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Franchisees, Consumers, and Employees: Choice and Arbitration

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FRANCHISEES, CONSUMERS, AND EMPLOYEES: CHOICE AND ARBITRATION

ROBERT W. EMERSON*
ZACHARY R. HUNT**

ABSTRACT

Commentators and lawmakers have called attention to the rising frequency of contractual arbitration as a non-negotiable condition of many relationships. Indeed, it is a rare individual who is not subject to at least one pre-dispute, binding arbitration agreement.

This Article studies common concerns associated with binding, pre-dispute arbitration agreements and evaluates their use in consumer-vendor, employee-employer, and franchisee-franchisor relationships. Having introduced concepts relevant throughout the Article, the Article in Part I studies contractual arbitration as a form of alternative dispute resolution for transactional disputes between consumers and vendors. It examines industry self-regulation, due process, consumer salience, and forum accessibility including online dispute resolution, among other matters. Part II evaluates concerns about unfairness toward the less powerful party in employment arbitration, including judicial safeguards against unconscionability and the proposed Forced Arbitration Injustice Repeal Act (the FAIR Act), while Part III critically examines bargaining power disparities between franchisees and franchisors.

Based on a comprehensive review of available data and literature, this Article finds that, while the most charitable interpretations by arbitration proponents are untenable, some measured but broadly supportive arguments for contractual arbitration can be persuasive. Although unchecked bargaining power disparities are rightfully concerning and should be addressed, contractual arbitration can nonetheless play a useful role in relational contracts.

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INTRODUCTION

Arbitration is a form of alternative dispute resolution in which a private, neutral, third party hears and decides a case instead of a civil court judge or jury.[1] In *binding* arbitration, the arbitrator's decision is final and enforceable.[2] When forming an employment, consumer, or franchise relationship, the parties may preemptively agree to arbitrate any future disputes that arise between them—this is called a *binding arbitration agreement* or *contractual arbitration*.[3] A sample arbitration clause furnished by the American Arbitration Association reads as follows:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[4]

Arbitrable disputes most often arise from negligence, breach of contract, breach of fiduciary duty, fraud, or failure to supervise.[5]

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[1] AM. BAR ASS'N SEC. OF DISP. RESOL., BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES 2 [hereinafter COMMERCIAL DISPUTES].

[2] *See, e.g.*, 28 U.S.C. § 657. Arbitration should not be confused with mediation, another form of alternative dispute resolution; while the two procedures are similar, arbitration is usually more formal than mediation. *Difference between Arbitration and Mediation*, B.C. INT'L COM. ARB. CTR., http://bcicac.com/about/what-is-mediationarbitration/difference-between-arbitration-and-mediation/ [https://perma.cc/D6W8-5S9W]. In mediation, a neutral third party (the mediator) guides the procedure and settles the dispute by helping parties come to an agreement to settle the dispute. *Mediation*, AM. BAR ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/disputeresolutionprocesses/mediation/ [https://perma.cc/5APT-2HSF]. The mediator, unlike an arbitrator, does not have the power to impose a decision on the parties. *Id.* Not all mediations result in a settlement of the dispute, and only the parties can decide, by agreement, how to settle the case. *Id.*

[3] *See Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Contract Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019). The terms "binding arbitration agreement," "arbitration agreement," "arbitration clause," and "contractual arbitration" are used interchangeably hereinafter to refer to binding, adhesive, predispute, contractually compelled arbitration as described in this paragraph.

[4] *Clauses*, AM. ARB. ASSOC., https://adr.org/Clauses [https://perma.cc/94CY-N9JN].

[5] *Dispute Resolution Statistics*, FIN. INDUS. REGUL. AUTH. (July 2021), https://www.finra.org/arbitration-mediation/dispute-resolution-statistics [https://perma.cc/9NWN-3MTF].

One prominent arbitration agency reported that out of 175 arbitrations in 2019, forty-two concerned delivery agreements, thirty-two involved a service agreement, twenty-six dealt with business acquisitions, fifteen related to an employment agreement, six covered a credit or loan agreement, six focused on intellectual property, and five were about a license agreement.[6] Arbitration is typically less expensive than litigation,[7] and it tends to be less formal.[8] The arbitrator (or panel of arbitrators) usually has specialized expertise in the relevant area of law (for example, employment, intellectual property, or civil rights).[9] An arbitral judgment is final, and losing parties usually cannot appeal the judgment or award unless there is evidence of misconduct.[10]

A. Case Law and Statutes

The primary statute governing contractual arbitration is the United States Arbitration Act of 1925, commonly called the Federal Arbitration Act (FAA), which provides for alternative dispute resolution via private arbitration.[11] Under the FAA, contractual arbitration is considered "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[12] In *Allied-Bruce Terminix Cos. v. Dobson*,

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[6] *SCC Statistics 2019*, ARB. INST. STOCKHOLM CHAMBER COM. 3 (2019).

[7] Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 732–33 (2006) [hereinafter *Arbitration Costs*] (asserting that overall process costs tend to be higher in litigation as opposed to arbitration due to a more extensive discovery phase, among other things); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 826–27 (2008) (noting a study comparing parties and attorneys' use of arbitration and finding that the majority of survey respondents, from fifty-one percent to eighty-nine percent, stated that arbitration was less expensive or more cost effective than litigation).

[8] Barbara Kate Repa, *Arbitration Pros and Cons*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html [https://perma.cc/V2NV-7GKE]. Both parties may use an attorney, but they are not required to do so. *Id.*

[9] COMMERCIAL DISPUTES, *supra* note 1, at 5.

[10] David K. Taylor, *Binding Arbitration: Limited Appeal Rights—Finality is the Rule*, BRADLEY (June 1, 2016), https://www.bradley.com/insights/publications/2016/06/binding-arbitration-limited-appeal-rights-finality-is-the-rule [https://perma.cc/5SYR-AH8M].

[11] 9 U.S.C. § 2.

[12] *Id.*

the United States Supreme Court held that the FAA applies to all disputes involving commerce,[13] upholding the validity of pre-dispute consumer arbitration agreements.[14] Importantly, the FAA mandates that agreements to arbitrate be in writing, as absent an agreement between the parties over a dispute, arbitration will not be compelled.[15]

In *Gilmer v. Interstate Johnson/Lane, Corp.*, the Court confirmed that statutory claims are subject to pre-dispute arbitration.[16] Even in cases where conflict exists between the FAA and other statutory rights, the FAA usually preempts.[17] In *AT&T Mobility, LLC v. Concepcion*, the Court held that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[18] More recently, the Court held in *Epic Systems Corp. v. Lewis*, that binding arbitration agreements can even preclude collective action—a statutory right under the National Labor Relations Act—against an employer by its employees, citing the FAA's "liberal federal policy favoring arbitration."[19]

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that the arbitrator decides the validity of a contract unless the arbitration agreement itself is at issue, in which case a court may decide its validity.[20] It reaffirmed *Prima Paint* in *Buckeye Check Cashing, Inc. v. Cardegna*, distinguishing between void and voidable contracts.[21] *Rent-A-Center West, Inc. v.*

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[13] James Chin, *Commerce*, INVESTOPEDIA (Jan. 19, 2021), https://www.investopedia.com/terms/c/commerce.asp [https://perma.cc/D4HG-ZNZW]. Commerce can be defined as an "exchange of goods, services or something of value." *Id.*

[14] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 282 (1995).

[15] Campbell Invs., LLC v. Dickey's Barbecue Rests., Inc., 784 Fed. App'x 627, 631 (10th Cir. 2019).

[16] 500 U.S. 20, 33 (1991).

[17] Claudia Salomon & Samuel de Villiers, *The United States Federal Arbitration Act: A Powerful Tool for Enforcing Arbitration Agreements and Arbitral Awards*, LEXISPSL ARB. 1, 2–3 (Apr. 2014).

[18] 563 U.S. 333, 343 (2011) (affirming the FAA's overarching purpose of ensuring enforcement of arbitration agreements according to their terms in order to facilitate informal, streamlined proceedings).

[19] 138 S. Ct. 1612, 1644 (2018).

[20] 388 U.S. 395, 406 (1967) (holding that a federal court may consider only the issues relating to the making and performance of the agreement to arbitrate).

[21] 546 U.S. 440, 449 (2006) (affirming that a challenge brought federally or at the state level to the validity of the contract, and not specifically the arbitration clause, must go to the arbitrator).

Jackson, held that unconscionability challenges must be decided in court, even if the contract unequivocally stipulates that an arbitrator will decide unconscionability.[22] On June 15, 2020, the Court granted certiorari in *Henry Schein, Inc. v. Archer and White Sales, Inc*.[23] The crux of the case turned on whether a provision that exempts (i.e., carves out) certain claims from arbitration negates an otherwise clear and unmistakable delegation of arbitrability decisions to the arbitrator.[24] The Court reviewed the Fifth Circuit's conclusion that a court, not the arbitrator, was required to determine the scope of the parties' arbitration agreement,[25] but eventually dismissed the case without a decision on the merits, allowing the Fifth Circuit's decision to stand.[26]

In *Doctor's Associates, Inc. v. Casarotto*, the Court held that state law requiring notice of an arbitration clause to be "typed in underlined capital letters on the first page of the contract" is preempted by the FAA, but it upheld the vulnerability of arbitration agreements to "generally applicable contract defenses, such as fraud, duress, or unconscionability."[27] In *Green Tree Financial Corp.–Alabama v. Randolph*, the high court determined that the possibility of a party being "saddled with prohibitive costs is too speculative to justify invalidation of an arbitration agreement."[28] Finally, the Supreme Court in *Hall Street Associates, LLC v. Mattel*

[22] 561 U.S. 63, 72 (2010) (noting that when a party challenges the validity of an agreement to arbitrate, the court must consider the challenge before addressing compliance with that agreement, but for challenges of the agreement as a whole, the challenge is for the arbitrator).

[23] 935 F.3d 274 (5th Cir. 2017), *cert. granted*, 138 S. Ct. 2678, 2678 (2018); *see also* Allan S. Kaplinsky & Mark J. Levin, *Supreme Court Agrees to Decide Arbitration Issue (But Not the Expected One)*, JD SUPRA (June 18, 2020), https://www.jdsupra.com/legalnews/supreme-court-agrees-to-decide-35783/ [https://perma.cc/WK3P-S5NM].

[24] 935 F.3d at 280–82, *cert. granted*, 207 L. Ed. 2d 1050 (U.S. 2020); *see* Caroline Simson, *High Court Takes Up Arbitration Carveout Question*, LAW360 (June 15, 2020), https://www.law360.com/articles/1280705/high-court-takes-up-arbitration-carveout-question [https://perma.cc/A698-YU7P].

[25] Kaplinsky & Levin, *supra* note 23.

[26] Russ Bleemer, *Scotus's Henry Schein No-Decision*, CPR INST. (Jan. 25, 2021), https://blog.cpradr.org/2021/01/25/scotuss-henry-schein-no-decision/ [https://perma.cc/72YC-ZNY5].

[27] 517 U.S. 681, 687 (1996) (directing courts to invalidate arbitration agreements under state laws applicable only to arbitration provisions).

[28] 531 U.S. 79, 90 (2000).

ruled that provisions of the FAA, such as judicial review authority, are exclusive and cannot be expanded by contract.[29] Arbitration enforcement has developed considerably, and continues to do so, as parties turn to private arbitration instead of litigation.[30]

B. Critical Perspectives: Counterarguments to Contractual Arbitration

Contractual arbitration is a normatively and politically difficult issue because the best arguments on both sides are compelling.[31] Opposition to contractual arbitration primarily relates to due process and unconscionability.[32] Many commentators believe that arbitration does not sufficiently ensure fairness or equity for the less powerful party.[33] More abstractly, one may speak of injustice—that to condition a relationship upon an agreement to arbitrate is invariably unfair.[34] Other talking points challenging a modern onslaught of arbitration[35] include low rates

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[29] 552 U.S. 576, 587 (2008).

[30] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/3WRL-MNFB].

[31] David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1250–52 (2009).

[32] *Id.* at 1255.

[33] *See, e.g.*, *id.* at 1249; Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) ("[E]mployers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to 'disarm' employees, effectively preventing them from bringing most individuals or class claims and thereby obtaining access to justice.").

[34] Terri Gerstein, *Forced Arbitration Is Unjust and Deeply Unpopular. Can Congress End It?*, SLATE (Mar. 1, 2019, 3:25 PM), https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html [https://perma.cc/XNW7-4TBG]; Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 UNIV. S.F. L. REV. 105, 118 (2003) ("This does not mean that the civil rights community should accept employment arbitration in its present form. Arbitration as condition of employment is wrong and should be opposed.").

[35] Although data on the spread of arbitration is limited, evidence suggests that arbitration agreements have become more widespread over the last three decades. *See* Colvin, *supra* note 30. A 1995 GAO study found that 7.6 percent of workplaces had adopted contractual arbitration. *Id.* Another study in 2003 found that 14.1 percent of surveyed telecommunications employers used contractual

of contract readership, absence of a formal appeals process, and removal of socially undesirable disputes from public view.[36] These concerns could disproportionately impact members of historically vulnerable groups (e.g., immigrants or persons with disabilities).[37] Employees may also face a "repeat player effect,"[38] where workers are less likely to win their cases if the arbitrator had handled past disputes involving the employer,[39] although evidence for such an effect is inconclusive, and the Court has "decline[d] to indulge" repeat-player arguments.[40]

Opponents argue that upfront costs faced by claimants in arbitration serve as a prohibitive measure against filing an otherwise

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arbitration as a condition of employment. *Id.* A 2017 study found that 50.4 percent of respondents reported that employees in their organizations were required to enter into arbitration agreements. *Id.* As of 2018, mandatory arbitration clauses were present in more than 55 percent of private non-unionized worker contracts. *Id.* The figure is higher, 65.1 percent, for companies with more than one thousand employees. *Id.*

[36] Gerstein, *supra* note 34.

[37] *See* Sternlight, *supra* note 33, at 1349. The Americans with Disabilities Act contains language that encourages claims to be settled in ADR. William D. Goren, *ADA and Mediation/Arbitration: Things to Think About*, UNDERSTANDING THE ADA: THE BLOG OF WILLIAM D. GOREN, J.D. LL.M. (Jan. 6, 2014), http://www.williamgoren.com/blog/2014/01/06/ada-mediation-arbitration/ [https://perma.cc/DX5K-BSEY].

[38] Stephen Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 67–68 (2017). It is possible that an analogous effect exists in litigation. Evidence of an analogous effect would support the theory that repeat-players benefit from experiential learning insofar as frequent exposure to any repetitive activity naturally produces a learning effect of some kind. A search of existing literature did not find such evidence, but the theory cannot be excluded. *See id.* at 68 ("[L]itigation may have a 'repeat-player effect' that equals or even exceeds arbitration's. That is, businesses who litigate often may do better in litigation than businesses who litigate rarely, and the gap between repeat players and 'one-shotters' in litigation may be wider than the analogous gap in arbitration. Consequently, evidence of a 'repeat-player effect in arbitration has little relevance without evidence showing whether litigation has a comparable repeat-player effect.'").

[39] Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997).

[40] Gilmer v. Interstate Johnson/Lane, Corp., 500 U.S. 20, 21 (1991); *see* Edward Silverman, *The Suspicious Existence of the "Repeat Player Effect" in Mandatory Arbitration of Employment Disputes*, 3 NAT'L L. REV. 90 (Mar. 31, 2013), https://www.natlawreview.com/article/suspicious-existence-repeat-player-effect-mandatory-arbitration-employment-disputes [https://perma.cc/J4JA-EXNK].

viable claim.[41] However, decisions to litigate tend to depend on overall costs rather than upfront costs;[42] some attorneys have even shown a willingness to finance arbitration costs as security for a percentage of the reward.[43] Further, unpredictable jury behavior makes it quite difficult for even a seasoned lawyer to predict how a particular group of jurors will decide a case.[44] Arbitration may provide more certainty, as arbitrators typically are educated on and experienced in the subject generally, and can more easily and predictably become familiar with the law and presentation of parties' evidence.[45]

Another flashpoint in the debate could involve the use of arbitration as a disciplinary appeals mechanism, particularly where powerful labor unions make it difficult to discipline employees even for serious misconduct.[46] In May 2020, George Floyd, an African-American man, was killed by Minneapolis police officer Derek Chauvin during an arrest for allegedly passing counterfeit bills in a grocery store.[47] Chauvin was fired and later convicted of second-degree unintentional murder.[48] Lieutenant Bob Kroll, head

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[41] Sternlight, *supra* note 33, at 1335–36.

[42] *Id.* at 1335.

[43] *Id.* at 1334–35 (reaffirming that employees may effectively utilize the contingent fee system within an arbitration context).

[44] *See* Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 376–79 (2011) (describing traditional views of lawyers regarding purported unpredictability of juries).

[45] *Id.* at 377; Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, J. DISP. RESOL. 89, 90 n.9 (2001) [hereinafter *Paying the Price*].

[46] Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?*, 32 A.B.A. J. LAB. & EMP. L. 133, 135 (2016) [hereinafter *Factors in Police*]; U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2007 13 (2010) (noting that around forty percent of local police departments allow collective bargaining for officers).

[47] Minyvonne Burke, *Owner of Minneapolis Grocery Store Says He Told Employee 'Call the Police on the Police' as She Witnessed George Floyd Death*, NBC NEWS (May 28, 2020, 2:04 PM), https://www.nbcnews.com/news/us-news/owner-minneapolis-grocery-store-says-he-told-employee-call-police-n1216461 [https://perma.cc/XA7X-W4AP].

[48] Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of all Three Charges for Killing George Floyd*, CNN (April 21, 2021, 12:13 PM), https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html [https://perma.cc/2FYL-DAJ6].

of the Minneapolis police union, later declared that Chauvin's firing was justified.[49] Police officers are different from other employees in that they usually have a union-negotiated right to appeal disciplinary actions in binding arbitration.[50] However, the intermediate steps between an initial complaint and binding arbitration are frequently conducted in such a way that the discipline cannot survive an appeal.[51] Police arbitration is understudied in the existing literature,[52] and this Article cannot claim a causal relationship between any variable and the frequency with which police discipline is reduced or reversed in binding arbitration. It hypothesizes that police unions leverage their political clout to create complex procedural requirements that police supervisors do not consistently meet at all levels of the disciplinary process.[53] Thus, when an appeal reaches binding arbitration, the case against the officer cannot withstand rigorous scrutiny by an independent third party.[54]

The legal community has spent decades in widespread disagreement over the scope and significance of contractual arbitration's disadvantages.[55] Even its terminology is divisive.[56] Some

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[49] Paul Walsh, *Minneapolis Police Union Head Says Chauvin Firing Is Justified but Rank and File Officers Being Scapegoated*, STAR TRIB. (June 24, 2020, 5:29 AM), https://www.startribune.com/lt-bob-kroll-mpls-police-union-is-being-scapegoated-by-failed-leaders/571439422/ [https://perma.cc/63V5-BK65].

[50] *See* Stephen Rushin, *Police Disciplinary Appeals*, 167 UNIV. PA. L. REV. 545, 579–81 (2019) (This study of 1,881 cases found that between 2006 and 2017, over twenty-eight percent of disciplinary appeals arising from termination resulted in rehiring of the officer.). Another study found that the most common grounds for reducing or reversing officer discipline are inadequate departmental investigations, lack of evidence for officer guilt, failure by investigators to comply with procedural requirements, and mitigating information in an officer's personnel file. *Factors in Police*, *supra* note 46, at 139–53.

[51] Rushin, *supra* note 50, at 570–79.

[52] *Id.* at 560.

[53] *Id.* at 581–82. Police union contracts frequently include generous language that protects officers by delaying interrogations, expunging records of prior misconduct, and limiting external oversight. *Id.* at 559–60.

[54] *Id.* at 579.

[55] Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 352 (2007).

[56] *Id.*; Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 365 (2007) (employing the term "employer-promulgated arbitration").

proponents use "*promulgated* arbitration," while critics have adopted the more pejorative "*mandatory* arbitration" or "*forced* arbitration";[57] this Article prefers the relatively neutral "*contractual* arbitration." While these arguments may seem compelling, relevant data and literature support a more favorable view of contractual arbitration.[58] Undesirable outcomes, as reported by some commentators, can largely be mitigated through a combination of industry self-regulation and judicial oversight.[59] Although the abuses by an opportunistic actor are rightfully concerning, absolute skepticism toward contractual arbitration is probably impractical and unnecessary.[60]

I. CONSUMER ARBITRATION

Consumer arbitration is a form of alternative dispute resolution used to resolve transactional disputes between a consumer and a vendor.[61] The consumer is an individual who seeks to acquire goods or services primarily for individual, family, or household use.[62] Vendors provide those goods or services in exchange for compensation.[63] They include privately held businesses, publicly held businesses, family-owned businesses, sole proprietorships, partnerships, corporations, financial institutions, and service providers.[64] The arbitration agreement is usually within a larger contract of sale, or container contract, which stipulates the terms

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[57] Rogers, *supra* note 55, at 352.

[58] *See, e.g.*, Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 265–69 (1990) (discussing benefits of arbitration); Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1359–62 (2002) (discussing economic rationales).

[59] Malin, *supra* note 56, at 396 (discussing self-regulation); Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration*, 42 SW. L. REV. 131, 181 (2012) (arguing for increased involvement from state courts).

[60] *See* Stempel, *supra* note 58, at 265–68; Sabin, *supra* note 58, at 1359–60.

[61] NAT'L CONSUMER L. CTR., CONSUMER ARBITRATION AGREEMENTS 2–3 (8th ed. 2020); *Paying the Price*, *supra* note 45, at 89.

[62] *See* CAL. R. OF CT. Standard 2(e)(1); *Consumer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[63] *Vendor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[64] *Id.*; *What is a Vendor?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/finance/vendor/ [https://perma.cc/MLG3-4AJM].

under which title to the asset will transfer.[65] In most cases, the vendor drafts both the container contract and the arbitration agreement, and the consumer must accept as a condition of purchase.[66]

A. Arbitration Agreements in Practice

In 2018, at least 826,537,000 binding arbitration agreements were in effect throughout the United States.[67] The U.S population was 328,000,000.[68] Eighty-one of America's one hundred largest companies use binding arbitration agreements as a standard provision of consumer contracts, and a strong majority of U.S. households are governed by at least one.[69] Virtually all transactions between a consumer and a nonconsumer are arbitrable, including those for retail goods, consumer services, financial products, e-commerce transactions, securities, and real estate.[70] Commercial transactions, also called business-to-business or B2B transactions, are also arbitrable, but those agreements are generally less controversial and enjoy a history of support in both domestic and international contexts.[71] Many of America's leading companies do not use arbitration agreements, but those companies primarily serve industrial or commercial clients rather than consumers—for example, Lockheed Martin, Boeing, or United Technologies.[72] Arbitration agreements also vary by scope.[73] Walmart, for example, agrees to arbitrate all claims between consumers and the company, while Ford more narrowly agrees to arbitrate disputes that arise from a credit installment plan.[74]

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[65] Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16, 17 (Nov. 2006).

