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# The Corporate Exploitation of Fundamental Rights: A Nation of Arbitration

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Claremont McKenna College

The Corporate Exploitation of Fundamental Rights: A Nation of Arbitration

submitted to  
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by  
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for  
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### Abstract

This thesis is an in-depth discussion and analysis of the alternative dispute resolution process of arbitration in the United States. It begins by providing a basic explanatory overview of arbitration clauses and the arbitration process. It then goes on to highlight the various benefits over traditional court litigation that arbitration has to offer. From there, the paper presents a detailed discussion of the many shortcomings of the arbitration process. It identifies the overall lack of procedural fairness that exists in arbitration today due to the fact that arbitration currently tends to favor businesses over consumers and workers during dispute settlements. The paper then identifies the various negative potential consequences that exist as a result of the unfair nature of arbitration today. This thesis concludes by presenting various ways that the arbitration process can be improved upon to make for a fairer, more neutral dispute resolution alternative.

## Introduction

As a fundamental feature of the American judicial system, every citizen is entitled to his or her day in court. Of course, traditional court hearings are not the only way for individuals to seek relief; there are many alternatives to traditional trial courts. A method of dispute resolution that is growing in popularity in the United States, arbitration is often viewed as a preferred process of dispute settlement. Arbitration is essentially a legal proceeding that exists as an alternative to a jury trial, and it is conducted between two disputed parties and is decided on by an arbitrator. Arbitrations are typically sought as an alternative form of dispute resolution due to a mutual arbitration agreement between two parties. Offering these parties more efficiency, less hostility, more cost savings, increased flexibility, more simplified rules, less exposure to risk, and greater privacy, the arbitration process is in many ways preferable to traditional trial court proceedings when settling disputes.

However, the arbitration process also offers a wide variety of shortcomings that, in many ways, serve to threaten the fairness of the proceedings. Having recently evolved into a process that largely favors big business, arbitration today exists as a procedure that is wickedly unfair for consumers and employees looking to seek relief from corporations that have committed wrongdoing. Such a shift away from justice is largely attributable to the nature of the arbitration process and the way in which the Supreme Court has interpreted arbitration law over the last few decades. One limitation of the arbitration process in this regard is the fact that it allows for a large amount of corporate control over the process that results in arbitration becoming incredibly harmful to the consumer. Control mechanisms that facilitate the engineering of the arbitration process to work in the favor of businesses include adhesion contracts, arbitrator biases, proceeding confidentiality, bootstrapping, class action waivers, and the final and binding nature

of the arbitrator's decision. In addition, the fact that many Americans today tend to sign contracts without reading all of their terms surrenders to big business even greater power over proceedings. As a result of this increase in corporate control over the arbitration process, businesses are capable of exploiting arbitration as a method of absolute litigation risk protection. One consequence of this current unfair nature of arbitration is that fewer individuals are choosing to go forward with arbitration. Additionally, the probability of a plaintiff victory in an arbitration against a corporation is decreasing significantly. Perhaps worst of all, arbitration as it exists with its shortcomings currently is providing businesses with an opportunity to engineer arbitration clauses to exploit consumers and employees. Any element of the justice system that allows for such abuse is fundamentally flawed and desperately in need of regulation.

Overall, arbitration does offer a plethora of advantages over traditional trial court proceedings. However, as the process exists today, consumers and employees are essentially robbed of their fundamental rights to fair dispute resolution processes. Because there are many benefits to pursuing arbitration over traditional court litigation, the best course of action appears to be to increase regulation and education in order to allow arbitration to further evolve into a process that is fair for all parties involved. Adjustments to the arbitration process that can help to achieve this goal include: increasing consumer education regarding arbitration, limiting the use of arbitration in certain cases, requiring post-dispute arbitrations to be signed before proceeding, offering dispute resolution alternatives to arbitration, preventing the enforcement of any arbitration clauses that are included in adhesion contracts, requiring arbitration clauses to be less "buried" in contracts, refusing to enforce unconscionable terms included in said clauses, and putting laws in place to safeguard against arbitrator bias. Additionally, honoring statutes put in place by states to protect their consumers and workers would increase the overall fairness of the

arbitration process. Only through an execution of these changes can arbitration truly become a fair and preferable form of dispute resolution.

## Chapter 1: The Basics of Arbitration

### *The Arbitration Clause*

It is impossible to understand the complexities of arbitration without first understanding the fundamentals of arbitration clauses themselves. An arbitration clause is, essentially, a contractual term that is included in a wide variety of agreements between two or more parties. This clause demands that any disputes that arise between these parties out of contracts or transactions be settled through an arbitration proceeding<sup>1</sup>. Like many elements of a contract, arbitration clauses can either be simple or complex. Arbitration clauses that merely state that disputes will be settled according to standard arbitration rules are considered simple, whereas more complex arbitration clauses exercise a larger amount of control over the details of the arbitration process<sup>2</sup>. For example, complex arbitration clauses may contain specific instructions for the arbitrator selection process or the proceeding's level of confidentiality. Overall, these clauses have a large potential for controlling dispute resolution processes, especially when they are more complex. As such, complex arbitration clauses will serve as the primary focus of this analysis.

Arbitration clauses can be found in the contractual agreements for most of the goods and services an average individual purchases<sup>3</sup>. For example, according to New York Times journalist Jessica Silver-Greenberg, "It is virtually impossible to rent a car, open a bank account, get a job, or enroll an elderly parent in a nursing home without signing away the right to take a case to

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<sup>1</sup> Repa, Barbara Kate. "Arbitration Basics." Nolo.com. Accessed September 27, 2016. <https://www.nolo.com/legal-encyclopedia/arbitration-basics-29947.html>.

<sup>2</sup> Ibid.

<sup>3</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. "Arbitration Everywhere, Stacking the Deck of Justice." Edited by Michael Corkery. The New York Times, November 1, 2015, New York ed. October 31, 2015. Accessed September 7, 2016. [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0).

court.”<sup>4</sup> In addition to these types of agreements, arbitration clauses are also commonly found in credit card applications, e-commerce transaction agreements, cell phone contracts, and internet service contracts<sup>5</sup>. Truthfully, arbitration clauses have become so popular with businesses that even the aforementioned list fails to fully identify every industry that inserts these terms into its contracts. In fact, the American Arbitration Association (AAA), a dominant firm in the field of arbitration, has reported that they handle more than 2 million arbitration proceedings each year<sup>6</sup>. This stunning statistic is not by accident: according to Honore Johnson, a researcher at Cornell University, companies are more frequently inserting arbitration clauses into their contractual agreements in order to “legal up” against trending increases in litigation in the United States<sup>7</sup>. Considering that a Cornell University-sponsored survey of Fortune 1000 corporations recently found that, over the past two decades, more corporations have embraced alternative dispute resolution and that this trend is continuing upwards<sup>8</sup>, a corporate need for a mitigation of litigation risk definitely could be driving the increasing popularity of arbitration clauses.

While they stand to be incredibly important terms in any agreement, arbitration clauses actually more often than not are buried deep within contracts<sup>9</sup>. As a result, most consumers and workers are not even aware of the amount of arbitration agreements to which they are bound<sup>10</sup>. While the placement or even the consumer ignorance of these clauses may not on the surface

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<sup>4</sup> Silver-Greenberg, Jessica, and Michael Corkery. "Bill Seeks to Limit Use of Arbitration to Avoid Courts." The New York Times, February 5, 2016, New York ed. February 4, 2016. Accessed September 7, 2016. <http://www.nytimes.com/2016/02/05/business/dealbook/bill-seeks-to-limit-use-of-arbitration-to-avoid-courts.html>.

<sup>5</sup> Silver-Greenberg, Jessica, and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*

<sup>6</sup> Repa, Barbara Kate. *Arbitration Basics*

<sup>7</sup> Johnson, Honore. "Adopting an Employment Arbitration Process." *Dispute Resolution Journal* 70, no. 4 (2015): 65-73. <http://cccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1785505040?accountid=10141>.

<sup>8</sup> Stipanowich, Thomas J., and J. Ryan Lamare. 2014. "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations." *Harvard Negotiation Law Review* 19.

<sup>9</sup> Silver-Greenberg, Jessica, and Michael Corkery. "In Arbitration, a ‘Privatization of the Justice System’." Compiled by Robert Gebeloff. The New York Times, November 2, 2015. October 1, 2015. Accessed September 26, 2016. <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>10</sup> Repa, Barbara Kate. *Arbitration Basics*

seem very material, in actuality many parties that did not notice arbitration clauses when signing their contracts have come up short in the dispute resolution process. Consumers have especially experienced the dangers of agreeing to contracts with hidden arbitration clauses over the last few decades. Overall, arbitration clauses often appear as minor additions to standard contractual agreements; however, in reality, these contractual terms carry with them an immense potential to demolish an individual's fundamental right to a jury trial.

### *What is Arbitration?*

Before delving into the facets and implications of the rising popularity of arbitration clauses, it is vital to also establish a baseline understanding of arbitration itself. To put simply, arbitration is an alternative to standard trial court litigation proceedings. In this alternative procedure known as arbitration, a dispute between two parties is brought to a neutral individual, known as an arbitrator. This decision-maker is selected by the parties involved in the dispute. The arbitrator, upon being briefed by both parties on the details of the dispute and then reviewing the evidence, makes a final decision in favor of either the plaintiff or the defendant. This decision typically is final and binding<sup>11</sup>. It is important to note that arbitration is a process that can only take place if both parties involved in the dispute have agreed to forgo their right to a jury trial in favor of this form of private dispute resolution instead<sup>12</sup>. Additionally, arbitration is very much a rights-based process. According to Honore Johnson, being rights-based essentially means that, in arbitration, one party is always deemed "right" based on either a contractual agreement or a statutory policy.<sup>13</sup> This contrasts with interest-based processes, which require that the parties in

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<sup>11</sup> "What Is Arbitration?" WIPO. Accessed September 27, 2016. <http://www.wipo.int/amc/en/arbitration/what-is-arb.html>.

<sup>12</sup> Ibid.

<sup>13</sup> Johnson, Honore. *Adopting an Employment Arbitration Process*

dispute negotiate a compromise to settle their disagreement<sup>14</sup>. Overall, arbitration as a method of dispute resolution is less formal, more efficient, and often less expensive than a courtroom trial.

Also vital to understanding arbitration is noting that there are different types of arbitration proceedings, and that some are more common than others are. First of all, arbitration can either be mandatory or voluntary. The nature of the arbitration in this regard depends on the willingness of the parties involved. While it was mentioned previously that arbitration is only possible when both parties have agreed to it, often this agreement occurs pre-dispute and, when push comes to shove, one party may no longer wish to enter arbitration. As a result, oftentimes plaintiffs find themselves in mandatory arbitration. When the proceeding is mandatory, this essentially means that the dispute must be resolved through arbitration because the parties have surrendered their rights to sue in court<sup>15</sup>. In contrast, when an arbitration is considered voluntary, both parties in the proceeding have agreed to arbitrate post-dispute<sup>16</sup>. In addition, arbitration can be either binding or nonbinding. The distinction between these two types is quite straightforward: if the proceeding is binding, the arbitrator's decision is final and can only be overturned by a court in very special circumstances<sup>17</sup>. In spite of these special circumstances, the overturning of an arbitrator's binding decision by a court is rare. In contrast, when a decision is nonbinding, either party may reject the decision and request a traditional courtroom trial to resolve the dispute instead<sup>18</sup>. Proceedings are most often mandatory and binding, leaving little room for either party to opt out of an arbitration decision.

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<sup>14</sup> Ibid.

<sup>15</sup> Repa, Barbara Kate. *Arbitration Basics*

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

Another important aspect of arbitration is the fact that the rules of evidence that are typically applied in traditional courtroom proceedings do not usually apply in arbitration<sup>19</sup>. This essentially means that, while the parties in a trial court may be limited by the court's restrictions on the amount of evidence that can be used to buttress their side of an argument in the dispute, parties in arbitration proceedings are not typically under these restrictions. While it is the job of the arbitrator to determine how much evidence is permissible in the proceeding, parties typically are able to present as much evidence as they need to in order to sufficiently make their cases.

#### *Arbitration Proceedings: A Breakdown*

It is necessary to recognize the key steps that take place during an arbitration proceeding in order to establish a full understanding of this form of dispute resolution. Typically, arbitration begins with the selection of an arbitrator—or arbitrators—by the parties involved in the dispute<sup>20</sup>. Arbitrations typically only need one arbitrator present unless the dispute is for an amount over \$50,000, in which case the procedure requires three arbitrators<sup>21</sup>. The choosing of the arbitrator(s) is based upon the selection process agreement included in the arbitration clause.

Arbitrators are most often selected from large arbitration firms, such as the American Arbitration Association (AAA), the National Arbitration Forum, or JAMS. These firms claim that they “[strive] to ensure a professional process” and each firm “[requires] their arbitrators to disclose any conflicts of interest before taking a case.”<sup>22</sup> Usually, before the hearing begins, arbitrators impose their own rules of procedure and then hold conferences with each of the parties to work out the details of the proceeding<sup>23</sup>. Unlike in a trial court, arbitrators may base

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<sup>19</sup> "Grenig & Scanza on Arbitration: Understanding Evidence (Part I)." *Dispute Resolution Journal* 70, no. 3 (2015): 85-96. <http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1746615066?accountid=10141>.

