LITIGATORS NEEDED TO ADVISE TRANSACTION LAWYERS ON LITIGATION PRENUPS

BY DONALD R. PHILBIN, JR.

EVEN BEFORE THE U.S. AND TEXAS SUPREME COURTS handed down *AT&T v. Concepcion*[1] and *NAFTA Traders, Inc. v. Quinn*,[2] dispute resolution options needed to be thin-sliced to effectuate the ends of a deal. What began with Chief Justice Warren Burger's call to the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* and Professor Frank Sander's "multi-door courthouse"[3] keynote in 1976 ("Pound Conference") has developed into a wide range of dispute resolution options,[4] each with strengths and weaknesses. Deal lawyers would benefit from the nuanced advice of trial lawyers as they tailor litigation prenups to specific transactions.

In *AT&T v. Concepcion*, the U.S. Supreme Court held that California state contract law, which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act ("FAA") because the law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[5] After *Concepcion*, commentators began to wonder aloud if attorneys would be committing malpractice not to advise business clients to include class action arbitration waivers in all consumer contracts.[6] The Texas Supreme Court may have addressed the most frequent complaint about arbitration – the lack of meaningful judicial review after the U.S. Supreme Court's *Hall Street Associates v. Mattel, Inc.*[7] case – by going a different direction under the Texas Arbitration Act ("TAA") in *NAFTA Traders, Inc. v. Quinn*. Particularly in bet-the-company cases, "[p]reserving the right to appeal was the *only* factor cited by a majority of [general counsel] as discouraging arbitration (63%).[8]

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While these cases highlight the need to periodically audit dispute resolution procedures, there are a number of factors impacting how these clauses are designed. The focus of this article is on empirical data collected since the Pound Conference that may help inform the choices embedded in such clauses.

Arbitration: A Short History

Commercial arbitration dates back to at least the thirteenth century and predated the American Revolution in New York and several other colonies.[9] George Washington included an arbitration provision in his will[10] and the Texas Constitution of 1845 recognized it.[11] By 1927, the American Arbitration Association's ("AAA") Yearbook of Commercial Arbitration listed over 1,000 trade associations that had systems of arbitration.[12] Arbitration is the preferred dispute resolution mechanism in international disputes primarily because non-resident parties distrust the legal systems of foreign countries and the New York Convention actually makes arbitration awards more enforceable than the judgments of domestic courts across national borders.[13]

But not all states took the same view of arbitration. "Historically, Anglo-American courts refused to enforce arbitration agreements, jealously guarding their dispute resolution monopoly."[14] Merchants and lawyers were successful, particularly in New York, in enacting legislation requiring courts to defer to arbitration. Parallel efforts established New York not only as a financial center, but as the preferred source of commercial law. According to Cornell Law Professor Theodore Eisenberg, who has done empirical work around litigation,[15] arbitration,[16] and choice of law[17] for at least a decade, "New York has openly sought to be an adjudication center for substantial business arrangements" and recent receptivity to forum selections has only advanced that effort.[18] In response to "widespread judicial hostility to arbitration agreements,"[19] Congress resolved inconsistent treatment of arbitration provisions across state lines in 1925 by adopting the New York approach in the FAA. The FAA supplies the substantive rules for deciding whether to uphold an arbitration agreement, stay judicial proceedings, compel arbitration, and confirm, vacate

or alter the award.[20] "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[21]

By 1984, the U.S. Supreme Court had formally announced a "new arbitrability regime."[22] Though the Court had already required fraudulent inducement allegations to be directed to the arbitrator unless those allegations solely attacked the arbitration clause, rather than the larger contract containing it (*Prima Paint* "separability doctrine"), it wasn't until 1984 that the Court finished what Congress had started by pre-empting inconsistent state substantive law[23] with what many had thought to be a procedural statute.[24] The Court further held that Congress invoked the full preemptive power of the Commerce Clause,[25] stated a "national policy favoring arbitration,"[26] and resolved "any doubts concerning the scope of arbitrable issues" in favor of arbitration.[27] This national policy favoring arbitration later extended into statutory claims, including Truth in Lending,[28] Age Discrimination in Employment Act,[29] securities,[30] and anti-trust.[31] It has also been held to cover fraudulent inducement,[32] tortious interference and intentional infliction of emotional distress,[33] defamation and the Texas Deceptive Trade Practices Act,[34] breach of fiduciary duty and conversion,[35] personal injury/wrongful death,[36] and wrongful discharge (*Sabine Pilot*).[37] "Employment arbitration grew dramatically in the wake of the Court's 1991 *Gilmer*[38] decision."[39] In fact, one commentator estimates that the number of workers covered by nonunion arbitration procedures now exceeds those covered by union representation.[40]