[66] Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175–76 (9th Cir. 2014) (describing "clickwrap" and "browsewrap" agreements, the two most common types of contracts formed on the internet).

[67] Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 242 (2019).

[68] *Id.*

[69] *Id.* at 238.

[70] *Id.* at 236.

[71] Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 82, 85 (2012).

[72] Szalai, *supra* note 67, at 238–39.

[73] *Id.* at 239.

[74] *Id.*

The narrowest arbitration agreements typically govern specialized technical matters, such as appraisal rights or non-compete requirements in franchising.[75]

In *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.*, the Supreme Court introduced the doctrine of *separability*—that an arbitration agreement is analytically distinct from the container contract.[76] Thus, a court may decide a challenge to the arbitration agreement itself, but an arbitrator will determine a challenge to the container contract.[77] In *John B. Goodman Ltd. Partnership v. THF Construction, Inc.*, for example, the Eleventh Circuit Court of Appeals found that "once the district court is satisfied that the parties actually agreed to arbitrate the dispute, it is for the arbitration panel, not the district court, to determine whether the underlying contracts in general are enforceable."[78]

E-commerce agreements warrant unique attention for their widespread relevance to most consumers.[79] As e-commerce has soared in the last two decades, so too has the associated use of contractual arbitration.[80] Arbitration agreements govern over sixty percent of retail e-commerce sales as of 2019.[81] As part of the vendor's larger terms of service, e-commerce arbitration agreements are presented in either scroll boxes or hyperlinked text, and consumers click an icon to signal acceptance.[82] If a vendor

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[75] Craig R. Tractenberg, *Nuts and Bolts of International Arbitration*, 38 FRANCHISE L.J. 451, 466 (2019).

[76] 388 U.S. 395, 406 (1967); *see* Robert H. Smit, *Separability and Competence—Competence International Arbitration:* Ex Nihilo Nihil Fit*? Or Can Something Indeed Come from Nothing?*, AM. BAR ASS'N SEC. INT'L L. & PRAC. 1, 4–5 (May 7, 2003) ("If all the court has to do in order to compel arbitration under FAA § 4 is to verify that the arbitration agreement—as opposed to the whole contract—is not in issue, then the two must be separable and the arbitration clause can be enforced notwithstanding a challenge to the contract containing it.").

[77] *See* Smit, *supra* note 76, at 2.

[78] 321 F.3d 1094, 1098 (11th Cir. 2003) (leaving it to the arbitration panel to decide whether the contracts were enforceable under Florida law).

[79] *See* Szalai, *supra* note 67, at 241–42.

[80] *Id.*

[81] *Id.* at 241 n.18.

[82] *See, e.g.*, Timothy Miller, *A Website User's Assent to Arbitration Terms is Required*, AM. BAR ASS'N (July 20, 2016), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2016/website-users-assent-to-arbitration-terms-is-required/ [https://perma.cc/HH99-TMJ3].

intends to bind the user of a website to an arbitration agreement, the vendor must make it clear to consumers that they are entering into a contract by navigating through the website.[83] In *Sgouros v. TransUnion*, the Seventh Circuit Court of Appeals denied TransUnion's motion to compel arbitration because TransUnion failed to clearly label either the scroll box or hyperlinked text as terms and conditions of sale.[84] Vendors can avoid uncertainties of mutual assent by using prominent, conspicuous language and placing the agreement icon near the terms and conditions to which the customer is agreeing.[85]

Significant law has also developed around contractual arbitration in the sale of consumer financial products—e.g., credit cards, checking accounts, savings accounts, reloadable prepaid cards, payday loans, or student loans.[86] Tens of millions of consumers use financial products that are subject to an arbitration agreement,[87] and most consumers report that arbitration agreements play "little to no role in choosing the credit card they use most frequently."[88] JPMorgan Chase, America's largest financial institution,[89] uses an arbitration agreement in nearly all of its credit card contracts, including its popular Sapphire, Slate, and United MileagePlus cards.[90] According to Chase, it prefers to

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[83] *Id.* ("Companies who want their websites to bind customers to contracts should design their websites so that it is clear to their customers that they are entering into a contract when they 'click' through the website.").

[84] No. 14-C-1850, 2015 WL 507584, at *6–7 (N.D. Ill. Feb. 5, 2015).

[85] Practical L. Com. Transactions, Sgouros v. TransUnion *and Best Practices in Online Terms and Conditions*, WESTLAW (May 10, 2016), https://content.next.westlaw.com/Document/Id24b2824096711e698dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1 [https://perma.cc/32SU-6TZL].

[86] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 780).

[87] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9 (2015) [hereinafter REPORT TO CONGRESS].

[88] *Id.* at 11.

[89] *See Biggest US Banks by Asset Size (2021)*, MONEY SUMMIT (Apr. 20, 2021), https://www.mx.com/moneysummit/biggest-banks-by-asset-size-united-states [https://perma.cc/64JR-D2M3] (taking data from FDIC showing JPMorgan Chase's considerable dominance in the industry).

[90] Jacob Passy, *Chase is Bringing Forced Arbitration Clauses Back to Its Most Popular Credit Cards*, MARKETWATCH (June 15, 2019, 8:17 AM), https://

arbitrate disputes because it "is often faster, less expensive[,] and provides better outcomes for our customers."[91]

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress empowered the Consumer Financial Protection Bureau (CFPB) to conduct empirical studies on pre-dispute arbitration agreements in connection with consumer financial products or services and present its findings to Congress.[92] In doing so, Congress granted the CFPB full authority "to limit or prohibit the use of pre-dispute arbitration clauses for consumer financial products or services if such a rule is in the public interest, for the protection of consumers, and if the findings of such a rule are consistent with findings from our study."[93] Following "the most comprehensive study of mandatory arbitration clauses ever undertaken," the CFPB did not find sufficient evidence to prohibit or substantially limit the use of arbitration agreements.[94] CFPB's sole proposal, a limitation on class-action provisions, was quickly scrapped by Congress via the Congressional Review Act.[95] Lawmakers maintained that because most agreements include carve-outs for access to small claims court, the proposed rule would inadvertently enrich lawyers without passing on any appreciable savings to consumers.[96] Lawmakers even cited the CFPB's own study, which found that prevailing consumers received an average of over $5,000 in arbitration versus $32 in class action suits.[97]

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www.marketwatch.com/story/chase-is-bringing-forced-arbitration-clauses-back-to-its-most-popular-credit-cards-2019-06-04 [https://perma.cc/4C3K-WDJZ].

[91] Gregory Karp, *Chase Brings Back Limits on Cardholders' Right to Sue*, GAINESVILLE SUN (June 5, 2019, 12:36 PM), https://www.gainesville.com/ZZ/business/20190605/chase-brings-back-limits-on-cardholders-right-to-sue [https://perma.cc/L38B-RGV9].

[92] REPORT TO CONGRESS, *supra* note 87, at 2.

[93] Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray on the Arbitration Rule Announcement*, CONSUMER FIN. PROT. BUREAU (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-arbitration-rule-announcement/ [https://perma.cc/SP7R-YQFL].

[94] *Id.*

[95] Ian McKendry, *Senate Votes to Repeal CFPB Arbitration Rule in Win for Financial Institutions*, AM. BANKER (Oct. 24, 2017, 10:21 PM), https://www.americanbanker.com/news/senate-repeals-cfpb-arbitration-rule-in-win-for-financial-institutions [https://perma.cc/95J4-59CR].

[96] *Id.*

[97] *Id.*

B. Consumer Due Process

Consumer fairness in arbitration is protected largely via self-regulation by arbitration providers.[98] Virtually all major providers have adopted written protocols for consumer due process, and vendors who seek a provider's services must use an arbitration agreement that complies with the provider's protocols.[99] The American Arbitration Association (AAA), for example, "will exercise its authority to decline administration of arbitration demands where an arbitration clause contains material violations of the AAA Consumer Due Process Protocols."[100] Put differently, if an arbitration agreement provides for administration by the AAA, that agreement must comply with AAA's Due Process Protocols.[101] Vendors must submit a copy of their arbitration agreements for review, and once an agreement is deemed compliant, it becomes publicly accessible in the AAA's Consumer Clause Registry.[102] Any subsequent changes to the agreement must also be reviewed by the AAA and updated in the registry.[103]

Most arbitration agreements explicitly name the arbitrator(s) who may administer the case.[104] Two of the most prominent arbitrators worldwide, AAA and the Judicial Arbitration and Mediation Services, Inc. (JAMS), lead the way as standard-bearers for due process in arbitration.[105] Both organizations will

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[98] Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 300–01 (2012) (discussing the extent of protocols adhered to by the AAA, including the Employment Due Process Protocol, the Consumer Due Process Protocol, the Health Care Due Process Protocol, and the Consumer Debt Collection Due Process Protocol); Peter B. Rutledge, *Who Can be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 268 (2008) (stating that while arbitration is not perfect a combination of industry self-regulation and judicial oversight, this combination has been used in the past to try to make arbitration as close to perfect as it can become).

[99] Drahozal & Zyontz, *supra* note 98, at 292, 300–01, 303.

[100] *Consumer*, AM. ARB. ASS'N, https://adr.org/consumer [https://perma.cc/4ASD-PZWB].

[101] AM. ARB. ASS'N, CONSUMER ARB. RULES 6, 9–10 (2005).

[102] *Id.* at 16.

[103] *Id.* at 39.

[104] Drahozal & Zyontz, *supra* note 98, at 295–96.

[105] *AAA Statement of Ethical Principles*, AM. ARB. ASS'N, https://www.adr.org/StatementofEthicalPrinciples [https://perma.cc/7WQ8-3SPZ]; *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS

refuse to administer a case if the arbitration agreement materially fails to comply with the relevant protocols.[106] As one would expect, key provisions of the Consumer Due Process Protocols center around ensuring that arbitration is reasonably priced and accessible; fairness and impartiality of the proceedings; and transparency regarding the consequences of the arbitration agreement.[107] They read:

> Consumers and businesses have a right to an independent and impartial arbitrator and independent administration of their dispute. Consumers always have a right to representation. Costs of the process for the consumers must be reasonable. Location of the proceeding must be reasonably accessible. No party may have unilateral choice of arbitrator. There shall be full disclosure by arbitrators of any potential conflict or appearance of conflict or previous contact between the arbitrator and the parties. The arbitrator shall have no personal or financial interest in the matter. Arbitrators should be empowered to grant whatever relief would be available in court. All parties retain the right to seek relief in small claims court for disputes or claims within the scope of its jurisdiction. Parties to the dispute must have access to information critical to resolution of the dispute. The use of mediation to foster voluntary resolution of the matter. Clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character.[108]

Similarly, JAMS provides the following:

> The arbitration agreement must be reciprocally binding on all parties such that (a) if a consumer is required to arbitrate his or her claims or all claims of a certain type, the company is so bound; and, (b) no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction. The consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications

(July 15, 2009), https://www.jamsadr.com/employment-minimum-standards/ [https://perma.cc/8ZKU-FK5H]; *Consumer Arbitration Minimum Standards*, JAMS (July 15, 2009) [hereinafter *Consumer Arbitration Minimum Standards*], https://www.jamsadr.com/consumer-minimum-standards/ [https://perma.cc/6XBK-GMJ5].

[106] Drahozal & Zyontz, *supra* note 98, at 292.

[107] *See id.* at 305–06 (discussing the general aspects of arbitration due process guidelines).

[108] *Consumer Arbitration Fact Sheet*, AM. ARB. ASS'N, https://go.adr.org/consumer-arbitration [https://perma.cc/J64D-CAPF].

> must be clear. Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court. The arbitrator(s) must be neutral, and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s). The consumer must have a right to an in-person hearing in his or her hometown area. The clause or procedures must not discourage the use of counsel. With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is $250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company, including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services. When the company is the claiming party initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration. In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail. The arbitration provision must allow for the discovery or exchange of non-privileged information relevant to the dispute. An Arbitrator's Award will consist of a written statement stating the disposition of each claim. The award will also provide a concise written statement of the essential findings and conclusions on which the award is based.[109]

Section 10(a) of the FAA provides for judicial review of arbitral awards and permits the reviewing court to vacate an award in the following circumstances:

> (a) Where the award was procured by corruption, fraud, or undue means.
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
> (c) 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.
> (d) 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.[110]

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[109] *Consumer Arbitration Minimum Standards*, *supra* note 105.

[110] 9 U.S.C. § 10 (1925); *see also* Gail A. Andler et al., *Settlement and Alternative Dispute Resolution (ADR)*, *in* BUSINESS COURTS BENCHBOOK 133,

Subsections 10(a)(1) through 10(a)(3) are the sources of authority for challenges to procedural fairness, while 10(a)(4) is the source for challenging correctness of the award.[111] Although courts have historically declined to review arbitral awards, the proliferation of pre-dispute arbitration agreements in the system has made courts more comfortable with reviewing and vacating arbitral awards rendered in error.[112] In June 2020, the Supreme Court denied certiorari to a Ninth Circuit Court of Appeals ruling requiring arbitrators to disclose ownership interests in for-profit tribunals.[113] The arbitrator had ruled the Washington Franchise Investment Protection Act did not apply to a beverage distributor, but the Ninth Circuit vacated the award on grounds that the arbitrator did not disclose his ownership in JAMS.[114] The Ninth Circuit's decision was the first to make clear that arbitrators must avoid even the appearance of partiality or else risk vacatur.[115] Hearing a factually similar case, another court invoked four factors utilized by the Second and Fourth Circuits in assessing evidence of powerfully suggestive bias:

> (1) The extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.[116]

138–39 (Vanessa R. Tiradentes et al. eds., 2019) (discussing prominent questions that guide judicial review).

[111] Helm, *supra* note 65, at 18.

[112] Stephen J. Ware, *Vacating Legally—Erroneous Arbitration Awards*, 6 Y.B. ARB. & MEDIATION 56, 83–84 (2014) ("[T]he Supreme Court's 1985–1991 decisions enforcing pre-dispute agreements to arbitrate mandatory law claims reduced judicial comfort with the longstanding rule that courts should not review arbitration awards for errors of law.").

[113] Monster Energy Co. v. City Beverages, LLC, 141 S. Ct. 164, 164 (2020) (mem.); Caroline Simson, *Monster Asks High Court to Weigh in On Arbitrator Bias*, LAW360 (June 3, 2020, 8:40 PM) [hereinafter *Monster Asks High Court*], https://www.law360.com/articles/1279454 [https://perma.cc/ER7G-SFE4].

[114] Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1132–33 (9th Cir. 2019).

[115] *Monster Asks High Court*, *supra* note 113.

[116] Martin v. NTT Data, Inc., No. 20-CV-0686, 2020 WL 3429423, at *8 (E.D. Pa. June 23, 2020).

Minimally, civil due process requires notice, an opportunity to be heard, and an impartial tribunal.[117] Beyond that, courts determine whether any other procedural rights are required to prove due process on a case-by-case basis.[118] In *Mathews*,[119] the Court held "due process is flexible and calls for such procedural protections as the particular situation demands."[120] *Mathews* established a balancing test to determine whether an individual has received due process based on (1) the importance of the interest at stake; (2) "the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value[ ] ... of additional procedural safeguards"; and (3) "the [g]overnment's interest."[121] To the extent a case heard in arbitration would have passed the *Mathews* test if it had been heard in court, the most fundamental elements of due process are largely preserved in arbitration.[122]

C. Effectiveness of Self-Representation

Arbitration permits disputants to appear pro se—under self-representation in lieu of counsel.[123] Unlike litigation, where the court ostensibly permits consumers to self-represent but in practice the consumers are limited by procedural formality and

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[117] *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (holding that reasonable steps must be taken to give parties notice and an opportunity to respond); *see also* Goldberg v. Kelly, 397 U.S. 254, 262–64, 267 (1970) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.")) (holding that the Due Process Clause provides the right to a meaningful trial or opportunity to be heard before welfare benefits are terminated); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872, 876 (2009) (holding that a judge's failure to recuse himself created an unconstitutionally biased tribunal).

[118] *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (explaining various factors to consider if more is needed to satisfy due process).

[119] *Id.* at 334.

[120] *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[121] *Id.* at 334–35.

[122] S*ee* Drahozal & Zyontz, *supra* note 98, at 292 (noting the basics of due process in arbitration).

[123] *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 818 (2003) (showing the win rate and win/loss ratio for employees who proceeded pro se were comparable to those who proceeded in AAA employment arbitration cases).

complexity, the streamlined nature of arbitration makes self-representation feasible for some consumers.[124] Of course, many consumers *should* retain compensated counsel.[125] In both litigation and arbitration, consumers represented by counsel are more likely to win some form of relief than those appearing pro se, and their awards tend to be higher.[126] This is unsurprising, as attorneys have specialized advocacy skills and screen for cases likely to be successful.[127] However, the effects of representation are not uniformly distributed across cases.[128] Some arbitrations—likely a substantial proportion and perhaps even a majority—are so procedurally and substantively simple that attorneys add little value for the consumer.[129] In those cases, consumers are empowered to self-represent and may, therefore, pursue claims that would otherwise be prohibitively expensive.[130]

The effectiveness of self-representation in arbitration is a function of two variables: the ratio of attorney fees to claim value and the frequency of difficult or complex tasks.[131] At one logical extreme of the first variable, some claims exist where the amount in controversy is less than the cost of compensated counsel.[132] In those claims, the value added by counsel approaches zero (or

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[124] *Compare Self-Representation: The Perils of Pro Se*, FINDLAW (Jan. 2, 2020), https://corporate.findlaw.com/litigation-disputes/self-representation-the-perils-of-pro-se.html [https://perma.cc/54LD-C8CK] (describing limitations on pro se representation in litigation), *with* FIN. INDUS. REGUL. AUTH., FINRA DISP. RESOL. SERVS. ARB.'S GUIDE 57–58 (Feb. 2021) (prescribing guidance for pro se parties in arbitration).

[125] SEARLE CIV. JUST. INST., CONSUMER ARB. BEFORE THE AM. ARB. ASS'N PRELIMINARY REP. 73–74 (2005) [hereinafter SEARLE REPORT].

[126] *Id.* at 73–75; Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 69–70 (2010).

[127] SEARLE REPORT, *supra* note 125, at 74.

[128] *Id.* at 73.

[129] *See Dispute Resolution Statistics*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#top15controversycustomers [https://perma.cc/R9LJ-U3Z2] (detailing the number of arbitrations opened and closed in recent years).

[130] *See* SEARLE REPORT, *supra* note 125, at 75 (noting the damages sought by *pro se* and represented claimants).

[131] Gary Born, *Legal Representation in Arbitration*, LEXISNEXIS 1, 1–2 (July 14, 2014); REPORT TO CONGRESS, *supra* note 87, at 28–29.

[132] *See Arbitration Costs*, *supra* note 7, at 739 (noting the fees with arbitrations).

negative, less the difference).[133] At the other extreme, some claims exist where the amount in controversy is so extraordinarily large compared to the cost of compensated counsel that there is zero or near-zero value in *not* retaining an attorney.[134] Although some predictive work may be involved, the ratio of attorney fees to claim value is calculable and lies, in most cases, somewhere between the two extremes.[135]

The second variable captures a dispute's need for *process*—tasks that add procedural difficulty or complexity.[136] Once again, it is helpful to conceptualize process at the extremes.[137] At one logical extreme are claims so immediately and obviously meritorious that both parties cooperatively move to resolve, perhaps even through customer service or other low-cost systems.[138] At the other logical extreme—the greatest conceivable exhaustion of process at every discernable step toward resolution—is litigation.[139] Even the simplest of litigated cases are subject to prolonged discovery, motions, hearings, pleadings, and arguments.[140] If a litigant "chooses" to self-represent, it is generally due to economic constraints rather than any perceived benefits.[141] One study found that fifty-seven percent of pro se litigants reported that they could not afford a lawyer, while eighteen percent would have preferred an attorney but did not want to pay attorney

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[133] *Id.* (noting if a claim is less than $950, the claimant would lose money or get nothing).

[134] *Id.* (stating the upper limit of filing fees).

[135] *Id.* (noting the fees that would allow someone to calculate when it is advantageous to retain representation in arbitrations).

[136] Born, *supra* note 131, at 2–3.

[137] *See supra* notes 132–34 and accompanying text.

[138] Hill, *supra* note 123, at 807–08.

[139] Raychel Lean, *Have Lawyers Ruined Arbitration?*, LAW.COM DAILY BUS. REV. (Feb. 5, 2020, 12:14 PM), https://www.law.com/dailybusinessreview/2020/02/05/have-lawyers-ruined-arbitration/ [https://perma.cc/AE2R-TX6Z] (explaining different lawyers' experiences with elongated arbitrations).

[140] *Why Does a Lawsuit Take So Long*, HG.ORG, https://www.hg.org/legal-articles/why-does-a-lawsuit-take-so-long-31734 [https://perma.cc/5VMW-2RC5] (explaining why litigation takes a long time).

[141] Lauren Sudeall & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, CONVERSATION (Sept. 21, 2017, 8:36 PM), https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159 [https://perma.cc/3MNC-46GG].

fees.[142] Only twenty-one percent reported that they self-represented due to case simplicity.[143]

Attorneys are vehicles for process, and the Supreme Court has spoken forcefully about when and to what degree process is excessive.[144] In *Walters v. National Association of Radiation Survivors*, the Court noted that cases involving simple questions of fact are "capable of resolution in a non-adversarial context" and expressed skepticism toward the value of attorneys in forums not designed for adversarial operations.[145] Some experts agree that attorneys are counterproductive in arbitration because they insert process into an otherwise simple and affordable procedure.[146] Jeffrey Schneider, a commercial litigator for Miami's Levine Kellogg Lehman Schneider + Grossman, advises his clients that "lawyers have figured out over the years how to mess up arbitration, [making] them costly and protracted."[147] Remarking on a case that took more than seventy-five trial days and years of discovery to resolve, Schneider says that the attorneys inadvertently created "a private arbitration proceeding which behaved like it was a court proceeding."[148] Although attorneys exist to manage difficult and complex tasks, their insertion into a case creates a feedback loop of new tasks for which they are required.[149]

A reduction in the value of counsel necessarily empowers the consumer.[150] One expert reports that arbitral procedures "are much simpler, and [consumers] are less likely to be tripped up in a procedural trap .... Assuming the consumer has been wronged and actually has some evidence to support it, they can win."[151] Moreover, to the extent that some firms will tactically refuse post-dispute arbitration if they believe attorney fees will make the claim

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[142] KENN GOLDBLATT, THE PRO SE LITIGANT'S CIVIL LITIGATION HANDBOOK: HOW TO REPRESENT YOURSELF IN A CIVIL LAWSUIT 7 (2016).

[143] *Id.*

[144] *Id.*

[145] Walters v. Nat'l Ass'n Radiation Survivors, 473 U.S. 305, 330 (1985).

