

## FITS AND STARTS FOR MANDATORY ARBITRATION

*Roger B. Jacobs\**

Mandatory arbitration is in the legal news almost daily. Whether it is a dispute among condominium owners regarding repairs in *Bell Tower Condominium Ass'n v. Haffert*,<sup>1</sup> cell phone add-ons that reached the Supreme Court in *AT&T Mobility LLC v. Concepcion*,<sup>2</sup> landlord-tenant disputes, partnership disputes, and of course traditional employment disputes, among others, a significant concern is the potential diminution of rights and remedies. However, those concerns can be ameliorated by an arbitration agreement as well as through the scope of authority of arbitrators. The ABA Litigation Journal recently had a discussion on the expansive/expensive process of arbitration and proposed methods of curtailing this process.<sup>3</sup>

The American Arbitration Association (“AAA”) is discussing “muscular” arbitration and focusing heavily on streamlining the arbitral process so that it does not just mimic federal court litigation.<sup>4</sup> Some of these problems can be resolved by the parties themselves. However, without fully addressing the “adhesion” issue, form agreements often specify the process without a discussion.<sup>5</sup> Formulaic arbitration

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1. 33 A.3d 1235, 1237 (N.J. Super. Ct. App. Div. 2012).

2. 131 S. Ct. 1740, 1744 (2011).

3. Steven Seidenberg, *International Arbitration Loses its Grip*, ABA JOURNAL (Apr. 1, 2010, 4:30 AM), [http://www.abajournal.com/magazine/article/international\\_arbitration\\_loses\\_its\\_grip/](http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/).

4. See Richard J. Webb, *American Arbitration Association Calls for Muscular Arbitration*, HEALTHCARE NEUTRAL ADR BLOG (Mar. 20, 2012), <http://www.healthcareneutraladrblog.com/2012/03/articles/healthcare-arbitration/american-arbitration-association-calls-for-muscular-arbitration/>.

5. See *Concepcion*, 131 S. Ct. at 1744.

provisions would have to be reviewed and tailored.

One of the essential problems is that a “one size fits all” solution simply does not work. Just as there are different issues in matrimonial, commercial, construction, employment, and other disputes, mandatory arbitration provisions need to address those “industry” specific concerns. The remedy seems to be far simpler since a process that permits the parties to obtain the same remedy a court or jury could impose should eliminate that particular question. The process is more complicated and needs to be thought through on a systemic basis to avoid issues of unfairness, among other things.<sup>6</sup>

It does not appear that the enthusiasm for mandatory arbitration is ebbing, at least in the courts. Uniformly, the Supreme Court and other courts continue to echo the notion that arbitration is an effective system of dispute resolution and is strongly favored, even if the arbitration is a result of an adhesionary process.<sup>7</sup>

Let’s look at employment for a moment. In *D.R. Horton, Inc. and Cuda*,<sup>8</sup> the National Labor Relations Board (“NLRB”) recently unsettled the entire area of arbitration by holding that although individual arbitration was acceptable, any agreement that barred class claims would violate the National Labor Relations Act, even in an unorganized shop.<sup>9</sup> Despite the fact that a two-member panel was acting at the time,<sup>10</sup> *D.R. Horton* will no doubt ripple through the court system until a likely decision, again, is reached in the Supreme Court. Collective action and class claim resolution is but one of the issues regarding arbitration.<sup>11</sup>

In our discussion, we examine the historical antecedents of mandatory arbitration in various aspects of life through its current iterations and conclude that mandatory arbitration – with several tweaks that we will discuss – can be an effective tool to regulate commerce, the workplace, and interpersonal relationships.

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6. For example, in a recent case in New Jersey, a malpractice claim was filed against an attorney who had suggested a matrimonial dispute could be expedited and handled cheaper in arbitration. *Goodwin v. Donahue, Hagan, Klein, Wensome & O’Donnell*, No. L-2885-09, 2011 WL 6845888, at \*1 (N.J. Super. Ct. App. Div. Dec. 30, 2011). The court rejected such a claim in part because public policy encourages arbitration, especially in matrimonial cases. *Id.* at \*2.

7. See, e.g., *Concepcion*, 131 S. Ct. at 1745; *Goodwin*, 2011 WL 6845888, at \*2.

8. 12-CA-25764, 2012 NLRB LEXIS 11 (N.L.R.B. Jan. 3, 2012).

9. See *id.* at \*16-17.

10. *Id.* at \*1.

11. For example, in Puerto Rico there is formulaic severance required from termination to resolve employment disputes. Perhaps in tandem with mandatory arbitration, this approach could obviate many problems.

## I. A HISTORY IN FAVOR OF ARBITRATION

*Prima Paint Corporation v. Flood & Conklin Manufacturing Company*<sup>12</sup>

While the brunt of this case did not involve mandatory arbitration clauses, the dicta of *Prima Paint* shed some light on the Court's view of mandatory arbitration. In footnote nine, the Court noted that section 1 of the Federal Arbitration Act ("FAA") expressly excluded arbitration clauses whenever one of the parties to an arbitration clause has little bargaining power.<sup>13</sup> Therefore, if an employee had little to no bargaining power when signing an employment contract that included a mandatory arbitration clause, a court could potentially hold that the arbitration clause was unenforceable. However, in *Prima Paint*, the Court held that because there was no claim that a party was fraudulently induced to enter the agreement to arbitrate, the clause was broad enough to encompass the claimant's allegations of fraud.<sup>14</sup> Also, since it was never claimed that the parties intended that "legal" issues relating to the contract be excluded from arbitration, it was held to be arbitrable under section 4 of the FAA.<sup>15</sup>

Justice Hugo Black, however, did not agree with the Court's decision.<sup>16</sup> According to Black's interpretation of the FAA, claims of fraud were grounds to rescind the contract because sections 2 and 3 of the FAA provided that if the Court found that there were grounds for revoking a contract, such as fraud, then there was no contract – therefore, nothing to arbitrate.<sup>17</sup> He stated that section 4's inquiry whether the making of an arbitration agreement was at issue was to be determined by reference to state law.<sup>18</sup> Therefore, because New York law (the applicable state law) did not provide for severability when there were general allegations of fraud, Justice Black reasoned that the arbitral

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12. 388 U.S. 395 (1967).

13. *Id.* at 402-03 n.9.

14. *Id.* at 406-07. The arbitral agreement at issue provided: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration . . . ." *Id.* at 398. Arbitral agreements that include the phrase "arising out of or relating to" are generally considered to be broad enough to cover any dispute arising out of the parties' dealings with one another. See PHILIPPE FOUCHARD, ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 298 (Emmanuel Gaillard & John Savage eds., 1999).

15. *Prima Paint*, 388 U.S. at 403-04, 406.

16. *Id.* at 407 (Black, J., dissenting).

17. *Id.* at 412-13.