<sup>20</sup> Repa, Barbara Kate. *Arbitration Basics*

<sup>21</sup> "Arbitration." SEC.gov. October 23, 2014. Accessed October 14, 2016. <http://www.sec.gov/answers/arbproc.htm>.

<sup>22</sup> Silver-Greenberg, Jessica, and Michael Corkery. *In Arbitration, a 'Privatization of the Justice System'*.

<sup>23</sup> Repa, Barbara Kate. *Arbitration Basics*

their decisions upon “their own ideas of what is fair and just,”<sup>24</sup> in addition to principles of common and statutory law.

Arbitrators possess a large amount of authority over arbitration proceedings. In addition to establishing procedural rules and making the final arbitration decision, arbitrators also possess the power to grant preliminary relief, determine the materiality of evidence, set the time and place for a hearing, compel the attendance of the parties in a dispute, issue subpoenas, issue confidentiality requirements, determine the award for the winning party, and award punitive damages and arbitration fees as they see fit<sup>25</sup>.

During the actual arbitration, each party has an opportunity to make their case on the dispute using witnesses and evidence like in a traditional courtroom<sup>26</sup>. At the end of the hearing, the arbitrator makes a decision and is required to produce a signed record of the award<sup>27</sup>. As was mentioned previously, the decision of the arbitrator is typically final and can only be appealed under very limited circumstances, such as the presence of corruption or fraud<sup>28</sup>.

#### *State vs. Federal Arbitration Law*

Federal arbitration law is governed by the Federal Arbitration Act of 1925 (FAA), and state arbitration law is governed by the Revised Uniform Arbitration Act of 2000 (RUAA) in the states that choose to adopt it. These laws governing arbitration at a state and federal level are very similar, but they do have some key differences that are worth mentioning.

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<sup>24</sup> Ibid.

<sup>25</sup> Meyerson, Bruce E. "The Revised Uniform Arbitration Act: 15 Years Later." *Dispute Resolution Journal* 71, no. 1 (2016): 1-45. <http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1795660742?accountid=10141>.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Repa, Barbara Kate. *Arbitration Basics*

At its beginning, the FAA was the result of a “push for federal legislation over arbitration to make arbitration agreements enforceable.”<sup>29</sup> Two New Yorkers, Julius Cohen and Charles Bernheimer, had succeeded in achieving this legislation in their home state and then went to Congress to make their case for arbitration agreements<sup>30</sup>. The two argued that arbitration deserved this legislation because it was cheaper and faster than traditional litigation. Even further, supporters of the Act in 1925 claimed that the FAA was consumer friendly. Finding these arguments convincing enough, Congress unanimously agreed to pass the Federal Arbitration Act<sup>31</sup>.

Both the FAA and the RUAA are applicable to any agreement to arbitrate between two parties. However, the FAA requires that arbitration agreements be in writing in order to be enforceable, while the RUAA merely requires a record that does not necessarily need to be in writing<sup>32</sup>. In addition, the FAA has a much broader reach than the RUAA<sup>33</sup>. As a result, the RUAA attempts to answer some of the questions left open by the FAA in order to ensure uniform arbitration law at the state level. The RUAA also champions state law in arbitration proceedings, unlike the FAA<sup>34</sup>.

This paper will focus primarily upon federal arbitration law rather than state arbitration law because of the Supreme Court’s tendency to favor federal arbitration standards over state law. This is largely because the Court supports “a national policy favoring arbitration,” which, according to former Arizona Court of Appeals Judge Bruce Meyerson, “[withdraws] the power

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<sup>29</sup> Leslie, Christopher R. "The Arbitration Bootstrap." *Texas Law Review* 94, no. 2 (2015): 265-330. <http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1756953341?accountid=10141>.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Meyerson, Bruce E. *The Revised Uniform Arbitration Act: 15 Years Later*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

of the states to require a judicial forum for the resolution of claims...by arbitration.”<sup>35</sup> Said Supreme Court decisions will be discussed in greater detail later in this analysis.

### *Arbitration vs. Mediation*

To conclude this discussion of the basics of arbitration, it must be emphasized that this paper is an analysis of arbitration proceedings, not mediation. While both fall within the same family of alternative dispute resolution methods, the two proceedings are fundamentally different and yield very contrasting results.

First of all, the goals of mediation and arbitration differ largely. While both proceedings aim to resolve disputes, arbitration does so by pursuing an answer to the question of which party is essentially in the right in the disagreement according to statutory law, evidence, and the judgment of the arbitrator. In contrast, mediation is a proceeding that aims to resolve disputes through negotiation and compromise, so no single party comes out of the proceeding entirely victorious<sup>36</sup>.

Another difference between arbitration and mediation involves the differing roles of neutral third parties. In arbitration, a third party arbitrator is selected to hear the details of the dispute and then decide on a ruling either in favor or against the plaintiff. As a result, the arbitrator carries an immense amount of power over the fate of the parties participating in the proceeding. In contrast, a neutral third party in a mediation serves to facilitate communication between the two parties in order to “resolve their disagreement on terms they both voluntarily accept.”<sup>37</sup> As a result of these goals, the third party individual in the mediation process carries much less power than an arbitrator.

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<sup>35</sup> Ibid.

<sup>36</sup> *Grenig & Scanza on Arbitration: Understanding Evidence (Part I)*, 85-96

<sup>37</sup> Ibid.

Finally, arbitration is much more formal than mediation<sup>38</sup>. In arbitration, disputes are resolved following methods that are typically premeditated and orderly, often similar to a trial court proceeding. However, in mediation, proceedings are much more free-formed and open for modification. Overall, because of these differences in these forms of alternative dispute resolution, mediation will not be considered in conjunct with arbitration during this analysis.

### *Conclusion*

Arbitration can be very complex, but it is oftentimes viewed as a superb alternative to a traditional courtroom trial. Indeed, arbitration clauses offer a wide variety of benefits. Businesses especially favor arbitration heavily as a result. However, not all Americans agree that arbitration is as fantastic as many businesses claim. Arbitration, when abused, provides businesses with an unfair amount of power over their consumers and employees. These facets of arbitration give corporations an ability to practically guarantee dispute victory, and they rob the consumer of his or her right to a day in court. The benefits and drawbacks of arbitration will be discussed in great detail in the following two chapters.

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<sup>38</sup> Repa, Barbara Kate. *Arbitration Basics*

## Chapter 2: The Benefits of Arbitration

### *Arbitration as an Alternative to Traditional Litigation*

The characteristics of arbitration proceedings in the United States offer a wide variety of advantages to all parties in a dispute. In general, the nature of its process results in arbitration being preferable to traditional court proceedings in many aspects. Such aspects that make arbitration a preferred alternative to court trials include arbitration's strengths in efficiency, cost, flexibility, simplification, arbitrator expertise, and confidentiality, as well as its tendency to mitigate hostility between the parties involved. The many advantages that arbitration offers over traditional court litigation likely has contributed to the rising popularity of arbitration as a preferred method of dispute resolution over the last few decades.

When analyzing the benefits of arbitration in comparison to standard court trial processes, one of the key advantages arbitration possesses is the speed at which disputes are settled. According to a study by the Federal Mediation and Conciliation Services, an arbitration proceeding lasts approximately 475 days on average from the date of filing to the date a decision is made. In contrast, the same study found that a similar case brought to a trial court would take, on average, anywhere from one and a half to three years to reach a decision<sup>39</sup>. Of course, the expedience of an arbitration procedure is entirely dependent upon proper arbitration planning to ensure for a quick and organized process<sup>40</sup>, but nonetheless the flexibility of arbitration alone gives parties a much greater chance of resolving disputes in a quicker manner. The general efficiency advantage that arbitration has over court litigation is also largely attributable to the

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<sup>39</sup> Repa, Barbara Kate. "Arbitration Pros and Cons." Nolo.com. Accessed September 26, 2016. <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html>.

<sup>40</sup> Wilson, Therese. "Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?" *Journal of Consumer Policy* 39, no. 3 (09, 2016): 349-364. doi:<http://dx.doi.org/10.1007/s10603-016-9322-z>. <http://ecl.idm.oclc.org/login?url=http://search.proquest.com/docview/1811109695?accountid=10141>.

fact that arbitration normally does not allow motions for summary judgment or motions to dismiss, two provisions that are generally permitted in trial courts<sup>41</sup>. In addition, the scope of discovery, a phase in a lawsuit in which each party seeks evidence to make their case, is much more restricted in arbitration<sup>42</sup>. These limitations placed on the discovery process also result in greater efficiency. Overall, the speed in which disputes in arbitration are settled is perhaps one of the greatest advantages this form of alternative dispute resolution offers over traditional litigation.

The second largest advantage arbitration possesses over the pursuance of lawsuits by trial is the fact that arbitration is, more often than not, much cheaper than taking a case to court<sup>43</sup>. Lesser costs are most likely attributable to the fact that the process takes much less time to reach a verdict. However, it is important to note that the arbitration process is not always less expensive than litigation. Due to the rising popularity of arbitration, its settlement process is actually becoming more expensive<sup>44</sup>. In addition, if an arbitration is not well structured, it may end up being costlier than traditional litigation<sup>45</sup>. Nevertheless, arbitration is generally considered a less expensive alternative to the plaintiff's standard "day in court" and as a result should be considered a key factor in arbitration's tendency to be preferable over other dispute resolution options.

The flexibility of arbitration proceedings also offers key benefits for both parties involved in a dispute. Arbitration, unlike courtroom trials that are subject to the courtrooms' and judges'

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<sup>41</sup> Fojo, Robert. "12 Reasons Businesses Should Use Arbitration Agreements." LawGives. April 1, 2015. Accessed November 3, 2016. <https://www.lawgives.com/guide/551c5a68777773fa5160200/12-Reasons-Businesses-Should-Use-Arbitration-Agreements>.

<sup>42</sup> Ibid.

<sup>43</sup> Repa, Barbara Kate. *Arbitration Pros and Cons*

<sup>44</sup> Ibid.

<sup>45</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

crowded schedules<sup>46</sup>, can be planned around the needs and availabilities of the parties involved<sup>47</sup>. It is incredibly easy to see why those participating in arbitration would prefer it to a courtroom trial when considering this element of flexibility: any reasonable person would likely prefer settling a dispute when it is most convenient for them.

Additionally, the fact that arbitration generally has more simplified rules of evidence and procedure when compared to courtroom litigation is a key advantage. In general, procedure and evidence rules are often very complicated in court proceedings<sup>48</sup>. As a result of the large quantity of evidence rules in a trial court, oftentimes a case cannot even be presented in its entirety<sup>49</sup>. Arbitration is not subject to these rules, and as a result, arbitrators are much more likely to permit all relevant evidence<sup>50</sup>. The disparity between rules of evidence and procedure in arbitration and in a courtroom make arbitration all the more preferable for parties that wish to put forward as best a case as possible to achieve a ruling in their favor. These simplified rules also likely contribute to the efficiency advantage that was mentioned previously: Evidential and procedural rules being tailored to the needs of those involved in arbitration<sup>51</sup> likely leads to a quicker arbitration process.

Also important to mention when discussing the benefits of arbitration is the fact that there is often much less hostility between the parties involved in the dispute during proceedings. According to Barbara Kate Repa, it is more likely in arbitration that parties “work together peaceably rather than escalate their angst and hostility.”<sup>52</sup> The absence of hostility is much less

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<sup>46</sup> Fojo, Robert. *12 Reasons Businesses Should Use Arbitration Agreements*

<sup>47</sup> Repa, Barbara Kate. *Arbitration Pros and Cons*

<sup>48</sup> Fojo, Robert. *12 Reasons Businesses Should Use Arbitration Agreements*

<sup>49</sup> Smith, Stephen. "Why Arbitration Remains the Better Option." Greenberg Glusker. September 2011. Accessed November 3, 2016. <http://www.greenbergglusker.com/news/articles/Why-arbitration-remains-the-better-option>.

<sup>50</sup> Ibid.

<sup>51</sup> Repa, Barbara Kate. *Arbitration Pros and Cons*

<sup>52</sup> Ibid.

common in traditional court proceedings<sup>53</sup>. This lack of strong aggression between the two parties in a dispute is likely because arbitration demands much more cooperation<sup>54</sup>.

Finally, both parties to a dispute generally prefer arbitration because of the fact that they have more of a say in choosing the individual(s) that will oversee their proceeding. The ability of the parties to choose their arbitrator(s) allows for the recruitment of individuals with a particular subject matter expertise<sup>55</sup> in order to ensure that the best decision is reached. This notion is certainly an advantage over courtroom rulings that are decided by randomly assigned judges and juries<sup>56</sup> that are potentially under informed about the subject matter at hand. Overall, the opportunity to select an arbitrator that best suits a particular case is a key factor that makes arbitration more preferable to the parties in a dispute. However, as will be discussed later, this aspect of arbitration can be abused if parties select individuals that are more likely to make biased decisions. Nonetheless, the freedom of arbitrator selection makes the arbitration process much more preferable than a courtroom trial.

The wide variety of advantages that arbitration offers over courtroom litigation causes both consumers and businesses alike to prefer arbitration, and for a good reason. Because arbitration is generally faster, less expensive, more flexible, more simplified, less hostile, and more accommodating to the specific needs of a case, businesses and consumers both have plenty of reasons to be in favor of arbitration. However, these same benefits also provide businesses with the opportunity to abuse the arbitration process, leading to a whole additional collection of reasons why companies in particular prefer to settle disputes through arbitration. The potential to

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<sup>53</sup> Fojo, Robert. *12 Reasons Businesses Should Use Arbitration Agreements*

<sup>54</sup> Ibid.