[146] Lean, *supra* note 139.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Brian McManus, *We Asked a Lawyer What to Do if You've Been Screwed by an Arbitration Clause*, VICE (Nov. 4, 2015, 2:35 PM), https://www.vice.com/en_us/article/exqq44/ask-an-expert-arbitration [https://perma.cc/9VMS-HPTY].

prohibitively expensive for the consumer to litigate, pre-dispute arbitration agreements neutralize vendor opportunism.[152]

At a practical level, if the cost of hiring an attorney is greater than the amount in controversy or the expected recovery, an attorney is not valuable.[153] If the cost of hiring an attorney is less than the amount in controversy or the expected recovery, the value of an attorney corresponds to the frequency of difficult or complex tasks.[154] Of course, this model does not account for less quantifiable variables (e.g., emotional comfort or subject matter expertise).[155] Nonetheless, the availability and feasibility of self-representation in simple, low-value claims empower consumers and prevent vendors from insulating themselves from those claims.[156]

D. AT&T Mobility LLC v. Concepcion

In 2006, Vincent and Liza Concepcion brought a class action suit against AT&T Mobility LLC (AT&T), alleging that the company had engaged in fraudulent advertising by offering a free cell phone with the purchase of a wireless plan.[157] While free phones were in fact supplied, customers were charged sales tax on the retail value of the phones.[158] Because the customers had agreed to arbitration agreements in their service contracts, AT&T filed a motion to compel arbitration.[159] The Concepcions opposed, arguing that the agreement was unlawfully exculpatory under California law because the agreement disallowed class-action suits.[160] The U.S. District Court for the Southern California, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*,[161] denied AT&T's motion.[162]

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[152] *See* Scott Baker, *A Risk Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 879 (2004) (characterizing pre-dispute arbitration as a risk management tool for both contracting parties).

[153] *See id.* at 872.

[154] *See id.* at 873.

[155] *See id.* at 880.

[156] *See id.*

[157] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 337–38.

[161] 13 P.3d 1100, 1124 (Cal. 2005).

[162] *AT&T Mobility LLC*, 563 U.S. at 338 (finding that AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions).

AT&T's motion was likely to grant the Concepcions full relief.[163] The District Court "described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute resolution process was 'quick, easy to use' and likely to 'prompt full or ... even excess payment to the customer without the need to arbitrate or litigate.'"[164] The court even remarked that customers would "likely be worse off" as members of a class.[165] Even so, the District Court interpreted *Discover Bank* as a bright-line ban on class action waivers.[166]

In perhaps its most significant modern decision on arbitration, the Supreme Court reversed, holding that state laws which "interfere[ ] with fundamental attributes of arbitration" are preempted by the FAA.[167] Justice Scalia, writing for the majority, endorsed the lower court's opinion that AT&T's customers were in a favorable position under the terms of their arbitration agreement, remarking that customers were "essentially guarantee[d] to be made whole."[168] AT&T's agreement, in relevant part, provided the following:

> AT&T must pay all costs for nonfrivolous claims; arbitration must take place in the county in which the customer is billed; for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; either party may bring a claim in small claims court in lieu of arbitration; and the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.[169]

The agreement also "denie[d] AT&T any ability to seek reimbursement of its attorney's fees and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, require[d] AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees."[170]

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.* at 344.
[168] *Id.* at 352.
[169] *Id.* at 337.
[170] *Id.*

Concepcion brought attention to the consumer-friendly terms in AT&T's arbitration agreement.[171] Recognizing the unlikely but persistent threat of a federal ban on pre-dispute arbitration, AT&T had introduced provisions to help consumers vindicate statutory claims.[172] Following *Concepcion*, some commentators were concerned that the Court's decision would incentivize vendors to abandon consumer-friendly terms.[173] However, the incidence of such terms rose dramatically as vendors moved to capture the precedential effects of *Concepcion*,[174] with AT&T's agreement heralded as the new "gold standard" for transactional attorneys.[175] One study found that nearly all companies in the sample had indeed rewritten their agreements to include AT&T-like provisions shortly after *Concepcion*.[176] Most notably, vendors began using cost-shifting terms to shift some or all arbitration costs from the consumer to the vendor.[177] Those terms make it more feasible for customers to initiate arbitration and dramatically reduce the risk of doing so.[178] Many vendors also introduced opt-out terms, giving consumers the right to voluntarily reject pre-dispute arbitration without imperiling the transaction.[179]

Of course, this Article does not suggest that the rise of consumer-friendly terms is a product of corporate altruism.[180] Vendors are presumably interested in limiting their exposure to litigation and thus draft arbitration agreements that will survive a challenge in court.[181] According to commercial litigators Gavin

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[171] *See id.* at 350.

[172] *Id.* at 338.

[173] Myriam Gilles, *Killing Them with Kindness: Examining Consumer-Friendly Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 853 (2012).

[174] *See id.* (remarking on "a clear increase in the popularity of these provisions over the past decade").

[175] *Id.* at 848; *see also* Makarowski v. AT&T Mobility, LLC, No. CV 09-1590-GAF (CWx), 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) (describing AT&T's arbitration agreement as containing "perhaps the most fair and consumer-friendly provisions this Court has ever seen").

[176] Gilles, *supra* note 174, at 850–53.

[177] *Id.* at 853–54.

[178] *Id.* at 857.

[179] F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 386 (2009).

[180] *Id.* at 372.

[181] *Id.* at 378.

W. Skok and Laura P. Hanson, "an understandable, conspicuous, and consumer-friendly arbitration clause is more likely to be enforced."[182] Some commentators and lower courts, citing dicta in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, have challenged arbitration agreements wherein consumers are less effective at vindicating statutory rights.[183] Although the Court has routinely dispensed with such arguments, the specter of effective vindication doctrine has motivated vendors to use agreements so blatantly consumer-friendly that they would survive such challenges.[184] Accordingly, attorneys encourage vendors to assume primary responsibility for arbitration costs, exclude certain types of claims from arbitration,[185] and include conspicuous notice of the arbitration agreement at or near the beginning of the container contract.[186]

Concepcion also brought attention to class-action terms in arbitration agreements, which typically require that claims be submitted individually.[187] Although class-action terms are politically divisive, *Concepcion* confirmed their general enforceability on grounds that states "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for an unrelated reason."[188] By agreeing to arbitrate, consumers do not waive statutory rights; they simply agree to have claims pursuant to those rights heard in an arbitral forum.[189] Moreover, by entering into an agreement that requires claims to be submitted individually, consumers are not invariably precluded from vindicating their federal or state statutory rights.[190] In fact, virtually all statutory rights are completely arbitrable.[191] Even where claims

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182 GAVIN W. SKOK & LAURA P. HANSEN, TIPS FOR DRAFTING CONSUMER ARBITRATION AGREEMENTS 3 (2020).

183 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 614–15 (1985).

184 *Id.* at 645.

185 SKOK & HANSEN, *supra* note 182, at 3 (concluding that "exclusions should be drafted carefully and narrowly to minimize the risk of later challenges that the exception applies more broadly than intended").

186 *Id.*

187 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011).

188 *Id.* at 352.

189 *Id.* at 338.

190 *Id.* at 340.

191 Henry Allen Blair, *What Remains of Effective Vindication? Something Important, Says the Second Circuit*, ARB. NATION (Apr. 26, 2019), https://www

pursuant to those rights may be prohibitively expensive to pursue individually, the Court has clarified that the effective vindication doctrine applies narrowly to the right to *pursue* statutory claims.[192] The simple fact that a remedy may not be worth the expense does not render absent the right to pursue that remedy.[193]

E. International Arbitration

Cross-border arbitration can be traced to the earliest days of antiquity.[194] Interstate merchants of ancient Greece were known to bring transactional disputes before their wisest elders, and a panel of neutral Spartans settled a territorial dispute between Athens and Megara.[195] Some scholars recognize the biblical Solomon as history's first arbitrator,[196] having heard and settled a child custody dispute brought before him by two maternal claimants in 1 *Kings* 3:16 to 28.[197] Unable to identify its true mother, Solomon ordered the child to be severed in half by sword, then awarded custody to the woman most distraught by the order.[198]

Today's international commerce is very different from the eras of ancient Greece and Solomon, but the role of arbitration has endured.[199] About ninety percent of all international contracts include a binding arbitration provision.[200] In *Mitsubishi Motors v. Soler Chrysler-Plymouth*, the Supreme Court acknowledged that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."[201] One survey of

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.arbitrationnation.com/what-remains-of-effective-vindication-something-important-says-the-second-circuit/ [https://perma.cc/G3BB-NKYF].

[192] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).

[193] *See id.* at 229.

[194] *See* Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 156 (1970) [hereinafter *History of Arbitration*].

[195] *See id.*

[196] *See id.* at 155.

[197] 1 *Kings* 3:16–28.

[198] *See id.*

[199] *See History of Arbitration*, *supra* note 194, at 157.

[200] *See* MAURICE KENTON & PETER HIRST, INTERNATIONAL COMPARATIVE LEGAL GUIDE 20 (12th ed. 2015).

[201] 473 U.S. 614, 638 (1985) (holding that an international tribunal was the proper forum to resolve U.S. antitrust claims which previously could only be heard in U.S. courts).

international investors found that two characteristics largely fuel their preference to arbitrate: neutrality and predictability.[202] Without contractual arbitration, international parties risk having their disputes heard by a "biased foreign judge who will apply unfamiliar procedures in a strange language."[203] Further, without the neutral forum that is international arbitration, a foreign party may be subjected to a local court rendering a decision that is perhaps rightly derided for letting nationalism influence the results.[204] A robust arbitral framework can also reduce the risks of foreign market entry and make challenging markets more attractive.[205] North Korea, for example, has developed a relatively advanced arbitration system in the hope that it will attract foreign investment.[206]

Arbitral judgments are more easily enforced than those of foreign courts.[207] One empirical study found that respondents assigned significantly greater importance to enforceability in international disputes than in domestic disputes.[208] Whereas different jurisdictions will typically have conflicting laws, arbitral awards are standardized via international conventions.[209] One such convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention).[210] Its 159 signatory nations "represent all parts of the world and many different levels of ... development" and include most major participants in international trade.[211] Although most arbitral awards are satisfied by

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[202] *See* Ya-Wei Li, *Dispute Resolution Clauses in International Contracts: An Empirical Study*, 39 CORNELL INT'L L.J. 789, 792–93 (2006).

[203] *Id.* at 793.

[204] *See* Tractenberg, *supra* note 75, at 464–65.

[205] *See* Li, *supra* note 202, at 793.

[206] *See* Kim Hyun-bin, *North Korea has Advanced Dispute Resolution System*, KOR. TIMES (Jan. 22, 2019, 3:35 PM), https://www.koreatimes.co.kr/www/nation/2019/01/103_262470.html [https://perma.cc/4K6L-4UKX].

[207] *See* Li, *supra* note 202, at 795.

[208] *See* WIPO ARB. & MEDIATION CTR., RESULTS OF THE WIPO ARBITRATION AND MEDIATION CENTER INTERNATIONAL SURVEY ON DISPUTE RESOLUTION IN TECHNOLOGY TRANSACTIONS 44 (2013).

[209] *See* KENTON & HIRST, *supra* note 200, at 23.

[210] *See* Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW. 249, 251 (1986).

[211] *Id.*

voluntary compliance,[212] the certainty and finality provided by the New York Convention are compelling incentives to arbitrate rather than risk litigating in a foreign court.[213]

Consider *Reyno v. Piper Aircraft Company*, which arose when an aircraft manufactured by Pennsylvania-based Piper Aircraft Company crashed in Scotland, killing its five Scottish passengers.[214] Reyno, a representative of the decedents, sought to have the case heard in the United States.[215] However, the federal district court of Pennsylvania dismissed the case under forum non conveniens.[216] On appeal, the Third Circuit Court of Appeals reversed on grounds that forum non conveniens does not apply if the alternative forum (in this case, Scotland) is less favorable to the plaintiff.[217] Finally, the Supreme Court reversed, holding that a motion to dismiss on the grounds of forum non conveniens cannot be defeated merely by showing that the law would be less favorable to the plaintiff in the alternative forum.[218] *Reyno* illustrates some of the practical problems associated with international litigation: jurisdictional uncertainty, substantive disparities, and procedural unfamiliarity.[219]

Business-to-consumer transactions, once limited to nearby merchants with whom one could physically conduct business, now include online transactions of worldwide origin and fulfillment.[220] Because international enforcement of court judgments is so difficult, arbitration agreements are often the "only feasible binding remedy" for disputes arising from those transactions.[221] Some

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[212] *See id.* at 250.

[213] *See* Li, *supra* note 202, at 795–96.

[214] 479 F. Supp. 727, 729 (M.D. Pa. 1979).

[215] *Id.* at 730.

[216] *See id.* at 727. Forum non conveniens means inconvenient forum. *See Venue*—Forum Non Conveniens, LAWSHELF, https://lawshelf.com/courseware contentview/venue-forum-non-conveniens/ [https://perma.cc/X8WS-NH3D]. This does not mean that the forum is improper but, instead, that the forum is inconvenient or not as appropriate as another forum. *See id.* To have a case dismissed under forum non conveniens there must be an adequate forum that is willing to hear the case and the defendant must be able to be served with the necessary process by the alternative forum. *See id.*

[217] *See* Reyno v. Piper Aircraft Co., 630 F.2d 149, 149 (3d Cir. 1980).

[218] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981).

[219] *See, e.g.*, *id.* at 236, 243.

[220] *See, e.g.*, Schmitz, *supra* note 71, at 81, 103; Szalai, *supra* note 67, at 246.

[221] Schmitz, *supra* note 71, at 101–02.

prominent governments continue to limit arbitration agreements on public policy grounds,[222] but international policymakers are developing solutions to overcome those differences.[223] For example:

> The EU has proposed Regulations calling for use of ODR for cross-border disputes, and the United Nations Commission on International Trade Law ('UNCITRAL') has instituted a Working Group on ODR for establishing a type of OArb for B2C disputes .... The UNCITRAL ODR Working Group—with representatives from over 60 nations, including the United States—is currently aiming to create a binding online mechanism for settling conflicts regarding cross-border online purchases.[224]

In coming years, OArb will likely emerge as a preferred format for internationally accepted and enforceable dispute resolution.[225] This is sensible given the rise of smart contracts and, relatedly, of blockchain arbitration.[226] Even prior to the ongoing COVID-19 pandemic, OArb was already "widely used for internet domain name disputes."[227] In the last two decades, U.S. arbitrations have increasingly leveraged information technology (for example, videoconferencing, online filing, digital discovery) to reduce costs, accelerate outcomes, and reduce procedural difficulty.[228] Some functions of OArb in its current form include document management, asynchronous communication, legal triage, payment

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[222] *See id.* at 83 ("France, Germany, and the United Kingdom ('U.K.'), for example, generally limit or refuse to enforce pre-dispute arbitration agreements in employment contracts with respect to employees' wrongful dismissal claims. Public policies in these countries protect employees' rights to bring their dismissal claims to public tribunals or courts.").

[223] *See id.* at 99.

[224] *See id.* at 99–101.

[225] *See id.* at 101–02.

[226] *See* Derric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?*, KLUWER ARB. BLOG (Mar. 29, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ [https://perma.cc/WD75-VFJW] (discussing the growth of OArb in blockchain matters—for example, smart contracts).

[227] *Id.* Whether legally binding or not, OArb of domain name disputes typically is governed by the Internet Corporation for Assigned Names and Numbers (ICANN), which has adopted a Uniform Domain Name Dispute Resolution Policy (UDRP). *Id.* A number of dispute resolution service providers help to resolve disputes under UDRP disputes, and the World Intellectual Property Organization (WIPO) appoints panelists to decide the disputes. *See id.*

[228] *See* Gabrielle Kaufmann-Kohler & Thomas Schultz, *The Use of Information Technology in Arbitration*, JUSLETTER, Dec. 2005, at 7.

facilitation, negotiation spaces, and document creation.[229] Information technology makes arbitration more feasible "in the sense that tasks can be undertaken—or goals can be reached—in a way that may not have been practicable without IT."[230] Where technology is unavailable, "costs and time constraints may lead to renouncing certain [procedures], like hearing a witness or experts who may not be quickly available, especially in fast-track procedures."[231]

Conveniently for present purposes, some of these effects are no longer speculative.[232] The ongoing COVID-19 pandemic has consigned thousands of otherwise live proceedings to online formats.[233] Courts are ordinarily inclined to hold at least one face-to-face hearing in the course of a dispute.[234] At impossibility, some have temporarily suspended "non-essential" filings and dispensed with orders to compel discovery or depositions.[235] Arbitral tribunals, on the other hand, have proven adaptable, rapidly integrating electronic case management, virtual hearings, and new digital protocols into pending cases.[236] Because pandemic-related budget constraints have led businesses to favor faster, cheaper dispute resolution,[237] newfound preferences for arbitration are

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[229] *See* Erika Rickard, *Online Dispute Resolution Offers a New Way to Access Local Courts*, PEW RES. CTR. (Jan. 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts [https://perma.cc/N7PD-PPJJ].

[230] Kaufmann-Kohler & Schultz, *supra* note 228, at 11.

[231] *Id.*

[232] *See* Kun Fan, *The Impact of COVID-19 on the Administration of Justice*, KLUWER ARB. BLOG (July 10, 2020), http://arbitrationblog.kluwerarbitration.com/2020/07/10/the-impact-of-covid-19-on-the-administration-of-justice/ [https://perma.cc/4SCT-ZSWH].

[233] *See id.*

[234] *See id.*

[235] *See* Eddy Salcedo & Owen R. Wolfe, *Courts Continue to Loosen COVID-19 Restrictions in Civil Litigation and to Push Civil Cases Forward*, SEYFARTH (May 5, 2020), https://www.seyfarth.com/news-insights/courts-continue-to-loosen-covid-19-restrictions-in-civil-litigation-and-to-push-civil-cases-forward.html [https://perma.cc/FT8D-96KX] (noting that New York state courts temporarily restricted such filings, including motion papers and notices of appeal, in response to COVID-19).

[236] *See* RICHARD KREINDLER ET AL., INTERNATIONAL ARBITRATION IN THE TIME OF COVID-19: NAVIGATING THE EVOLVING PROCEDURAL FEATURES AND PRACTICES OF LEADING ARBITRAL INSTITUTIONS 1 (2020).

[237] *See Expedited Remote Arbitration in the Age of COVID-19*, MILLER CANFIELD (Mar. 27, 2020), https://www.millercanfield.com/resources-COVID-19-Expedited-Remote-Arbitration.html [https://perma.cc/L6KA-65GT].

likely to endure even after the immediate effects of COVID-19 have subsided.[238]

Would-be claimants can now, in most cases, commence an arbitration electronically, even if ordinary procedures would require hard copies of certain documentation, and proceed to its conclusion with minimal non-local travel or face-to-face interaction.[239] An advantage of arbitration is that the parties are the ones who decide how the arbitration will be conducted.[240] The parties can agree to limited discovery and to limit direct testimony to only include written statements.[241] Instead of cross-examinations, the parties can agree that only the arbitrator can pose questions.[242] Additionally, parties may opt to hold all meetings and hearings remotely, or even to forgo hearings entirely, in which case the arbitrator will decide the matter within a short period of time.[243] The AAA allows parties to agree that an arbitrator will make his or her decision based on the documents alone within fourteen days of the hearing,[244] while the International Chamber of Commerce allows for videoconference arbitration.[245]

Significantly, courts are responding to competitive pressure from arbitration.[246] In many jurisdictions, judges have become more specialized in commercial disputes, fast-track procedures have been created, and even some procedural rules can now be tailored to the needs of the dispute.[247] Arbitration is not a panacea, and in many circumstances, it is not preferable to a well-functioning court system.[248] Some research suggests that U.S. companies and those

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[238] *See* Frédéric P Gilbert & Jean H. Gagnon, *Canada: Beyond COVID-19: Treating a Franchisor-Franchisee Dispute as a Divergence to be Reconciled Rather than a Battle to be Won*, FASKEN (May 27, 2020), https://www.fasken.com/en/knowledge/2020/05/27-covid-19-traiter-differend-franchiseur-franchise-divergence-a-concilier [https://perma.cc/QF8B-Z6PQ].

[239] *See* KREINDLER ET AL., *supra* note 236, at 2.

[240] *Id.*

[241] *See id.*

[242] *See id.*

[243] *See id.*

[244] *See id.*

[245] *See id.*

[246] *See* Julian Nyarko, *We'll See You in ... Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. 6, 17–18 (2019).

[247] *See id.* at 18.

[248] *See id.*

economically connected to U.S. companies often do not behave as one would expect if they in fact believe arbitration to be superior to litigation.[249] At a minimum, arbitration might only be strictly preferred in cases where relevant law is clear and only its application to the facts is in dispute.[250] Court decisions also create positive externalities in the form of precedent,[251] and the strict confidentiality of arbitration comes at the cost of a coherent body of decisions to which subsequent arbitrators can be bound, and against which prospective disputants can measure their likelihood of success.[252]

F. Consumer Salience

Some consumers do not read contracts.[253] Among consumers who make some effort to read a contract, some do not read the arbitration agreement.[254] Even among consumers who read a contract and in doing so read the arbitration agreement, still some do not properly consider the importance of the provision.[255] This is a problem of *consumer salience*—the degree to which a consumer's attention is differentially directed to the arbitration agreement.[256]

Consumer non-salience is a problem for proponents of contractual arbitration.[257] One study of 2,000 U.S. consumers found that ninety-seven percent of eighteen- to thirty-four-year-olds and ninety-one percent of consumers at-large agree to legal terms of service without reading them.[258] This does not erase the benefits

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[249] *See id.* at 17 (reporting that respondents in the sample did not adopt arbitration clauses at a rate consistent with the "widely held belief among scholars of international arbitration" that court systems are not suitable for international disputes).

[250] *See id.*

[251] *See id.* at 18.

[252] *See id.* at 18.

[253] *See* Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659, 714 (2013) (citing to sources for the idea that "actually almost everyone, even businesspersons and law professors[,] do not read form contracts").

[254] *See* Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, N.Y.U.J.L. & BUS. 793, 795, 806–07 (2015).

[255] *See id.*

[256] *Id.* at 795. Notably, consumers are typically presented with contracts on a "take it or leave it" basis, with no ability to negotiate over terms. *Id.*

[257] *See id.* at 795, 806.