18. See *id.* at 423.

agreement was unenforceable.<sup>19</sup> Despite Justice Black's reasoning, the Supreme Court has continued to find in favor of enforcing arbitration clauses and as discussed in this article, even mandatory arbitration clauses.<sup>20</sup>

*First Options of Chicago, Inc. v. Kaplan*<sup>21</sup>

In *First Options*, the issues revolved around whether the arbitrator or the court had the power to decide arbitrability and if the court's review must be made *de novo*.<sup>22</sup> The Kaplans had signed four different agreements with First Options, as individuals, as well as for the company that they owned, MKI.<sup>23</sup> Both owed First Options money.<sup>24</sup> Only one contract contained an arbitration clause – the contract between First Options and MKI, *not* the contract between the Kaplans and First Options.<sup>25</sup> The Kaplans were not an implied party to the arbitration agreement since the Kaplans did not personally sign the contract between First Options and MKI.<sup>26</sup>

Despite the lack of direct privity of the arbitration contract between the Kaplans and First Options, First Options sued the Kaplans individually.<sup>27</sup> The Kaplans objected.<sup>28</sup> The arbitrators proceeded to hear the merits of the dispute and found for First Options.<sup>29</sup>

The Supreme Court affirmed the Third Circuit's decision that the dispute was not arbitrable, holding that the question of "who" decides arbitrability turns upon the parties' agreement.<sup>30</sup> The Court also found that in light of the fact that arbitration is a creature of contract, courts should defer to the arbitrator if the parties agreed to submit the dispute and its arbitrability to the arbitrator.<sup>31</sup> Therefore, a court can only set aside the arbitrator's decision under the narrow grounds of section 10 of the FAA.<sup>32</sup>

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19. *See id.* at 421.

20. *See, e.g.,* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

21. *Id.* at 938.

22. *Id.* at 941.

23. *Id.* at 940.

24. *Id.*

25. *Id.* at 941.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 943, 947.

31. *Id.* at 943.

32. *Id.*

Generally, the standard of review for the courts is the state law principles that ordinarily apply in interpreting the formation of contracts.<sup>33</sup> Because Pennsylvania law required the parties to objectively reveal intent to submit the arbitrability issue to arbitration, the award against the Kaplans personally was found to be invalid.<sup>34</sup> The Kaplans had not revealed their intent to submit the arbitrability issue to arbitration for the individual contracts with First Options.<sup>35</sup>

After *First Options*, a court must make an independent review when deciding if questions of fact are not “clearly erroneous” and when reviewing legal questions *de novo*.<sup>36</sup> Since the question of whether a mandatory arbitration agreement is fair is a factual issue, a district court’s decision that the arbitration agreement is fair is not likely to be reversed on appeal.

*Buckeye Check Cashing, Inc. v. Cardegna*<sup>37</sup>

Although mandatory arbitration was not a concern in this case, the Supreme Court’s analysis of precedent and the applicability of state law are important to note. As seen in *Concepcion* and other lawsuits, plaintiffs’ attorneys have often invoked state law claims of fraud or unconscionability when arguing against mandatory arbitration clauses that ban class-arbitrations.<sup>38</sup>

The Court’s reasoning in *Buckeye* has been interpreted to create “an explicit federal policy imposing arbitration.”<sup>39</sup> *Buckeye* reaffirmed the Court’s prior rulings in favor of arbitration over traditional litigation and was relied upon in the recent decisions concerning arbitration agreements in employment.<sup>40</sup> Some scholars have concluded that *Buckeye* has also been accepted worldwide.<sup>41</sup> This development makes

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33. *Id.* at 944.

34. *Id.* at 944, 946-47.

35. *Id.* at 946.

36. *Id.* at 948.

37. 546 U.S. 440 (2006).

38. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742, 1761 (2011) (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (2004); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 547 (2008); *Hume v. United States*, 132 U.S. 406, 411, 414 (1889)).

39. Timothy S. Hall, *The Future of Judicial Policing in Consumer Contracting After Buckeye Check Cashing* 17 (Feb. 1, 2007) (unpublished manuscript) (on file with author).

40. See *Buckeye*, 546 U.S. at 440.

41. See ANDREW DE LOTBINIÈRE MCDUGALL & LEON IOANNOU, *SEPARABILITY SAVED: US SUPREME COURT ELIMINATES THREAT TO INTERNATIONAL ARBITRATION* 3 (2006), available at

U.S. law more compliant with international law in finding that the arbitrator, and not the court, is the body to decide contractual issues.<sup>42</sup>

In *Buckeye*, the Supreme Court stated that there were two types of challenges to the validity of an arbitral agreement: (1) the arbitral clause; or (2) “the contract as a whole, either on a ground that directly affects the entire agreement (e.g. through fraudulent inducement), or on the ground that the illegality of one of the contract provisions renders the entire contract invalid.”<sup>43</sup>

The Court stated that as explained in *Southland Corp. v. Keating*,<sup>44</sup> the FAA created federal substantive, not procedural, law that applied in both federal and state courts.<sup>45</sup> Therefore, state law cannot bar enforcement of section 2 of the FAA, even if the case involved state law claims.<sup>46</sup> In this case, the Cardegnas were challenging the entire contract, not solely the arbitration agreement.<sup>47</sup> The Court held that the arbitrator must decide the issue of illegality.<sup>48</sup> The Court reaffirmed *Prima Paint*’s holding that state law on severability is not relevant.<sup>49</sup> It opined that “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”<sup>50</sup> Further, the Court found that since a state could not create an artificial defense that ran counter to federal law, the state law was invalid.<sup>51</sup> The Court concluded that defendants are limited to common law defenses under the FAA.<sup>52</sup>

Justice Clarence Thomas dissented, explaining that, similar to Justice Black in *Prima Paint*, he does not believe that the FAA applies to

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[http://www.whitecase.com/files/Publication/aa8fd727-7927-440f-8ee8-96b9a5752f82/Presentation/PublicationAttachment/870b81f2-e957-457c-8ced-a302e80524d4/article\\_Separability%20Saved.pdf](http://www.whitecase.com/files/Publication/aa8fd727-7927-440f-8ee8-96b9a5752f82/Presentation/PublicationAttachment/870b81f2-e957-457c-8ced-a302e80524d4/article_Separability%20Saved.pdf).

42. See *id.*

43. *Buckeye*, 546 U.S. at 444.

44. 465 U.S. 1 (1984).

45. *Buckeye*, 546 U.S. at 445.

46. *Id.*

47. *Id.* at 443.

48. *Id.* at 446, 449.

49. *Id.* at 445-46.

50. *Id.* at 449. Notably, “[i]f International Arbitral Law is applicable, the arbitral tribunals are the competent authority” in determining the validity of an arbitration agreement. Emine Eda Cerrahoğlu Balssen, *Competent Authority to Decide on Validity of Arbitration Agreements*, INT’L LAW OFFICE (Oct. 1, 2009), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=4127ead9-2772-463b-a226-ce03d0347bab>.

51. See *Buckeye*, 546 U.S. at 446.

52. See *id.* at 443-45, 447.

proceedings in state court.<sup>53</sup> However, despite Justice Thomas's dissent, the *Buckeye* Court re-affirmed its commitment to enforcing arbitration agreements, even those that are mandatory clauses included in a larger contract.<sup>54</sup>

*Buckeye* and the other authority already discussed aid in understanding the general background from which the Court approaches arbitration in general. However, in order to obtain a clearer understanding to how the employment sector is affected by the judiciary's approach to arbitration, and what type of mandatory arbitration clause a court is likely to find to be fair and enforceable, we need to examine recent decisions specifically revolving around employment contracts.