<sup>55</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

<sup>56</sup> Fojo, Robert. *12 Reasons Businesses Should Use Arbitration Agreements*

abuse an arbitration proceeding in order to obtain a favorable judgment is, ultimately, what causes arbitration to become harmful to the consumer. All of these points will be discussed in much greater detail as this analysis continues.

### *Why Businesses Especially Love Arbitration*

Companies favor this alternative method of dispute resolution for all of the reasons mentioned in the previous section, but they also favor arbitration because arbitration favors them. The nature of arbitration often leads to favorable results for businesses. For this reason, it is no wonder that arbitration is becoming an increasingly popular alternative to trial proceedings: certain facets of arbitration often provide businesses with the opportunity to take steps to increase the likelihood of an arbitration ruling in their favor. As a result, companies are largely incentivized to insert arbitration clauses into their contractual agreements. Many factors contribute to arbitration's tendency to favor and protect businesses, which in turn causes businesses to largely prefer arbitration to standard court litigation. These factors include arbitration's tendency to be confidential, low-risk, and predictable. In addition, a huge factor that leads businesses to favor arbitration when settling disputes is the fact that arbitration tends to honor additional elements of arbitration clauses, such as class action waivers, that would not typically be honored in a trial court. A combination of all of these factors causes arbitration to be incredibly business-friendly and therefore recommended for corporations looking to mitigate litigation risk.

Perhaps one of the most important aspects of arbitration from a business perspective is the fact that proceedings are typically deemed private. Such an element of confidentiality serves to protect businesses in a way that traditional court proceedings cannot. Privacy is required either

by the arbitration's procedural rules<sup>57</sup>, or by an agreement of the parties that is typically found in the arbitration clause<sup>58</sup>. Keeping the details of an arbitration out of the public eye is immensely beneficial for the corporations involved in disputes because this privacy gives companies the opportunity to protect their reputation and minimize public scrutiny of their business practices<sup>59</sup>. This protection is especially important for companies involved in employee or consumer disputes, as the details of these types of cases could reflect poorly on the corporation. Because of this confidentiality emphasis, it is in a business's best interest to move forward with arbitration in lieu of traditional litigation.

Arbitration overall is a much less risky form of dispute settlement<sup>60</sup>. Companies favor arbitration proceedings over trial hearings much more frequently as a result. Such a lessening of a business's exposure to risk is mostly because a company has much less to lose in arbitration than in court if a final ruling is not made in their favor. One reason for this lesser risk is the fact that punitive damages are rarely included in arbitration awards<sup>61</sup>. Punitive damages are, essentially, damages in excess of simple compensation that are rewarded to further punish the wrongdoer and deter others from committing similar wrongs<sup>62</sup>. A lack of potential punitive damage payment provides a corporation with the assurance that, even if it loses a case, the costs of the obligatory award payments still will not be incredibly excessive. Based on this information, it makes intuitive sense that corporations favor arbitration. From a business perspective, a preference for arbitration can certainly be expected when considering the large

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<sup>57</sup> Ibid.

<sup>58</sup> Repa, Barbara Kate. *Arbitration Pros and Cons*

<sup>59</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

<sup>60</sup> Johnson, Honore. "Adopting an Employment Arbitration Process." *Dispute Resolution Journal* 70, no. 4 (2015): 65-73. <http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1785505040?accountid=10141>.

<sup>61</sup> Ibid.

<sup>62</sup> "Legal Definition of Punitive Damages." *The Free Dictionary*. Accessed December 03, 2016. [http://legal-dictionary.thefreedictionary.com/Punitive Damages](http://legal-dictionary.thefreedictionary.com/Punitive%20Damages).

disparity between the financial risks involved in trial court proceedings compared to those in arbitration.

Another key reason why businesses especially prefer to arbitrate when faced with a dispute is the fact that it is generally easier to predict how substantive law will be applied in an arbitration hearing<sup>63</sup>. As mentioned in the previous chapter, arbitrators are not required to strictly follow the law when making a decision on a dispute. However, according to Stephen Smith, arbitrators actually are more likely than court judges to correctly follow the law. Smith states that arbitrators are more likely to make a lawfully correct ruling due to the fact that arbitrators—unlike trial judges—are paid for their time, are capable of taking ample time to make a proper decision, and are more qualified in business and civil law<sup>64</sup>. Smith actually advises business to insert arbitration clauses into their contracts for this reason, among others.

Also an incredibly important element of arbitration that must be mentioned is the fact that it often enables class action waivers. A class action, essentially, is a proceeding in which individuals who lose small amounts of money due to a company's violation of their rights are able to join together to seek relief and hold businesses liable for wrongdoing<sup>65</sup>. A person with a small claim is not likely to pursue a case alone because the cost of litigation, even through arbitration, typically is much greater than the maximum possible recovery amount of his or her claim. For this reason, class actions allow these small claim holders to still be capable of pursuing justice. Said justice can, however, be obstructed with a class action waiver. A class action waiver is a contractual term that prohibits the consumers and workers that agree to it from

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<sup>63</sup> Smith, Stephen. *Why Arbitration Remains the Better Option*

<sup>64</sup> Ibid.

<sup>65</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. "Arbitration Everywhere, Stacking the Deck of Justice." Edited by Michael Corkery. *The New York Times*, November 1, 2015, New York ed. October 31, 2015. Accessed September 7, 2016. [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0).

bringing or participating in a class action against the corporation to which they are contracted<sup>66</sup>. The enforcement of class action waivers is a major reason for businesses to adopt arbitration clauses in their contracts because it essentially allows a firm to become immune to harmful class action litigation.

Class action waivers often result in a plaintiff's abandonment of his or her claim altogether. Because the cost to take a dispute to court or arbitration typically is much greater than the value of a plaintiff's small claim, a majority of consumers and workers bound by class action waivers choose to just take their losses and capitulate. For example, research conducted by the New York Times found that, between 2010 and 2014, only 505 consumers went to arbitration over a dispute of \$2500 or less<sup>67</sup>. Drawing back upon the AAA statistic from the previous chapter that stated that their firm handles over 2 million arbitrations per year, this is an alarmingly miniscule number of small claims. Based on this data, one can conclude that most consumers with small claims that were barred from pursuing a class action simply chose not to move forward with their cases. A plaintiff's tendency to opt out of litigation due to a class action waiver is fantastic from a business perspective: Because businesses are able to limit consumers and employees to pursuing claims solely on an individual basis, they are able to mitigate a massive amount of litigation risk that typically coincides with class action lawsuits. Such a protection over corporate disputes certainly incentivizes businesses to pursue arbitration instead of a jury trial, where class action waivers are not enforced.

Finally, businesses typically favor arbitration because arbitration typically favors businesses. For one, the rules and the arbitrators in arbitration tend to favor corporations.

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<sup>66</sup> Leslie, Christopher R. "The Arbitration Bootstrap." *Texas Law Review* 94, no. 2 (2015): 265-330. <http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1756953341?accountid=10141>.

<sup>67</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. *Arbitration Everywhere, Stacking the Deck of Justice*

Because arbitrators often view the company that is a party to an arbitration proceeding as their “client”, it is common that an arbitration ruling will favor the business over the consumer<sup>68</sup>. The implications of such a bias in arbitration will be discussed in detail in the following chapter.

Overall, arbitration stands as potentially the best option for settling disputes from a corporate perspective. Based on the large quantity of benefits that arbitration has to offer, particularly to businesses, it is easy to see why. Because companies especially benefit from the confidentiality, risk mitigation, arbitrator expertise, and predictability of arbitration, it is no wonder that most corporations are advised to insert arbitration clauses into their contracts in order to mitigate legal risk<sup>69</sup>. Class action waivers and the tendency for arbitration to favor businesses especially explains why companies favor arbitration over courtroom trials.

### *Conclusion*

Overall, arbitration as a method of dispute resolution offers a wide variety of benefits to the consumer and the corporation alike. The nature of these proceedings is especially advantageous to businesses, who can greatly mitigate their legal risk by choosing to arbitrate. Unfortunately, the same cannot necessarily be said for consumers and employees involved in the arbitration process. At the very least, it is clear from this discussion that arbitration should be a preferred method of dispute resolution because of the elements of efficiency, cost reduction, flexibility, and simplification that arbitrations offer to both sides of a disagreement. Indeed, arbitration overall is much more beneficial than court litigation for many reasons, especially from the perspective of the corporation. Unfortunately, anything that has pros also has cons.

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<sup>68</sup> Silver-Greenberg, Jessica, and Michael Corkery. "In Arbitration, a 'Privatization of the Justice System'." Compiled by Robert Gebeloff. The New York Times, November 2, 2015. October 1, 2015. Accessed September 26, 2016. <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>69</sup> Fojo, Robert. *12 Reasons Businesses Should Use Arbitration Agreements*

Whether or not the disadvantages of arbitration, especially from the consumer perspective, outweigh these aforementioned advantages will be investigated in the subsequent chapter.

### Chapter 3: The Shortcomings of Arbitration

It is clear from the previous chapter's discussion that arbitration does offer a wide variety of benefits over the traditional courtroom trial for all parties involved in a dispute. At the very least, these advantages justify the necessity of honoring arbitration as a valid form of dispute resolution in America's justice system. However, many of the benefits of arbitration greatly favor businesses over the everyday consumer or employee that is bound by an arbitration clause. As a result of this corporate favoritism, legal advisors typically recommend that businesses insert arbitration clauses into their contractual agreements. Unfortunately, in spite of the aforementioned benefits of arbitration, these clauses do not always stand to benefit the party on the other side of a business agreement. The fact that arbitration can deny consumers and employees of their fundamental rights serves as a major shortcoming of this form of alternative dispute resolution.

The reality of the traditionally business-friendly arbitration process is that it is incredibly unfair for consumers and employees looking to seek remedies from businesses. In arbitration, customers and workers alike often do not stand a chance against major businesses because corporations often possess a disproportionate amount of power over arbitration proceedings. This power allows a dispute to be settled in a way that harms the company involved as little as possible. This unequal balance of power can be attributed to a variety of factors, such as the fact that parties are often forced to agree to terms on a "take it or leave it" basis or are not aware that they are bound by an arbitration clause. The unjust nature of arbitration from a consumer perspective is also partially due to the fact that arbitration decisions are often subject to arbitrator biases. The ability of corporations to demand confidentiality during proceedings additionally serves to unfairly protect businesses from "harmful" litigation. As if the above disadvantages

from the consumer perspective were not enough, the chances of a consumer obtaining a fair ruling become even slimmer when considering the rising popularity of bootstrapping in arbitration clauses. Bootstrapping will be further defined later in this chapter. As a result of arbitration's tendency to favor businesses, consumers and employees often get the short end of the stick when a decision is made. Considering the fact that it is practically impossible to appeal an arbitrator's decision, it currently appears that nearly every facet of the arbitration process is stacked up against the consumer.

Being business-friendly, arbitration currently stands as "a way to circumvent the courts and bar people from joining together in class action lawsuits," which prevents citizens from "[fighting] illegal and deceitful business practices."<sup>70</sup> The effects and implications of this massive consumer disadvantage in arbitration are vast, unjust, and incredibly troublesome. While arbitration does stand as an alternative form of dispute resolution that offers many advantages over traditional courtroom trials, the process's shortcomings from the consumer and employee perspective are unacceptable and must be addressed. Best said by Boston Federal Judge, William G. Young, "business has a good chance of opting out of the legal system altogether and misbehaving without reproach"<sup>71</sup> as arbitration exists currently.

*Surprise! You are bound by an Arbitration Clause!*

Perhaps the most horrific characteristic of arbitration clauses is the fact that most consumers and workers are not even aware that they are bound by them until it is too late. The consumer's typical lack of awareness in this regard is attributable to the fact that there exists

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<sup>70</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. "Arbitration Everywhere, Stacking the Deck of Justice." Edited by Michael Corkery. The New York Times, November 1, 2015, New York ed. October 31, 2015. Accessed September 7, 2016. [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0).

<sup>71</sup> Ibid.

today a general consumer ignorance of the “fine print” in contracts. Even if consumers or workers do not wish to be bound by arbitration clauses, oftentimes the contracts that contain them are presented to consumers on a “take it or leave it” basis, and as a result, buyers have no choice but to agree to all the terms. The fact that consumers are either unaware of what they have agreed to or incapable of doing anything to avoid arbitration clauses has enabled greater corporate control over arbitration proceedings. Because consumers have no choice but to be bound by the arbitration clauses they agree to, whether knowingly or not, corporations are able to engineer arbitration terms that practically guarantee that they will come out of an arbitration proceeding unscathed and victorious.

When a contract is presented to a party on a “take it or leave it” basis, it is known as a contract of adhesion<sup>72</sup>. The ability of adhesion contracts to bind consumers to arbitration in the event of a dispute serves as a major limitation of arbitration clauses from the consumer perspective. Adhesion contracts create an incredibly uneven playing field in the realm of contractual negotiation<sup>73</sup>. When a contract is presented on a “take it or leave it” basis, consumers have no choice but to agree to the included arbitration clause, no matter how unfairly the arbitration’s terms have been engineered to facilitate corporate victory. Consumers are then left to choose between agreeing to proceed in unfair arbitration and abandoning the agreement altogether, practically guaranteeing that corporations will be able to successfully create arbitration clauses that yield rulings in their favor. Jessica Silver-Greenberg describes this dilemma best in her New York Times article: “For many people, when the choice is between

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<sup>72</sup> Wilson, Therese. "Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?" *Journal of Consumer Policy* 39, no. 3 (09, 2016): 349-364. doi:<http://dx.doi.org/10.1007/s10603-016-9322-z>.