[258] *See* Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUS. INSIDER (Nov. 15, 2017, 7:30 AM), https://www.businessin

of contractual arbitration, but it does affect how consumers interact with those benefits.[259] Economic theorists, for example, might suggest that the cost savings generated by arbitration agreements should, all else constant, be passed through to consumers in the form of lower prices.[260] However, both absolute pass-through and pass-through elasticity are sensitive to demand curvature,[261] and because consumers tend not to read their contracts, arbitration agreements have no appreciable effect on demand.[262] The theoretical pass-through effects of arbitration agreements are therefore constrained by consumer non-salience.[263]

Non-readership naturally calls into question the consumer's clear and unmistakable intent to arbitrate, especially insofar as non-readership relates to differences in consumer sophistication.[264] A study of credit card contracts by the Consumer Financial Protection Bureau, for instance, found that the average arbitration agreement was more than 1,100 words in length and written at an average grade level of 15.6 (i.e., some college education).[265] In *Richardson v. Coverall North America, Inc.,* however, the Court held that clear and unmistakable delegation of arbitrability to an arbitrator existed regardless of consumer sophistication.[266] In that case, incorporation by reference of the AAA Commercial Arbitration Rules was found sufficiently clear and unmistakable.[267] Nonetheless, when less sophisticated consumers later become aware of the dispute resolution terms to which they agreed, they may

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sider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 [https://perma.cc/GT9J-LWXL].

[259] *See id.*

[260] *See* REPORT TO CONGRESS, *supra* note 87, at 1, 3–4.

[261] RBB ECON., COST PASS-THROUGH: THEORY, MEASUREMENT, AND POTENTIAL POLICY IMPLICATIONS: A REPORT PREPARED FOR THE OFFICE OF FAIR TRADING 7–8 (2014).

[262] Barr, *supra* note 254, at 795.

[263] *See id.*

[264] *See id.* at 795, 806–07.

[265] *See id.* at 807.

[266] 811 Fed. App'x 100, 103 (3d Cir. 2020) (holding that a plain delegation is clear and unmistakable regardless of party sophistication and that incorporation by reference of the Commercial Arbitration rules of the AAA is sufficiently clear and unmistakable to delegate questions of arbitrability to the arbitrator).

[267] *See id.*

experience shock or discomfort, particularly when the dispute is emotionally charged in nature.[268]

Of course, the law presumes that those who manifest assent to a contract have read and understood that contract in its entirety.[269] Even so, the presumption of readership strains credulity and practicality in the case of arbitration agreements, where even a thorough, informed reading by a sophisticated transactor is unlikely to have an appreciable impact on the transaction.[270] A consumer dissatisfied with the terms of the presented contract typically has no avenue to negotiate boilerplate terms of the contract with her fellow transactor, and, even were she so inclined, the expected value of the task is unlikely to be worthwhile.[271] One might question whether reading a boilerplate contract for most transactions is even *rational*—that is, whether the effort to read and understand boilerplate terms and their effects on unlikely contingencies is tantamount to obsessive behavior.[272] Thus, because courts will make presumptions of readership even when such presumptions amount to legal fiction, commentators have rightly identified that opportunistic drafters could include harshly one-sided terms with few pre-transactional consequences.[273]

So long as consumers have notice and an opportunity to read, the consumer salience problem can be mitigated.[274] Consumer non-salience is not a death knell to proponent arguments, but increased readership would naturally benefit consumers and

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[268] *See* Omri Ben-Shahar, *The Myth of 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 5 (2009).

[269] *See id.* at 7.

[270] *See id.* at 7–8.

[271] *See id.*

[272] *See id.* at 15.

[273] *See id.* at 8.

[274] *See* Specht v. Netscape Comm'n Corp., 306 F.3d 17, 29 (2d Cir. 2002) (citing California's constructive notice is specified in Civil Code § 19) ("Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."); *see also* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 232 (2d Cir. 2015) (quoting Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 858 P.2d 245, 255 (Wash. 1993)) (positing that mutual assent can be found as long as a reader has had an opportunity to read and the terms are not hidden or inconspicuous); Starke v. Squaretrade, Inc., 913 F.3d 279, 289 (2d Cir. 2019).

insulate vendors from unconscionability arguments in court.[275] To that end, vendors can facilitate readership by providing conspicuous notice of the arbitration agreement and using large-font text in a prominent location.[276] Moreover, inapplicable presumptions of readership can be rebutted in court by evidence of contrary actual assent.[277] Opt-out clauses offer perhaps the most promising solution to the consumer salience problem, but their value is constrained by both the prevalence of non-readership and the unwillingness of many vendors to include such clauses.[278] However, were a widespread adoption of opt-out clauses to be compelled by regulation, vendors might be incentivized to avoid unfavorable terms lest large swaths of consumers opt out of their arbitration agreements.[279]

II. Employment Arbitration

More than half of all non-union, private sector employees in the United States are subject to contractual arbitration,[280] and it is typically a non-negotiable condition of employment.[281] An employment relationship is formed when an individual agrees to perform work for an employer in exchange for pay or other remuneration.[282] Some employers permit employees to opt out of the arbitration clause, while others choose to forgo contractual arbitration altogether.[283] Crucially, an employment relationship is characterized by the dynamics of the relationship, not contractual terms.[284] Even someone who is ostensibly an independent

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[275] Ben-Shahar, *supra* note 268, at 8.
[276] *See Starke*, 913 F.3d at 289.
[277] *See id.*
[278] Barr, *supra* note 254, at 807.
[279] *See id.* at 817.
[280] *See* Hill, *supra* note 123, at 779–80.
[281] *See id.*
[282] *See* Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. Legis. 295, 298 (2013).
[283] *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 783 (2008).
[284] Kwak, *supra* note 282, at 296–98.

contractor can be entitled to the legal rights of an employee if the dynamics of the relationship indicate employment.[285]

A. Process Advantages: Affordable, Fast, and Flexible

Recall that *process* describes the degree to which procedurally difficult or complex tasks are necessary to resolve a dispute.[286] Arbitration reduces process in three primary ways: lowering costs, accelerating outcomes, and granting procedural flexibility.[287] Those advantages apply across arbitrable areas of law, but they can be especially significant in employment, where fiduciary obligations and an intricate legal environment can make litigation expensive, lengthy, and complex.[288]

Arbitration typically offers a far lower cost structure than litigation.[289] While precise amounts and sources of savings vary, it does so primarily by reducing the expenses associated with procedurally difficult or complex tasks like discovery, motions, hearings, and appeals.[290] Some of those savings are directly attributable to the limited role of attorneys—merchants of process who trade in the billable hour.[291] For employees, cost advantages are even more significant when forum costs and cost-shifting

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[285] *See id.* at 301–02. Hence, despite the franchisor's claims and the franchise contract's wording, a franchisee may seem to be more employee than independent contractor. *See also* Robert W. Emerson, *Assessing* Awuah v. Coverall North America, Inc.*: The Franchisee as a Dependent Contractor*, 19 STAN. J.L. BUS. & FIN. 203 (2014) (considering a Massachusetts Supreme Judicial Court decision finding that a franchisee was its franchisor's employee and thus entitled to job protections such as minimum wages and overtime pay, the author concludes that, to correct the imbalance in franchisor-franchisee relationships, franchisees should be entitled to legal protections such as a right to form associations and to enter into collective bargaining agreements).

[286] *See supra* Part I.

[287] *See* Andler et al., *supra* note 110, at 133–34.

[288] *See id.*

[289] *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitrator Fees*, 5 J. AM. ARB. 251, 257 (2006) ("[T]here is consensus that the enforcement of adhesive arbitration agreements lowers the dispute-resolution costs of the businesses that use them.").

[290] *See id.* at 258.

[291] *See id.*

provisions are considered.[292] In one empirical study of two hundred cases, "AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25 percent of the cases, hearing fees in 71.3 percent of the cases, and some or all of the filing fees in 85.12 percent of the cases."[293] Thirty-two percent of contractually arbitrating employees paid nothing for arbitration, and another twenty-nine percent paid only attorney's fees.[294] Thus, only thirty-nine out of two hundred employees in the sample paid any amount of forum fees.[295]

The streamlined discovery process and limited role of attorneys allow for much greater efficiency in arbitration.[296] Meanwhile, arbitral finality obviates the lengthy appeals and delays that are common in litigation.[297] Another empirical study of 4,000 cases found that employment arbitrations are concluded in an average of 361.5 days, while litigation takes an average of two-and-a-half years.[298] According to the Arbitration Institute of the Stockholm Chamber of Commerce, most of its cases in 2018 were decided within six to twelve months.[299] Cases that go to court can carry on for years if the decision is appealed multiple times, and an appeal can lead to a reversal and remand to the lower courts.[300] Moreover, arbitration is the primary dispute forum for low- and middle-income employees,[301] who are presumably more likely to abandon a prohibitively expensive or lengthy claim than their high-income colleagues.[302]

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[292] Hill, *supra* note 123, at 810–12.

[293] *See id.* at 812.

[294] *See id.* at 802.

[295] *Id.* at 798.

[296] COMMERCIAL DISPUTES, *supra* note 1, at 3.

[297] Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5, 8 (2011)

[298] *Id.*

[299] *SCC Statistics 2019*, *supra* note 6, at 5.

[300] *See, e.g.*, Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, CHI. TRIB. (Sept. 28, 2015, 12:32 AM), https://www.chicagotribune.com/nation-world/sns-bc-us--federal-case-backlog-20150927-story.html [https://perma.cc/95UT-7HQW]; Rickard, *supra* note 229.

[301] Hill, *supra* note 123, at 784.

[302] *Id.*

Like consumer due process, arbitration administrators define the necessary level of formality in employment disputes.[303] AAA's Employment Due Process Protocol, for example, stipulates that:

> Employees should have the right to be represented by a spokesperson of their own choosing.
>
> Employees/Individuals should have access to all information reasonably relevant to their claims.
>
> Employees/Individuals and Employers have a right to an independent and impartial mediator and/or arbitrator.
>
> Mediators and/or arbitrators shall have knowledge of the statutory issues at stake in the dispute and familiarity with the workplace and employment environment and shall attend training provided by the government agencies, bar associations, academic institutions, etc.
>
> No party may have unilateral choice of arbitrator.
>
> There shall be full disclosure by mediators and/or arbitrators of any potential conflict or appearance of conflict or previous contact between the arbitrator and the parties. The arbitrator shall have no personal or financial interest in the matter.
>
> Arbitrators should be empowered to grant whatever relief would be available in court under the law.[304]

Note that the more flexible nature of arbitration should not be interpreted as a relaxed attitude toward due process.[305] Arbitration can be less formal, but it is not informal.[306] One study of 609 arbitration participants found that most were "very satisfied" with arbitration.[307] Sixty-six percent reported that they would be "likely to use arbitration again," with almost half of those "likely to use" respondents saying that they would be "extremely likely."[308] Even forty percent of unsuccessful disputants reported being "moderately to highly satisfied with the fairness of the process."[309] According to the American Bar Association, "80 [percent] of attorneys and 83 [percent] of businesspeople report that

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[303] *See* COMMERCIAL DISPUTES, *supra* note 1, at 4.

[304] *Employment Arbitration Under AAA Administration*, AM. ARB. ASS'N, https://www.adr.org/employment [https://perma.cc/U3MB-EZEF].

[305] COMMERCIAL DISPUTES, *supra* note 1, at 8.

[306] *Id.*

[307] U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION 25 (April 2005).

[308] *Id.*

[309] *Id.*

arbitration is a fair and just process,"[310] and arbitrators are "more likely to understand the subject of the arbitration than judges."[311]

Arbitration can even serve as a de facto appellate court for in-house disputes or grievance processes.[312] In heavily unionized industries—for example, utilities, transportation, education, construction, manufacturing, or the public sector—grievance processes are designed to meet the needs of both unions and employing organizations.[313] Typically, a grievance will move through a sequence of contractually defined steps until it is either resolved or submitted to binding arbitration.[314] While the number and type of intermediary steps can vary, over ninety percent of U.S. collective bargaining agreements provide for arbitration as the final step of the grievance process.[315] Arbitration advances the interests of both employees and management by serving as

> a mechanism for the extension of the relationship between the parties, a union tactic to pressure management for strategic purposes, a diagnostic device to uncover underlying problems in the workplace, a mechanism for individual employees or union officials to challenge management over a range of working conditions, or even a forum for the communication of information.[316]

Note that grievance arbitration should not be confused with interest arbitration.[317] Grievances concern the misapplication of company policy or collectively bargained contract terms, while interest arbitration concerns impasses in negotiation of the collective agreement itself.[318] Additionally, employees receive greater protections

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[310] COMMERCIAL DISPUTES, *supra* note 1, at 8.

[311] *Id.*

[312] Alexander J. S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. DISP. RESOL. 643, 662 (2001).

[313] *Id.* at 644–45.

[314] *See, e.g.*, Mark E. Zelek, *Labor Grievance Arbitration in the United States*, 21 UNIV. MIA. INTER-AM. L. REV. 197, 197 (1989).

[315] *Id.* at 197.

[316] SEAN C. DOYLE, THE GRIEVANCE PROCEDURE: THE HEART OF THE COLLECTIVE AGREEMENT 2 (1999).

[317] Barry Winograd, *An Introduction to the History of Interest Arbitration in the United States*, 61 LAB. L.J. 164, 164 (2010).

[318] *Id.* at 165 ("Interest arbitration, in effect, is a way to form a contract, either in whole, or in part.").

in arbitration than other people, such as independent contractors.[319] Some franchisees have recently claimed to be misclassified employees to try to gain these protections.[320] This is an ongoing issue that can lead to arguments of unconscionability in mandatory arbitration clauses.[321]

Among experts and commentators, the consensus view is that arbitration tends to reduce costs, accelerate outcomes, and permit more flexibility compared to litigation.[322] This research did not find any instance of an expert or commentator disputing those effects.[323] Some argue that the upfront arbitration costs may deny individuals (like consumers and employees) the opportunity to assert their claims.[324] Those who make this argument base it on three self-evident premises: (1) upfront forum costs are more expensive in arbitration than in court, (2) some people cannot afford the upfront costs associated with arbitration, and (3) the contingent fee system that is present in litigation allows people to avoid paying costs upfront.[325] However, the overall cost remains lower than litigation.[326] Less obviously, this research found two ancillary process advantages of arbitration: information technology and judicial divestment.[327] This Article has already endorsed OArb in consumer arbitration, and it does so again here.[328] OArb's potential may be even greater in employment law, where some litigators remain skeptical of IT solutions in favor of their working habits.[329] Despite the entry of young, tech-savvy graduates

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[319] Jonathan Solish & David Harford, *Stradivarius Revisited: Re-Tuning Your Franchise Arbitration Instrument*, 40 FRANCHISE L.J. 69, 89 (2020).

[320] *Id.*

[321] Stephen J. Ware, *Employment Arbitration & Voluntary Consent*, 25 HOFSTRA L. REV. 83, 126–28 (1996) [hereinafter *Employment Arbitration*].

[322] *See* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1182 (2019) (arguing that where there has been an overwhelming pro-arbitration federal policy, courts should not forget and should protect litigation precedents that supports arbitration).

[323] *Id.* at 1147–48.

[324] *Arbitration Costs*, *supra* note 7, at 730.

[325] *Id.* at 731–32.

[326] *Id.* at 733.

[327] *See* Bookman, *supra* note 322, at 1182.

[328] *See supra* notes 225–31 and accompanying text.

[329] *See Survey Finds Majority of Lawyers Still Skeptical of TAR Technology*, IPRO TECH LLC (Feb. 17, 2015), https://iprotech.com/news/survey-finds-ma

into the profession, litigators fear the risk of "wasted innovation"—a term coined by management consultant Geoffrey Moore to describe the expenses of novel, unprofitable innovation.[330] Arbitration, on the other hand, appears much more receptive to technology and its facilitative effects in legal proceedings.[331] For example, while litigants must appear at one or many in-person hearings, communications technology allows arbitrators to conduct some entire arbitrations remotely.[332]

Judicial divestment refers to the economic and logistical benefits of reallocating cases from court dockets to arbitration.[333] Courts are publicly subsidized for their services far beyond the amounts typically collected from parties in court fees.[334] According to one expert, "this fiscal impact can be conceived in the abstract as thousands of dollars per case multiplied by thousands or tens of thousands of disputes every year."[335] In 2014, the median time for civil cases to reach trial was three years and four months, and the average weighted caseload per judge was over 1,000.[336] Contractual arbitration alleviates court backlogs—a particularly acute problem in federal courts—and allows courts to allocate scarce judicial resources more optimally.[337] These backlogs are heavily populated by high-volume, routine legal matters, most of which could be easily handled in arbitration without

jority-of-lawyers-still-skeptical-of-tar-technology/ [https://perma.cc/MB2F-G8AE] (expanding on "the industry's history of slow acceptance ... and reluctance to replace proven, but outdated, methods").

[330] GEOFFREY A. MOORE, DEALING WITH DARWIN: HOW GREAT COMPANIES INNOVATE AT EVERY PHASE OF THEIR EVOLUTION 7 (2005).

[331] Rickard, *supra* note 229.

[332] Jessica Sabbath & Brianna E. Kostecka, *Best Practices for Conducting Remote Arbitration Hearings*, BLOOMBERG L. (Apr. 21, 2020, 4:00 AM), https://news.bloomberglaw.com/us-law-week/insight-best-practices-for-conducting-remote-arbitration-hearings [https://perma.cc/87VL-8WGZ]; Farzaneh Badiei, *Online Arbitration Definition and Its Distinctive Features*, 2010 ODR, 87, 92.

[333] *See* Fla. R. Civ. P. 1.800 (stating that a judge in some cases may order arbitration or arbitration with mediation if the judge determines it could be beneficial to the litigants or the court).

[334] Nyarko, *supra* note 246, at 18.

[335] Mark Fellows, *Limits on Arbitration Would Burden Courts and Taxpayers*, CORP. COUNSEL BUS. J. (Dec. 1, 2007), https://ccbjournal.com/articles/limits-arbitration-would-burden-courts-and-taxpayers [https://perma.cc/RXF5-X993].

[336] Thanawala, *supra* note 300.

[337] *See id.*; Rickard, *supra* note 229.

entanglement of a judge or court.[338] Of course, the five direct and indirect process advantages of arbitration—cost, speed, flexibility, technology, and judicial divestment—are contingent upon a pre-dispute agreement to arbitrate, as "parties engaged in adversarial posturing after a dispute has arisen will rarely agree on anything, much less a cheaper dispute resolution forum that will reduce costs for one's opponent."[339]

B. The Unconscionability Defense

Unconscionability is a defense to enforcement of a contract so overwhelmingly one-sided or unfair that it suggests abuse at contracting, as no reasonable and informed person would agree to it otherwise.[340] Some argue that to condition employment upon an arbitration agreement is invariably unfair to employees and thus unconscionable.[341] These arguments are usually untenable.[342] Courts have long treated arbitration agreements as mutual promises protected by the FAA, and "[t]he U.S. Supreme Court doctrine on arbitration represents the most absolute statement of the vigor of contract freedom."[343]

While it is rare for a court to strike down an arbitration agreement for any reason,[344] unconscionability defenses are the

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[338] Rickard, *supra* note 229.

[339] Fellows, *supra* note 335.

[340] M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 220–22 (2013).

[341] *Employment Arbitration*, *supra* note 321, at 159.

[342] Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1191–93 (2003).

[343] *Id.* at 1190.

[344] Federal courts rarely determine that an arbitration agreement is invalid. *See* Philip Kirchner, *Will my Arbitration Agreement be Enforced?* N.J.L.J. ONLINE (Apr. 26, 2018), https://plus.lexis.com/search?pdsearchterms=LNSDUID-ALM-NJLAWJ-20180426WILLMYARBITRATIONAGREEMENTBEENFORCED&pdbypasscitatordocs=False&pdisurlapi=true&pdmfid=1530671&crid=a07db5bc-d21e-4aee-b99f-4d517221a133 [https://perma.cc/F48R-K3Y4]. However, New Jersey state courts have begun to lower the standard to demonstrate invalidity. *Id.* Kirchner goes on to say, "[a]pplying principles of New Jersey contract law and Third Circuit precedent interpreting the FAA, those decisions (at a federal level) almost universally enforce arbitration clauses regardless of whether they contain language waiving the right to sue in court, seek a jury trial or bring specific statutory claims." *Id.*

most common and most successful for both employees and consumers.[345] Unconscionability defenses are built upon two concepts: procedural unconscionability and substantive unconscionability.[346] Procedural unconscionability concerns the formation of the contract, while substantive unconscionability concerns its terms.[347] In most jurisdictions, both procedural and substantive unconscionability must be proven, but some courts use a sliding scale where some small degree of one type is sufficient in combination with a much higher degree of the other type.[348]

Procedural unconscionability arguments typically concern the nature of employment contracts as adhesion contracts—standardized, negotiable contracts offered on a take-it-or-leave-it basis.[349] Virtually all employment contracts are adhesion contracts.[350] Courts have long held that simply being an adhesion contract is not sufficient to find an arbitration agreement unconscionable.[351] More illustratively, if an employer were to use an adhesion contract *and* print the arbitration agreement in illegibly small legalese, it would likely be held procedurally unconscionable.[352] The Supreme Court emphasizes party self-determination and has repeatedly held that arbitration agreements should be enforced as the parties agreed.[353] However, although irrelevant on its own, an adhesion contract *can* provide the small amount of procedural ammunition necessary for a "sliding scale" court to find unconscionability if a very high degree of substantive unconscionability is evident.[354]

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[345] Schmitz, *supra* note 71, at 81, 92.

[346] *Id.* at 92.

[347] Browne & Biksacky, *supra* note 340, at 220–22; *Employment Arbitration*, *supra* note 321, at 126 n.225 (citing Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18. J.L. & ECON. 293, 302 n.28 (1975)) (distinguishing between substantive and procedural unconscionability).

[348] Richard Craswell, *Two Different Kinds of Procedural and Substantive Unconscionability* 2 (U.C. Berkeley L. & Econ. Workshop, Working Paper, 2010).

[349] Schmitz, *supra* note 71, at 92.

[350] *See* RICK J. NORMAN, LOUISIANA EMPLOYMENT LAW § 3:2 (2020).

[351] Lagatree v. Luce, Forward, Hamilton & Scripps, 88 Cal. Rptr. 2d 664, 678 (Ct. App. 1999).

[352] OTO, LLC v. Kho, 447 P.3d 680, 691 (Cal. 2019).

[353] Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap Sophisticated Parties Too*, 2010 J. DISP. RESOL. 235, 236 (2010).

[354] Craswell, *supra* note 348, at 2 n.3.

Substantive unconscionability arises when contract terms are excessively harsh or one-sided.[355] For example, an arbitration agreement that gives the employer a unilateral right to change or modify the agreement at any time could be held substantively unconscionable.[356] Substantive unconscionability relates to whether "the essence of the provision" is inherently unfair or unreasonable, not to procedure—i.e., how the provision is applied.[357] In their conventional forms, arbitration agreements represent mutual promises where one party's promise to arbitrate is consideration for the other party's promise to arbitrate.[358] Put differently, they represent a mutually beneficial exchange of value.[359]

Significantly, when both parties are sophisticated and equal in bargaining power, courts are generally unreserved in enforcing the contract as written.[360] Emblematic of this tendency is one of the most visible and controversial arbitration systems in the world—that of the National Football League (NFL).[361] The NFL's disciplinary policies, which include a union-negotiated arbitration

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[355] David Horton, *Unconscionability Wars*, 106 NW. UNIV. L. REV. 387, 393 (2015).