So, "in a few short decades we have gone from a 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law' to a 'strong endorsement of the federal statutes favoring this method of resolving disputes.'"[41] The result has been a "massive shift from in-court adjudication to arbitration" during a period that roughly parallels various critiques of discovery related costs.[42] For instance, in 1989 Judge Frank Easterbrook suggested "abandoning notice pleading" in order to put "some preliminary assessment of the merits ahead of the decision about discovery" in his *Discovery As Abuse* article.[43] The Supreme Court cited that article in raising the pleading bar in *Bell Atlantic Corp. v. Twombly*[44] in 2007. Other recent efforts to address civil justice issues in litigation and arbitration have been convened under high sounding titles: *The Future of Civil Litigation* at the Sedona Conference,[45] *American Justice as a Crossroads: A Public and Private Crisis* at Pepperdine Law,[46] and the *2010 Civil Litigation Conference* convened by the Judicial Conference Advisory Committee on Civil Rules at Duke Law ("Duke Symposium").[47] A number of studies were prepared in the run up to these conferences by the American Bar Association Litigation Section (ABA Litigation),[48] the Federal Judicial Center (FJC),[49] the RAND Institute for Civil Justice,[50] Lawyers for Civil Justice (LJC),[51] the National Employment Lawyers Association (NELA), the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS).[52] With the exception of mediation, which has benefited from dissatisfaction with both litigation and arbitration, no method of resolving disputes escaped criticism.

So arbitration is included in a wider variety of contracts than at any time, and, yet, it has "never been subject to wider criticism."[53] By the twenty-first century, arbitration had become a "wide-ranging surrogate for trial in a public courtroom" and "arbitration procedures [had] become more and more like the civil procedures they were designed to supplant, including pre-hearing discovery and motion practice."[54] The fair-haired child of the post-Pound era had "grown into a troubled teenager."[55] In fact, long-time arbitration guru Tom Stipanowich notes that "criticism of American arbitration is at a crescendo."[56] That criticism comes from several quarters, but our focus here is on the commercial context. "Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation – extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost."[57] As one general counsel explained: "[I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation."[58] Professor Stipanowich notes that the latest edition of the American Institute of Architects construction forms eliminates binding arbitration as the default procedure, as have other form contracts.[59] Parties now have to opt-in to arbitration with a check-box rather than it appearing as the default. And Stipanowich and others note that "'e-discovery' looms as the ultimate test for arbitration as an alternative to court."[60] Of course, e-discovery hovers over litigation to such an extent that one distinguished Federal District Judge, Royal Furgeson, observed after *Twombly* and *Ashcroft v. Iqbal*[61] that "Discovery has become such an over-riding issue with federal judges that it is having a spillover effect on the rest of the civil justice system, and especially on pleading. Both *Twombly* and *Iqbal* illustrate this. If trial lawyers and magistrate and district judges do not deal better with discovery, I predict that the appellate courts will eventually become so concerned that they will dictate additional changes to the civil justice system, perhaps even more problematic than *Twombly* and *Iqbal*. The time to act is now."[62]

Modern Transformations

The RAND survey of general counsel found that "arbitration is becoming increasingly like litigation."[63] In the international context, this is often called the Americanization of arbitration, allegedly importing "brass knuckle" techniques "that are so alarmingly familiar in American courts."[64] That metamorphosis imbued arbitration with the "style, technique, and training" of these lawyers,[65] who often made tactical use of discovery, choice of law, venue, and other variables. One commentator has tied American influence on international arbitration to the "meteoric rise of the American law firm in the global market place."[66] Whatever its cause, this view was prominent enough by 2003 that Ohio State Law convened a symposium on *The Americanization of International Dispute Resolution*.[67]

Concepcion was decided in the consumer class action context where at least one third of major consumer transactions are covered by arbitration clauses.[68] And while companies have in the past inserted unconscionable arbitration provisions into form contracts, they now seem to be rushing to make them fair in an effort to withstand scrutiny. Pace Professor Jill Gross has asked her ADR class to bring their consumer or employment agreements to class to discuss the provisions. Historically, they had no problem locating unfair, unreasonable, or arguably unconscionable provisions in at least one of the agreements. "This year, for the first time," she reported, "no student in my class (31) could identify an arguably unconscionable provision in a pre-dispute arbitration clause."[69] The clauses "contained 30 day opt-out provisions, references to due process protocols, mechanisms to choose consumer-friendly venues for arbitration hearings, and remedy-preserving terms."[70] Nebraska Professor Kristen Blankley reports similar findings, with the exception of a rise in class action waivers within the arbitration clause. The AT&T clause at issue in *Concepcion* provided for procedures to keep costs very low and even guaranteed claimants a $7,500 minimum recovery if the arbitrator's award was greater than AT&T's last written settlement offer. Gross attributes these changes to "judicial policing of the one-sided arbitration clause."[71]

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Faster, Simpler, and Cheaper?