<http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1811109695?accountid=10141>.

<sup>73</sup> Repa, Barbara Kate. "Arbitration Pros and Cons." Nolo.com. Accessed September 26, 2016. <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html>.

giving up the right to go to court or the chance to get a job, it is not a choice at all.”<sup>74</sup>

Unfortunately, most contracts between businesses and consumers and between employers and employees are contracts of adhesion<sup>75</sup>. As a result, one can infer that many of the consumers and workers that are compelled to settle disputes through arbitration due to previous arbitration agreements were not voluntarily agreeing to arbitrate in the first place. The court’s tendency to demand that these fundamentally nonconsensual arbitration agreements be honored certainly serves as a drawback to the arbitration process as it currently exists.

Whether a contract is presented to a consumer on a “take it or leave it” basis or not, many consumers are not even aware that arbitration clauses exist in the agreements they sign. In many cases, individuals have not knowingly consented to arbitrate disputes arising out of their contracts<sup>76</sup>. Especially in a time when electronic contracts are becoming much more commonplace, an unfortunate truth is that many Americans no longer take the time to read through the terms of a contract before signing it. Recent empirical research highlighted by Therese Wilson “has confirmed the general lack of both awareness of, and understanding of, arbitration clauses...by consumers.”<sup>77</sup> As a result, many individuals are not aware that they are forfeiting their right to a jury trial by agreeing to an unfair arbitration clause. This unfortunate truth only exacerbates the problem of unfair arbitration.

American ignorance of this growing problem provides an opportunity for businesses to exploit arbitration clauses even further. According to F. Paul Bland Jr., “the sharp shift away

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<sup>74</sup> Silver-Greenberg, Jessica, and Michael Corkery. "In Arbitration, a 'Privatization of the Justice System'." Compiled by Robert Gebeloff. The New York Times, November 2, 2015. October 1, 2015. Accessed September 26, 2016. <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>75</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

from the civil justice system has barely registered with Americans,” because the “tangle of bans” inside arbitration clauses have been inserted into contracts that no one reads in the first place<sup>78</sup>. Based on this information, one can infer that it must be quite easy to manipulate the system if the parties that are most affected by wrongdoing are not even aware that they are being wronged. Even when consumers do read contractual terms before signing, oftentimes they are not aware what they are agreeing to by accepting the terms of an arbitration clause. Consumer rights lawyer Jane Santoni herself admits that she has “never met a client who’s understood what the word arbitration clause meant.”<sup>79</sup> As a result, consumers and employees oftentimes sign away their fundamental courtroom rights simply because they do not know any better.

Unfortunately, the courts still mandate arbitration to the same degree whether or not the plaintiff knew what they were agreeing to when he or she signed their contract. Even if a consumer had no choice but to agree to all the terms of a contract, the courts still fully enforce arbitration clauses. This fact is a fundamental shortcoming of arbitration. Santoni herself claims that “if they put in the contract ‘you are waiving a constitutional right,’ that would get people’s attention...but they don’t say that.”<sup>80</sup> She makes an interesting point here. If preventing consumer exploitation is as easy as re-writing contractual elements in non-technical language to facilitate better understanding, the courts should not be forcing consumers into arbitration simply because they were not aware that they were surrendering their trial rights. Overall, it does not seem fair that citizens are able to waive their rights in this way without actually comprehending what they are agreeing to. In the spirit of justice, the courts appear overbearing in forcing consumers to arbitrate when they have unintentionally waived their rights. Doing so establishes

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<sup>78</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. *Arbitration Everywhere, Stacking the Deck of Justice*

<sup>79</sup> Silver-Greenberg, Jessica, and Michael Corkery. *In Arbitration, a ‘Privatization of the Justice System’*

<sup>80</sup> Ibid.

the notion that the courts tend to favor businesses in this realm of dispute settlement, which offers a large opportunity for further consumer exploitation.

### *Arbitrator Bias*

Arbitration tends to favor businesses over consumers in part because of the frequent presence of arbitrator bias during proceedings. The potential for favoritism in these decision makers serves as a significant shortcoming of arbitration. Arbitrator bias most likely exists as a threat to the arbitration process because the proceedings do not have any strict rules that prevent conflicts of interest among arbitrators<sup>81</sup>. While certain arbitration firms may prohibit conflicts of interest, no hard and fast rule currently exists that bans arbitrator bias in all arbitration proceedings. Because there are no restrictions in place to prevent the selection of biased arbitrators, companies are much more able to select decision makers that are more inclined to rule in their favor. As a result, arbitrators also have a greater incentive to rule in the favor of a business that can subsequently hire them for future arbitration hearings. Overall, this ever-present threat of arbitrator bias serves as one of the reasons consumers and workers come up short in most arbitration hearings.

Opportunities for arbitrator bias arise in part because the arbitrator is largely at will to dictate the nature of his or her arbitration proceeding. For example, arbitrators are “largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold,”<sup>82</sup> meaning that they possess the power to make decisions regarding evidence in favor of businesses if they so wish. In addition, the fact that arbitrators are able to make decisions based on their own judgment without being as tightly bound by the rule of law, which was discussed previously, allows arbitrators the opportunity to favor corporations when making a

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

final decision. For example, religious institutions with arbitration clauses can demand an arbitration process with an arbitrator that is guided by the rules of the Bible instead of by state or federal law<sup>83</sup>, which allows those businesses to control the legal outcomes of disputes by using first amendment freedoms of religion. Few courts have intervened on this issue of religious arbitration<sup>84</sup>, and this is merely one example of the freedoms that arbitrators may take when attempting to reach a verdict. Essentially, the absence of arbitration regulation from the decision-making perspective allows arbitrators to have the freedom to make non-neutral decisions if they wish.

The biggest reason that arbitrator bias stands to threaten the fairness and neutrality of the arbitration process is the fact that arbitrators have developed a tendency to rule in favor of the businesses that hire them<sup>85</sup>. Based on the fact that a New York Times study of arbitration records indicated that, between 2010 and 2014, a total of forty-one arbitrators had each handled ten or more cases for a single company<sup>86</sup>, it is clear that arbitrators receive more “repeat clients” when they rule in favor of a business during a dispute. While it is understandable why arbitrators may wish to develop a favorable relationship with a company in order to obtain more opportunities to oversee future arbitration proceedings, these biases rob the plaintiff of his or her right to an impartial trial. Unfortunately, even if an arbitrator feels morally inclined to make an unbiased decision, he or she often cannot without fear of losing business for their arbitration firm<sup>87</sup>. For example, in interviews conducted between arbitrators and the New York Times, more than three

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<sup>83</sup> Silver-Greenberg, Jessica, and Michael Corkery. "In Religious Arbitration, Scripture Is the Rule of Law." The New York Times, November 3, 2015, New York ed. October 2, 2015. Accessed September 26, 2016. <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

<sup>84</sup> Ibid.

<sup>85</sup> Repa, Barbara Kate. *Arbitration Pros and Cons*

<sup>86</sup> Silver-Greenberg, Jessica, and Michael Corkery. *In Arbitration, a 'Privatization of the Justice System'*

<sup>87</sup> Ibid.

dozen arbitrators claimed that they felt “beholden” to companies during proceedings<sup>88</sup>. Such a statistic becomes even more alarming when considering personal accounts from arbitrators, like Stefan M. Manson, who ruled in favor of an employee in an age discrimination suit and was subsequently never hired to hear another employment case<sup>89</sup>. Clearly, even if an arbitrator wishes to decide without bias, achieving a victory over a corporation can be next to impossible.

From a business standpoint, it is understandable why arbitrators may feel pressure to decide in favor of a corporation. After all, arbitration firms are private entities whose success is dependent upon whether or not they are hired to conduct arbitration hearings. Because typical business success is often determined by a company’s ability to keep its customers happy and recurring, it is no wonder why arbitration bias is posing such a problem: It is practically necessary in order to keep the arbitration firm in business. Considering the fact that companies often specify in their contracts the firm that will exclusively handle their arbitrations<sup>90</sup>, it is even easier to see why arbitrators become incentivized to decide in favor of businesses in order to keep their own arbitration firms successful. These incentives, coupled with the fact that arbitrators are not required to specify the reasons for their decisions<sup>91</sup> and the fact that it is very difficult to appeal an arbitrator’s ruling<sup>92</sup>, practically guarantee defeat for employees and consumers.

Overall, the incentives and opportunities for biased decision making that exist within the arbitration process pose a great threat to the achievement of a fair ruling in the settlement of a dispute. These biases, in combination with the other shortcomings of arbitration that will be

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

<sup>92</sup> Ibid.

discussed subsequently, make it nearly impossible for a consumer to benefit from the arbitration process.

*Protecting the Corporation, Ignoring the Consumer*

Without yet having even fully discussed all the ways in which arbitration favors the corporate world, it is already easy to see that consumers and employees begin the arbitration process at an incredibly unfair disadvantage. While to a certain extent one can argue that corporations are merely taking advantage of what is available to them in the dispute resolution process, there is something to be said about arbitration's tendency to favor businesses. The very nature of arbitration as it currently exists practically guarantees a corporate victory. Even in the off chance that a plaintiff triumphs against a corporation, privacy restrictions still ensure that companies suffer minimal reputational damage from a hearing. This unfair protection is another shortcoming of arbitration in the fact that it unfairly supports the corporate party in a proceeding even in the event of a loss.

Confidentiality, while noted previously as a positive aspect of the arbitration process, also can serve as a drawback if it results in a corporation not being rightfully punished or exposed for wrongdoing. To draw back upon what was discussed previously, corporations essentially are able to ensure that arbitration be conducted privately and confidentially simply by inserting the requirement into their arbitration clauses. This is incredibly beneficial for businesses because it allows them to protect their reputations. However, it must be noted that the court's enforcement of arbitration confidentiality requirements may rob consumers all over the world of information that is important for their well-being. As pointed out by Jessica Silver-Greenberg, "thousands of cases brought by single plaintiffs over fraud, wrongful death, and rape are now being decided

behind closed doors.”<sup>93</sup> Keeping information that is this important for consumer safety purposes behind closed doors only serves to place future consumers in harm’s way. The element of privacy within arbitration especially is a limitation of this form of alternative dispute resolution because it becomes even more difficult for anyone to tell if the proceedings are conducted fairly if the proceedings are kept confidential<sup>94</sup>. As a result, unfairness due to factors such as arbitrator bias or the use of adhesion contracts will not be noticed by the public and therefore will not be addressed or reviewed by courts. Even further, because the Federal Government does not require any sort of public reporting for arbitration, such a lack of consumer protection remains a problem even without specified confidentiality requirements. Overall, the unshakable confidentiality of the arbitration process may actually be more of a drawback than a benefit.

### *Bootstrapping*

Arbitration is bad enough for the consumer without even considering bootstrapping. As if arbitrator bias, adhesion contracts, inconspicuous arbitration clauses, and arbitration confidentiality were not enough to mitigate a business’s legal risks at the expense of the worker or consumer, bootstrapping stands as a lesser-known but equally powerful way for corporations to protect themselves through arbitration. The legal term “bootstrapping,” was coined by UCI Law Professor Christopher R. Leslie. According to Professor Leslie, it essentially is a situation where firms insert terms that are actually unrelated to arbitration into their arbitration clauses “in the hopes that judges will be more likely to enforce terms embedded in arbitration clauses.”<sup>95</sup> Many of these terms that are inserted into arbitration clauses are, on their own, considered legally unconscionable in many states, and therefore unenforceable. However, according to

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<sup>93</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. *Arbitration Everywhere, Stacking the Deck of Justice*

<sup>94</sup> Silver-Greenberg, Jessica, and Michael Corkery. *In Arbitration, a ‘Privatization of the Justice System’*

<sup>95</sup> Leslie, Christopher R. "The Arbitration Bootstrap." *Texas Law Review* 94, no. 2 (2015): 265-330.  
<http://ecl.idm.oclc.org/login?url=http://search.proquest.com/docview/1756953341?accountid=10141>.

Professor Leslie, many courts enforce the same unconscionable terms when they are inserted into arbitration clauses<sup>96</sup>. Examples of such unconscionable terms will be highlighted later in this section. Recent rulings made by the United States Supreme Court further support the enforceability of unconscionable terms that are included in arbitration clauses, making the odds of consumer justice in arbitration even slimmer.

Bootstrapping appears to be one of the largest threats to maintaining arbitration fairness. Standing as the corporation's most flexible tool to protect itself from harmful litigation, bootstrapping and the Federal Court's treatment of it is one of the most harmful shortcomings of arbitration. Without the protection of the states to ensure fair treatment for consumers and employees during arbitration, businesses are free to unfairly engineer arbitration clauses to minimize the already miniscule damages they might suffer due to dispute settlements.

Before proceeding, it is important to mention that the majority of research that has been conducted on bootstrapping was performed and analyzed by Professor Christopher Leslie. While this section of discussion draws mainly from Professor Leslie's work, this issue of bootstrapping and the implications of its enforceability in the American judicial system are incredibly important to consumer and employee rights and to the nature of arbitration as a whole. Overall, though the problem of bootstrapping can be said to be just one man's opinion, it is an opinion that has great merit and is worth considering extensively in the context of this analysis.