[356] Al-Safin v. Cir. City Stores, Inc., 394 F.3d 1254, 1260–62 (9th Cir. 2005) (stating that an arbitration agreement is unconscionable under California law when the agreement gives the employer "the unilateral right to terminate or modify the agreement"); McNamara v. S.I. Logistics, Inc., No. 17-cv-12523-ADB, 2018 WL 6573125, at *3 (D. Mass. Dec. 13, 2018) (finding that the arbitration provision was illusory because the defendant could modify the agreement at any time without notice to the plaintiff); Michael L. DeMichele & Richard A. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63, 76–77 (2006) (noting that courts have found arbitration provisions unconscionable when the employer has the right, from the contract, to modify the contract at any time without providing notice of the change because unrestricted unilateral rights to modify "provides the drafting party employer complete control over the rules and procedures governing the arbitral forum"). In addition, courts have held that a unilateral right to alter an arbitration agreement may be considered an illusory promise. *See id.* at 79.

[357] Solish & Harford, *supra* note 319, at 82.

[358] Rutledge v. Asbury Auto. Grp., No. 3:17-CV-190-CCS, 2017 WL 6349 041, at *3 (E.D. Tenn. Dec. 12, 2017).

[359] *See id.*

[360] Doneff, *supra* note 353, at 236.

[361] *See* Martin H. Malin, *"Deflategate," Tom Brady and Labor Arbitration*, ARB. INFO (May 31, 2016), https://law.missouri.edu/arbitrationinfo/2016/05/31/deflategate-tom-brady-and-labor-arbitration-by-professor-martin-h-malin [https://perma.cc/FNN6-YF8M].

process,[362] drew national attention in the aftermath of the 2014–15 AFC Championship Game between the New England Patriots and the Indianapolis Colts, during which a pass by Patriots quarterback Tom Brady was intercepted by Colts linebacker D'Qwell Jackson.[363] Suspecting that the football was underinflated, officials found that the Patriots' footballs were materially out of compliance with the NFL's minimum air pressure specifications.[364] NFL Commissioner Roger Goodell fined the organization $1 million and suspended Brady for four games.[365]

Brady appealed Goodell's decision pursuant to Article 46, Section 1(a) of the NFL-NFLPA collective bargaining agreement, which provides for appeals to a hearing officer appointed by Commissioner Goodell.[366] Goodell, as authorized by Article 46, appointed himself to arbitrate Brady's appeal.[367] After Goodell affirmed the suspension, Brady filed suit, and Goodell's decision was vacated by U.S. District Court for the Southern District of New York.[368] On appeal, however, the U.S. Court of Appeals for the Second Circuit reversed, observing that the case called for "a straightforward application of well-established law governing judicial review of labor arbitration awards."[369] Though unusual in its delegation of virtually unlimited authority in matters of discipline and review to the commissioner, the agreement was treated as "the product of arms-length negotiations between parties of equal bargaining power,"[370] with the Second Circuit forcefully noting that "had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement."[371]

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[362] Cole Renicker, *A Comparative Analysis of the NFL's Disciplinary Structure: The Commissioner's Power and Players' Rights*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1051, 1069 (2016).

[363] Joseph Stromberg, *Tom Brady's Deflategate Scandal, Explained*, VOX (May 19, 2015, 1:22 PM), https://www.vox.com/2015/1/21/7866121/deflated-football-patriots-cheating [https://perma.cc/7C88-XJ6Q].

[364] *Id.*

[365] *Id.*

[366] Malin, *supra* note 361.

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

Of course, some arbitration agreements have overstepped and appropriately been found unconscionable.[372] Indeed, some commentators have advanced the theory that arbitration agreements, particularly those of adhesion, are inherently unconscionable.[373] However, this may be untenable because of the judicial safeguards by which an unfair arbitration agreement can be held unenforceable.[374] By empowering courts to strike down procedurally or substantively unconscionable agreements, contractual arbitration "penalizes drafters for overreaching and maintains judicial integrity."[375]

C. Dynamic Motivations

If arbitration is indeed mutually beneficial, as proponents claim, then one might question why it so frequently can only be obtained because it is contractually compelled.[376] The implication, opponents argue, is that arbitration agreements are products of imbalance that favor only those powerful enough to demand them.[377] A justification for the proponent view does exist, and it lies in the dynamic motivations at play throughout a dispute.[378] To be useful, arbitration must be stipulated pre-dispute because each party's incentives to behave opportunistically will change in the course of forming the relationship, recognizing a cause of action, bringing a complaint, selecting a forum, resolving the case, and executing a judgment.[379] Otherwise, parties could behave

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[372] Paul B. Marrow, *Determining if Mandatory Arbitration is "Fair": Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y.L. SCH. L. REV. 187, 232 (2009).

[373] Jeff Guarrera, *Mandatory Arbitration: Inherently Unconscionable, but Immune from Unconscionability*, 40 W. ST. U. L. REV. 89, 102 (2012).

[374] Marrow, *supra* note 372, at 232.

[375] Horton, *supra* note 355, at 393.

[376] *See* Amanda R. James, *Because Arbitration Can Be Beneficial, It Should Never Have to Be Mandatory: Making a Case Against Compelled Arbitration Based upon Pre-Dispute Agreements to Arbitrate in Consumer and Employee Adhesion Contracts*, 62 LOY. L. REV. 531, 541 (2016).

[377] *Id.* at 532–33.

[378] William L. Ury et al., *Designing an Effective Dispute Resolution System*, 4 NEGOT. J. 413, 414 (1988).

[379] 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 BERKLEY J. EMP. & LAB. L. 1, 65–66 (2003).

opportunistically and, at any rate, would rarely agree to arbitration after a dispute arises.[380]

Consider a scenario where Ms. Employer and Mr. Employee enter into an employment relationship. At the outset of their relationship, both parties are equal in their inability to predict future disputes. Thus, their incentives are the same; all else constant, they would likely prefer arbitration over litigation. However, at precisely the moment a cause of action occurs, their incentives diverge. If litigation would be prohibitively expensive for Employee, or if their resources are otherwise significantly disparate, Employer's dominant strategy is to refuse arbitration and force Employee to either litigate or abandon his claim. Similarly, if the complaint or its likely judgment is socially undesirable, Employee has an advantage over Employer, as Employee can pressure her to settle unfavorably. Without a binding arbitration agreement, forum selection becomes a tactical matter. However, if Employer and Employee agree at contracting to arbitrate future disputes, their dynamic motivations are neutralized.

Dynamic motivations are also influenced by information asymmetries between employers and their employees.[381] At contracting, the greatest risk in an employment relationship is assumed by the employer.[382] Applicants naturally have more knowledge than their employers about the likelihood that they would behave wrongfully within the scope of their employment.[383] Moreover, accurate reference information is difficult to acquire.[384] Applicants have an incentive to withhold unflattering details, and their previous employers are usually aware that they could be sued for sharing negative information.[385] Employees also tend to conceal negative attitudes toward their employers until after a claim is made, frustrating any efforts by employers to make meaningful systemic changes or even, perhaps, simply to treat a small problem before it worsens.[386] An employee's claim may sit in court or arbitration for many months or years before resolution,

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[380] *Id.* at 32.

[381] Edward A. Dauer, *Judicial Policing of Consumer Arbitration*, 1 PEPP. DISP. RESOL. L.J. 91, 95 (2000).

[382] Marrow, *supra* note 372, at 193–94.

[383] *Id.* at 206.

[384] *Id.*

[385] *Id.*

[386] *Id.*

where, at that point, the driving concern of the dispute often has become moot, with parties and decision makers still left to sort out the claims they asserted.[387] Often, though, arbitration can cut short the time period in which a dispute holds parties hostage.[388]

Employers are prudent to mitigate the considerable risks to which they are exposed in making an offer of employment.[389] When pre-dispute arbitration agreements are not in place, the dominant strategy for employees is often to bypass non-adversarial options entirely,[390] imposing costs on businesses and courts that may have been avoidable.[391] According to Paul Bennett Marrow:

> Monitoring for behaviors among employees that suggest dissatisfaction is challenging, rarely effective, and is almost always very expensive. Many employers have concluded that this risk is best addressed by the implementation of a dispute resolution system designed to flush out asymmetrically held information, provide for an opportunity to correct problems, foster settlement, and relegate only the most stubborn claims to evaluation by a third party.[392]

Arbitration agreements generally motivate parties to solve problems proactively, and they secure access to a suitable forum if in-house systems are unsuccessful.[393] When a feature or condition of the workplace aggrieves an arbitration-bound employee, he or she is more likely to bring it to the employer's attention before considering a suit.[394] If the claim has merit, the employer can voluntarily correct the problem, thereby defusing a potentially adversarial dispute.[395] Cooperative resolution is not so simple in most cases, but even so, the employer-employee relationship improves when parties are encouraged to resolve claims cooperatively before adversarial measures are considered.[396]

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[387] *Id.* at 211 n.48.

[388] *See* Scott E. Korzenowski & Benjamin B. Reed, *The Keys to Successful Negotiation and Early Dispute Resolution*, AM. BAR ASS'N 42D ANN. F. ON FRANCHISING, Oct. 16–18, 2019, at 6.

[389] Marrow, *supra* note 372, at 206–07.

[390] *See id.* at 224.

[391] *See id.* at 192.

[392] *Id.* at 207.

[393] *Id.* at 207–08.

[394] *Id.* at 193–94.

[395] *Id.* at 208.

[396] Ury et al., *supra* note 378, at 414.

Unchecked dynamic motivations permit subtle forms of opportunism in behaviors that are easy to detect but difficult to intercept (or, perhaps, to impute bad faith).[397] Parallels exist in franchising, where franchisee-initiated lawsuits can damage the franchisor's brand and thus be used as a strategic tool by opportunistic franchisees.[398] Absent an arbitration agreement, the threat of a highly publicized lawsuit can be enough to force defendants into undesirable settlements regardless of the claim's merits.[399] Although these defendants can usually compel a Confidential Settlement Agreement in order to ensure that the defendant will not be labeled a "soft target" for such claims,[400] confidentiality agreements are a symptomatic treatment that fails to address the underlying disorder of party opportunism.[401] Arbitration agreements, on the other hand, neutralize bad publicity as a source of opportunism by providing pre-dispute assurances of confidentiality.[402]

D. The Forced Arbitration Injustice Repeal (FAIR) Act

Arbitration agreements remain divisive, and the publicity surrounding a small number of controversial cases has applied political pressure to lawmakers.[403] In February 2019, Congress introduced the Forced Arbitration Injustice Repeal (FAIR) Act,[404] which would prohibit pre-dispute arbitration agreements in employment and consumer contracts.[405] The FAIR Act would also invalidate current arbitration clauses that have already been

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[397] *See id.* at 414–15.

[398] David Grossbaum, *Can You Keep a Secret? The Ethical and Practical Issues of Confidential Settlement Agreements*, AON ATT'YS ADVANTAGE, https://www.attorneys-advantage.com/Risk-Management/Can-you-Keep-a-Secret [https://perma.cc/5BWE-HRWE].

[399] *Id.*

[400] *Id.*

[401] *See, e.g.*, *id.*

[402] Marrow, *supra* note 372, at 233.

[403] Alesia Fernandez Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/84VG-LB6G].

[404] *See* H.R. 1423, 116th Cong. (2019).

[405] Mark Schoeff, Jr., *Bills Would End Mandatory Arbitration in Adviser, Broker Contracts*, INVESTMENTNEWS (Mar. 4, 2019), https://www.investmentnews.com/bills-would-end-mandatory-arbitration-in-adviser-broker-contracts-78433 [https://perma.cc/MV3T-3YMQ].

signed, but only if the dispute arises after the law goes into effect.[406] While not the first attempt by Congress to sidestep arbitration's long history of statutory and judicial endorsement, it is the most significant attempt in recent years.[407] On September 20, 2019, the House passed the FAIR Act by a largely party-line vote of 225–186.[408] It died without a vote in the Senate.[409] Still, in its veto threat, the Trump administration wrote:

> These blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers and employees it seeks to protect.[410]

His successor holds very different views on this issue.[411] In his campaign platform, President Biden vowed in part to "enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits or collective litigation."[412] While serving in the Senate, Vice President Harris cosponsored the FAIR Act, and she has been uncommonly outspoken against contractual arbitration throughout her career.[413] Political speculation lies far beyond the scope of this

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[406] Campbell, *supra* note 403.

[407] *Id.*

[408] *Id.*

[409] Mark Kantor, *Congress Continues to Debate the Proper Role of Arbitration*, AM. BAR ASS'N (Apr. 22, 2021), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2021/congress-continues-to-debate-the-proper-role-of-arbitration/ [https://perma.cc/L2GE-4FMY].

[410] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY 1 (2019) [hereinafter STATEMENT OF ADMINISTRATION POLICY].

[411] *See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, JOE BIDEN FOR PRESIDENT [hereinafter *The Biden Plan*], https://joebiden.com/empowerworkers/ [https://perma.cc/98GB-F4N5].

[412] *Id.*

[413] *See* Cale Guthrie Weissman, *Kamala Harris Blasts Chase CEO Jamie Dimon Over Sneaky Forced Arbitration Clause*, FAST CO. (June 10, 2019), https://www.fastcompany.com/90362256/kamala-harris-to-chase-ceo-dimon-end-forced-arbitration-now [https://perma.cc/KQ88-P3BD].

Article, but it does make the passing observation that the Biden administration will probably be less hospitable toward contractual arbitration than was the Trump administration.[414]

Had the FAIR Act been passed, and subsequently challenged in court, it would likely face staunch scrutiny under the Court's current composition, particularly from Justices Amy Coney Barrett and Brett Kavanaugh.[415] In 2018, then-Judge Barrett, citing *Epic Systems Corp*., upheld a class action waiver that had been struck down by the district court.[416] She reasoned that the availability of class arbitration is a "threshold question of arbitrability," and therefore the contract at issue must be evaluated by a court to determine whether it permits class arbitration.[417] Justice Brett Kavanaugh's first opinion as a member of the Court, for example, was written for a unanimous majority in favor of enforcing an arbitration agreement.[418] Many of the Court's decisions in the past decade have been decided by narrow majorities, and even some of arbitration's skeptics on the Court have occasionally been unmoved by arguments against enforcement of an arbitration clause.[419] The FAIR Act, if signed into law, could eventually find itself challenged in front of a more unified Court than other arbitration cases have encountered.[420]

Thus, on balance, the fate of the FAIR Act is uncertain.[421] The bill is surely well-intentioned, but it could deprive employees

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[414] *Compare* STATEMENT OF ADMINISTRATION POLICY, *supra* note 410, at 1, *with The Biden Plan*, *supra* note 411.

[415] *See* Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 503–04 (7th Cir. 2018); Adam Liptak, *In His First Supreme Court Opinion, Justice Brett Kavanaugh Favors Arbitration*, N.Y. TIMES (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/us/politics/supreme-court-brett-kavanaugh-opinion.html [https://perma.cc/N2AN-AMCE].

[416] *Herrington*, 907 F.3d at 503–04.

[417] *Id.*

[418] *Id.*

[419] Ronald Mann, *Opinion Analysis: Kavanaugh's First Opinion Rejects Vague Exception Limiting Enforcement of Arbitration Agreements*, SCOTUSBLOG (Jan. 9, 2019, 10:58 AM), https://www.scotusblog.com/2019/01/opinion-analysis-kavanaughs-first-opinion-rejects-vague-exception-limiting-enforcement-of-arbitration-agreements/ [https://perma.cc/ZQ36-CQGS].

[420] *See* Schoeff, *supra* note 405.

[421] *See* David R. Golder et al., *Bill to Nullify Mandatory Predispute Arbitration Agreements Passes in U.S. House*, 9 NAT'L L. REV. 276 (Oct. 3, 2019), https://www.natlawreview.com/article/bill-to-nullify-mandatory-predispute-arbitration-agreements-passes-us-house [https://perma.cc/B3WA-TFKW].

and consumers of the benefits discussed throughout this Article.[422] More abstractly, it represents what some find to be a trespass on self-determination principles and the freedom of contract.[423] Interested parties, and particularly stakeholders in arbitration, should pay close attention as its legislative journey unfolds.[424]

III. FRANCHISE ARBITRATION

Franchising is a sophisticated commercial relationship where a franchisor—the owner of a "trademark, trade name, copyright, patent, trade secret, or some form of business operation, process, or system"[425]—permits a franchisee to use some or all of those resources in furnishing goods or services.[426] In return, the franchisee is obligated to carry out the services for which the trademark has been made prominent or famous.[427] Franchisees are responsible for day-to-day business decisions, such as hiring and firing employees, setting compensation, scheduling shifts, and managing inventory.[428] The franchisor provides significant operating assistance in the form of capital financing, advertising, supply chain management, or business expertise.[429]

A. Franchising as a Form of Enterprise

One of the earliest American franchisors was pharmacist and Civil War veteran John S. Pemberton.[430] Pemberton sustained a saber wound in the Battle of Columbus and thereafter

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[422] *See id.*

[423] *Id.*

[424] *See* Schoeff, *supra* note 405.

[425] ROBERT W. EMERSON, BUSINESS LAW 348 (Barron's eds., 6th ed. 2015) [hereinafter BUSINESS LAW].

[426] *Id.*

[427] *Id.*; *see* Robert W. Emerson & Catherine Willis, *International Franchise Trademark Registration: Legal Regimes, Costs, and Consequences*, 52 WAKE FOREST L. REV. 1, 14 (2017) (noting that "the well-known marks doctrine ... allows foreign owners of well-known trademarks the opportunity to bring infringement actions against citizens of other member nations of the Paris Convention using the same or similar marks").

[428] BUSINESS LAW, *supra* note 425, at 348.

[429] *Id.* at 349.

[430] *See* Melissa A. Win, *How the Civil War Created Coca-Cola*, HISTORYNET (Nov. 2016), https://www.historynet.com/civil-war-created-coca-cola.htm/ [https://perma.cc/SV9U-VLQJ].

became addicted to morphine.[431] Seeking a cure for his addiction, he created a formula made of sugar, molasses, and cocaine.[432] In 1886, he sold selected businessmen licenses to bottle and sell his formula as a beverage, now known as Coca-Cola.[433]

Today, approximately 733,000 franchised establishments operate throughout the United States.[434] They are responsible for 7.6 million jobs and account for $404.6 billion in GDP.[435] Franchising allows the parent company to expand its operations without substantial capital outlays for each new business unit.[436] Those outlays and the risks of failure are transferred to franchisees,[437] effectively giving the franchisor access to venture capital without exchanging equity.[438] In return, franchisees receive an established business model with a higher likelihood of success than an equivalent sole proprietorship.[439] Note that franchisees are not independent business owners.[440] Franchisors exert significant control over how franchisees may conduct business, and franchisees do not have a right to renewal unless it is granted by the franchisor.[441] Franchising is a temporary investment more akin to a leasing opportunity than a purchase of ownership.[442]

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[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] Jeff Bevis, *Franchises Drive Job and Economic Growth*, FORBES (Mar. 27, 2019, 7:00 AM), https://www.forbes.com/sites/jeffbevis/2019/03/27/franchises-drive-job-and-economic-growth/#f8647337bb0b [https://perma.cc/8L24-RDVT].

[435] *Id.*

[436] Chris Joseph, *Franchising as a Business Model*, CHRON., https://smallbusiness.chron.com/franchising-business-model-4471.html [https://perma.cc/T4GP-XV4S].

[437] *Id.*

[438] *Id.*

[439] Eddy Goldberg, *The Benefits of the Franchise Model*, FRANCHISING.COM, https://www.franchising.com/guides/benefits_of_the_franchise_model.html [https://perma.cc/2Q6G-6V9L].

[440] *See id.*

[441] *Business Law—Franchise Disputes*, CURRY L. GRP., https://currylawgroup.com/civil-litigation/business-law-franchise-disputes/ [https://perma.cc/M9XX-5RA5].

[442] *Id.* In the international realm, we can see some national laws where a franchisee may be likened to a consumer. *See* Robert W. Emerson, *Franchisees as Consumers: The South African Example*, 37 FORDHAM INT'L L.J. 455, 456–57 (2014) (comparing South Africa's recent franchising regulations with those of

Franchise enterprises can be grouped into three categories: business format systems, distributorships, and manufacturing arrangements.[443] In a business format system, the most common and well-known form of franchising, the franchisor provides an established business model and trade name under which the franchisee operates.[444] In a distributorship, the manufacturer licenses a dealer to sell or otherwise distribute its products.[445] In a manufacturing arrangement, the franchisor provides inputs or formulas that the franchisee will use to manufacture and sell the product according to the franchisor's standards.[446]

Franchising in the United States is regulated by the Federal Trade Commission (FTC) via the FTC Franchise Rule.[447] Adopted in 1978 and revised in 2007, the Rule requires franchisors to provide franchisees with "the material information they need in order to weigh the risks and benefits of such an investment."[448] It prescribes a Franchise Disclosure Document (FDD) containing specific information items about the franchising opportunity.[449] The twenty-three items are: The Franchisor and any Parents, Predecessors, and Affiliates; Business Experience; Litigation; Bankruptcy; Initial Fees; Other Fees; Estimated Initial Investment; Restrictions on Sources of Products and Services; Franchisee's Obligations; Financing; Franchisor's Assistance, Advertising, Computer Systems, and Training; Territory; Trademarks; Patents, Copyrights, and Proprietary Information; Obligation to Participate in the Actual Operation of the Franchise Business; Restrictions on What the Franchisee May Sell; Renewal, Termination, Transfer, and Dispute Resolution; Public Figures; Financial

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older commercial regulations, particularly those in Australia, China, France, and the United States; examining cooling-off periods, the unconscionability doctrine, and penalties for violations, one sees that the consumers' rights orientation of South African franchise law extends farther than does the franchise law in most nations, including the aforesaid four countries).

[443] BUSINESS LAW, *supra* note 425, at 349.

[444] *Id.*

[445] *Id.*

[446] *Id.*

[447] *Id.* at 348.

[448] *Franchise Rule*, FTC (citing 16 C.F.R. §§ 436–37 (2019)), https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule [https://perma.cc/9SDQ-PTN4].

[449] BUSINESS LAW, *supra* note 425, at 350.

Performance Representations; Outlets and Franchisee Information; Financial Statements; Contracts; and Receipts.[450]

Franchisors collect an initial fee at contracting and ongoing royalties from the franchisee.[451] The royalty is typically a percentage of gross income over a fixed period, and for some businesses or industries, it may be the franchisee's most significant monthly expense.[452] Some franchisors provide debt financing for franchisees or have financing agreements with external lenders.[453] Alternatively, franchisees may finance with cash, conventional loans, home equity, or rollover funds from a retirement account.[454] In a Rollover for Business Startups (ROBS), the franchisee forms a C corporation, establishes a 401(k) for the new business, rolls over funds from the existing retirement account to the new account, then purchases stock in the new business.[455] A ROBS may be used in combination with other financing options,[456] and the Small Business Administration will typically guarantee up to eighty percent of some loans.[457]

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[450] *Id.* at 350–51; *see* Robert W. Emerson & Michala Meiselles, *U.S. Franchise Regulation as a Paradigm for the European Union*, 20 WASH. U. GLOBAL STUD. L. REV. 743, 774–84 (2021) (discussing each of the 23 FDD items and their impact on the franchise relationship, including the commitments of both the franchisor and the franchisee).