## II. A BRIEF HISTORY OF EMPLOYMENT CONTRACTS AND MANDATORY ARBITRATION CLAUSES

### *Jock v. Sterling Jewelers, Inc.*<sup>55</sup>

*Jock* is a recent employment case dealing with an arbitrator's decisions and class arbitration.<sup>56</sup> Moreover, it provides an example of how employers do not always benefit from including a mandatory arbitration clause in employment contracts.<sup>57</sup>

Plaintiffs, current and former employees of Sterling, a national jewelry company, filed a discrimination claim against Sterling Jewelers, alleging violations of Title VII of the 1964 Civil Rights Act and the Equal Pay Act.<sup>58</sup> The employment contract contained an arbitration agreement.<sup>59</sup> The arbitration clause provided that employees agreed to arbitrate all employment disputes, including those arising under Title VII and the Equal Pay Act.<sup>60</sup> It also required employees to first file a complaint with the employer's administrator, who would then reach a decision.<sup>61</sup> If the employee did not agree with the administrator's decision, he or she could file an appeal to either an outside administrator

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53. See *id.* at 449 (Thomas, J., dissenting).

54. See *id.* at 442-43, 449 (majority opinion).

55. 646 F.3d 113 (2d Cir. 2011).

56. See *id.*

57. See *id.*

58. *Id.* at 115.

59. *Id.*

60. See *id.* at 116-17.

61. *Id.* at 115.

or peer review panel.<sup>62</sup> If the employee was still not satisfied with the result, he or she could file for arbitration, which would be conducted under the laws of Ohio.<sup>63</sup> The arbitration agreement never explicitly mentioned class actions.<sup>64</sup>

A number of Sterling employees filed claims together in arbitration.<sup>65</sup> The arbitrator issued a threshold award, stating that the arbitration agreement did *not* prohibit class arbitration under Ohio law unless there was an explicit provision to the contrary.<sup>66</sup> Sterling moved to vacate the arbitrator's decision.<sup>67</sup> The district court denied Sterling's motion and Sterling appealed.<sup>68</sup>

The mandatory arbitration agreement in *Jock* was silent regarding class actions.<sup>69</sup> The Second Circuit ruled that the arbitrator did not exceed his power in deciding that the plaintiffs were entitled to arbitrate the claim as a class.<sup>70</sup> Since the arbitrator did not violate section 10(a)(4) of the FAA, which provided that awards issued by arbitrators who exceed their powers are not enforceable, the award was not subject to vacatur.<sup>71</sup> The court further stated that the issue of whether an arbitral award is valid was based on "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue."<sup>72</sup>

The arbitrator found, and the court affirmed, that because Sterling never clarified the ambiguity in the arbitration agreement regarding whether class actions are arbitrable, it must be properly construed against Sterling.<sup>73</sup> The court stated that since the arbitrator did not act in "manifest disregard" of the law and because neither the statutory claims, nor the contract, prohibit class action arbitrations, the court could not grant the defendant's motion to stay the arbitration.<sup>74</sup>

It is interesting that the Second Circuit decided to word its decision to include "manifest disregard" of the law after the Supreme Court, in *Hall Street*, essentially removed manifest disregard of the law as an

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62. *Id.* at 115-16.

63. *Id.* at 116-17.

64. *Id.* at 117.

65. *Id.* at 116.

66. *See id.* at 117.

67. *Id.*

68. *Id.* at 117-18.

69. *Id.* at 117.

70. *Id.* at 127.

71. *Id.* at 121-23.

72. *Id.* at 122.

73. *Id.* at 117, 124.

74. *See id.* at 117-18.



argument for vacatur.<sup>75</sup> Regardless of the court's rationale, *Jock* is a recent example of how mandatory arbitration clauses can sometimes benefit employees.<sup>76</sup> *Jock* also served as an example for other employers that Sterling's error in drafting its arbitration agreement provided guidance for employers on how to draft mandatory arbitration clauses (discussed in detail in Part V).

*Nino v. Jewelry Exchange, Inc.*<sup>77</sup>

Jewelry Exchange's contract with its employees contained an arbitration provision with very specific timelines and procedures for filing individual complaints against the employer.<sup>78</sup> It also included a provision that allowed both Jewelry Exchange and the grieving employee to block a party's nomination for an arbitrator.<sup>79</sup> However, the arbitral clause was drafted so that Jewelry Exchange had one more opportunity to object to a party-appointed arbitrator than the employee.<sup>80</sup> The employee in this case, Nino, signed a one-page document agreeing that he was bound to the grievance procedure provided in the employee handbook.<sup>81</sup> Significantly, the grievance procedure in the handbook differed from the employment contract.<sup>82</sup>

Nino sued Jewelry Exchange in court rather than filing for arbitration.<sup>83</sup> Jewelry Exchange raised a defense that the case could not be heard in court due to the arbitration agreement.<sup>84</sup> But, it continued to litigate the case for fifteen months before it filed the appropriate motion.<sup>85</sup> During that time, Jewelry Exchange engaged in a substantial amount of discovery and, after more than a year into the litigation process, moved to compel arbitration.<sup>86</sup> In response, Nino argued that the arbitration agreement was unconscionable, not enforceable, and

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75. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008).

76. See generally *Jock*, 646 F.3d at 113 (holding that the arbitrator did not exceed his authority in allowing the plaintiffs to pursue their claims in class arbitration).

77. 609 F.3d 191 (3d Cir. 2010).

78. See *id.* at 197.

79. *Id.*

80. *Id.*

81. *Id.* at 198.

82. *Id.* Specifically, the handbook does not have an arbitration agreement, requires employees to file the initial grievance within two days, as opposed to five, and gives the managing director the final say in all decisions except terminations. *Id.*

83. See *id.* at 199.

84. *Id.*

85. *Id.*

86. See *id.*

waived.<sup>87</sup>

The Third Circuit found that Jewelry Exchange had forfeited its right to arbitration, despite the mandatory arbitration clause in the contract.<sup>88</sup> Due to its delay, the court found that the employer waived its right to object to the litigation.<sup>89</sup> The court also reasoned that unconscionability is a matter of arbitrability, and for the court to decide, not the arbitrator.<sup>90</sup> Because unconscionability is determined by state law principles, and in this case, the Virgin Islands, the law provided that in order for a contract to be unconscionable, it must be procedurally unconscionable (i.e. contracts of adhesion) *and* substantively unconscionable.<sup>91</sup> The court found that the contract was substantively unconscionable since the timelines in the mandatory arbitration clause were unreasonable and the terms were unreasonably favorable to the employer/the party requesting arbitration.<sup>92</sup> The arbitration agreement did not penalize Jewelry Exchange if it did not meet the deadlines.<sup>93</sup> Conversely, employees were punished if they failed to meet deadlines and lost claims.<sup>94</sup> Therefore, the court found the arbitration agreement to be unconscionable and unenforceable.<sup>95</sup> *Nino* provided an excellent illustration of what *not* to include in a mandatory arbitration clause.<sup>96</sup>

*Rent-A-Center, West, Inc. v. Jackson*<sup>97</sup>

*Rent-A-Center* required employees to sign an employment contract as well as a separate arbitral agreement.<sup>98</sup> The arbitral agreement contained a provision that all claims, including discrimination, would be arbitrated.<sup>99</sup> It also provided that the arbitrator would settle issues of arbitrability.<sup>100</sup> After one of *Rent-A-Center*'s employees, Antonio

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87. *Id.*

88. *Id.* at 209 (discussing *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912 (3d Cir. 1992)).

89. *Id.* at 210.

90. *See id.* at 200 (citing *Howsman v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

91. *Id.* at 200-01.

92. *Id.* at 202.