#### I. The Rise of Bootstrapping

Over the past few decades, the policies of the American justice system have evolved to favor arbitration<sup>97</sup>. Such an evolution was catalyzed by two Supreme Court decisions that effectively set a tone for arbitration-friendly rulings that have been subsequently echoed by the

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

lower courts. The Supreme Court decisions in *AT&T Mobility LLC vs. Concepcion* (2011) and *American Express Co. vs. Italian Colors Restaurant* (2013) together have paved the way for a more universal enforceability of arbitration clauses, no matter their terms. Each of these decisions draws upon the Federal Arbitration Act (FAA) that was previously described in this paper. In response to these decisions, according to Professor Leslie, “firms are harnessing the reasoning of these opinions in order to insert a variety of unconscionable contract terms into arbitration clauses.”<sup>98</sup> What’s worse, the courts are letting them.

Before delving into the details of the above court cases, it is important to define a few important concepts that are relevant to these decisions. First, one cannot understand the dangers of bootstrapping without first understanding unconscionability. Unconscionability is an element of contract law—and, therefore, state law—that demands that the terms of a contract be considered unenforceable if they contain unconscionable terms<sup>99</sup>. The Law Dictionary states that a term is unconscionable if it is “so unfair to a party that no reasonable or informed person would agree to it.”<sup>100</sup> These contractual terms can be deemed as either substantively or procedurally unconscionable. Substantive unconscionability applies if the actual terms of the contract are unconscionable, while procedural unconscionability applies when the process by which the contract is made is deemed unconscionable<sup>101</sup>. State contract law ordinarily deems unconscionable contracts and unconscionable contract terms unenforceable, but recent Supreme Court decisions have undermined this unconscionability defense<sup>102</sup>.

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> "Legal Definition of Unconscionable." The Free Dictionary. Accessed November 20, 2016. <http://legal-dictionary.thefreedictionary.com/unconscionable>.

<sup>101</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>102</sup> Ibid.

Also important to understand when analyzing the aforementioned cases is the Effective Vindication Doctrine. This arbitration-specific doctrine essentially provides that one cannot compel arbitration if the proceedings rob the plaintiff of his or her statutory rights<sup>103</sup>. It was created by the Supreme Court as a way to ensure that arbitration “remains a real method of dispute resolution.”<sup>104</sup> Unfortunately, the Supreme Court’s recent rulings in favor of business-friendly arbitration have given companies a greater incentive to insert waivers of statutory rights into their arbitration clauses because said decisions have inherently undermined the Effective Vindication Doctrine in the same way that they have undermined the unconscionability defense.

When considering elements of unconscionability and the Effective Vindication Doctrine, it is natural to wonder how items once rendered unenforceable become acceptable when they are found within an arbitration clause. The main answer to this question is found by examining the Supreme Court’s evolution of its interpretation of the Federal Arbitration Act (FAA) over the past few decades. As was mentioned in this paper’s previous overview of the FAA, the Act was passed by Congress in 1925 because arbitration was viewed to possess a variety of advantages over traditional litigation. However, it is crucial to this paper’s examination of the FAA to mention that, according to Professor Christopher Leslie, the 1925 Congress that successfully passed this legislation was solely concerned with arbitration proceedings for disputes between merchants<sup>105</sup>. As we know from this paper’s previous discussion of arbitration, this merchant exclusivity in the proceedings no longer exists. In fact, it seems as though the most popular use of arbitration these days is for disputes between consumers and businesses or employees and their employers. This shift is likely because businesses realized that they could better mitigate

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

their legal risk by inserting arbitration clauses into contracts with consumers and employees, and because the Supreme Court began allowing it. With that being said, the broadening of arbitration's reach to include these additional parties since the FAA's creation in 1925 is primarily because of the fact that the Supreme Court's interpretation of the Federal Arbitration Act has evolved significantly over the years. In particular, the Supreme Court's understanding of Section 2 of the FAA has allowed arbitration to become more applicable to non-merchant parties<sup>106</sup>. Section two states:

*A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*<sup>107</sup>

According to Professor Leslie, the Supreme Court interprets this part of the Act to mean that the FAA overrides any state law that prohibits arbitration for any reason<sup>108</sup>. This interpretation is the primary reason that bootstrapping has become such a problem for consumers: because the Supreme Court asserts that the FAA allows for it. According to Professor Leslie, the Supreme Court's allowance for the expanding reach of arbitration clauses "fundamentally undermines the expansive body of state and federal law designed to protect consumer and worker interests."<sup>109</sup> Based on this opinion, it is possible that this shifting interpretation is the primary reason for why consumer rights are consistently being violated by the now business-friendly nature of arbitration. At the very least, it is important to note that the results of this FAA interpretation

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<sup>106</sup> Ibid.

<sup>107</sup> U.S. Congress. Federal Arbitration Act: P.L, 43 Stat. 883, February 12, 1925. By Garrett E. Brown. Cong.

<sup>108</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>109</sup> Ibid.

often violate the seventh amendment to the Constitution, which preserves the citizen's right to a jury trial<sup>110</sup>. This right disappears when parties are forced into arbitration.

The Supreme Court's interpretation of the FAA began to change in 1980s<sup>111</sup>. At that point, the Court began to argue that the 1925 Congress intended that the FAA create a "federal policy in favor of arbitral dispute resolution"<sup>112</sup> and for the FAA to preempt state laws<sup>113</sup> so that arbitration would be enforced according to its terms. Since then, the Court has issued over a dozen arbitration-friendly opinions similar to the one mentioned above<sup>114</sup>. The development of this "regime where the legal claims of consumers and employees must be decided in private arbitration"<sup>115</sup> instead of court is best exemplified through an examination of two particular Supreme Court rulings.

The case of *AT&T Mobility LLC vs. Concepcion* in 2011 resulted in a decision that spearheaded arbitration's transformation into a process that is harmful to the consumer. Vincent and Liza Concepcion, who were seeking class action treatment regarding an unfair \$30 charge from AT&T for what was supposed to be a free cell phone, brought the case to a California court<sup>116</sup>. The couple had signed an adhesion contract containing an arbitration clause with a class action waiver, which the state of California did not consider enforceable. After the California Supreme Court ruled not to honor the class action waiver, the case made its way to the United States Supreme Court. The Court held that the FAA preempted any state laws that made class

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<sup>110</sup> U.S. Constitution, amend. 7, sec. 3, cl. 2.

<sup>111</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>112</sup> *Mitsubishi Motors Corp vs. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 631.

<sup>113</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Liptak, Adam. "Supreme Court Allows Contracts That Prohibit Class-Action Arbitration." *The New York Times*, April 28, 2011, New York ed. April 27, 2011. Accessed November 3, 2016. <http://www.nytimes.com/2011/04/28/business/28bizcourt.html>.

action waivers unenforceable<sup>117</sup>, and, therefore, the California ban on class action waivers did not apply. As a result, corporations were essentially given the green light to insert class action bans into their contractual arbitration clauses.

This decision had many troublesome implications. For one, it essentially gave the “OK” to firms that wanted to insert otherwise unconscionable terms into their contracts, as long as those terms were included within the arbitration clause. This decision was a major setback for consumers and workers alike. While this Supreme Court ruling primarily focused upon class action waivers, it can be argued that this decision paved the way for an even greater enforceability of a wide variety of unconscionable clauses due to the fact that even more business-friendly decisions regarding this issue have been made subsequent to this case. The decision, by limiting the ability of courts to render elements of a contract unenforceable due to their unconscionability<sup>118</sup>, practically encourages firms to engineer arbitration clauses that will allow them to overstep statutes put in place by states to protect consumers and employees. As the following Supreme Court ruling will indicate, this *Concepcion* decision galvanized arbitration clauses to demand business-friendly arbitration. The drawbacks of this class action waiver endorsement will be discussed later in this section.

The second case that was fundamental in the rise of bootstrapping is the *American Express Co. vs. Italian Colors Restaurant* case that took place in 2013. The people of Italian Colors brought a case against American Express claiming that the bank had violated antitrust laws. Unfortunately, the restaurant had entered contracts with American Express that contained class action waivers, and it went to court to seek class-wide relief. Similar to the previously discussed *Concepcion* ruling, the Supreme Court responded to this class action request by ruling

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<sup>117</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>118</sup> *Ibid.*

that “a contractual waiver of class arbitration is enforceable under the FAA,” even when “the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”<sup>119</sup> This decision was yet another major loss for consumers and a major win for businesses because it further demonstrated the Court’s acceptance of class action waivers within arbitration clauses. This business-friendly ruling served to further protect corporations because it provided them the ability to further shield themselves from harmful litigation due to class actions. This protection is especially helpful in mitigating a firm’s legal risk because consumers are much less likely to pursue a small claim individually because the cost for them to arbitrate on their own often is larger than the small claim for which they are seeking remedy. Professor Christopher Leslie believes that the combination of the above Supreme Court decisions in the *Concepcion* and *Italian Colors* cases served to dismantle “entire fields of law.”<sup>120</sup> Such a disintegration of former policies put in place for consumer and employee protection allows corporations to obtain even more power over their customers and workers in litigation.

The Supreme Court rulings in the *Concepcion* and *Italian Colors* cases served to be major setbacks for proponents of class action protection for consumers. In the years following these decisions, a number of similar rulings in favor of class action waivers have been issued in the Supreme Court, as well as in lower courts across the country<sup>121</sup>. The corporation’s ability to protect itself from class action litigation with the use of arbitration clauses serves to practically ensure their dispute victory, whether individual consumers choose to continue pursuing their claims or not. In addition to bringing about the end of class action protection, these rulings

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Lazarus, David. "Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights." Los Angeles Times, December 18, 2015, Business sec. December 18, 2015. Accessed November 3, 2016. <http://www.latimes.com/business/la-fi-lazarus-20151218-column.html>.

together with the Supreme Court's new general interpretation of the reach of the FAA carry with them the potential for a new enforceability of other unconscionable contract terms bootstrapped to arbitration clauses. After all, if the courts are willing to dismantle a consumer's fundamental right to a jury trial even in the event of a small claim, it is certainly plausible that more statutory consumer protections will soon be rendered ineffective as well. Forcing arbitration that fundamentally undermines the consumer's right to the pursuance of justice makes the corporation practically invincible as a result. This mandatory arbitration, in the words of the Legislative Director for the National Association of Consumer Advocates, Christine Hines, allows for "big businesses [to write] all the rules. It shields companies from being held accountable for bad practices."<sup>122</sup> Hines makes an excellent point. If bootstrapping eventually makes it possible for businesses to mitigate their legal risks through the use of traditionally unconscionable terms that make consumer victory virtually impossible, eventually businesses will no longer ever be forced to take responsibility for their wrongdoings. Any legal system that allows for such a violation of ethical business practices and of fundamentals of consumer fairness certainly should be considered a system that is deeply flawed.

The effects of this Supreme Court shift in FAA interpretation possess the potential to have incredibly dire consequences. According to Professor Leslie, already "firms are harnessing the reasoning of these [*Concepcion* and *Italian Colors*] opinions in order to insert a variety of unconscionable contract terms into arbitration clauses."<sup>123</sup> Even worse, the lower courts are following the Federal Court's lead in deeming these wildly unfair terms enforceable whenever they are found within an arbitration clause<sup>124</sup>. Already, these decisions have led more firms to

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<sup>122</sup> Ibid.

<sup>123</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>124</sup> Ibid.

adopt unfair arbitration clauses. In addition, legal firms are now advising businesses to “manage their legal risk in a more effective and predictable fashion by using clear, well-written arbitration agreements that prohibit or limit remedies that customers or employees normally pursue in court.”<sup>125</sup> As a result, mandatory arbitration clauses have come to dominate entire industries<sup>126</sup>, leaving consumers and employees truly without any other choice.

The fact that arbitration bootstrapping is already posing a problem to consumers nationwide serves to support the fact that the arbitration system as it currently exists is fundamentally flawed. Such a notion becomes incredibly troublesome when acknowledging the fact that the aforementioned Supreme Court decisions essentially confirm the legality of arbitration bootstrapping. Such an egregious ignorance of consumer rights in favor of the corporation’s need to protect itself absolutely stands as the greatest limitation of arbitration today. Whether or not the courts are correct in mandating bootstrapped arbitration of this nature is up for debate, but based upon this analysis thus far it is at the very least obvious that the restrictions under which consumers and workers are currently placed with corporate-engineered arbitration cannot and should not be tolerated. This stands especially true when considering the fact that a majority of consumers and employees bound to arbitration are not even aware that they have signed away their rights to a traditional trial, as well as the fact that the Supreme Court has forbidden states from requiring firms to provide an upfront notice of arbitration clauses<sup>127</sup>. Because the current nature of arbitration robs the consumer of his or her fundamental right to a

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<sup>125</sup> Fojo, Robert. "12 Reasons Businesses Should Use Arbitration Agreements." LawGives. April 1, 2015. Accessed November 3, 2016. <https://www.lawgives.com/guide/551c5a68777773fa5160200/12-Reasons-Businesses-Should-Use-Arbitration-Agreements>.

<sup>126</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>127</sup> Ibid.

fair trial in a wide variety of ways, more legislation over arbitration is necessary in order to address the shortcomings of the arbitration process.