[451] Joel Libava, *Franchise Fees: Why Do You Pay Them and How Much Are They?*, U.S. SMALL BUS. ASS'N (Apr. 18, 2017), https://www.sba.gov/blog/franchise-fees-why-do-you-pay-them-how-much-are-they [https://perma.cc/SNB8-6FQR].

[452] Fiona Simpson, *Franchise Royalty Fees: Percentage Versus Fixed?*, FORBES (Oct. 8, 2018, 1:41 PM), https://www.forbes.com/sites/fionasimpson1/2018/10/08/franchise-royalty-fees-percentage-versus-fixed/#38613e3a1a93 [https://perma.cc/Z45M-WEEK]; *see* Robert W. Emerson & Charlie C. Carrington, *Devising a Royalty Structure that Fairly Compensates a Franchisee for Its Contribution to Franchise Goodwill*, 14 VA. L. & BUS. REV. 279, 289–90, 316 (2020) (proposing a variable royalty system meant to, among other things, balance the parties' power in a franchising relationship, to bring consistency to the legal identity of franchisees, and to mitigate franchisee free riding).

[453] Eddy Goldberg, *Franchise Financing Options*, FRANCHISING.COM, https://www.franchising.com/guides/franchise_financing_options.html [https://perma.cc/8N7S-TN24].

[454] *Id.*

[455] Tom Thunstrom, *Rollover for Business Startups (ROBS): The Ultimate Guide*, FIT SMALL BUS. (May 24, 2021), https://fitsmallbusiness.com/rollover-business-startups-robs/ [https://perma.cc/D9AS-NLQ4].

[456] *See id.*

[457] Goldberg, *supra* note 453.

Franchisees are not promised success or profitability.[458] Franchisee claims against franchisors often cite alleged misrepresentation during the franchise sales process, noncompliance with FTC disclosure requirements, exclusive territory encroachment, wrongful termination, or wrongful refusal to renew.[459] Franchisor claims against franchisees often cite failure to comply with standards of the system, failure to pay contractual fees, violation of in-term or post-term restrictive covenants, or unauthorized use of trademarks or proprietary information after termination.[460]

B. Construction of Franchise Agreements

Franchise agreements typically include a number of onerous provisions, any one of which can induce an arbitrable claim.[461] One court, for example, held that an arbitrator's decision to apply Pennsylvania law to a California franchise's post-term restrictive covenant was proper and did not flout California law.[462] Another court, in considering an agreement that provided for the application of California law, decided that California law would govern the substantive rights of the parties but federal arbitration law would govern the procedure of the arbitration.[463]

Issues of provision construction are complex, and mandatory arbitration provisions can be particularly onerous for franchisees.[464] The arbitration provision is theoretically neutral, but

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[458] Richard Gibson, *Why Franchisees Fail*, WALL ST. J. (Apr. 30, 2007 11:59 PM), https://www.wsj.com/articles/SB117770922300685303 [https://perma.cc/5N3D-3YKJ].

[459] John Verhey & Stephanie Blumstein, *Basics Track: Franchise Litigation*, INT'L FRANCHISE ASS'N 50TH ANN. LEGAL SYMP., May 7–9, 2017, at 33–36, 38, 40–42.

[460] *Id.* at 27–32.

[461] *See, e.g.*, Paul Green Sch. of Rock Music Franchising, LLC v. Smith, 389 Fed. App'x 172, 178 (3d Cir. 2010); Prudential Real Est. Affiliates, Inc. v. Prudential Long Island Realty, No. SA CV 95-78 AHS (EEx), 1995 WL 18218022, at *4–5 (C.D. Cal. June 12, 1995).

[462] *Paul Green Sch. of Rock Music Franchising, LLC*, 389 Fed. App'x at 178.

[463] *Prudential Real Est. Affiliates, Inc.*, 1995 WL 18218022, at *4–5.

[464] Jeffrey M. Goldstein, *What Does it Mean if My Franchise Agreement Requires "Mandatory Arbitration"?*, GOLDSTEIN L. FIRM (Aug. 10, 2018), https://www.goldlawgroup.com/mean-franchise-agreement-requires-mandatory-arbitration/ [https://perma.cc/5D6M-44QE].

in practice, arbitration provisions tend to favor the franchisor.[465] Arbitration provisions differ from franchisor to franchisor, but typically the arbitration provision will designate where the arbitration will take place (usually in a location most convenient to the franchisor), limit the timeframe in which a franchisee can assert a claim against the franchisor, and exempt situations in which a franchisor needs to assert its rights.[466] An arbitration provision can also prevent class actions, allow the franchisor to decide the qualifications of an arbitrator, and limit remedies.[467] A provision that requires arbitration of "[a]ny controversy, claim or dispute from the franchise agreement" can arguably limit arbitration to contractual claims.[468] In the franchise context, this could mean that the clause does not extend to other disputes that could arise from contracts other than the franchise agreement, such as supply agreements and guarantees.[469] Rather than merely covering actions that arise from the franchise agreement, drafters should design arbitration clauses to include actions that arise from the franchise relationship itself.[470]

In franchising, parties are strongly incentivized to resolve a case cooperatively rather than in litigation or arbitration because disputes are cumbersome to resolve once formally initiated.[471] A franchisor will typically bring counterclaims against a franchisee-initiated claim as a form of leverage over the franchisee.[472] Even if a franchisee does not believe that he or she has acted out of compliance, a motivated franchisor can usually find some term

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[465] *Id.*

[466] Jeffrey M. Goldstein, *What Franchisees Need to Know About Mandatory Arbitration*, GOLDSTEIN L. FIRM (Oct. 5, 2016), https://www.goldlawgroup.com/franchisees-need-know-mandatory-arbitration/ [https://perma.cc/FT4Q-5SXG].

[467] Bill Killion, *Is Your Commitment to Arbitrate Enforceable?*, FRANCHISE TIMES (Mar. 1, 2007), https://www.franchisetimes.com/March-2007/Is-your-commitment-to-arbitrate-enforceable/ [https://perma.cc/8GN6-KNLG].

[468] C. Griffith Towle et al., *Effective and Failed Strategies to Compel/Avoid Arbitration*, AM. BAR ASS'N 41ST ANN. F. ON FRANCHISING, Oct. 10–12, 2018, at 29.

[469] *Id.*

[470] *Id.*

[471] *Can I Sue My Franchisor?*, GARNER, GINSBURG & JOHNSEN, P.A. (Aug. 12, 2021), https://www.yourfranchiselawyer.com/can-sue-franchisor/ [https://perma.cc/9SCW-ZAJ9].

[472] *Id.*

in the franchise agreement or operations manual with which the franchisee has failed to comply.[473]

Sometimes a franchisor will carve out a right for itself in the arbitration provision but ban a franchisee from exercising the same right.[474] Courts have enforced litigation carve-outs in arbitration provisions;[475] however, they will look to the fairness of the carve-out.[476] Courts have considered whether, by initiating litigation for certain claims, the franchisor essentially waived its right to defend the same types of claims in arbitration.[477] The rationale for litigation carve-outs for injunctive relief and other provisional relief is stronger than the argument for litigation carve-outs for unpaid royalties and other monetary claims because a franchisor would probably insist on arbitration if a franchisee were to bring claims about royalties or other monetary claims.[478] Furthermore, it is the franchisor that frequently benefits from private, usually mandatory, arbitration, keeping the proceedings and outcome confidential.[479] Litigating franchisee disputes, on the other hand, is a completely public proceeding and may create burdens that the franchisor would like to avoid.[480]

When there is an optional arbitration provision, courts look to whether the promise to arbitrate is illusory.[481] In *Druco Restaurants, Inc. v. Steak N' Shake Enterprises*, the franchise agreement included a provision that allowed Steak N' Shake to

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[473] *Id.* The franchise contracting process is "rife with opportunities for the franchisor to insert language that is advantageous to its own purposes." Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make It Better*, 46 U. MICH. J.L. REFORM 349, 367 (2013) [hereinafter *Franchise Goodwill*] (discussing, inter alia, "franchisor opportunism").

[474] William Sentell, *Having it Both Ways: Can a Franchisor Insist on Arbitration and Litigation?*, 21 FRANCHISE LAW. 11, 12 (2018).

[475] *See, e.g.*, Meadows v. Dickey's Barbeque Rests., 144 F. Supp. 3d 1069, 1087 (N.D. Cal. 2015); Berent v. CMH Homes, 466 S.W.3d 740, 758 (Tenn. 2015); *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001).

[476] Sentell, *supra* note 474, at 12.

[477] *Id.*

[478] *Id.* at 13.

[479] *Put Your Business in Capable Hands*, BUNDY L. FIRM, https://www.myfranchiselawyer.com/our-services/franchisee-services/franchise-arbitration-litigation/ [https://perma.cc/4GBL-UERR].

[480] *Id.* (noting the importance of consulting with an experienced franchise attorney when developing a franchise dispute resolution system).

[481] Sentell, *supra* note 474, at 13.

"institute ... a system of nonbinding arbitration or mediation" at Steak N' Shake's discretion.[482] Eventually, a dispute arose over mandatory menu pricing.[483] Franchisees tried to bring an action in federal court, but Steak N' Shake wanted to use nonbinding arbitration.[484] The lower court found that the optional arbitration provision was an illusory promise because the decision to arbitrate or not arbitrate was at Steak N' Shake's whim.[485] The Seventh Circuit Court of Appeals affirmed, stating that that the arbitration provision was "vague and indefinite" to "demonstrate the existence of valid agreements to arbitrate."[486]

Franchise contracts usually cover a period of two to over twenty years.[487] The average length tends to depend upon the particular industry, where the typical franchise term clusters around a smaller range of years (for example, full-service restaurants usually have initial terms between ten to twenty years long, and work-at-home arrangements generally have terms of about five to seven years).[488] The franchisee's nonexclusive license to use the franchisor's proprietary information is strictly limited to that period of time and ceases once the relationship is terminated.[489] Franchisors may also require franchisees to invest a percentage of gross revenue in local and national advertising, either by direct expenditure or in the form of a fee paid to the franchisor.[490] All costs and fees associated with opening and operating the franchise over the life of the agreement must be disclosed in the FDD, but there are "virtually no restrictions" on what the franchisor may require.[491] Franchisors may grant the

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[482] 765 F.3d 776, 779 (7th Cir. 2014).

[483] *Id.*

[484] *Id.*

[485] *Id.*

[486] *Id.* at 784.

[487] Michael J. Katz, *United States*, *in* INTERNATIONAL FRANCHISING US/1, US/31 (Dennis Campbell ed., 2019).

[488] *Id.* at US/31.

[489] *Id.*

[490] *Id.* at US/32; *see also* Michael Seid, *Advertising Fees and Strategies for Franchisors*, MSA WORLDWIDE, https://www.msaworldwide.com/blog/advertising-fees-and-strategies-for-franchisors/ [https://perma.cc/2MEP-ESE3] (noting the advertising budget that franchisees have to contribute can be a fixed amount, a minimum dollar amount, or a percentage of gross sales).

[491] Katz, *supra* note 487, at US/32.

franchisee an exclusive territory, but they are not required to do so, in which case the franchisee may face competition from other franchisees or franchisor-owned distribution channels.[492]

Many agreements contain provisions that restrict franchisee behaviors—for example, disclosing proprietary information, "looting" key personnel, or competing against the franchisor.[493] Non-compete covenants typically govern both the term of the franchise and a "reasonable period of time" thereafter.[494] Post-term covenants have attracted considerable attention for restricting the otherwise lawful exercise of a franchisee's right to work.[495] All fifty states have statutes addressing non-compete covenants,[496] and overbroad covenants may be held unenforceable.[497] To avoid enforceability challenges, a post-term non-compete covenant should identify competing forms of business, limit enforceability to a reasonable period of time, and apply only to a specific geographical territory.[498]

Some jurisdictions bar from arbitration any claim which could not be brought in court due to time limitations;[499] an arbitration clause providing for application of New York state law in disputes, for example, introduces the possibility of a statute of limitations defense pursuant to New York's statutory bar on arbitrations that would have been barred by time limitations in a court of the state.[500] In other jurisdictions, parties may expressly designate a length of time within which an arbitration must commence.[501] The parties generally may contractually shorten or lengthen the applicable statute of limitations unless otherwise voided by public policy; in Florida, for example, provisions designating

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[492] Ed Teixeira, *Understand Key Aspects of the Franchise Territory*, FORBES (May 31, 2018, 9:06 PM), https://www.forbes.com/sites/edteixeira/2018/05/31/understand-key-aspects-of-the-franchise-territory/#2d0b80e43759 [https://perma.cc/4RDA-D6EZ].

[493] Katz, *supra* note 487, at US/34.

[494] Jon H. Sylvester, *The Uncertain Status of Post-Employment Non-Compete Covenants in Texas*, 14 T. MARSHALL L. REV. 1, 8 (1988).

[495] Katz, *supra* note 487, at US/34.

[496] *Id.* at US/35.

[497] Verhey & Blumstein, *supra* note 459, at 31.

[498] Katz, *supra* note 487, at US/36.

[499] Craig P. Miller & Laura Danysh, *The Enforceability and Applicability of a Statute of Limitations in Arbitration*, 32 FRANCHISE L.J. 26, 29 (2012).

[500] *Id.*; *see also* N.Y. C.P.L.R. § 7502 (MCKINNEY 2005).

[501] Miller & Danysh, *supra* note 499, at 30.

a period of time shorter than that provided by the applicable statute of limitations are void.[502] Because the grounds on which time limitation provisions is void can differ dramatically, drafters should proceed with caution when imposing time limitations on future disputes or modifying those that would otherwise govern claims in a court of the applicable law.[503]

To maintain product or brand consistency, franchisors usually place vertical restraints on the source materials that franchisees may use.[504] If a franchisee "discover[s] or invent[s] improvements to the franchisor's system," title to the discovery or innovation usually transfers to the franchisor under the theory that it would not exist but for the franchisor's proprietary system.[505] Franchisors may also include provisions in the franchise agreement for sales quotas, regional advertising collectives, liability for the franchisee's acts,[506] mandatory operation hours, inspections, or internal audits.[507]

Under most franchise agreements, any violation of the agreement is considered a material breach.[508] In a survey of the standard agreements for one hundred food service franchise systems, ninety-one listed "franchisee's insolvency and/or bankruptcy"

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[502] *Id.* at 31.

[503] *Id.*

[504] Katz, *supra* note 487, at US/32.

[505] *Id.* at US/32–US/33. The goodwill associated with a franchisee's efforts presents similar issues, as ordinarily franchisors capture all, or almost all, goodwill related to the franchised system. *Franchise Goodwill*, *supra* note 473, at 356 (noting that the franchisor typically contends that "it owns the franchise's systemic goodwill and any goodwill created as a result of the expansion of the franchise," even including local goodwill that a franchisee developed"); Robert W. Emerson, *Franchises as Moral Rights*, 14 WAKE FOREST J. BUS. & INTELL. PROP. L. 540, 557 (2014) (noting that courts may have inconsistent decisions, but articulating the dichotomy between types of franchisees genuinely capable of building goodwill and those far less likely to do so—"Start-up franchises have not built their brand and customer loyalty yet, so the franchisee could be significantly contributing to the franchise's goodwill. On the other hand, there is likely not much franchisee-developed goodwill concerning well-established franchises such as McDonalds, Holiday Inn, and H&R Block.").

[506] Katz, *supra* note 487, at US/34, US/39, US/41.

[507] Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward its Franchisees*, 72 N.C. L. REV. 905, 953 (1994) [hereinafter *Franchise Contract Clauses*]; Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641, 651–52 & 690 (2013) [hereinafter *A Two-Standard Approach*].

[508] *Franchise Contract Clauses, supra* note 507, at 949.

as grounds for termination, seventy-two listed “loss of lease,” sixty-five listed “failure to operate the business,” thirty-two listed “conducting an unlawful enterprise,” thirty-two listed “being found guilty of a crime,” thirteen listed “abandonment of the business,” and nine listed “denial of franchisor access to inspect the franchise[ ]”.[509] Indeed, the agreements’ explicit delineation of grounds for termination has only increased over the years.[510] Franchisors generally enjoy “unbridled discretion” in choosing whether to renew the franchise agreement.[511]

Careful drafters should also consider provisions of the arbitration clause itself.[512] Franchisors may use a choice of law provision to control which state’s laws will apply so long as the state has a substantial relationship to one or both parties.[513] Similarly, a choice of venue provision designates the physical location where arbitration shall be held,[514] which is usually favorable to the franchisor and may be unfavorable to the franchisee.[515] Contracts can require arbitration against related parties, such as the franchisor’s directors or affiliated companies.[516] Franchisors may also allocate arbitration costs in a prescribed way or limit the availability of some categories of damages, e.g., punitive damages.[517] Agreements often prohibit class action or consolidation.[518] In one case, a court created a subgroup within the class action for franchisees with arbitration clauses in their franchise agreements when the dispute concerned whether the franchisor had breached fiduciary duties.[519]

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[509] *Id.* at 949–50.

[510] *A Two-Standard Approach, supra* note 507, at 698.

[511] *Franchise Contract Clauses, supra* note 507, at 949.

[512] *See* Bethany L. Appleby et al., *Inside a Franchise Arbitration*, AM. BAR ASS’N 31ST ANN. F. ON FRANCHISING, Oct. 15–17, 2008, at 2–3.

[513] *Id.* at 4–5.

[514] *Id.* at 5.

[515] *See id.* at 6.

[516] Ronald T. Coleman, Jr. & Justin M. Klein, *Drafting Dispute Resolution Clauses from a Litigator’s Perspective*, AM. BAR ASS’N 37TH ANN. F. ON FRANCHISING, Oct. 15–17, 2014, at 12 (“[T]he arbitration agreement can specify that it covers all claims against the franchisor’s officers, directors, employees, or affiliated companies.”).

[517] *See id.* at 43, 46.

[518] *See id.* at 27.

[519] Collins v. Int’l Dairy Queen, Inc., 168 F.R.D. 668, 678 (M.D. Ga. 1996), *modified*, 169 F.R.D. 690, 694 (M.D. Ga. 1997).

Many contracts require disputants to move through a series of prerequisites—most commonly mediation and/or negotiation—before proceeding to arbitration.[520] In *World of Beer Franchising, Inc. v. MWB Dev. I, LLC*, the court held that when a franchise agreement requires mediation before pursuing a preliminary injunction or arbitration, the disputants must follow the sequence prescribed by the franchise agreement.[521] Prerequisites also ensure that parties engaged in adversarial posturing will not refuse mediation if agreeing to mediate could be seen by the other party as a sign of weakness.[522] To prevent an opportunistic party from abusing prerequisite requirements, drafters should specify time constraints for the prerequisites' completion.[523] As courts also are interested in preserving the status quo pending arbitration, they retain jurisdiction in order to grant preliminary injunctive relief when there is a disadvantaged, nonbreaching party.[524] In determining whether to grant the preliminary injunction, a court may consider the facts of the underlying dispute to determine the likelihood of success, although an arbitrator will decide the case itself.[525]

The threat of being forced into arbitration by non-signatory parties is developing issue for franchisors.[526] A non-signatory, one who is not contractually obligated to agree to arbitration, may be bound to arbitrate by applying the law of agency.[527] If the signatory and non-signatory are closely related, arbitration may be compelled if failing to permit the non-signatory "to arbitrate would eviscerate the arbitration agreement [between the signatories]."[528] According to the Second Circuit Court of Appeals, for

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[520] W. Michael Garner, *Dispute Resolution in the Twenty-First Century: The Challenge To Get ADR Right*, 40 FRANCHISE L.J. 25, 31 (2020) [hereinafter *Dispute Resolution in the Twenty-First Century*].

[521] 711 F. App'x 561, 569 (11th Cir. 2017).

[522] Tractenberg, *supra* note 75, at 465.

[523] *Dispute Resolution in the Twenty-First Century*, *supra* note 520, at 32.

[524] Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 894–95 (2d Cir. 2015).

[525] Sunni, LLC v. Edible Arrangements, Inc., No. 14 Civ. 461 (KPF), 2014 WL 1226210, at *17 (S.D.N.Y. Mar. 25, 2014) (first citing Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1053 (2d Cir. 1990); then citing Am. Exp. Fin. Advisors Inc. v. Thorley, 147 F.3d 229, 231 (2d Cir. 1998)).

[526] *See* 1 THOMAS H. OEHMKE & JOAN M. BROVINS, OEHMKE COMMERCIAL ARBITRATION pt. 2, § 8:1 (3d ed. 2021).

[527] *See id.* at pt. 2, §§ 8:1, 8:22.

[528] *Id.* at pt. 2, § 8:27 (discussing the third-party doctrine).

a non-signatory to compel arbitration against a signatory, "the subject matter of the dispute [must be] intertwined with the contract providing for arbitration."[529] In *Doctor's Associates v. Burr-CCH*, the court held that while the Burrs did not agree to arbitrate against parties that were not parties to the arbitration, the Burrs "did agree to arbitrate all claims, which could include related parties within the scope of the arbitrable claims."[530] Even if there was no written agreement, a signatory party can be equitably estopped from denying arbitration when there is a close relationship between the entities involved and between the alleged wrongs and the non-signatory's obligations and duties in the contracts.[531] However, this does not work in reverse: a signatory cannot compel a non-signatory to arbitration under this theory.[532] Common scenarios in franchising may occur when a franchisee owner who is not a signatory to the franchise agreement can bring a claim against the signatory franchisor to the arbitration agreement.[533] The franchisor may have to arbitrate against the non-signatory franchisee if the sorts of claims brought were anticipated in the arbitration agreement.[534]

Franchisors should also consider the transfer of obligations under an arbitration agreement to new franchisees.[535] Absent a written assumption, an existing franchise agreement will not automatically bind a franchise purchaser to the arbitration clause.[536] In one case involving a current franchisee's purchase of an existing restaurant franchise from another franchisee, the court denied a

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[529] Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354, 361 (2d Cir. 2008).

[530] Craig R. Tractenberg, *Nonsignatories Bound by an Arbitration Clause in Franchise Cases*, LEGAL INTELLIGENCER (Mar. 2, 2020), https://www.foxrothschild.com/publications/nonsignatories-bound-by-an-arbitration-clause-in-franchise-cases/ [https://perma.cc/2Q3U-E6AK] (discussing Dr.'s Assocs. v. Burr, 226 F. Supp.3d 106 (D. Conn. 2016)).