Proponents have long claimed that arbitration is faster (74%), simpler (63%), and cheaper (51%) than litigation.[72] Only eight percent reported that arbitration was more expensive than litigation in the Harris survey.[73] In a 1998 survey, Lipsky and Seeber found that most respondents believed that businesses used arbitration clauses to save both time (68.5%) and money (68.6%).[74] Indeed, the U.S. Supreme Court found that arbitration is cheaper than litigation[75] by turning to Congressional declarations in the Patent and Trademark Office appropriations bill of 1982: "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices; and, arbitrators are frequently better versed than judges and juries in the area of trade customs and the technologies involved in these disputes."[76] These observations may be showing their age given the changes in arbitration practice.

In their employment case study, Eisenberg and Hill found that the time to final hearing was about three times faster in arbitration than in court.[77] Lower pay employees average time to award on civil rights claims (262 days) was faster than higher pay employees (383 days) and both were significantly faster than time to trial in state (818 days) and federal (709 days) court.[78] Non-civil rights cases were also disposed of three times more quickly in arbitration with lower pay employees (233 days) and higher pay employees (271 days) than they were in the state court basket of cases (723 days).[79] Colvin's more recent study found that arbitration was only twice as fast as litigation, because the mean time to disposition had increased to 361.5 days, but 59.1% settled pre-hearing at the 284.4 day mark.[80] The RAND survey of general counsel with significant litigation experience and less arbitration experience (25% had never attended an arbitration) found that arbitration is somewhat better than litigation in the business-to-business context (52%), saves money relative to litigation (60%), and saves time compared to litigation (59%).[81]

Interestingly, the removal of an arbitration clause never (51%) or rarely (39%) affected the price charged to a customer.[82] And, though changes to an arbitration clause could be material under Section 2-207 of the Uniform Commercial Code, the Second Circuit held that "the inclusion of an arbitration provision in a contract did not constitute a material alteration."[83] If arbitration is in fact cheaper than litigation, one would expect the removal of such a clause to be material and result in a price adjustment.[84] All of which led Eisenberg

to conclude that corporate defendants are "less concerned about, and in need of less protection from, litigation than the Supreme Court's *Twombly* and *Iqbal* decisions suggest."[85]

RAND also identified a perception that arbitration is a more just process.[86] Harris also found that arbitration participants were satisfied with the fairness of the process (75%) and outcome (72%).[87] Lipsky and Seeber found that 60% believed arbitration provided a more satisfactory process than litigation.[88] But there are persistent questions about whether corporate users really buy into these broad perceptions. Eisenberg found much higher use of mandatory arbitration clauses in consumer contracts (76.9%) than in "material" contracts disclosed to the Securities and Exchange Commission (6.1%).[89] And while mandatory arbitration was the dispute resolution mechanism of choice in employment matters generally (79-92.9%),[90] arbitration clauses were less prevalent in individually negotiated CEO employment contracts (42%).[91]

Eisenberg has repeatedly shown that corporations inject arbitration clauses into their contracts with consumers and lower pay employees much more frequently than they do with their executives and other sophisticated businesses. For employees who earn less than $60,000 per year, "arbitration, not litigation, is their only realistic dispute resolution option" due to employer imposed clauses.[92] But that could be a benefit, if arbitration were in fact procedurally less daunting than litigation, because lower pay employees may not have access to counsel according to the ACTL and ABA Litigation studies finding an economic floor for litigation generally at $100,000. Eisenberg and Hill's findings are consistent: "[l]ower pay employees may be unable to attract the counsel necessary for meaningful access to court."[93] But if that were the case, employees would elect arbitration post-dispute and there would be no need for take-it-or-leave-it clauses pre-dispute. Eisenberg contends that the "systematic eschewing of arbitration clauses in business-to-business contracts also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses."[94] A commentator at the Duke Symposium argued that the Supreme Court has used procedural law to "weaken the ability of citizens to enforce [substantive] laws enacted to protect them from business misconduct."[95] There are moves in Congress to reverse many of those decisions, and the new Consumer Financial Protection Bureau may attempt to ameliorate others.[96]