## II. The Effects of Bootstrapping Legality

The Supreme Court's recent openness to class action waivers within arbitration clauses facilitates the corporation's ability to place even more restrictions upon the consumer with arbitration clauses. First and foremost, the ability to dismantle a consumer's right to the pursuance of a class action is absolutely cemented by these decisions and most certainly will become more common as time progresses. For example, already another case, *DirecTV vs. Imburgia*, made its way to the Supreme Court in 2015. The case was also questioning the enforceability of a class action waiver placed inside an arbitration clause<sup>128</sup>. Unsurprisingly, the Supreme Court ruled that the class action lawsuit could not be pursued<sup>129</sup>, further confirming the enforceability of unconscionable bootstrapped contract terms in arbitration clauses.

The new honorability of class action waivers poses quite a threat to consumer rights. Class action litigation was initially created by Congress "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights."<sup>130</sup> Acting as a way for consumers to band together to seek remedy for these small claims, class action lawsuits in the past indeed have succeeded in acting as a solution to this problem. Unfortunately, this solution disappears as courts honor class action waivers more frequently. If the fix to the previously mentioned problem disappears, one can only infer that the problem that had before been solved will soon manifest itself as an issue once again. Following

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<sup>128</sup> Lazarus, David. *Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights*

<sup>129</sup> Savage, David G. "Supreme Court Says Binding Arbitration Clauses in Consumer Contracts Trump California Law." *Los Angeles Times*, December 14, 2015. Accessed November 3, 2016. <http://www.latimes.com/business/la-na-supreme-court-california-arbitration-20151214-story.html>.

<sup>130</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

this logic, without the ability to pursue small claims through class actions, it is likely that consumers will not have enough incentive to pursue recovery for their relatively small damages individually. Consumers and employees that have been wronged by businesses likely will then be less motivated to proceed to individual arbitration for a small claim. Professor Leslie points out that this decreased incentive is likely because these waivers make arbitration “prohibitively expensive for plaintiffs because the expected costs of bringing an individual claim exceed the highest possible damages award.”<sup>131</sup> Once again, this shows that the Court’s new attitude towards arbitration serves to protect businesses. Seeing as a Consumer Financial Protection Bureau (CFPB) study has already confirmed that 85% of consumer arbitration clauses include “no class arbitration provisions” within their terms<sup>132</sup>, it is clear that this problem is only going to get worse.

It is easy to see why the enforceability of bootstrapped class action waivers serves as a fundamental shortcoming of the arbitration process as it exists currently. It should certainly be a red flag to lawmakers that arbitration is currently encouraging consumers not to pursue justice. Considering the fact that many laws exist to ensure that all citizens have a right to represent themselves positively in court, such as the right to an attorney, it can be inferred that this obstruction of consumer and worker justice dismantles one of the fundamental goals of the American legal system. As arbitration laws currently exist, the chances for wronged individuals to obtain recovery seem to become slimmer and slimmer as time passes. Perhaps worst of all, this problem will likely only be further exacerbated in the future as more firms realize the benefits of insulating themselves from harmful litigation through the use of class action waivers

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<sup>131</sup> Ibid.

<sup>132</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

in their arbitration agreements. In fact, according to Barbara Kate Repa, there has already been speculation that businesses include arbitration clauses in their consumer contracts mainly so that they can also enforce class action waivers<sup>133</sup>. Overall, it is easy to see that this element of arbitration is fundamentally flawed and absolutely should be addressed by lawmakers.

An additional effect of the Supreme Court's honoring of class action waivers within arbitration clauses is the fact that additional types of unconscionable contract terms can likely be made enforceable when included in arbitration clauses. The Supreme Court's treatment of the FAA essentially possesses the power to enable courts to enforce a number of unconscionable terms that dismantle consumer rights even further. As a result, businesses are further protected from harmful litigation and consumers are further discouraged from pursuing the remedies they rightfully deserve.

Professor Leslie points out a number of contractual elements that businesses can include in their arbitration clauses to further engineer arbitration proceedings to work in their favor<sup>134</sup>. Before continuing, it is important to note that each additional contractual term mentioned here provides an unfair advantage to businesses so much that they would generally be considered unconscionable and therefore unenforceable. However, by inserting these clauses into arbitration agreements, businesses are able to potentially obtain even more litigation protection because of how courts currently are honoring arbitration agreements. While not all courts honor all of these additional terms, many have been known to follow the Supreme Court's lead by deeming them enforceable<sup>135</sup>.

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<sup>133</sup> Ibid.

<sup>134</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>135</sup> Ibid.

For one, corporations can potentially reduce statutes of limitations in order to more quickly close the window of opportunity that consumers and employees have to pursue disputes<sup>136</sup>. If a bootstrapping of this type were deemed honorable by the court, which is certainly possible considering that many attorneys are actually advising their businesses to shorten statutes of limitations in this way<sup>137</sup>, consumers and workers would be less likely to obtain the remedies they rightfully deserve because they may not file their claims on time. As a result, businesses would have yet another way to protect themselves from harmful litigation by use of the arbitration clause.

Second, Professor Leslie notes that businesses may be able to place limitations upon the amount of damages that could be awarded through arbitration by utilizing bootstrapping<sup>138</sup>. These limitations would most likely be put in place to prevent the rewarding of damages beyond a compensatory amount<sup>139</sup>. This requirement could serve as another unfair way for businesses to protect themselves because it minimizes potential costs while simultaneously discouraging consumers from pursuing their individual claims because damage limitations possess the potential to make arbitration an even more prohibitive cost for plaintiffs. On a similar note, businesses can bootstrap to keep costs of litigation down by including fee-shifting provisions in their arbitration clauses<sup>140</sup>. If these provisions were honored, the party that loses in the dispute would have to pay for the arbitration and attorney fees for both parties in the dispute<sup>141</sup>. As a result, individual arbitration once again does not appear very appealing to consumers with

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

smaller claims due to its prohibitive costs that are worsened by this provision. In addition, once again businesses are given the opportunity to protect themselves from the law.

Professor Leslie additionally points out that the inclusion of anti-injunction clauses and forum selection clauses in arbitration agreements is often honored by the courts<sup>142</sup>. The ability for businesses to additionally include these provisions serves as another major drawback to the arbitration process because it makes it that much more difficult for consumers to pursue the remedies that they deserve. Both of these clauses, if deemed enforceable, further equip businesses with the tools necessary to ensure that every element of an arbitration proceeding works in their favor. By limiting injunctions and enabling themselves to select the forum in which arbitration proceeds, corporations are able to further engineer arbitration proceedings by preemptively planning them in their arbitration agreements in order to ensure their victory over consumers and employees in disputes.

Overall, the rising popularity and enforceability of bootstrapping has made it so that states cannot protect their citizens<sup>143</sup> and citizens cannot protect themselves. The Supreme Court's honoring of arbitration clauses over state legislation that was put in place to protect consumers and employees appears fundamentally flawed. It is clear that, with the ability to bootstrap, businesses can make themselves practically invincible simply by the including a well-engineered arbitration agreement. Based on this information and the fact that a recent empirical study conducted by Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin found that, for firms that impose arbitration clauses on their customers and employees, "less than 10% of their negotiated non-consumer, non-employment contracts included arbitration clauses,"<sup>144</sup> it is apparent that

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

arbitration clauses have become ways to deter consumers from pursuing their rights instead of ways to efficiently resolve disputes. The fact that bootstrapping practically allows corporations to exist above the law while they wrong consumers and employees serves as the most significant limitation of the arbitration process.

### *Appealing the Arbitrator's Decision*

The cherry on top of all of the shortcomings of arbitration is the fact that the final, binding decision made by the arbitrator can only be appealed under very limited circumstances<sup>145</sup>. Even if the decision is considered for appeal, court records show that historically when plaintiffs ask the courts for an appeal of an arbitration decision, they almost always lose<sup>146</sup>. The fact that arbitration decisions are protected so heavily even further robs consumers and workers of the right to ensure that their disputes are settled fairly. Even if the arbitrator's award is unfair or illogical<sup>147</sup>, the decision is rarely overturned, thereby forcing plaintiffs to abide by improper rulings. The permanent nature of the arbitration decisions further exacerbates the power that corporations have to engineer dispute victories at the expense of the consumer or employee. Not only are businesses now able to construct mandatory arbitration agreements that establish proceedings that are likely to weigh heavily in their favor, but also they are able to guarantee that the resulting unfair decision is permanent. Cementing the shortcomings of arbitration by prohibiting relief through an appeal process, the irreversible arbitrator decision proves that consumers are offered practically no escape from the harsh realities of business-friendly arbitration.

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<sup>145</sup> Silver-Greenberg, Jessica, and Michael Corkery. *In Arbitration, a 'Privatization of the Justice System'*

<sup>146</sup> *Ibid.*

<sup>147</sup> Repa, Barbara Kate. *Arbitration Pros and Cons*

### *The Potential Effects of Arbitration's Shortcomings*

A process that has evolved into a dispute resolution method that practically guarantees minimal corporate harm, arbitration as it currently stands clearly is not a proceeding that maximizes justice. The potential effects of these wildly unfair limitations in the arbitration process are monstrously detrimental, especially from the perspective of a consumer or employee that has been wronged by a corporation. Each pro-business aspect of arbitration that has been discussed in this chapter presents some potential for negative consequences.

The most obvious effect of the many shortcomings of arbitration is the corporation's victory in arbitration. In a study conducted by Alex Colvin examining data from 3945 arbitration cases conducted by the AAA, only 21.4% of employees won cases against their employers<sup>148</sup>. These win rates were even lower when the employer involved in the dispute had been involved in multiple arbitrations<sup>149</sup>, demonstrating the obvious effects of arbitrator biases. The slim chances of plaintiff victory are only one of many negative consequences of the flawed arbitration system.

Also, the rising popularity of bootstrapping due to recent Supreme Court rulings in favor of class action waivers offers a wide variety of potential negative effects. For one, the amount of enforceable restrictions in arbitration that corporations are able to engineer into their arbitration clauses will likely prevent many wronged consumers and employees from even pursuing their claims against the business. This injustice allows companies to win out over consumers that they have wronged without even arbitrating. Even if these wronged parties choose to pursue their disputes, they are more likely to be obstructed from justice and are less likely to receive a

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<sup>148</sup> Colvin, A. J. S. (2011). An empirical study of employment arbitration: Case outcomes and processes [Electronic version]. Retrieved from Cornell University, ILR School site

<sup>149</sup> Ibid.

favorable ruling because of enforceable bootstrapping. Such a lack of consumer and employee fairness throughout the arbitration process is an obvious consequence of all the previously mentioned enforceable terms that can be bootstrapped to arbitration clauses. These terms de-incentivize arbitration from a consumer perspective because they create additional restrictions and prohibitive costs<sup>150</sup>. By honoring these terms, courts and arbitrators alike buttress the agenda of corporations seeking to mitigate their legal risk while simultaneously robbing wronged parties of their fundamental rights. Currently, the Court does not seem to express concern because “consumers and employees voluntarily agree to mandatory arbitration and the attendant terms,”<sup>151</sup> but clearly the Supreme Court is not considering the fact that most consumers and employees do not possess an understanding of or are not even aware that they are bound by arbitration clauses. Overall, such negative consequences of arbitration should not be tolerated by consumer, workers, or lawmakers.

Additionally, engineering arbitration agreements to mandate confidentiality during the proceedings allows corporations to conveniently hide their wrongdoings from the public eye. As a result, not only will the violation of consumer rights during the proceeding go unnoticed, but also the misconduct carried out by the business. For example, if a corporation was producing products that were in some way harmful to consumers, demanding private individual arbitration for the damages caused by the product would prevent the public from learning of the dangers of the item and it would prevent other parties harmed by the product from banding together to seek relief. In this instance, a consequence of this negative aspect of arbitration could be physically harmful to consumers. This mandated privacy, in combination with class action prevention, essentially invites companies to “commit fraud, torts, discrimination, and other harmful acts

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<sup>150</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

<sup>151</sup> *Ibid.*

without fear of being sued.”<sup>152</sup> It is easy to imagine the sorts of horrific consequences to which this corporate freedom could lead.

### *Conclusion*

Overall, the arbitration process as it exists currently is a mess of unfairness and corporate control. The plethora of shortcomings that arbitration proceedings possess yields a plethora of negative consequences. As pointed out by Harvey Rosenfield, founder of Consumer Watchdog, “the more the US Supreme Court allows big corporations to evade accountability, the less confidence Americans [will] have in the judicial branch and [in] the rule of law.”<sup>153</sup> It is up to the nation to recognize the many limitations of the current arbitration process in order to make changes toward a fairer dispute resolution process. Arbitration does offer many benefits over traditional litigation, but without controls put in place to prevent corporate manipulation of workers and consumers, parties that have been wronged by businesses may never have a chance to fully pursue or obtain the relief they deserve.

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<sup>152</sup> Ibid.

<sup>153</sup> Lazarus, David. *Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights*

#### Chapter 4: The Implications of the Rise of Arbitration

It has been made clear that arbitration as it currently exists in the American justice system possesses an overwhelming amount of limitations from the perspective of the consumer. Of course, from the perspective of a corporation, arbitration arguably offers a wide variety of benefits and legal protections; unfortunately, these corporate benefits are quite easy to exploit. The process currently treats businesses preferentially, which can potentially be taken advantage of at the expense of consumers and employees. Such a corrupt, one-sided system possesses the potential for procedural manipulation to generate greater corporate gains.

There are many implications that must be considered with regard to arbitration's shortcomings. The rising popularity of business-friendly arbitration and the Supreme Court's recent emphasis upon the holistic enforceability of arbitration clauses has the potential to discourage harmed parties from pursuing their claims and to cause unfavorable rulings to be made by arbitrators against masses of workers and consumers. In addition, in the spirit of corporate greed, the arbitration system as it exists currently can be manipulated by businesses and developed into a method of unregulated and unfair profit generation. The negative effects of these implications are reason enough to advocate for greater regulation over the arbitration industry.