93. *Id.* at 207.

94. *See id.*

95. *Id.* at 208.

96. The guiding principles for drafting arbitral clauses in light of *Nino* are examined in this article. *See* discussion *infra* Part V.

97. 130 S. Ct. 2772 (2010).

98. *Id.* at 2775.

99. *Id.*

100. *Id.*

Jackson, filed a discrimination suit, Rent-A-Center moved to compel arbitration.<sup>101</sup> In opposition, Jackson argued that the arbitral contract was unconscionable.<sup>102</sup>

Prior to this case, the Court held, in *Prima Paint*, that Congress permitted the arbitrator to decide whether an arbitration agreement is enforceable, unless the claimant specifically alleged that he or she only agreed to the arbitration clause based on fraud in the inducement.<sup>103</sup> In this case, Jackson did not argue that the arbitrator could not decide whether the arbitration agreement was unconscionable.<sup>104</sup> Rather, Jackson argued that because the arbitration agreement as a whole was unconscionable, the entire agreement, including both the arbitration contract and the employment contract, was presumptively unenforceable.<sup>105</sup>

The Court found, in *Rent-A-Center*, that the issue of whether the entire contract was unconscionable was separate from whether the arbitral agreement was unconscionable.<sup>106</sup> *Prima Paint* had already set the standard for separability.<sup>107</sup> Thus, in *Rent-A-Center*, the Court focused on whether the issue of the unconscionability of the arbitral agreement was a matter for the arbitrator to decide.<sup>108</sup> The Court decided that it was a matter for the arbitrator, not the court, since it dealt with the enforceability of the arbitration clause.<sup>109</sup> The Court found that a contract could delegate the power to decide whether an arbitral agreement is enforceable to the arbitrator under section 2 of the FAA.<sup>110</sup> By extension, the arbitrator could also determine whether the agreement as a whole was enforceable or unconscionable.<sup>111</sup>

However, the *Rent-A-Center* Court was not unanimous in its decision.<sup>112</sup> Leading a four-justice dissent, Justice John Paul Stevens

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101. *Id.*

102. *Id.*

103. *See id.* at 2778 (citing *Prima Paint Corp. v. Food & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)).

104. *Id.* at 2775.

105. *Id.* at 2779.

106. *Id.* at 2778.

107. *See id.* The doctrine of separability provides that the arbitral agreement stands alone from the main contract. Thus, even if the main contract was entered into based on fraud in the inducement, if the arbitral agreement is valid, the parties are obligated to arbitrate whatever claims are covered by the arbitral agreement. *See id.*

108. *See id.* at 2779.

109. *See id.*

110. *See id.* at 2778.

111. *Id.* at 2779.

112. *Id.* at 2781 (Stevens, J., dissenting).

contended that, based on *First Options*, the Court was required to perform an *in toto* review (meaning that both contracts, the employment contract and the arbitral contract, had to be reviewed by the court).<sup>113</sup> Since a court cannot conclude that a party agreed to arbitrate the question of arbitrability until it decided whether the agreement was unconscionable, the dissent took issue with the majority's analysis as a whole.<sup>114</sup>

If Jackson had argued that the arbitration clause itself was unconscionable or that he was induced to enter the contract based on fraud, then the Court could have decided differently. However, because the majority of the Court interpreted *Prima Paint* to require the Court to separate the contract from the arbitration agreement, the *Rent-A-Center* Court was obligated to allow the arbitrator to decide the issue of unconscionability of the arbitral agreement.<sup>115</sup>

### III. FAIRNESS AND UNCONSCIONABILITY IN MANDATORY ARBITRATION

#### CLAUSES

Employees often argue that the arbitration agreement is either unfair or unconscionable.<sup>116</sup> This section of the discussion is devoted to analyzing cases in which the courts have dealt with the issues of fairness and unconscionability.

#### *"Fairness" in Mandatory Arbitration*

Arguments regarding the fairness of mandatory arbitration clauses generally focus on its adhesive nature or on the procedural aspect of the arbitration.<sup>117</sup> *Marino v. Writers Guild of America, East, Inc.*<sup>118</sup> involved

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113. See *id.* at 2782-83.

114. See *id.* at 2781-82.

115. See *id.* at 2779 (majority opinion). It is important to note that the Court's general composition has not likely changed with Justice Elena Kagan as Stevens' replacement. Therefore, it is unlikely that the Court would overturn *Rent-A-Center* or greatly distinguish it as the Court is currently comprised.

116. See, e.g., *id.* at 2779-80 (discussing the plaintiff's argument that the entire arbitration agreement was procedurally and substantively unconscionable); *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 196 (3d Cir. 2010) (stating the plaintiff's argument that the arbitration agreement was unconscionable and unenforceable).

117. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1633 (2005) (quoting David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36-37 (1997)).

both of these grounds of attack.

The case centered on who was entitled to receive the writing credit for “Godfather III” – Marino, Mario Puzo, or Francis Ford Coppola.<sup>119</sup> After an arbitral award was issued against Marino’s favor, Marino challenged the award and requested a review by the Policy Review Board, as required under his union contract with the Writers Guild of America.<sup>120</sup> The Board determined that a new arbitration was unnecessary.<sup>121</sup> The arbitration award was final.<sup>122</sup>

In court, Marino made a number of arguments grounded on the fairness of the arbitration process. Marino argued that the anonymity of the arbitrators’ identities, as required under the union contract, was unfair.<sup>123</sup> Marino also contended that the arbitral procedures were improperly applied to him since he was barred from submitting evidence that was relevant in his opinion and was unable to see Coppola’s and Puzo’s written submissions.<sup>124</sup> Lastly, Marino stated that members of the arbitral panel did not properly weigh the evidence.<sup>125</sup>

The Ninth Circuit Court of Appeals rejected all of Marino’s arguments regarding the fairness of the decision-making process.<sup>126</sup> Since the arbitral procedures found in the contract were properly followed, the arbitration itself was not unfair.<sup>127</sup> The court noted that employees subject to arbitration were not entitled to all the processes that are traditionally part of a court procedure.<sup>128</sup> Because Marino did not object to the arbitral procedures or the alleged unfairness of the arbitration process throughout the arbitration itself, the court determined that Marino waived his right to object.<sup>129</sup> Therefore, the court reasoned that Marino was bound by the arbitral process.<sup>130</sup>

Mandatory arbitral agreements in labor law disputes are generally viewed more favorably than similar agreements in employment law because labor agreements generally result from arm’s length

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118. 992 F.2d 1480 (9th Cir. 1993).

119. *Id.* at 1482.

120. *Id.* at 1482-83.

121. *Id.* at 1483.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1486.

127. *See id.* at 1486-87.

128. *See id.* at 1483, 1488. One of the arguments in favor of arbitration is that it should be more efficient and economical. *See id.* at 1488.

129. *See id.* at 1484.