Several studies have compared win rates and damage awards in arbitration and litigation. Since we can't run the same case through both the litigation and arbitration systems, these studies inherently compare apples with oranges and the relatively small data samples add wrinkles. Some studies suggest that employee win rates are higher in arbitration. Maltby reported that "employees prevailed in 63% of arbitrations compared to 14.9% of court cases."[97] Using 1,430 federal court, 160 state court, and 297 AAA arbitration matters alleging employment discrimination, Eisenberg and Hill found "little evidence that arbitrated outcomes materially differ from trial outcomes for higher paid employees.[98] But the data is not uniform and the results are not as strong for lower pay employees who were more likely to assert discrimination or other statutory causes of action rather than the breach of contract claims arising out of the executives' individually negotiated agreements. In civil rights claims, Eisenberg and Hill found higher pay employees prevailed in arbitration more (40%) than lower pay employees (24.3%).[99] Considering the sample size, those figures may be within the margin of error compared to composite employee success rates in state (43.8%) and federal (36.4%) discrimination litigation.[100] In non-civil rights claims, where the sample size was more statistically relevant, the lower pay employee win rate (39.9%) was at the state and federal discrimination win rate, while the higher pay employees bested those rates in arbitration (64.9%).[101] In a 2011 published study of 3,945 AAA administered employment cases, Colvin found an employee win rate of 21.4%, which is below the earlier court win rate.[102] And the court win rate probably falls when motions to dismiss and for summary judgment are factored into the results.[103]

The dollar amount of the awards also reflected the pay and claim type differentials. Higher paid employees received higher arbitration awards on their non-civil rights claims ($211,720), presumably breach of contract, and lower paid employees obtained higher arbitration awards on their civil rights claims ($259,795).[104] Average civil rights arbitration awards for lower ($259,795) and higher ($32,500) pay workers were lower than the basket of state ($478,488) and federal ($336,291) claim judgments the authors used for comparison.[105] Non-civil rights claims inverted. Higher pay employees did better ($211,720) in this category than lower pay employees ($30,782), but both did worse than the state court basket ($462,307).[106] Colvin later found the mean employment arbitration award to be $109,858, below the federal and California averages in his study.[107]As with Eisenberg's studies, Colvin found that higher pay workers won higher awards ($165,671) more often (42.9%) than lower pay workers (22.7% and $19,069, respectively).[108] Workers in Colvin's middle band ($100K - $250K), fell in between (31.4% and $64,895, respectively).[109] Delikat and Kleiner's study of

securities industry employment outcomes showed that the median arbitration award ($100,000) was roughly comparable to the mean federal court trial judgments ($95,554).[110] Outside of the employment context, there were no differences in awards between arbitration and litigation. Eisenberg and Hill concluded that "[a]rbitrator-juror comparisons in non-employment contexts provide no empirical evidence of systematic juror-arbitrator differences."[111]

Anecdotally, we can easily recall cases that deviate from statistics showing similar results in arbitration and litigation. For instance, in *Perry Homes v. Cull*,[112] the owner of a $242,759 home was awarded $800,000 in arbitration over serious structural and drainage issues.[113] Indignant that an arbitrator could award more than three times the purchase price of the home, Perry Homes sought and obtained vacatur from the Texas Supreme Court on a waiver theory. A Tarrant County jury then awarded the homeowner $58 million.[114] On the other hand, after Senator Al Franken passed an anti-arbitration amendment to the Department of Defense Appropriations Act of 2009 in honor of Jamie Leigh Jones and the Fifth Circuit exempted certain claims from the arbitration provision in her employment contract,[115] Ms. Jones lost a Houston jury trial.[116]

The statistical and anecdotal results highlight one reason general counsel tend to favor arbitration with its flaws – tighter standard deviations. The state court basket of cases and the lower pay employee civil rights recoveries had very high standard deviations – exactly what the general counsel in the RAND survey aimed to limit with the use of arbitration. According to RAND, "corporate counsel may essentially be weighing the benefits of confidentiality and experienced decisionmakers against the costs of a potentially smaller award – even if that cost is not real."[117]

Whether in litigation or arbitration, there is a concern that repeat players not gain advantage relative to one-shot participants. These concerns are heightened in the employment context because employers are systematically more likely to be repeat players – individuals have few employers but employers have many employees.[118] Lisa Bingham began to identify a repeat player effect in a series of studies in the 1990s. Using relatively small AAA samples, she found some evidence that employers participating in multiple arbitrations either got good at it or arbitrators tried to curry favor with the repeat players through their awards.[119] Other commentators criticized those studies noting that there were several reasons repeat play improves performance – other than arbitrator bias. They divide into two groups. The practice-makes-perfect group that includes more resources, greater expertise, better policies informed by lots of experience, and the adoption of internal grievance procedures to address claims before they escalate to filed matters. The other group suggests that arbitrators are either biased because they hope to be selected in future cases or that employers know more about the arbitrators through repeat play than do the one shot players.[120] These concerns are often ameliorated by strict disclosure requirements. Colvin sliced and diced the data several different ways, and others will take issue with his assumptions, to show that the employee win rate with repeat employers (16.9% and 12.0%) was roughly half what it was with single shot employers (31.6% and 23.4%).[121] He further found that average damage awards dropped from $27,039 to $7,451 in cases with repeat play employers.[122]