For one, the business-friendly nature of arbitration and the courts' acceptance of terms, such as class action waivers, will most likely result in a decrease in the amount of consumers and workers that actually choose to move forward into arbitration. Considering that the corporate-engineered facets of arbitration currently tend to incur large costs, it would not be surprising if more plaintiffs chose to cease the pursuance of their claims because their litigation costs would be too large. These prohibitive costs serve to drive away wronged parties because the cost to

arbitrate a small claim individually oftentimes outweighs the maximum potential award the plaintiffs can achieve by proceeding with arbitration. This discouragement is most likely a result of the rise in class action waivers in the arbitration process: If parties pursuing small claims are forced to settle their disputes individually in lieu of pursuing a class action, arbitration will likely cost more than the actual claim. Consumers forced to pursue small claims individually are even further discouraged by attorney availability for these proceedings, seeing as few attorneys are willing to accept cases for claims so small due to the fact that there is not enough reward available in exchange for their hard work. Considering the fact that most individuals, attorneys and plaintiffs alike, will pursue what offers the greatest reward, it is likely often in a wronged party's best interest to just take their losses instead of risking the incurrence of even higher cost obligations due to arbitration.

Even if wronged parties choose to continue with the pursuance of their claims in spite of the low probability of profiting from the proceedings, they will rarely come out victorious on the other side. This low success rate is another implication of the currently flawed arbitration process. According to an investigation recently conducted by the New York Times, of 1179 cases filed between 2010 and 2014, arbitrators ruled in favor of companies 80% of the time<sup>154</sup>. Given arbitration's current biases toward corporations, this percentage will likely only increase as the years pass. Unfortunately, this falling success rate only exacerbates the issue of plaintiff motivation to move forward with arbitration. If the vicious cycle of discouragement from proceedings and costly consumer losses continues, corporations may one day be able to obtain control over the entire arbitration process.

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<sup>154</sup> Silver-Greenberg, Jessica, and Robert Gebeloff. "Arbitration Everywhere, Stacking the Deck of Justice." Edited by Michael Corkery. The New York Times, November 1, 2015, New York ed. October 31, 2015. Accessed September 7, 2016. [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0).

Corporate control is the most troublesome implication of the arbitration process as it exists currently. The ability for businesses to manipulate this system into a profit-generating process only increases as courts continue to rely upon corporate favoritism in the arbitration process. The best way to fully illustrate the potential that businesses possess to manipulate the arbitral system into one of profit generation is by creating a hypothetical scenario. So, imagine there is a well-established internet provider that serves millions of customers nationwide. Imagine that these customers each, upon activating their service, agrees to a contract that contains an arbitration clause loaded with terms that have been engineered to minimize the company's legal risks. In particular, the arbitration clause specifies that all disputes will be resolved in mandatory and binding arbitration that will be conducted by an arbitrator of the internet provider's choosing in a venue of the internet provider's choosing. Additionally, the arbitration clauses specify that the arbitral proceedings and all information relating to them must be kept confidential. Other terms included in the internet contract's arbitration clause involve a reduction to the statute of limitations that exist in the event of a dispute and limitations that specify that damages can only be awarded up to the amount necessary for compensation. The arbitration clause also prohibits the rewarding of punitive damages. Finally, the arbitration clause contains a class action waiver that demands disputes be settled solely on an individual basis. The contracts are presented to consumers on a "take it or leave it" basis and are not open for negotiation, but the internet company estimates that about 60% of their customers do not even read through all of the contractual terms before signing.

Now, imagine that the internet provider executives catch wind of the business-friendly nature of arbitration. Imagine that one crafty executive comes into work one morning with an idea: the company can use pro-corporation arbitration to unfairly profit from their consumers,

and they can do so without much punishment and without fear of being exposed to the public. The company decides to move forward with the idea and begins to charge some of its customers at random for a small amount, say \$75. The charges are presented to customers on their billing statements as a “mandatory one-time service fee,” and the trial run of this scheme results in a total of one million customer charges. The internet provider finds that approximately 40% of the customers that were asked to pay the “fee” paid it without question. This allowed the company to earn approximately \$30 million.

The other 60% of customers that were wrongfully charged contested the fee demands by calling the internet provider. After complaining and being told that the fees were necessary for security purposes, approximately 10,000 customers capitulate and agree to pay the charges. This results in the internet provider obtaining another \$750,000 in revenue. The remaining customers that have still not paid decide to contest the charge and begin looking into their legal options. After consulting with lawyers, the wrongfully charged customers find that, according to the contract they signed, their disputes must be settled in individual arbitration that is largely controlled by the internet company. Unaware that these “service fees” are harming others as well, customers are barred from pursuing class relief that they were unaware of in the first place. Seeing that pursuing arbitration will likely cost more than it is worth, another 25,000 customers give in and agree to just pay the fee. This results in another \$1.875 million on the revenue books. Another 5000 of these customers fail to file their claims before the statute of limitations specified in their contracts runs out, and as a result they have no choice but to pay the fee. This results in another \$375,000 in revenue for the internet provider.

The remaining 10,000 wrongfully charged customers choose to pursue individual arbitration. Even though arbitrator and venue selection likely works in the favor of the internet

company during the proceedings and even though the business-friendly nature of arbitration likely would result in a corporate victory during at least some of the hearings, for the sake of example assume that all 10,000 consumers that chose to arbitrate win their cases. This would result in the internet company making payments to cover the compensatory damages for each individual customer, which would amount to a total of \$750,000.

In the end, the internet provider was able to profit a total of \$31.5 million from the wrongful charging of its customers, even though in the worst-case scenario it lost every case that was taken all the way to arbitration. Considering the business-friendly nature of arbitration as of recent, this profit number would likely be even higher because the company would inevitably win at least some of these arbitration hearings. Overall, the internet company comes out of this wrongful fee charging “trial” process with the knowledge that it can largely profit from a manipulation of its customers and of the arbitral process in its contractual agreements.

Based on this information, it is clear the company can successfully inflate its revenues year after year at increasingly larger scales without much kickback. Even further, because of the mandated confidentiality in the cases that do make it to arbitration, the company will be able to commit these wrongdoings completely out of the public eye. Besides a standard of ethical business, the internet provider really has nothing to lose by charging these fraudulent amounts. Everyone is either happy or uninformed, except the wronged consumer.

The above example illustrates the implications for wrongful business practices that exist behind the arbitration process as it stands currently. This is essentially a worst-case scenario meant to exemplify how simple it is for a corporation to manipulate the arbitration process in order to make a profit. Essentially, it is possible for corporations lacking a strong ethical code to profit from the exploitation of consumers, unnoticed by the public, if the scheme is carried out

correctly. This requires companies to manipulate arbitration agreements by equipping them with the aforementioned conditions in this example. Together, these manipulations serve to aid the business in winning arbitration hearings and in discouraging consumers from pursuing their claims. This scenario essentially establishes that, if engineered properly, arbitration can be used by corporations to commit fraud practically effortlessly. Even further, businesses wishing to profit from this manipulation can actually estimate the maximum possible damage that would be paid to an individual consumer in the event that they win their arbitration case, as well as the amount of consumers likely to actually pursue their small claims individually. From there, these companies could calculate the exact charge and customer amounts necessary to maximize profit. Overall, businesses stand able to exploit the arbitration process by violating consumer rights without damaging their company's reputation as the arbitral process exists today, and for this reason, among many others, arbitration must be regulated to facilitate greater fairness and to circumvent greater corporate manipulation.

### Chapter 5: Solving Arbitration's Problems

Clearly, arbitration presents a number of drawbacks that result in an obstruction of justice for non-corporate parties during the dispute resolution process. Fortunately, many of these flaws within the current arbitration system can be fixed with the implementation of some additional guidance and regulation. Of course, these proposed solutions are much easier said than done, but any step taken towards a fairer arbitration process would be incredibly beneficial to the workers and consumers that are consistently harmed by business-friendly arbitration.

One of the simplest ways to reduce the number of consumers and workers wronged through arbitration is by making efforts to further educate Americans. Properly informing citizens of their legal rights and of the ins and outs of arbitration will help to reduce the previously mentioned problem of the consumer's lack of understanding of the arbitration process. The long-term goal of this increased education would be to integrate arbitration education within the scholastic curriculum in high schools and colleges. In the short term, a good start would be to encourage consumers and workers to be sure they understand the terms of their agreements before signing any contracts<sup>155</sup>. In addition, simply encouraging consumers to be on the lookout for arbitration clauses in their contracts would be incredibly useful, because, as was mentioned previously, most consumers and workers are not aware that they are bound by arbitration clauses. Of course, even this move toward a more legally educated and justice-conscious America may be overreaching, but increasing education about arbitration, even on the smallest of scales, as arbitration continues to rise in popularity is the best first step toward change.

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<sup>155</sup> Repa, Barbara Kate. "Arbitration Pros and Cons." Nolo.com. Accessed September 26, 2016. <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html>.

Greater justice within the arbitration system can also be achieved with additional legislation. Given the Supreme Court's obvious favoritism towards arbitration clauses over the past few decades, it appears that additional Congressional legislation or executive action is the only way for arbitration to ever move away from its current state of corporate favoritism. Some efforts to improve the arbitration process have already been put into place, but courts still have demonstrated that they will uphold an arbitration clause in its entirety<sup>156</sup>. For example, recently a group of senators and representatives in Congress has been proposing an Arbitration Fairness Act that would "prevent the enforcement of pre-dispute agreements to arbitrate employment claims, consumer disputes, civil rights claims, and antitrust violations."<sup>157</sup> This Congressional motion is a fantastic step in the right direction, but unfortunately is unlikely to pass any time soon. Professor Leslie calls this Act "a partial solution at best" because it fails to address all the mistakes that the Supreme Court has made with the FAA<sup>158</sup>. Given that this proposal does nothing to address the wicked unfairness that is allowed in arbitration with regards to unconscionable items such as class action waivers, Professor Leslie's point seems very astute. The fact that this Act will likely not pass becomes even more realistic when considering that a similar Act, the Fair Arbitration Act, was introduced to Congress in 2011. This Act proposed a number of items that would serve to increase fairness within the arbitration process, such as the enactment of requirements for fair arbitration clause disclosure, additional rights to ensure neutrality, and the ability for parties to opt out of arbitration in favor of a small claims

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<sup>156</sup> Wilson, Therese. "Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?" *Journal of Consumer Policy* 39, no. 3 (09, 2016): 349-364. doi:<http://dx.doi.org/10.1007/s10603-016-9322-z>.

<http://ecl.idm.oclc.org/login?url=http://search.proquest.com/docview/1811109695?accountid=10141>.

<sup>157</sup> Leslie, Christopher R. "The Arbitration Bootstrap." *Texas Law Review* 94, no. 2 (2015): 265-330.

<http://ecl.idm.oclc.org/login?url=http://search.proquest.com/docview/1756953341?accountid=10141>.

<sup>158</sup> *Ibid.*

procedure<sup>159</sup>. Needless to say, this Act was not enacted by Congress, making Professor Leslie's guess that the Arbitration Fairness Act will not be passed either quite considerable. Additionally, Senator Al Franken has made efforts to eliminate forced arbitration from consumer and employee contracts, but once again this will not likely make it through Congress<sup>160</sup>. Clearly, additional steps need to be taken in order to ensure that justice within the arbitration process is safeguarded.

The following proposed legislation would together serve to make the arbitration process more fair and desirable for everyone. Without these adjustments toward fairness, arbitration cannot and should not be considered a viable alternative dispute resolution process. As it exists currently, it is merely a formality to guarantee that the corporation gets what it wants. Each of the following proposals would benefit the fairness of the arbitration process on its own, but achieving each of the following pieces of legislation together would serve to fundamentally fix a broken arbitration system. It is important to note that these proposals will not address the issue of Congress failing to pass any legislation on the issue of arbitration, but it does offer some additional jumping off points for Congress to focus upon if the issue of arbitration ever develops an importance within the Congressional establishment. Given the gravity of the pro-business situation and the amount at which arbitration is currently violating fundamental consumer and worker rights, this issue certainly should be taken seriously by Congress if it has not already.

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<sup>159</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

<sup>160</sup> Lazarus, David. "Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights." *Los Angeles Times*, December 18, 2015, Business sec. December 18, 2015. Accessed November 3, 2016. <http://www.latimes.com/business/la-fi-lazarus-20151218-column.html>.

## I. Limit the Use of Arbitration in Certain Instances

As was mentioned previously, a bill was introduced to Congress in early February that would strictly limit arbitration. If passed, this bill would prohibit “civil rights cases, employment disputes, and other crucial lawsuits from being forced into arbitration.”<sup>161</sup> Unfortunately, this bill is likely to face a large amount of opposition<sup>162</sup>. Limiting arbitration’s reach in this way would be incredibly beneficial because it would address the issue of corporations facing little punishment for seriously wrongful acts. If disputes regarding discrimination or fraud were barred from arbitration, corporations in the wrong would be less likely to make it out of a dispute settlement without paying the price for their wrongful acts. In addition, this would allow for greater discouragement for companies to commit wrongdoing, because they are less likely to be under the cover of confidential arbitration and therefore must act more ethically to further protect their business’s image.