130. *Id.* at 1488.

negotiations,<sup>131</sup> with the members' interests represented by their union representatives.<sup>132</sup> In the employment law context, employees are not usually represented by negotiators when employers are drafting employment contracts, leaving employees with little real choice other than to accept an employment contract as presented.<sup>133</sup> However, employees with union representation sometimes also have little choice as well.<sup>134</sup> Perhaps it could be said that "you read it, you sign it, and you are bound by it."<sup>135</sup>

But perhaps the most helpful decision in discussing arbitration, fairness, and unconscionability is *Hooters of America, Inc. v. Phillips*.<sup>136</sup> Despite the fact that the Fourth Circuit limited its decision to the specific facts at hand, it focused on fairness and unconscionability in mandatory arbitration.<sup>137</sup>

The issue in *Hooters* was whether an employee's Title VII employment discrimination claims were arbitrable under the employment contract.<sup>138</sup> Although the employee, Phillips, was supposed to receive a copy of the arbitration rules and procedures, Hooters never provided her with a set.<sup>139</sup> Phillips signed the agreement without receiving or reviewing the document.<sup>140</sup>

The rules that Hooters instituted were stacked against its

131. See, e.g., 29 C.F.R. § 4.11 (2010) (requiring arm's length negotiations for federal service contracts).

132. See Roger B. Jacobs, *Supreme Court Tips Against Individual Rights – Again*, 27 HOFSTRA LAB. & EMP. L.J. 267, 269 (2010).

133. *Employment and Non-Compete Agreements*, RIGGAN, LLC, <http://www.rigganlawfirm.com/lawyer-attorney-1649233.html> (last visited Apr. 20, 2012).

134. See Robert P. Hunter, *Disadvantages of Union Representation*, MACKINAC CENTER FOR PUB. POL'Y, (Aug. 24, 1999), [www.mackinac.org/article.aspx?ID=2313&print=yes](http://www.mackinac.org/article.aspx?ID=2313&print=yes) (describing the employee's loss of individuality upon becoming a member of "an overall bargaining unit in which the majority rules").

135. Notably, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court rejected the employee's argument that he did not waive his right to trial by signing the agreement. See 500 U.S. 20, 26 (1991). Some subsequent cases, however, have distinguished *Gilmer* by reasoning that the employee in that case was an experienced businessman. See Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 162 (2010) (citing Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 305 (2003)). The same can potentially be said of Marino, who was presumably well-educated. See *Marino*, 992 F.2d at 1481.

136. 173 F.3d 933 (4th Cir. 1999).

137. *Id.* at 938.

138. *Id.* at 937.

139. *Id.* at 936.

140. See *id.* Question to ponder: should the employer be responsible when the employee does not ask at the outset to view the arbitration agreement?

employees. For example, employees were only given five days to review the arbitral agreement and decide whether to accept or reject it.<sup>141</sup> Phillips argued that such an agreement was unenforceable.<sup>142</sup> Phillips contended that because the arbitral agreement was a mandatory aspect of her employment, it was a contract of adhesion and she lacked bargaining power.<sup>143</sup>

The *Hooters* arbitration procedures were also not even-handed.<sup>144</sup> Hooters was not required to respond to employee claims and essentially had no limits on who would serve as the arbitrator.<sup>145</sup> It also had the right to change the rules at any point in the process and to appeal the arbitral award when it could show by a preponderance of the evidence that the arbitrators exceeded their authority.<sup>146</sup> Hooters employees were not granted similar rights under the arbitral procedures.<sup>147</sup>

The Fourth Circuit determined that “Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.”<sup>148</sup> Accordingly, the court determined that the arbitral agreement was unenforceable, and Phillips could not be compelled to arbitrate her claim of sexual harassment.<sup>149</sup>

Because of the one-sided nature of the mandatory arbitration clause in *Hooters*, the court determined the arbitration agreement to be unenforceable.<sup>150</sup> Courts, however, do not often find the arbitral process to be a “sham.”<sup>151</sup> Typically, as seen in *Rent-A-Center* (discussed Part II *infra*), courts try to construe arbitral agreements in a light most favorable to enforcement.<sup>152</sup>

### *The Unconscionability Argument*

In attacking the arbitral agreement, employees often raise the

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141. *Id.*

142. *Id.*

143. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 613 (D.S.C. 1998).

144. *Hooters of America*, 173 F.3d at 938.

145. *Id.* at 938-39.

146. *Id.* at 939.

147. *See id.* at 938-39.

148. *Id.* at 938.

149. *Id.* at 940.

150. *Id.* at 938.

151. *See id.* at 940.

152. *See, e.g., Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (using the doctrine of separability to find the arbitration valid).

defense of unconscionability.<sup>153</sup> When confronted with this contract issue, courts use a number of factors to assess the question, including: whether there was unequal bargaining power, whether the clause was a contract of adhesion or negotiable, whether deception was used in making the employee sign the arbitral agreement, and whether there was an unfair advantage, to list just a few.<sup>154</sup>

Arguments that the arbitration clause is unconscionable rarely succeed.<sup>155</sup> The unconscionability argument only applies in situations where there was found to be a contract of adhesion between the employee and employer.<sup>156</sup> However, on the rare occasion that the employee persuasively makes out a case of unconscionability, the win is often short lived. Employers can easily and quickly amend the mandatory arbitration clauses in order to satisfy more stringent standards.<sup>157</sup>

The Sixth Circuit found an invalid arbitral agreement in *Walker v. Ryan's Family Steak Houses, Inc.*<sup>158</sup> Every employee in *Walker* was subject to arbitration based on a mandatory arbitration clause contained in the application.<sup>159</sup> Employment was conditioned upon signing the arbitral agreement.<sup>160</sup> Plaintiffs provided evidence that they were rushed to sign the arbitral agreement and that representatives of Ryan's Family Steak Houses did not fully or adequately explain the provisions of the two-page arbitration agreement.<sup>161</sup> Ryan's Family Steak Houses argued that the mandatory arbitration clause was enforceable because it was signed before commencing employment.<sup>162</sup>

The district court found that the arbitral agreement was a classic contract of adhesion and was not enforceable.<sup>163</sup> On appeal, the Sixth

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153. See, e.g., *id.* at 2775 (arguing that an agreement to arbitrate all "past, present, or future" employment disputes based on any federal law was unconscionable); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744-45 (2011) (arguing that an agreement to arbitrate all claims by employees only in their individual capacities and to permit the employer to make unilateral amendments to the agreement was unconscionable); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 372 (6th Cir. 2005) (arguing that an agreement appearing to prohibit class-based claims was unconscionable).

154. See STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 144 (2d ed. Supp. 2010).

155. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 456 (2011).

156. See HUBER & WESTON, *supra* note 154, at 129.

157. *Id.*

158. 400 F.3d at 387.

159. *Id.* at 373.

160. *Id.*

161. *Id.* at 373-74.

162. *Id.* at 380.

163. *Id.* at 384.



Circuit found that the contracts of three plaintiffs who were hired prior to signing the arbitral agreement were ones of adhesion.<sup>164</sup> The court opined that because these contracts were ones of adhesion, the alleged consideration was illusory, rendering the arbitration provisions unenforceable.<sup>165</sup> All employees of Ryan's Family Steak Houses had a similar lack of consideration.<sup>166</sup> The court also criticized the employer for failing to explain the arbitration clauses to the applicants and, when it did attempt to do so, for haphazardly explaining the agreement, which was filled with inaccuracies regarding the rights the applicants were waiving.<sup>167</sup>

The court did not find that the arbitral agreement was definitely unconscionable.<sup>168</sup> As a result, in order to find the agreement invalid, the court had to rely on the fact that the arbitral process itself was inherently unfair.<sup>169</sup> For example, the three members who would constitute the arbitral panel were to be selected from three different lists.<sup>170</sup> The court particularly took issue with two of the lists of arbitrators.<sup>171</sup> One list consisted of names of supervisors and managers from one of the signatories of Employment Dispute Services, Inc. ("EDSI," who was also the named respondent in all arbitrations, not Ryan's Family Steak House).<sup>172</sup> The second list consisted of employees from another signatory of EDSI.<sup>173</sup> The court found the members of these lists to be problematic given that the employer's annual fees to EDSI consisted of nearly half of EDSI's gross income in one year.<sup>174</sup> Therefore, the Sixth Circuit determined that due to the symbiotic relationship between Ryan's Family Steak Houses and EDSI, it was Ryan's, not EDSI, who effectively determined two-thirds of the members of the arbitral panel.<sup>175</sup> The court took issue with this composition of the panel and reasoned that such a panel would be unfair and any award unenforceable.<sup>176</sup>

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164. *Id.* at 385.