[531] *See* McBro Plan. & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984).

[532] *See* MAG Portfolio Consultant, GMBH v. Merlin Biomedical Grp., 268 F.3d 58, 62 (2d Cir. 2001).

[533] *See* CD Partners, LLC v. Grizzle, 424 F.3d 795, 797–98 (8th Cir. 2005).

[534] *Id.* at 798.

[535] *See* Campbell Invs., LLC v. Dickey's Barbecue Rests., Inc., 784 F. App'x 627, 628 (10th Cir. 2019).

[536] *Id.* (holding that franchisee Campbell's purchase of an existing franchise from another franchisee did not automatically bind Campbell to the franchisee's arbitration agreement).

motion to compel arbitration because a valid written agreement did not exist to bind the franchisee purchaser to the arbitration language of the preceding franchisee's operating agreement.[537] Franchise Disclosure Documents and Asset Purchase Agreements should be carefully drafted to clarify whether the purchaser assumes an existing agreement's arbitration language.[538]

Finally, franchisors may limit the scope of arbitration via carve-outs or simply avoid adopting mandatory arbitration clauses altogether.[539] The most common carve-outs in franchise arbitration are for trademark disputes and claims seeking injunctive relief.[540] A franchisor's trademark "is the lifeblood of the business," and most franchisors will not risk an arbitrator's binding determination that the mark is generic or invalid.[541] Similarly, because injunctive relief can take weeks or months in arbitration, franchisors are interested in preserving access to courts when immediate injunctive relief is necessary.[542] One example is an ex-franchisee's unauthorized use of proprietary information or trademarks, in which case immediate injunctive relief is necessary to stop potential harm to the franchisor.[543] Franchisors might also seek immediate injunctive relief if franchisor liability for the franchisee's acts is at issue.[544] In *Torres v. Simpatico, Inc.*, a class of plaintiffs brought a Racketeer Influenced and Corrupt

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[537] *Id.* at 634–35.

[538] *See id.* at 632–34.

[539] Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 499–500, 500 n.4 (2017) (citing Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 956 (2014)); *see also* SBN Staff, *When To Sacrifice the Benefits of Arbitration in Favor of Litigation*, SMART BUS. (Aug. 1, 2014, 6:18 AM), https://www.sbnonline.com/article/sacrifice-benefits-arbitration-favor-litigation/ [https://perma.cc/2XTJ-6V2P].

[540] Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 113–14 (2008).

[541] Eileen Davis, *ADR Well-Suited to Handle Franchise Cases*, 10 ALTS. TO HIGH COST LITIG. 131, 131 (1992).

[542] *See Does Arbitration Make Sense for Franchisors? A Litigator's Perspective*, MULCAHY LLP (Oct. 30, 2017), http://www.mulcahyllp.com/firmnews/practicenews/doesarbitrationmakesenseforfranchisorsalitigatorsperspective.html [https://perma.cc/3E6W-QT9H].

[543] *See id.*

[544] *See* Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781, 783, 807 (3d Cir. 1978).

Organizations Act (RICO) claim against a franchise system and individuals related to the franchisor.[545] The arbitration provision in the franchise agreement provided that "[t]he provisions of [the arbitration agreement] ... are intended to benefit and bind certain third party non-signatories."[546] The court applied Missouri law and held that non-signatories could enforce the arbitration clause based on the agreement's expressed language.[547] Any draft of these arbitration carve-outs must explicitly "apply to all claims in which injunctive relief is sought ... and [ ] any dispute whether the carve-out applies must be resolved by the court and not the arbitrator."[548] In the franchise context, it seems fair to conclude that the more the arbitration "deck" is stacked against a franchisee, the more likely the arbitrator, the tribunal, or the judge will refuse to enforce an arbitration clause.[549]

C. The Legal Environment

Franchises in the United States operate under "what may be the most comprehensive scheme of government regulation in the world."[550] In the franchise system, disputes can "arise in four different forums: federal court, state court, state administrative tribunals, and arbitration tribunals."[551] If the arbitration agreement includes a forum selection clause, the arbitration will take place in the chosen forum.[552] For example, the court in *Szymczyk v. Signs Now Corp.*[553] held that the FAA preempted a North Carolina

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[545] Torres v. Simpatico, Inc., 995 F. Supp. 2d 1057, 1059–60 (E.D. Mo. 2014), *aff'd*, 781 F.3d 963, 971 (8th Cir. 2015).

[546] *Id.* at 1062.

[547] *Id.* at 1064–65.

[548] Cheryl L. Mullin et al., *Injunctive Relief Pending Arbitration: The Evolving Role of Judicial Action*, 38 FRANCHISE L.J. 547, 554 (2019) (emphasis omitted).

[549] Solish & Harford, *supra* note 319, at 70 ("As the use of arbitration clauses has expanded, courts have been less willing to endorse arbitration clauses that stack the deck unfairly against franchisees. There is greater risk today that an arbitration clause that is too one-sided will not be enforced, leading to the possible loss of the right to arbitrate altogether. A 'perfect' arbitration clause today would, therefore, avoid extremes that might undermine its enforceability.").

[550] Katz, *supra* note 487, at US/8.

[551] 3 W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE pt. 5, § 17:1, 2 (2021) [hereinafter FRANCHISE & DISTRIBUTION LAW].

[552] *Id.* at pt. 5, § 17:21, 3; *see* Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc., 840 F. Supp. 708, 711 (D. Ariz. 1993).

[553] 606 S.E.2d 728, 732 (N.C. Ct. App. 2005).

statute[554] that prohibited forum selection clauses requiring out of state arbitration.[555] In New Hampshire, the "Equipment Dealership Act expresses a strong public policy in favor of having arbitration proceedings" in the dealer's city or country.[556]

Arbitration clauses in franchise agreements have been routinely upheld in court.[557] The FAA generally preempts state franchise law that limits or imposes conditions upon a party's right to arbitrate.[558] The court in *Cochran v. Snap-On Tools Corp.* held that an arbitrator was to determine whether an arbitration clause in a franchise agreement was the product of fraud in a franchise case.[559] Courts have even held that statutory claims under state franchising law should be arbitrated because the state statute is invoked by the franchise agreement, and thus the claim is contractual.[560] California law allows a court to make an order that gives a collateral estoppel effect to some arbitrator findings.[561] In *Dealer Store Owners Association, Inc. v. Sears, Roebuck and Co.*,[562] an association of appliance store owners brought a complaint in state court, but the court held that suing through a surrogate in order to avoid an arbitration provision was not an appropriate use of associational standing.[563]

In the franchising context, arbitration agreements have proven to possess a powerful reach.[564] In *Toddle Inn Franchising, LLC v. KPJ Assocs., LLC*, the court compelled the franchisees to arbitration two years after the franchise agreement had expired.[565]

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[554] N.C. GEN. STAT. ANN. § 22B-3 (West 2021) (recognized as preempted by United States *ex rel.* TGK Enters., Inc. v. Clayco, Inc., 978 F. Supp. 2d 540, 549 (E.D.N.C. 2013)).

[555] *Szymczyk*, 606 S.E.2d at 732.

[556] FRANCHISE & DISTRIBUTION LAW, *supra* note 551, at pt. 5, § 17:21, 3.

[557] *See Szymczyk*, 606 S.E.2d at 732.

[558] *See* FRANCHISE & DISTRIBUTION LAW, *supra* note 551, at pt. 3, § 10:50, 2.

[559] Cochran v. Snap-On Tools Corp., Bus. Franchise Guide (CCH) ¶ 9762, 1991 WL 11991094 (S.D. Iowa 1991).

[560] S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1524 (7th Cir. 1993).

[561] Castaneda v. Santanas Cuisine, Inc., No. D068354, 2016 WL 7474067, at *8 (Cal. App. 4th Dist. 2016).

[562] Dealer Store Owners Ass'n v. Sears, Roebuck & Co., No. CIV05-1526 ADM/JSM, 2006 WL 91335, at *1 (D. Minn. 2006).

[563] *Id.* at *8.

[564] *See* Dr.'s Assocs. v. Burr, 226 F. Supp. 3d 106, 113 (D. Conn. 2016).

[565] *Dealer Store Owners Ass'n*, 2006 WL 91335, at *4 (acknowledging both the provision's wide scope and the interplay with the contract's survival clause).

Claims against non-signatories have also been found to be under the umbrella of an arbitration clause.[566] In *Doctor's Assocs. v. Burr*,[567] a potential Subway franchisee filed several tort claims, including unfair business practices, against a third party not mentioned in the contract.[568] The court held that the claims were to be resolved in arbitration, as agreed, since they related to the franchising "application or candidacy," explicitly within the limits set forth by the text of the provision.[569] In the same light, the trial court in *Hyung Wook Kim v. Bruce Kim* dismissed the franchisee's case at bar against a non-signatory upon the introduction of new evidence during discovery.[570] It was held that the defendants acted within the scope of employment required to compel arbitration.[571]

To avoid enforceability challenges in court, an arbitration agreement should specify all matters that the franchisor wishes to be subject to arbitration.[572] In one case, the plaintiff successfully argued that a claim was not subject to arbitration because the claim was based on oral promises for a distribution contract.[573] Some state laws require that arbitrators initially decide whether the dispute is subject to arbitration unless the issue arises under the Federal Arbitration Act, in which case a court decides whether the dispute should be arbitrated.[574] If the parties are sophisticated, courts tend to hold that incorporation of AAA rules in an arbitration clause shows a clear and unmistakable intent to submit the issues to arbitration.[575] If the parties are not sophisticated, however, courts may question whether the parties actually intended to delegate arbitrability to the arbitrator.[576] The court in *Blanton v. Domino's Pizza Franchising, LLC* held that incorporation of the AAA rules provides clear and unmistakable

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[566] *See Dr.'s Assocs.*, 226 F. Supp. 3d at 112.

[567] *Id.*

[568] *Id.* at 109.

[569] *Id.* at 111.

[570] *Dealer Store Owners Ass'n*, 2006 WL 91335, at *2.

[571] *Id.* at *3.

[572] *See* Meldeau Int'l Inc. v. Goodyear Tire & Rubber Co., 750 F. Supp. 1574, 1578 (S.D. Fla. 1990).

[573] *Id.*

[574] FRANCHISE & DISTRIBUTION LAW, *supra* note 551, at § 3:62, 3.

[575] *Id.*

[576] *Id.*

evidence that the parties intended to arbitrate arbitrability,[577] noting that eleven of the twelve circuits had already issued similar holdings.[578] As observed, though it may not necessarily safeguard a party from compulsion to arbitrate, franchisors should ensure that party identities are "laid out in the arbitration agreement. The identities define who will be responsible for the principal obligations under the agreement; they also are involved in covenants not to compete, post termination obligations, choice of venue and arbitration provisions, and other parts of the agreement."[579] Drafters should also consider that invasive trademark controls could give rise to employee misclassification claims.[580] Some courts have evaluated such claims based on whether the purported employee is engaged in the same business as the employer, giving no special consideration to characteristics of the franchise business model.[581] A successful employee misclassification claim could entitle the "franchisee" to stricter employee protections in arbitration under state law.[582]

International dispute resolution could hinder the dispute process between an international franchisor and its American franchisee simply because of differences in the discovery process.[583] International tribunals do not use a discovery process and disagree with the volume and intrusiveness of American discovery.[584] The analogous international process is called *document production*, and the documents that can be produced are very limited in comparison to domestic arbitration.[585] International

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[577] Blanton v. Domino's Pizza Franchising, LLC, 962 F.3d 842, 851 (6th Cir. 2020).

[578] *Id.* at 846 ("[C]onsider that every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules ... provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'").

[579] FRANCHISE & DISTRIBUTION LAW, *supra* note 551, at § 3:4, 2.

[580] Solish & Harford, *supra* note 319, at 89.

[581] *Id.*

[582] *Id.* at 90.

[583] *See* Matthew J. Soroky, *Compelling U.S. Discovery in International Franchise Arbitrations: The (F)utility of Section 1782 Applications*, 39 FRANCHISE L. J. 185, 186 (2019).

[584] *Id.*

[585] INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 7–9 (2010) [hereinafter IBA RULES].

disputants must produce a *Redfern Schedule*—a required form that briefly and clearly explains the specific document requested and its relevance for document production.[586] The tribunal will only accept documents or categories of documents if the requesting party shows that, more likely than not, the documents exist and are within the possession, power custody, or control of the other party.[587] Eschewing depositions and discovery, witnesses present witness statements in lieu of direct examination.[588]

The absence of American discovery in international arbitration can prevent some parties from gathering the necessary information to prepare for a hearing.[589] For example, an American attorney will not be permitted to gather her opponent's employee information and data files.[590] She must instead rely on answers to written interrogatories prepared by the opposing side's attorney.[591] Additionally, international law will not allow attorneys to produce documents that weaken their own clients, preventing one party from using the document production process to receive information from the other party that may strengthen its own case.[592] International arbitration rules also prohibit attorneys from preparing their witnesses before an arbitration hearing.[593] The American attorney may feel relatively unprepared because she must do without the opportunity to question the opponent directly and thoroughly beforehand.[594]

It is significant that franchise arbitration, particularly between international parties, has proven especially sensitive to effects of the ongoing COVID-19 pandemic.[595] Major arbitral

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[586] Lucila Hemmingsen et al., *Discovery in Cross-Border Disputes: Choosing between Domestic Litigation and International Arbitration*, N.Y.L.J. ONLINE (Mar. 9, 2018), https://www.law.com/newyorklawjournal/2018/03/09/discovery-in-cross-border-disputes-choosing-between-domestic-litigation-and-international-arbitration/ [https://perma.cc/6EQ7-QXW7].

[587] *Id.*

[588] IBA RULES, *supra* note 585, at 5, 10–12.

[589] *See* Hemmingsen et al., *supra* note 586.

[590] *Id.*

[591] *Id.*

[592] *Id.*

[593] *Id.*

[594] *Id.*

[595] John Fellas, *International Arbitration in the Midst of COVID-19*, N.Y.L.J. 1, 1–3 (Mar. 24, 2020).

institutions remain open and pending franchise arbitrations have been able to continue.[596] Nonetheless, many franchisees have found it impossible or impracticable to comply with their contracts due to the ongoing pandemic.[597] For example, franchisees who are obligated to pay fixed royalty or advertising fees regardless of revenue might fail to meet those obligations due to collapsing demand and/or government-ordered closures.[598] Most franchise agreements provide protection to both parties from non-performance liability under qualifying circumstances via force majeure clauses.[599] There is no right to force majeure protection in common law; such provisions are creations of contract and are thus considered on their own precise terms.[600] In general, courts will acknowledge a force majeure defense only upon the existence of an express force majeure clause in the agreement.[601] Moreover, both courts and arbitrators interpret force majeure clauses narrowly; if the contract does not expressly classify pandemics, epidemics, diseases, etc. as force majeure events, the tribunal will interpret the wording and conditions expressly agreed to by the franchising parties to determine applicability of the force majeure

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[596] *Id.*

[597] Dalton Barker, *McDonald's Floats Rent Deferment. Should it Do More?*, CHI. BUS. (Mar. 17, 2020, 4:09 PM), https://www.chicagobusiness.com/restaurants/mcdonalds-floats-rent-deferment-should-it-do-more [https://perma.cc/BFN4-K53N].

[598] *Id.*

[599] Baker McKenzie, *No Force Majeure Clause? Other Potential Options to Excuse Contractual Performance Under US Law in the Face of COVID-19*, BAKER MCKENZIE (Mar. 6, 2020), https://www.bakermckenzie.com/en/insight/publications/2020/03/no-force-majeure-clause#:~:text=Most%20US%20states%20recognize%20common,contract%20performance%20under%20certain%20circumstances.&text=Impossibility%20generally%20would%20not%20include,of%20commutable%20inventory%20or%20inconvenience [https://perma.cc/5F34-C9BE].

[600] *Id.* If no force majeure clause exists, either party might be able to invoke the common law doctrine of frustration. *Id.* Texas law, for example, will excuse a party from performance if performance is rendered impossible "without his fault by the occurrence of an event." *Id.* California law expands impossibility to include impracticability, covering obligations that are rendered prohibitively difficult or expensive but technically remain possible. *Id.* In general, however, a force majeure defense is more likely to be recognized than a defense at common law under equivalent circumstances. *Id.*

[601] *COVID-19: Force Majeure Event?*, SHEARMAN & STERLING (Mar. 12, 2020), https://www.shearman.com/perspectives/2020/03/covid-19--force-majeure-event [https://perma.cc/85NT-6HH5].

clause.[602] For example, party seeking to invoke a force majeure clause must prove that the COVID-19 pandemic falls within the scope of the clause; that the pandemic significantly impacted the party's obligations; that the pandemic was the sole cause of failure to perform; that the party took sufficient steps to mitigate impact; and that the party complied with other relevant requirements.[603]

Franchisors, too, might fail to meet specific obligations to their franchisees.[604] Many franchisors will face supply chain exposure as members of the supply chain, particularly those across borders, invoke their own force majeure clauses.[605] Key suppliers could face solvency issues, and it is even possible that franchisees will invoke force majeure clauses to abandon their franchises.[606] Franchisors should therefore expect a significant increase in the number of disputes over the coming year as repercussions from pandemic-related non-performance ripple throughout the franchise network.[607]

The FTC has a longstanding history of aggression in cases where deception or unfair conduct is suspected.[608] In 2017, the FTC reached a nearly $1 million settlement with a fitness and nutrition mobile application.[609] The application promised monetary incentives for users to achieve fitness and nutrition goals.[610] The FTC alleged that Pact, Inc., the application developer, falsely promised financial rewards and unfairly billed without consent.[611] Pact's

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[602] *Id.*

[603] McMillan LLP, *9 Things You Should Do Right Now to Protect Your Franchise System During the COVID-19 Pandemic*, ICLG.COM (May 13, 2020), https://iclg.com/briefing/12233-9-things-you-should-do-right-now-to-protect-your-franchise-system-during-the-covid-19-pandemic [https://perma.cc/A9BD-ERDB].

[604] *Id.*

[605] *Id.*

[606] *Id.*

[607] *Beyond COVID-19: Treating a Franchisor-Franchisee Dispute as a Divergence to be Reconciled rather than a Battle to be Won*, FASKEN LLP (May 27, 2020), https://www.fasken.com/en/knowledge/2020/05/27-covid-19-traiter-differend-franchiseur-franchise-divergence-a-concilier [https://perma.cc/Z4L9-DYFV].

[608] Mark Brohan, *The FTC Settles with a Fitness App Developer over Unfair Consumer Billing*, DIGIT. COM. 360 (Sept. 25, 2020), https://www.digitalcommerce360.com/2017/09/25/ftc-settles-fitness-app-developer-unfair-consumer-billing/ [https://perma.cc/2J27-N2N7].

[609] *Id.*

[610] *Id.*

[611] *Id.*

agreement stipulated that users who met a goal or completed an activity would receive a portion of the amount collected from those who did not meet a goal or complete an activity.[612] According to the FTC's complaint, Pact did not adequately inform users on cancelling recurring charges, and users were charged even after terminating their memberships.[613] The FTC stated that the Pact's actions violated the Restore Online Shoppers' Confidence Act and the FTC's prohibition against deceptive practices.[614] The Act prohibits a company from "charging consumers for goods or services unless the material terms of the transaction ... are clearly and conspicuously disclosed before obtaining consumers' billing information."[615] As part of a settlement between Pact and the FTC, users "receive[d] more than $940,000 in earned cash rewards and refunds," and the developer was required to obtain express and informed consent before charging its users.[616]

D. Bargaining Power Disparities

Since the 1970s, franchisees have become increasingly sophisticated, likely due to the growing availability of franchisee resources.[617] With federal franchise disclosure requirements, the rise of franchisee associations[618] and franchise law specialists,[619]

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[612] *Id.*

[613] *Id.*

[614] *Id.*

[615] *Id.*

[616] *Id.*

[617] Michael R. Yellin, *Arbitrating a Franchise Dispute into the Forum of One's Choice*, COLE SCHOTZ, P.C. (May 20, 2014), https://m.coleschotz.com/arbitrating-a-franchise-dispute-into-the-forum-of-ones-choice [https://perma.cc/Z88H-58PH].

[618] It has been argued that collective action with franchisee associations is needed in order to correct the franchisor-franchisee relationship disparity. *See* Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 PA. ST. L. REV. 99, 103, 107–08 (2013). This requires enough leading franchisees to form a sustainable association that has enough members to influence the franchisor. *Id.* Collective associations may ensure fairness and protect newcomers in franchises. *Id.*

[619] *See* Robert W. Emerson, *Transparency in Franchising*, 2021 COLUM. BUS. L. REV. 172, 242 (2021) [hereinafter *Transparency in Franchising*] ("While general practitioners may provide a bevy of benefits to a franchisee over the course of the franchisee's business venture, a lawyer who specializes in franchising matters typically is necessary for someone who seeks to understand thoroughly

and a trove of data accessible via the Internet,[620] today's franchisees have access to more information,[621] which may alleviate some of the historic difficulties with negotiation.[622] One hardship that remains, however, is the unequal bargaining power of the franchisees.[623] Franchisors remain the dominant party at contracting, and the presumption that franchise agreements are the product of arms-length transactions between equally sophisticated parties strains credulity.[624]

The *Gilmer* Court held that "[m]ere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[625] The same reasoning has been upheld in consumer agreements.[626]

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the implications of any prospective franchise relationship"); Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 SAN DIEGO L. REV. 709, 772 (2014) ("Many franchisees believe themselves capable of self-representation .... The particularly confounding aspect of this state of affairs is that the investors who most need the assistance of a legal expert are the ones whose limited skills and self-awareness make them the least likely to realize that fact.").

[620] For example, Franchimp.com provides users access to its database of over 400,000 franchisees, 10,000 franchisors, and 15,000 franchise disclosure documents; the International Franchise Association (IFA) provides information to franchisees about franchising opportunities, challenges, and best practices. FRANCHIMP, https://www.franchimp.com [https://perma.cc/HY2B-36WQ]; INT'L FRANCHIS ASS'N, https://www.franchise.org [https://perma.cc/384A-TNAT]. Some online websites, such as FranchiseOpportunities.com, offer searchable databases of IFA information. Alexis Writing, *Sources of Franchisee Information*, CHRON.COM, https://smallbusiness.chron.com/sources-franchise-information-619.html [https:// perma.cc/2KL6-YFWV].

[621] *Transparency in Franchising*, *supra* note 619, at 242 (noting that "regulations concerning disclosure increase the amount of information available to the prospective franchisee," but cautioning that the additional information "do[es] not guarantee a complete understanding or synthesis of that information by the franchisee.").

[622] Yellin, *supra* note 617; *see A Two-Standard Approach, supra* note 507, at 683–85 (arguing that individual franchisees with little knowledge, experience or bargaining power should not be able to bargain away their paltry powers rather than involve the assistance of a franchisee association).

[623] Yellin, *supra* note 617.

[624] *A Two-Standard Approach*, *supra* note 507, at 650, 663.