## II. Require Post-Dispute Arbitration Agreements or Alternatives to Arbitration

California lawyer Cliff Palefsky once said that arbitration only works “if both sides [want] to participate. Once it’s forced, it’s corrupted.”<sup>163</sup> Given the previously mentioned issue that arbitration often leaves consumers with no other choice but to submit to mandatory arbitration, Palefsky certainly has a point. These required dispute settlement proceedings often are agreed to without the consumer’s explicit knowledge, making it all the more possible for a business to corrupt the arbitration proceeding. By requiring that both parties

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<sup>161</sup> Silver-Greenberg, Jessica, and Michael Corkery. "Bill Seeks to Limit Use of Arbitration to Avoid Courts." The New York Times, February 5, 2016, New York ed. February 4, 2016. Accessed September 7, 2016. <http://www.nytimes.com/2016/02/05/business/dealbook/bill-seeks-to-limit-use-of-arbitration-to-avoid-courts.html>.

<sup>162</sup> Ibid.

<sup>163</sup> Silver-Greenberg, Jessica, and Michael Corkery. "In Arbitration, a ‘Privatization of the Justice System’." Compiled by Robert Gebeloff. The New York Times, November 2, 2015. October 1, 2015. Accessed September 26, 2016. <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

agree to arbitrate before moving into the arbitration process, it can be assured that both parties to the proceeding are moving forward voluntarily. Even further, this solves the problem presented previously about how consumers subject to pre-dispute arbitration agreements essentially sign away their fundamental right to a jury trial without even realizing it. This would also facilitate the arbitration process, because neither side of the dispute is being forced into anything. According to Honore Johnson, many scholars suggest that a voluntary process is much fairer due to the fact that alternative options for dispute resolution allow for the parties in dispute to choose the process that best suits their needs<sup>164</sup>. This of course will result in a reduction in litigation protection for corporations, but such a reduction appears to be necessary given the pro-business nature of arbitration as it exists currently. Overall, offering parties the option to choose whether or not to arbitrate will likely spearhead a shift towards neutrality because consumers and workers will not likely choose to arbitrate if the proceedings are conducted unfairly.

### III. Prohibit the Honoring of Arbitration Clauses that are Included in Adhesion Contracts

As was mentioned previously, contracts of adhesion, or contracts that are presented to workers and consumers on a “take it or leave it” basis, can require signers to agree to incredibly unfair arbitration terms. These adhesion contracts offer signers no escape from unfair arbitration engineering due to the fact that consumers are not in a bargaining position to refuse consent to arbitrate<sup>165</sup>. Such a lack of consent should indicate that said arbitration clause should not be considered enforceable, but the Supreme Court’s respect for these clauses has completely ignored this fact. Even further, according to Stephen Ware, arbitration

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<sup>164</sup> Johnson, Honore. "Adopting an Employment Arbitration Process." *Dispute Resolution Journal* 70, no. 4 (2015): 65-73. <http://ccl.idm.oclc.org/login?url=http://search.proquest.com/docview/1785505040?accountid=10141>.

<sup>165</sup> Wilson, Therese. *Setting Boundaries rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*

clauses arising out of adhesion contracts “would often be found procedurally unconscionable because of the process of contract formation and inequality of bargaining power.”<sup>166</sup> By prohibiting arbitration mandated by contracts of adhesion, arbitration would become a much more valid and fair alternative to traditional courtroom litigation because it would demand greater consent from the parties involved. This additional consent would provide for greater fairness due to the fact that corporations are less capable of manipulating consumers that have agreed to arbitrate voluntarily, as well as provide for a general reduction of hostility between the parties due to the consensual nature of the proceedings.

#### IV. Impose More Arbitration Clause Presentation Requirements

Requiring greater specificity and a clearer presentation of the arbitration clause would be one way to attempt to solve the general problem that many consumers are not even aware that they are bound by arbitration clauses. Some examples of these increased requirements are requiring that arbitration clauses be presented near the beginning of a contractual agreement or requiring it to be more noticeable by presenting it in bold and or all capitalized letters. This additional requirement would be a great start in making the arbitration process fairer because it would increase the likelihood of consumer awareness concerning the existence of an arbitration clause in a contract. If consumers begin to notice the existence of arbitration clauses with a greater frequency, they may be able to fight for fairer arbitration agreements in order to prevent over-bearing corporate control over the procedures.

#### V. Make Unconscionable Terms Unenforceable

Improving arbitration by deeming unconscionable arbitration clause terms unenforceable directly addresses the bootstrapping issue discussed in Chapter 4. Of course, passing this

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<sup>166</sup> Ibid.

legislation will be especially difficult considering the fact that the Supreme Court has made numerous decisions advocating for the exact opposite. However, this proposal is perhaps the most impactful piece of legislation in the realm of improving arbitration fairness. Deeming unconscionable terms unenforceable would safeguard the class action rights of consumers and workers, as well as protect rights for specific statutes of limitations, fee-shifting provisions, venue and arbitrator selection fairness, and rightful damage awards.

Of course, refusing to enforce unconscionable terms is mandated when these terms are outside of arbitration clauses; however, when these unconscionable terms are included in arbitration clauses, determining their unenforceability is in direct violation of the Supreme Court's interpretation of the FAA. For this reason, as mentioned previously, Congress would have to pass legislation regarding these unconscionable terms in order for any change to occur in this regard. Such action on the part of Congress would be instrumental to achieving a more equal and neutral arbitration process because it would serve to dismantle one of the fundamental reasons for why arbitration thus far has facilitated such a colossal amount of corporate control.

At the very least, a massive step toward greater arbitration fairness could be taken simply by refusing to enforce class action waivers in arbitration clauses. As was previously discussed, class action waivers pose a fundamental problem for consumers wishing to seek relief for their small claims because being forced into individual arbitration discourages the consumer from even pursuing his or her claim. Barred from taking class action, suddenly consumers are faced with a dispute resolution procedure that costs much more than it is worth. By removing the enforceability of these waivers, consumers would be able to pursue their claims without being discouraged by prohibitive costs, thereby removing the

corporation's previous ability to avoid harmful lawsuits simply by engineering proper arbitration procedures. Preventing unconscionable terms that encourage greater prohibitive costs overall will allow for greater procedural fairness because consumers and workers will no longer be discouraged from pursuing justice simply because they cannot afford it. Overall, the creation of legislation that aids parties to take legal action against corporate wrongdoers will allow for a much more balanced, neutral arbitration process by forcing the arbitral process to surrender some of its facets that have in the past caused the process to be more pro-business.

#### VI. Safeguard Against Arbitrator Bias

Parties typically appoint arbitrators to make decisions during the arbitration process. Unfortunately, proper engineering of arbitration clauses can ensure that selected arbitrators are more inclined to decide in favor of the corporation involved. The arbitrator bias that results significantly obstructs justice throughout the arbitration procedure from the consumer perspective. One way to approach this arbitrator bias problem is by prohibiting any sort of contractual specification about the arbitrator selection process. This way, businesses will be less able to engineer bias arbitrator selection because the decision makers are not predesignated and will not be selected until the beginning of the arbitration process. This minor change in legislation would allow for a greater possibility for the plaintiff to weigh in on the arbitrator selection decision.

Requiring arbitrators to publish the reasoning behind their decisions, which traditional court procedures mandate, would additionally help to eliminate the threat of arbitrator bias. By making these decisions public, greater transparency and confidence in arbitrator

neutrality<sup>167</sup> can be achieved because the decisions are much more open for examination. This would additionally address the confidentiality issue of the arbitration process because it would make decisions available to the public eye. As a result, not only will the decisions made by arbitrators be subject to public scrutiny, but also the corporation's reputation. Referring back to Chapter 4, a major reason that arbitration is viewed to have pro-business leanings is because it acts as a way for companies to resolve disputes out of the public eye in order to protect their reputations, even if it is the public's best interest to be informed. By requiring published arbitrator decisions like in traditional courts, information that is pertinent for the safety of the public would also become more accessible, thereby making the arbitration process as a whole much more neutral.

Additionally, centralizing the arbitrator supply would eliminate the "client" issue that sometimes arises in arbitration where arbitrators feel inclined to rule in favor of businesses so as to be hired again to decide on future proceedings. By creating an arbitral institution subsidized by the government that would supply arbitrators instead<sup>168</sup>, the incentive for arbitrators to decide in favor of their "clients" would disappear. It is important to note, however, that this shift in the nature of the arbitrator selection process would also put an end to the benefits that come with arbitrator selection, such as the fact that individuals with expertise in certain fields applicable to the dispute at hand will no longer be available to arbitrate. Still, centralizing arbitration in this way would practically eliminate the problem of arbitrator bias.

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<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

## VII. Honor Statutory Consumer and Worker Protection Laws

A fundamental issue with the Supreme Court's recent treatment of arbitration is that it undermines state laws that were put in place to protect its consumers and workers, such as the California ban on class action waivers in the *Concepcion* decision mentioned previously. One way to fix the currently corrupted arbitration process in this regard is to honor these statutory protections instead of dismissing them in favor of the FAA as the Supreme Court has in the past. Of course, this once again is a piece of legislation that can only be achieved by going around the Court by way of Congress or an executive order.

According to Professor Christopher Leslie, states have taken three approaches to protect their citizens from overreaching arbitration provisions. These approaches include some of the previously recommended legislations in this analysis, such as the prohibition of arbitration for certain kinds of disputes, the application of the unconscionability doctrine to make anti-consumer terms in arbitration clauses unenforceable, and the demand for more a more obvious contractual presentation of the arbitration clause<sup>169</sup>. In the past, the courts have struck down these protections due to their apparent violation of the FAA. As a result, the nation is left with the unfair, pro-business arbitration process that exists today. Clearly, an allowance of these statutes for greater consumer protection poses the potential to make the arbitration process much fairer.

By allowing for greater consumer and worker statutory protections, the issue of bootstrapping is also addressed. This way, it would become much more difficult for businesses to engineer arbitration clauses that minimize their litigation risk by way of consumer exploitation. As a result, consumers and workers alike would be much more

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<sup>169</sup> Leslie, Christopher R. *The Arbitration Bootstrap*

protected, depending on the venue of the dispute, from the obstruction of justice that is currently occurring in arbitration proceedings.

### *Conclusion*

Overall, it is clear that there is much that can be done to address the shortcomings of arbitration. While Congress has remained relatively silent on the issue for quite some time<sup>170</sup>, their interference is absolutely necessary. If America hopes to see arbitration move away from the favoring of businesses over consumers and workers, at least some of the aforementioned proposals must be considered. These additional pieces of potential legislation would correct for the holes in the arbitration process that currently allow for corporate exploitation to engineer the process to work in their favor. If these changes are not made and if the arbitration process continues in the business-friendly direction in which it is currently heading, arbitration will be seen as nothing more than a way for businesses to cheat consumers and workers and get away with it.

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<sup>170</sup> Lazarus, David. *Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights*

### Conclusion

Overall, arbitration does offer a wide variety of benefits that make it a valid alternative to traditional trial court proceedings. Because of the fact that it is typically cheaper, faster, less risky, and less hostile than traditional litigation, arbitration should absolutely continue to be viewed as a legitimate dispute resolution method. However, the significant number of shortcomings that arbitration possesses in its current pro-business state make the process egregiously unfair and corrupt. Arbitration currently appears to be a method for preserving corporate power instead of a method for bringing greater justice and conflict resolution. The arbitration process largely favors businesses over consumers and workers because the decisions are often prone to arbitrator bias, the unfair enforcement of unconscionable terms in arbitration clauses, and the final and binding nature of the arbitrator's decision. The implications of such a pro-business dispute resolution system are quite troublesome and are a general antithesis of justice for consumers and workers alike. Because arbitration today essentially guarantees corporate victory and because businesses are essentially able to engineer arbitration clauses to mitigate their legal risks and protect their reputations, the process as a whole has resulted in a mass obstruction of justice and cannot be deemed an acceptable dispute resolution method any longer.

Of course, one should not blame corporations for wanting to take every step possible to protect themselves from litigation risk. The problem with unfair arbitration practices lies in the nature of arbitration itself, not in how businesses have been able to abuse it. Overall, fairness in this dispute resolution process can only be achieved if Congress takes steps to prevent businesses from exploiting the arbitration process as it exists currently. Though it is less likely, courts can also take steps toward more fair arbitration processes by refusing to enforce unfair arbitration

agreements. A recent ruling rejecting an arbitration clause with a class action waiver in the United States Court of Appeals serves as a perfect example of how courts can contribute to the transformation of the arbitration process into one that is neutral and fair<sup>171</sup>. Further educating consumers and workers so that they are better able to protect themselves from exploitation also will help achieve greater procedural fairness. In conclusion, these steps, in addition to a general increase in regulation over the arbitration process, would allow the dispute resolution method of arbitration to once again become a legitimate way to obtain a fair ruling outside of a courtroom. Of course, businesses likely will not be very enthusiastic about these necessary changes, but at the end of the day, the best way to achieve fairness in this process is to aim to create the most level playing field possible.

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<sup>171</sup> Silver-Greenberg, Jessica, and Noam Scheiber. "Court Rules Companies Cannot Impose Illegal Arbitration Clauses." *The New York Times*, May 27, 2016, New York ed. May 26, 2016. Accessed December 1, 2016. <http://www.nytimes.com/2016/05/27/business/dealbook/court-rules-companies-cannot-impose-illegal-arbitration-clauses.html?smprod=nytcore-ipad&smid=nytcore-ipad-share>.

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