165. *Id.* at 381, 383.

166. *See id.* at 381.

167. *Id.* at 382, 384.

168. *Id.* at 384-85.

169. *Id.* at 385-86.

170. *Id.* at 386.

171. *Id.* at 386-87.

172. *Id.*

173. *See id.* The third list was comprised of attorneys, retired judges, and others in the legal profession. *Id.*

174. *Id.* at 386.

175. *Id.*

176. *Id.* at 388.

The Sixth Circuit also ruled that the limited discovery process EDSI provided was potentially prejudicial to employees.<sup>177</sup> The court reasoned that the combination of limited discovery with a potentially biased panel was procedurally unfair to employees.<sup>178</sup>

Alternatively, in *Nino v. Jewelry Exchange, Inc.*,<sup>179</sup> the applicable law of the Virgin Islands required contracts to be both procedurally and substantively unconscionable to be unenforceable.<sup>180</sup> The Third Circuit explained that under Virgin Islands law, contracts of adhesion were procedurally unconscionable.<sup>181</sup> In order to be substantively unconscionable, the contract must contain provisions that are unreasonably favorable to one party to the detriment of the other.<sup>182</sup> In *Nino*, the court held that requiring an employee to submit a claim to arbitration within five days of the event was substantively unconscionable and unreasonably favorable to the employer.<sup>183</sup>

Similar to *Walker*, the *Nino* court also analyzed whether the arbitral agreement was fair, specifically in terms of the five-day filing period.<sup>184</sup> The Third Circuit determined that the time period was extremely brief.<sup>185</sup> Also, due to the binding timeline, the mandatory arbitration clause was unenforceable because it was too one-sided.<sup>186</sup> The court found that this unbalanced approach was “exacerbated” by the fact that the arbitral agreement explicitly insulated the employer from any liability if it failed to process an employee’s claim in a timely manner.<sup>187</sup>

Employers must be aware of the potential arguments that may be advanced by disgruntled employees. Courts continue to carefully scrutinize certain mandatory arbitration provisions. But, courts usually

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177. *Id.* at 387.

178. *See id.*

179. 609 F.3d 191 (3d Cir. 2010) (exemplifying the general rule that cases dealing with unconscionability are fact-specific and can be easily distinguished).

180. *Id.* at 201 (citing *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 362 (3d Cir. 2007)).

181. *Id.*

182. *See id.*

183. *Id.* at 202. The court had previously found a thirty-day waiting period to be substantively unconscionable. *See Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 277-78 (3d Cir. 2004); *Alexander v. Anthony Int’l, LP*, 341 F.3d 256, 266 (3d Cir. 2003).

184. *See Nino*, 609 F.3d at 203.

185. *Id.* at 202-03.

186. *Id.* at 203.

187. *Id.* The court also decided that the arbitral agreement’s requirements regarding the parties’ responsibilities for the costs of the arbitration were substantively unconscionable. *Id.* However, that issue is outside the scope of this article and will not be addressed. Also, employees were required to submit their claims to Jewelry Exchange first for an internal grievance process. *Id.* at 197. After the internal investigation, employees could submit their claims for arbitration if they were not satisfied with the internal result. *Id.*

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do not find contracts to be unenforceable due to unconscionability.<sup>188</sup> Perhaps some general guidelines for employers may be helpful when drafting a mandatory arbitration clause.

#### IV. PROPOSALS

A mandatory arbitration provision should reduce the costs of litigation. If it does not, it will not be acceptable to the parties.

##### *Some Thoughts on How to Present a Mandatory Arbitration Clause*

The arbitration agreement should be in **bold** and CAPITALIZED. A bold, capitalized clause will prevent employees from later arguing that they did not have notice of the mandatory arbitration provision or see it in the contract. It should also be easy to read, unambiguous, and written in terms the average employee could understand.

The employer should also provide the arbitration agreement to each employee. Employers should give employees sufficient time to read the agreement on their own<sup>189</sup> and request a written acknowledgement of the employee's acceptance of the agreement. A sample agreement is as follows:

#### ARBITRATION AGREEMENT

Each employee agrees that any and all grievances that arise between any employee and the Company arising during or following the employee's employment with the company that cannot be resolved by the Complaint Resolution Procedure set forth in this Handbook shall be resolved through final, impartial, and binding arbitration.

The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16. Judgment on the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. The place of the arbitration shall be Somerset, State of New Jersey, and the arbitrator shall be selected from Panels of the New Jersey Office of the American Arbitration Association.

**Grievances Defined.** Under this Agreement, the term "grievances"

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188. See HUBER & WESTON, *supra* note 154, at 144.

189. While this is not mandatory in order to ensure enforceability, it is better to err on the side of caution. See *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 150 (2d Cir. 2004) (holding that an employee could not avoid his obligation to arbitrate his Title VII claims based on the fact that he failed to read the document carefully before signing).

means any and all past, present, and future claims that arise between any employee and any of the following: the Company, its employees and agents (in their capacities), as well as any affiliated companies, benefit plan sponsors and administrators. Such grievances include, but are not limited to: statutory and common law claims of discrimination (including all claims under the Law Against Discrimination); claims for compensation, retaliatory discharge, benefits; tort claims; claims for breach of contract; and all other statutory and common law claims arising out of or relating to the terms and conditions of employment or its termination.

This Agreement does not apply to claims for workers' compensation, unemployment compensation, temporary injunctions in aid of arbitration, the disclosure of trade secrets, or claims of discrimination before the Equal Employment Opportunity Commission or similar administrative agency responsible for ensuring compliance with fair employment standards.

**The Procedure.** The aggrieved party must submit written notice to the other side within the legal time period for filing the claim asserted.

The local Panels of the American Arbitration Association in Somerset, New Jersey shall be used and the parties shall select a single arbitrator to conduct the arbitration proceedings under the National Rules of the American Arbitration Association.

The Arbitrator shall assess the distribution of the costs of arbitration between the parties. Except that the party that initiated the claim shall pay an amount equivalent to the filing fees to initiate a claim in a court of competent jurisdiction.

The Arbitrator shall interpret company policy and state and federal law as necessary to reach a final, binding, and exclusive decision.

The Arbitrator shall resolve all issues relating to discovery, the admission of evidence, and the interpretation and enforceability of this agreement, including whether it is void or voidable.

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THE ABOVE AGREEMENT AND VOLUNTARILY ACCEPT ITS TERMS. I UNDERSTAND THAT THIS AGREEMENT SUPERSEDES ANY PRIOR AND CONTEMPORANEOUS ARBITRATION AGREEMENTS BETWEEN THE COMPANY AND MYSELF. I FURTHER UNDERSTAND THAT BY ENTERING INTO THIS AGREEMENT, BOTH THE COMPANY AND I PROMISE TO RESOLVE ANY AND ALL GRIEVANCES THAT ARISE BETWEEN US IN AN ARBITRATION PROCEEDING RATHER THAN A COURT OF LAW.