[625] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

[626] Doneff, *supra* note 353, at 244 ("As courts moved from hostility to arbitration to a more 'hands off' approach, businesses began inserting arbitration clauses in various types of agreements, including employment and consumer agreements.").

However, franchisor-franchisee inequality is uniquely concerning because courts assume—often problematically so—that franchisees are sophisticated enough to protect themselves.[627] As one federal district court reasoned: "in this case, we have two sophisticated business entities that obviously knew or should have known what they were doing. Having expressly agreed to arbitration in its contract for insurance, [plaintiff] must now reap what it has sown and submit its claims in that forum."[628]

It is not an entirely unreasonable assumption.[629] Many franchise disputes are between similarly situated parties.[630] Some franchisees are publicly traded corporations for whom franchising is a mechanism of the business model.[631] However, the result of this view is that franchisees are relatively unprotected in the event an opportunistic franchisor exerts its bargaining power undesirably.[632] For example, whereas employment and consumer due process protocols require proceedings in a reasonably accessible location, franchisors are subject to no such requirement and may freely stipulate a site unfavorable to the franchisee.[633] In one study, eighty-two percent of agreements required that arbitration take place in the franchisor's home location.[634] Courts have also considered provisions waiving the right to a jury trial.[635] In *Guirguis v. Dunkin' Donuts, Inc.*, he court upheld a provision that would dismiss without prejudice a franchisee's action if it demanded a jury trial or punitive damages, leaving arbitration as the franchisee's only available remedy.[636] Due to the unequal bargaining power, "a franchisee seeking to have [a] court decide the arbitrability question may be able to [resolve the matter of]

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[627] *Id.* at 236.

[628] Michael Angelo's Gourmet Foods, Inc. v. Nat'l Fire Ins. Co., No. A-05-CA-912-SS, 2006 WL 2241225, at *4 (W.D. Tex. Aug. 4, 2006).

[629] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 UNIV. ILL. L. REV. 695, 766 (2001).

[630] *Id.*

[631] Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1979 (2014).

[632] Jean R. Sternlight, *Protecting Franchisees from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45, 70 (2000).

[633] *Id.* at 45.

[634] Drahozal, *supra* note 629, at 734.

[635] Guirguis v. Dunkin' Donuts, Inc., No. 09-5118, 2010 WL 715514, at *3 (D.N.J. Mar. 1, 2010).

[636] *Id.* at *3.

clear and unmistakable intent by pointing to contractual provisions that arguably conflict to some degree."[637]

Some states have enacted legislation to remedy this issue,[638] and franchising case law "recognizes the occasional need to protect franchisees."[639] In *Ticknor v. Choice Hotels International, Inc.*, the court held that an arbitration clause was unconscionable under state law "because it required binding arbitration of the weaker bargaining party's claims, but allowed the stronger bargaining party the opportunity to seek judicial remedies to enforce contractual obligations."[640] The court in *Shino v. Doctor's Associates, Inc.* found that if the franchisor is also the franchisee's lessor and the lease does not include an arbitration agreement, the franchisor has waived its right to compel arbitration from the franchise agreement.[641] Another court found that if an arbitration agreement was clearly labeled in bold letters with capitalized headings, and if the franchisee stated that he or she could do business in English, no more than minimal procedural unconscionability exists.[642] In general, an arbitration agreement should avoid making arbitration conditional or at the option of one party, as either can render the agreement unenforceable.[643]

E. Parallels in Timesharing

Bargaining power disparities in franchising have informative parallels in timesharing, where one party usually has inferior bargaining power at contracting and terms are usually non-negotiable.[644] Timeshares are divided ownership arrangements

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[637] C. Griffith Towle et al., *Effective and Failed Strategies to Compel/Avoid Arbitration*, AM. BAR ASS'N 31ST ANN. F. ON FRANCHISING, Oct. 10–12, 2018, at 11.

[638] Robert W. Emerson & Jason R. Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J.L. & POL. 353, 374 (2014).

[639] BUSINESS LAW, *supra* note 425, at 350.

[640] 265 F.3d 931, 940 (9th Cir. 2001).

[641] Shino v. Dr.'s Assocs., Inc., Bus. Franchise Guide (CCH) ¶ 10,566, 1994 WL 17092052 (Ill. Cir. Ct. 1994).

[642] Estrada v. CleanNet USA, Inc., No. C 14-01785, 2015 WL 833701, at *3 (N.D. Cal. 2015).

[643] Druco Rests., Inc. v. Steak N Shake Enters., Inc., 765 F.3d 776, 784 (7th Cir. 2014).

[644] There is an idea called "precarity capitalism." It is neoliberal capitalism that has mutated into a new form that is "marked by the emergence of a precarious multitude." *Capitalism on Edge*, COLUM. UNIV. PRESS (2020),

in which several parties share ownership of a property.[645] These arrangements can take the form of *deeded ownership*, where the interest is considered real property, or a *right to use*, where the party's ability to transfer or sell the interest is restricted.[646] The concept of timesharing originated in England, but since the 1970s, the industry has gained a reputation for high-pressure solicitation by U.S. companies.[647] Forty percent of timeshare owners are minorities, seventy-five percent have college degrees, and the median timeshare owner is thirty-nine years old with an annual income approaching six figures.[648]

Many timeshare presentations are designed to apply pressure to prospective buyers.[649] Like franchise agreements, the legal environment of timesharing largely exists to address differences in bargaining power at contracting.[650] Both federal law and Nevada state law, for example, provide for a "cooling-off" period for consumer sales that take place away from the seller's place of business.[651] In Ontario, the Consumer Protection Act (CPA) gives a customer a ten-day cooling-off period after entering into

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http://cup.columbia.edu/book/capitalism-on-edge/9780231195379 [https://perma.cc/Y86N-HMLU]. The idea is that "[w]idespread economic insecurity ails the 99 percent [of the population] across differences in income, education, and professional occupation; it is the underlying cause of such diverse hardships as work-related stress and chronic unemployment." *Id.* Moreover, "economic precarity is ... [a] hallmark of contemporary capitalism." Albena Azmanova & Marshall Auerback, *Why 2020 Was the 'Precarity Election' in US*: *Neither Political Party Has Truly Addressed the Issue of Economic Security, Which Is Why the Country Remains a House Divided Against Itself*, NEWSCLICK (Nov. 13, 2020), https://www.newsclick.in/why-2020-was-precarity-election-US [https://perma.cc/WP2C-V7K5]. Traditional notions of work have and will continue to be expanded upon as society decides how to address issues related to automation, rising inequality, and economic precarity. Surely these ideas extend to the gig economy, entrepreneurship, and franchising.

[645] Elvis Picardo, *Timeshare*, INVESTOPEDIA (Apr. 8, 2021), https://www.investopedia.com/terms/t/timeshare.asp [https://perma.cc/SK34-N43N].

[646] Sheri Ann Forbes, *Timeshare 101 for Attorneys*, 28 NEV. LAW. 25, 25 (2020).

[647] *Id.*

[648] *Id.*

[649] James J. Shanks, *The Trouble with Time Shares*, LEXOLOGY (June 23, 2014), https://www.lexology.com/library/detail.aspx?g=36e00840-be2e-45b8-9429-d5dd5591d3b2 [https://perma.cc/QT4D-G2JP].

[650] *How to Legally Get Out of a Timeshare Contract*, ADVOC. FIN. SERVS. [hereinafter *Legally Get Out*], https://advocatefinancialservices.com/how-to-legally-get-out-of-timeshare-contract/ [https://perma.cc/7UWR-NVQ9].

[651] Forbes, *supra* note 646, at 28.

a timeshare agreement, during which the customer can freely cancel the agreement.[652] The CPA also requires pre-contract disclosures and dictates what is included in the pre-contract disclosures.[653] Sometimes, the timeshare contract itself will provide for a longer cooling-off period than that required by applicable law.[654] In any case, solicitors are required to inform buyers of their right to rescind and avoid obstructing the buyer's means of doing so.[655] The circumstances under which a timeshare contract can be terminated are well-defined, and like franchises, fraud and dishonesty are generally included.[656] Many timeshare contracts do not end until the timeshare owner dies or until the owner relinquishes the timeshare back to the resort.[657]

Florida is noteworthy for its well-developed state law on timesharing.[658] This may be due in part to the state's elderly population, who are often targeted for timesharing presentations due to their willingness to enter into such contracts.[659] Any purchase or owner's association may bring an action for damages or injunction or declaratory relief for a violation of Florida Statute 721.21 against a developer, seller, escrow agent, or managing entity.[660] Prevailing parties are entitled to attorney's fees.[661] Florida Statute 721.10 states a purchaser may cancel a contract before "midnight o[n] the 10th calendar day" of the execution date, or the day that "the purchaser received the last of all documents required to be provided to him or her, including the notice required by s. 721.07(2)(d)."[662] This cancellation right cannot

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[652] Shanks, *supra* note 649.

[653] *Id.*

[654] Forbes, *supra* note 646, at 28.

[655] *Id.*

[656] *Legally Get Out*, *supra* note 650.

[657] Forbes, *supra* note 646, at 25.

[658] Amy Loftsgordon, *Florida Timeshare Foreclosure and Right to Cancel Laws*, NOLO [hereinafter *Florida Timeshare Foreclosure*], https://www.nolo.com/legal-encyclopedia/florida-timeshare-foreclosure-right-cancel-laws.html [https://perma.cc/9338-NUVF].

[659] Lisa Weintraub Schifferle, *Timeshare Resale Scheme Preyed on Older Adults*, FED. TRADE COMM'N (May 22, 2018), https://www.consumer.ftc.gov/blog/2018/05/timeshare-resale-scheme-preyed-older-adults [https://perma.cc/725K-NBYE].

[660] FLA. STAT. ANN. § 721.21 (West 2000).

[661] *Id.*

[662] *Id.* § 721.10(1); *see also* Amy Loftsgordon, *Timeshare Cancellation Rights & Special Protections: 50-State Chart*, NOLO, https://www.nolo.com/legal-en

"be waived by a purchaser or ... [a] person acting on behalf of the purchaser."[663] The closing may not occur until after the cancellation period has expired.[664] If a seller attempts to have the purchaser waive his or her cancellation right or to hold a closing before the period has expired, then the contract is voidable for one year after the cancellation period would have expired.[665]

The Florida Deceptive and Unfair Trade Practice Act states that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[666] The Florida Legislature intended that this Act would give "due consideration and great weight" to interpretations of the FTC and federal courts.[667] To have a claim under this Act, the violated law or statute must "proscribe unfair trade practices or unfair methods of competition," not a violation of a law or statute which may give the consumer some kind of benefit.[668] A person or entity is not liable under this Act if there is no evidence of deceptive or unfair conduct.[669]

In *Wyndham Vacation Ownership, Inc. v. Clapp Business Law, LLC*, a timeshare sales company brought a claim under Florida's Deceptive and Unfair Trade Practices Act alleging that a law firm and a lawyer committed unfair or deceptive practice in a timeshare exit scheme.[670] The plaintiff alleged: (1) the law firm and lawyer were used by a timeshare exit company to commit fruitless negotiations as well as to send boilerplate demand letters that demanded rescission of timeshare contracts and cessation of contact with owners; and (2) the law firm and lawyer

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cyclopedia/timeshare-cancellation-rights-special-protections-50-state-chart.html [https://perma.cc/2NZC-CHM9] (providing a chart of how to cancel a timeshare contract by state and whether the state warrants special legal protections).

[663] FLA. STAT. ANN. § 721.10(1)(b) (West 2000).

[664] *Id.*

[665] *Id.*

[666] FLA. STAT. ANN. § 501.204(1) (West 2017).

[667] *Id.* § 501.204(2).

[668] *In re* Edgewater by the Bay, LLLP, 419 B.R. 511, 516 (Bankr. S.D. Fla. 2009).

[669] *See* Fid. & Guar. Ins. v. Ford Motor Co., 707 F. Supp. 2d 1300, 1316 (M.D. Fla. 2010).

[670] *See* 411 F. Supp. 3d 1310, 1314–15 (M.D. Fla. 2019).

stopped negotiating after sending the demand letters.[671] The court found this was sufficient evidence of unfair or deceptive practices.[672]

Timeshare owners have a variety of legal needs, including estate planning and cancellation of services.[673] When timeshare owners encounter legal issues, they should turn to licensed attorneys and be wary of unreliable information from informal sources, e.g., the internet.[674] A common deceptive pricing scam involves a bait-and-switch in which a person or entity "baits" a consumer with an advertised special at an appealing price, but after the consumer is baited, the seller "switches" the price with a higher one.[675] A variation of the traditional bait-and-switch involves "[h]aving the consumer sign a contract for the advertised item and then immediately pointing out the deficiencies of that product."[676]

A Florida Federal Court held that disgorgement and refunds are remedies available to the FTC in a case that involved a violation of Section 13(b) of the FTC Act and Section 6(b) of the Telemarketing and Consumer Fraud and Abuse Prevention Act.[677] In this case, the defendant tricked consumers into paying for assistance with selling or renting timeshares, but, in reality, the defendant did not provide the promised or paid for service.[678] The court held that it did not matter whether Section 13(b) of the FTC Act provided for equitable remedies because the Act did not explicitly restrict remedies available to the FTC.[679] If a seller acts in bad faith, the buyer can recover damages, like loss of the bargain damages.[680]

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[671] *Id.* at 1314.

[672] *See id.* at 1320.

[673] *See* Michael Hales, *Timeshare Law: A Primer for Idaho Attorneys*, ADVOC., OFF. PUBL'N OF THE IDAHO STATE BAR, Sept. 2016, at 56, 58.

[674] *See id.* at 58–59.

[675] *See* 2 DEE PRIDGEN ET AL., CONSUMER PROTECTION AND THE LAW § 11:35, at 328–29 (2020–2021 ed. 2020).

[676] *Id.* at 330.

[677] Richard P. Lawson, *Florida Federal Court Affirms FTC's Available Remedies*, LEXOLOGY (Nov. 9, 2017), https://www.lexology.com/library/detail.aspx?g=8740b5cb-a510-4040-b834-3f7f06efc996 [https://perma.cc/W8AW-C57F].

[678] *See id.*

[679] *See id.*

[680] David A. Bowen, Note, *Timeshare Ownership: Regulation and Common Sense*, 18 LOY. CONSUMER L. REV. 459, 472 (2006).

In 2013, the FTC announced "191 actions to stop fraudulent" actions involving "hawking timeshare property resale services."[681] The FTC advised timeshare owners to "never pay for a promise, get everything in writing first, and pay only after your unit is sold."[682] If a consumer believes that he or she needs redressability with a timeshare issue, then the consumer should look to state law.[683] Florida's Timeshare Resale Accountability Act (Timesharing Act) requires disclosures to be provided by resale service providers about fees and costs for advertising, listing, and sale of the timeshare.[684] In *Bell v. RDI Resort Services Corp.*, a Florida Court of Appeals held for a timeshare purchaser against the managing entity for breach of contract because the original developer made oral representations. The court explained that the Timesharing Act was intended to protect timeshare buyers from all third parties.[685]

Florida also requires developers to provide purchasers of a timeshare with a copy of its public offering statement.[686] A public offering statement provides a detailed history of the project, including: "a description of the timeshare plan," "the duration, in years, of the timeshare plan," "whether any interest in the underlying real property will be conveyed to the purchaser," "a description of the accommodations, and" "an explanation of how the timeshare developer apportioned common expenses and ownership of the common elements."[687]

One purpose of Florida's Timesharing Act is to provide prospective owners with the "procedures and disclosure requirements for the creation, sale, ... and operation of timeshare plans,"[688] defined as "any arrangement, plan, scheme or similar device whereby a purchaser gives consideration for ownership

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[681] *FTC and Dozens of Law Enforcement Partners Halt Travel and Timeshare Resale Scams in Multinational Effort*, FTC (June 6, 2013), https://www.ftc.gov/news-events/press-releases/2013/06/ftc-dozens-law-enforcement-partners-halt-travel-timeshare-resale [https://perma.cc/M68J-6KLU].

[682] *See id.*

[683] *See* Bowen, *supra* note 680, at 469–70.

[684] *See* FLA. STAT. ANN. § 721.205(1)(a) (West 2012).

[685] *See* Bowen, *supra* note 680, at 472.

[686] *See* FLA. STAT. ANN. § 721.07 (West 2015).

[687] *Florida Timeshare Foreclosure*, *supra* note 658.

[688] Bowen, *supra* note 680, at 470; *see also* 16 C.F.R. §§ 436–37 (2019) (explaining the disclosure requirements of franchisors).

rights in, or a right to use, accommodations and facilities."[689] The Timesharing Act permits a buyer to initiate a private action against a person or entity.[690] It provides for several forms of relief, including damages, injunctive relief, and declaratory relief against a seller, developer, escrow agent, or managing agent.[691] Sellers are required by the Act to provide all buyers with a "'fully completed and executed' copy of the purchase contract."[692] It also requires additional disclosures in a resale of a timeshare interest because this assists the buyer in determining all relevant parties that have an interest in the timeshare interest and defines the buyer's obligation as a timeshare owner.[693] Finally, the Act provides a buyer of a timeshare interest the option to void the contract for up to a year after closing if the reseller does not comply with the provisions of the Act.[694]

Timesharing, like franchising, illustrates the importance of a well-developed legal environment that addresses bargaining power disparities at contracting.[695] Although franchisees are traditionally presumed to be sophisticated business entities, many are no different from prospective timeshare buyers who enter into complex business arrangements under false or mistaken expectations.[696] Unsophisticated franchisees *can* informedly enter into arbitration agreements, but observers would be prudent to evaluate these agreements differently from those between highly sophisticated business entities.[697]

CONCLUSION

Although arguments to the contrary are intuitively compelling, contractual arbitration in its conventional form is not

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[689] Bowen, *supra* note 680, at 470–71; *see* Susan Guillory, *What Business Licenses Does My Franchise Need?*, FRANCHISE DIRECT (Aug. 6, 2018), https://www.franchisedirect.com/blog/whatbusinesslicensesdoesmyfranchiseneed/ [https://perma.cc/86AP-JFWB] (stating that buying a franchise agreement gives a person a license to the franchise's brand and operating techniques).

[690] Bowen, *supra* note 680, at 471.

[691] *Id.* at 471–72.

[692] *Id.* at 473.

[693] *Id.* at 474.

[694] *See id.*

[695] *See* Bowen, *supra* note 680, at 478.

[696] *See supra* text accompanying notes 624, 627, and 632.

[697] *See supra* text accompanying notes 618–22, 627–32, and 638–39.

inherently harmful to the governed relationship, and absolute skepticism toward its use is unwarranted.[698] Fairness for the less powerful party can be provided through a combination of industry self-regulation and judicial oversight, and contractual arbitration offers many of those parties a pathway to resolve disputes for which litigation would be prohibitively expensive or time-consuming.[699] While all of these dispute resolution abuses by an opportunistic player are rightfully concerning, the worst conceivable actions may be sufficiently rare and well-addressed that parties need not abandon the benefits discussed throughout this Article.[700] Thus, contractual arbitration represents a mutual exchange of value for which measured, centrist arguments can be persuasive.[701]

Crucially, this Article notes an emerging procedural divide between low-process and high-process claims.[702] Existing scholarly interest in this topic is focused predominately on arbitration as an alternative to costly litigation in high-process claims.[703] However, significant changes are more likely to occur at the threshold of cost-effectiveness.[704] As technological and procedural innovations make more low-process claims feasible in arbitration, administrators will develop alternative processes for those who would sacrifice flexibility for efficiency.[705] Online dispute resolution (ODR) will likely become the new standard in low-process claims for which no feasible alternative is available, and as ODR becomes increasingly capable of processing high volumes of information at low costs, it could even creep into tasks once thought reserved for expensive human attorneys.[706] While these effects might be less pronounced in the high-process environment, they will almost certainly prove transformative in the low-process environment.[707]

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[698] *See supra* text accompanying notes 55, 57–58, and 60.
[699] *See supra* text accompanying notes 7–8, 59, and 139–41.
[700] *See supra* text accompanying notes 638–39.
[701] *See supra* text accompanying notes 358–59.
[702] *See, e.g.*, *supra* text accompanying notes 232–38.
[703] *See, e.g.*, *supra* text accompanying note 7.
[704] *See supra* text accompanying note 228.
[705] *See supra* text accompanying notes 228–31.
[706] *See supra* text accompanying notes 221–23 and 225–30.
[707] *See supra* text accompanying notes 232–38.

Finally, courts remain the most influential actors in the legal environment of arbitration.[708] The Supreme Court may soon resolve, or at least inform, some gateway arbitrability issues (such as stare decisis and reviewability of arbitrator orders or decisions), delegation of class arbitrability, and the role of common law principles in those determinations.[709] Meanwhile, lower courts will continue to inform on matters of language, interpretation, and procedure.[710] While an outright ban on contractual arbitration might be inappropriate, some discrete reforms could offer a more optimal balance of interests.[711] For example, a statutory exception for employment cases involving sexual misconduct would permit those cases to be heard in a forum that is intuitively more appropriate.[712] Reform could also consist of procedural changes, such as a requirement that arbitration agreements shall not be located within the "fine print" of a container contract.[713] Nonetheless, reform should be designed to augment the contractual arbitration process rather than to usurp its judicial and statutory protections.[714] So long as the legal environment is carefully tailored to prevent abuse by opportunistic actors, contractual arbitration will likely withstand the hostility of its challengers.[715]

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[708] *Cf. Arbitrability, Delegation, Carve-Outs and Estoppel: SCOTUS Says "Welcome Back, Henry Schein,"* MINTZ (Aug. 31, 2020) [hereinafter *SCOTUS Says*], https://www.mintz.com/insights-center/viewpoints/2196/2020-08-31-arbitrability-delegation-carve-outs-and-estoppel-scotus [https://perma.cc/SP8E-E8GR].

[709] *See id.*

[710] *See* DDK Hotels, LLC v. Williams-Sonoma, Inc., 6 F.4th 308, 311–12, 317–19 (2d Cir. 2021) (being a relatively recent case in which a lower court interpreted an arbitration agreement).

[711] *See, e.g.*, Press Release, Lindsey Graham, U.S. Senator, S.C., Graham, Gillibrand Announce Bipartisan Legislation to Help Prevent Sexual Harassment in the Workplace (Dec. 6, 2017), https://www.lgraham.senate.gov/public/index.cfm/2017/12/graham-gillibrand-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace [https://perma.cc/8RA4-5KFF].

[712] *See id.*

[713] *Cf.* Bowen, *supra* note 680, at 473 (explaining a similar requirement under Florida's timeshare laws).

[714] *Cf. id.* at 473 (giving an example of such a reform in the context of Florida's timeshare laws).

[715] *Cf. SCOTUS Says*, *supra* note 708 (explaining potential, and relatively limited, actions the Supreme Court of the United States may take regarding contractual arbitration in a case of interest, none of which would lead to its abolition).