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_____ Employee Signature	_____ Signature of Authorized Company Agent
_____ Employee Name Printed	_____ Authorized Company Agent Name Printed
_____ Date	_____ Date

### *Drafting the Arbitration Agreement*

An arbitration agreement should include a severability clause that if any part of the arbitral agreement is unenforceable, that provision shall be severed from the rest of the arbitral contract to ensure that the dispute would still be adjudicated in the arbitral forum.

Other points of reference to create an effective workplace-dispute grievance alternative include: timelines, the procedure for appointing arbitrator(s), the scope of workplace claims that will be arbitrated, discovery procedures, apportionment fees, potential remedies, the award, and whether the award will be published or kept confidential.

The arbitration agreement should not shorten the statute of limitations. There should be filing time limits in which employees should be given the same amount of time to file for arbitration as they would if they were filing a complaint in a court of law.<sup>190</sup>

Regarding the appointment of arbitrators, the employer has a choice to either have a panel hear the dispute or a single arbitrator. If the employer elects to have the arbitration heard by a panel of arbitrators, then it should also include the procedure for the appointment of the arbitrators. Alternatively, it should select an arbitral institution, such as AAA, to administer the dispute and adopt the institution's rules concerning the appointment of arbitrators.

A fair, court-approved manner of appointing a tripartite panel of arbitrators could be based on *Walker* in which the employer and employee each select one arbitrator.<sup>191</sup> The employer might also supply

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190. See, e.g., *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 671-72 (Cal. Ct. App. 2004) (finding that a six-month time limit to file a claim was unconscionable); see also Evan J. Spelfogel, *The Benefits of Employment Arbitration in Employment Law*, 4 N.Y. DISP. RESOL. LAW. 24 (2011) (suggesting that time limits in mandatory arbitration provisions should be comparable to any applicable statutes of limitations).

191. See *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 376 (6th Cir. 2005).

the employee with a list of arbitrators that describe the arbitrators' track records and expertise.<sup>192</sup> Both party-appointed arbitrators subsequently agree on the third arbitrator, who will serve as chairman. But, this process may be too cumbersome, time consuming, and, ultimately, too expensive.

If the employer decides that it wants to have the arbitration heard by a solo arbitrator due to cost and other factors, the arbitration provision might provide, for example, that the *employee* selects the arbitrator. When the employee selects the arbitrator, any concerns a court may have of the employer having an "advantage" over an employee through increased familiarity of the arbitral program disappears. Of course, a traditional method of striking names from approved lists could be utilized, leaving the process entirely to an outside agency (AAA) and following its procedures. Alternatively, the employer could opt for a rotating and designated panel. Fairness can be built into each of these processes.

Another factor for employers seeking to arbitrate employment disputes to consider is providing proper notice to employees. Therefore, it would also be wise for employers to specifically state that the arbitration agreement includes statutory claims and to provide a list of the specific statutes. Additionally, the arbitration agreement should provide that the employee is allowed to file any claim with the Equal Employment Opportunity Commission ("EEOC"), NLRB, or any other administrative agency.<sup>193</sup> If so, a court will likely compel arbitration.

In *Circuit City Stores, Inc. v. Adams*,<sup>194</sup> the Supreme Court determined that claims that an employer violated statutory employment laws were arbitrable.<sup>195</sup> While this is now more important in labor law as opposed to employment law after *14 Penn Plaza LLC v. Pyett*,<sup>196</sup> parties may consider including a clause that the employee agrees to arbitrate all statutory claims. Such a clause is another measure

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192. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 280 (2d ed. 2007) (regarding mandatory arbitration in consumer disputes).

193. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) ("We have held that federal statutory claims may be the subject of arbitration agreements . . . because the agreement only determines the choice of forum. . . . 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

194. 532 U.S. 105 (2001).

195. See *id.* at 122-23.

196. See 556 U.S. 247 (2009) (holding that an arbitration clause in an employment contract requiring union members to waive their right to bring a statutory claim in federal court – in this case under the ADEA – was valid and enforceable).

employers can easily take to help ensure enforceability of mandatory arbitration provisions.

However, even if the employer includes such a prophylactic provision for arbitrating statutory claims, administrative agencies may still bring claims against the employer regarding the mandatory arbitration clause itself.

Additionally, the Fifth Circuit has recently held that personal injury claims, such as wrongful death and other tort claims, are not arbitrable.<sup>197</sup> Such an exclusion should also be considered when drafting arbitration agreements.

### *Remedies*

The arbitration agreement should provide that the arbitrator is entitled to grant any and all remedies that would have been available if the dispute was adjudicated in court. Such a provision might include punitive damages, treble damages, and attorneys' fees.<sup>198</sup> It might also address the concerns of critics of mandatory arbitration clauses and supporters of the Fairness in Arbitration Act. As a fundamental rule, arbitration agreements should not abridge an employee's statutory rights.<sup>199</sup>

### *Dividing up the Fees – How to Prevent a Court from Shutting You Down*

Another source of criticism for mandatory arbitration clauses is the division of fees between employers and employees. Courts might refuse to enforce arbitration awards due to the division of fees. However, in *Bradford v. Rockwell Semiconductor Systems, Inc.*,<sup>200</sup> the Fourth Circuit held that fee-splitting provisions do not automatically render arbitration contracts unenforceable.<sup>201</sup> It is unlikely that an employer would be able to "sway" the arbitrator by paying the arbitration fees. The *Bradford* court stated that whether the fee allocation is fair should be determined

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197. See *Graves v. BP Am., Inc.*, 568 F.3d 221 (5th Cir. 2009); *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

198. CARBONNEAU, *supra* note 192, at 358.

199. See Mark S. Mathison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers*, 25 ABA J. OF LAB. & EMP. LAW 173, 193 (2010) (explaining that *Pyett* does not require employees to waive their statutory rights, just their "right to a judicial forum as the place to vindicate statutory rights").

200. 238 F.3d 549 (4th Cir. 2001).

201. *Id.* at 551.

on a case-by-case basis.<sup>202</sup> In federal employment discrimination claims, the employer could consider a clause that requires employees to pay an equivalent fee for filing a cause of action in federal court.<sup>203</sup> On the other hand, it might be simpler for an employer to absorb the filing fee or to limit the claimant's fee to the amount incurred by filing in a court in that jurisdiction and some arbitral costs<sup>204</sup> than risk *ad hoc* decisions on this point. Employers who pay for arbitration costs ensure that the arbitration agreement does not force the employee to incur costs that the employee would not have to otherwise pay in court.<sup>205</sup> Commentators have expressed that such a role increases the overall "fairness" of the mandatory arbitration system.<sup>206</sup>

If applicable, the arbitration agreement should state that the employer must pay for the costs of e-discovery. Such a policy essentially adopts the federal courts' policy of forcing the producing party to pay the costs<sup>207</sup> and would avoid any argument an employee may have that the arbitration process is unfair and unconscionable.

#### *Amending Mandatory Arbitration Agreements*

Some courts have held that employment handbooks that state employers can alter the terms of the handbook at any time are unenforceable due to lack of mutuality.<sup>208</sup> This question is one to be pondered based upon jurisdiction and business needs. Although continued employment has generally been held to ratify modifications to the arbitration agreement,<sup>209</sup> employers might consider seeking employee consent to modifications. Obviously, this issue needs to be considered based upon the size of the company, technical expertise

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202. *Id.* at 559.

203. See Spelfogel, *supra* note 190.

204. See Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1235 (10th Cir. 1999); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997).

205. See, e.g., Martinez v. Master Prot. Corp., 118 Cal. App. 4th 107, 115-16 (Cal. Ct. App. 2004) (holding that the arbitration clause was unconscionable because it imposed costs unique to arbitration, imposed time limits to filing a claim, and limited discovery).

206. But see Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 413-14 (2009) (explaining that once an employer agrees to pay the costs of arbitration, the possibility of collusion between the employer and the arbitrator arises).

207. See Cole, 105 F.3d at 1484.

208. See, e.g., Douglass v. Pflueger Hawaii, Inc., 135 P.3d 129, 144 (Haw. 2006) (holding that the arbitration agreement was illusory and unenforceable because the employer's reserved right to alter the agreement at any time did not provide "mutuality of obligation").

209. See, e.g., Dantz v. Am. Apple Grp., LLC, 123 F. App'x 702, 708 (6th Cir. 2005) (finding that the employee's continued employment constituted acceptance by performance of the employer's unilateral contract).



required for the job, and practicality. In other words, some changes are more housekeeping in nature and should be routine when issued. Substantive changes present a more complicated question and should usually be handled by widespread dissemination and sign off, either electronically or otherwise, to insure enforceability.

### *Providing for the Award*

The arbitral clause should require the arbitrator(s) to write a comprehensive award.<sup>210</sup> In other words, it should be clear to the parties what was decided and the basis for the decision. The parties should agree to publish the award either by the arbitral institution or the employer's newsletter unless confidentiality is required. This would negate critics' arguments that arbitrations do not fully address and remediate employees' issues due to the private nature of this process.<sup>211</sup>

## V. CONCLUDING THOUGHTS

Mandatory arbitration is alive and well.

The historical antecedents suggest it will continue to thrive and, in fact, expand. Its overall acceptance is, of course, based upon fundamental fairness.

Arguments regarding contracts of adhesion have largely been rejected. Providing employees with copies of agreements and requiring signoff simplifies much of the process.

Fine-tuning needs to be done, particularly in instances where boards and courts have concerns over class-based waiver of rights. For example, as the Board ruled in *D.R. Horton*, individual arbitration was permissible, but requiring groups of employees to arbitrate was not. Subject to court review, depending upon the time this article is being read, *D.R. Horton* must be accepted at the Board level.

Individualized mandatory arbitration provisions appear to be generally accepted and will expand.<sup>212</sup> The real battle appears to be over

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210. Spelfogel, *supra* note 190.

211. See Sternlight, *supra* note 117, at 1635 (arguing that arbitration is problematic because as a private process, it is not open to public scrutiny).

212. In *Marmet Health Care Center, Inc. v. Brown*, the Supreme Court, again, clarified and restated the favorable position of arbitration. 565 U.S. \_\_ (2012). The Court declared that "[s]tate and federal courts must enforce the Federal Arbitration Act (FAA) . . . with respect to all arbitration agreements covered by that statute." *Id.* The Court reversed a decision of the Supreme Court of Appeals of West Virginia and said the court had misread and disregarded earlier Supreme Court precedents interpreting the FAA. *Id.* The court noted that the West Virginia Court found the FAA's

class-wide utilization of arbitration.<sup>213</sup> Some basic thoughts and

coverage to be more limited than mandated by the Supreme Court. *Id.* In a very clear statement the Supreme Court said “[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” *Id.* (citing U.S. CONST. art. VI, cl. 2).

The Marmet Health Care Center matter involved the consolidation of three negligence suits against nursing homes in West Virginia. *Id.* Each involved an agreement to arbitrate all disputes except collection matters. *Id.* In each of the cases a family member had commenced suit in state court alleging negligence-caused injuries or harm resulting in death. *Id.* The Supreme Court of Appeals of West Virginia issued a decision regarding all three matters and held that, as a matter of public policy, under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that resulted in a personal injury or wrongful death was not enforceable. *Id.* The state court considered the preemption issue and concluded that Congress did not intend for the FAA to apply to personal injury or wrongful death suits that “only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce . . . .”

The U.S. Supreme Court made a very clear statement. It said the West Virginia Court’s interpretation of the FAA was “both incorrect and inconsistent with clear instruction in the precedents of this Court.” *Id.* Referring to the FAA the Court said that the text includes “no exception for personal-injury or wrongful-death claims.” *Id.* Therefore, relying upon its earlier decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), West Virginia’s prohibition against predispute agreements to arbitrate personal injury or wrongful death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim and that rule is contrary to the terms and coverage of the FAA. *Id.*

The Supreme Court of Appeals of West Virginia also proposed an alternative holding that the particular clauses in two of the cases were unconscionable. *Id.* The Supreme Court remanded these cases for further review in West Virginia to determine whether the arbitration clauses in two of the cases were unenforceable under state common law principles not specific to arbitration and preempted by the FAA. *Id.* Thus, a rather resounding endorsement of arbitration – again – by the Supreme Court.

213. A recent development is worth noting with regard to the fits and starts for mandatory arbitration. Carlyle Group LP had planned to protect itself from class action lawsuits with mandatory arbitration. *See* Miles Weiss, Jesse Hamilton & Cristina Alesci, *Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts*, BLOOMBERG (Feb. 3, 2012, 5:57 PM), <http://www.bloomberg.com/news/2012-02-03/carlyle-drops-class-action-lawsuit-ban.html>. The buyout firm had amended a regulatory filing to require future shareholders to resolve claims against it through arbitration. *Id.* This provision would have forced a further clarification by the Supreme Court. There had already been congressional comments against the proposal and, in the past, the Securities and Exchange Commission (SEC) had blocked a less restrictive arbitration clause more than twenty years ago. *See id.* The potential impact for closely held firms and hedge fund and buyout firms, also structured as limited partnerships, would have been significant. However, in a rapid about-face, the Carlyle Group announced that it was withdrawing the mandatory arbitration clause included in the registration statement in response to pressure from shareholder rights activists, potential investors, and the SEC. *Id.* The SEC has generally disfavored mandatory shareholder arbitration provisions. *See id.* However, the Supreme Court, in 2011, upheld an arbitration provision in a consumer contract that allowed class-wide procedures, finding that the FAA preempted California law. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). Building on that decision, Carlyle might have prohibited class action arbitration. Since Carlyle pulled the trigger, this clarification will have to wait for a further Supreme Court pronouncement on proscriptions to future class action like the one proposed by Carlyle in its LP. For a discussion of how courts treat collective arbitration and distinguish such cases from class

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comments may be helpful. Utilizing notice provisions similar to courts will minimize objections. Discovery procedures need to be tailored in advance and fine-tuned to avoid the possibility of matching the time and expense of litigation.

In general, the benefit of arbitration to all concerned is to provide a more user-friendly process that is efficient and less costly than litigation. If it is not, it will be disfavored as too cumbersome and more problematic than the court system. Avoiding litigation in court is only a positive if the arbitration is fair to all users and gets the job done at a “price point” that makes it a good investment. After all, even the use of arbitration is subject to the free market.