With dismissals and summary judgments trending up in federal practice, some wonder if there is a structural impediment to similar results in arbitration. The RAND survey noted that "arbitrators have low incentive to control the amount of discovery or time spent on pre-hearing disputes because they are paid by the hour."[123] Other interviewees thought the parties might be "extending the process because arbitration awards generally cannot be appealed."[124]

The tension, of course, is with due process and vacatur. As Stipanowich puts it, "since arbitrators are subject to vacatur for refusal to admit relevant and material evidence,[125] some may draw the inference – not established by law – that a failure to grant court-like discovery is an inherent ground for vacatur."[126] Though the FAA controls in most instances, the "finality" of arbitration awards varies "considerably among jurisdictions."[127] During a 2004 survey of federal and state vacatur opinions, Mills found that federal courts granted only six of sixty-one motions, but the courts of California, New York, and Connecticut vacated awards about one-third of the time. Texas, on the other hand, was in a group of nine states that granted only one vacatur during the nine months sampled.[128] The most common successful ground for vacatur was "exceeded powers" (20.8%), and only two of 52 (3.8%) were granted for manifest disregard, which some now suggest is a subset of "exceeding powers" after *Hall Street*.[129] Of course, counsel can agree upon a discovery plan – often with general counsel making cost / benefit tradeoffs.

There is a persistent perception that arbitrators tend to "split the baby," trying to "give each side a partial victory (and therefore partial defeat)," rather than make a strong ruling for fear of alienating one of the parties.[130] Seventy-one percent of the general counsel recently surveyed by RAND held this view, though respondents who used arbitration clauses most

frequently disagreed.[131] And this may well be a case where cognitive shortcuts highlight the most memorable cases even if empirical research shows a different trend in larger data sets. Keer and Naimark did find the mean arbitration award to be 50.53% of the amount demanded, but it was because the results were bimodal – the largest percentage of awards clustered at the ends (barbell graph) because most arbitrators either granted or denied the requested relief in total.[132] The AAA analyzed 111 of its awards in 2009 to see if it could confirm this broadly held perception. It found that:

- 7% awarded approximately half (41 – 60%) of what was claimed
- 41% awarded more than 80% of the claimed amount
- 19% denied the claims completely[133]

One of the biggest reasons general counsel favored contractual arbitration in the RAND survey was confidentiality (59%).[134] Not only does confidentiality reduce publicity over the dispute and its outcome, it reduces the risk of divulging trade secrets or other commercially sensitive information. [135] Of course, parties desiring confidentiality must contract for it.[136] One RAND respondent went so far as to say that "they accept the risk of spending potentially larger amounts of money on arbitrators and outside counsel to keep the details of a commercial dispute secret."[137] There are statutory and practical exceptions to confidentiality, however. California state law, for instance, requires organizations that provide arbitration services to report "the name of the employer; the name of the arbitrator; filing and disposition dates; amounts of claims; amounts awarded; and fees charged" for cases nationally.[138] Colvin and others argue that more data ought to be available to help researchers and policy makers.[139] Even with confidentiality clauses, however, the record of individual arbitrations have been laid bare in vacatur attempts in court. Limiting bad publicity ties back into general counsels' concerns about predictability, and most view arbitration as more predictable – even if they unevenly seek that predictability. RAND notes that "predictability is an overarching concern of business – in terms of both the dispute's outcome and the indirect effects of potentially bad publicity."[140]

Confidentiality comes with social costs – a loss of transparency and a reduction of common law precedent. University of Houston Law Professor Richard Alderman notes that courts have developed doctrines like the warranty of good and workmanlike performance.[141] Today's mobile home contract, he observes, would contain an arbitration clause. Some arbitrator would apply existing law, perhaps in secret. But new doctrine would not be court pronounced like it was in *Melody Home Manufacturing Co. v. Barnes*.[142] Indeed, arbitrators might exceed their powers by relying on arbitral common law unless the contract permits them to do so.[143] But the vast majority of arbitration matters, like their court counterparts, would probably not contribute to common law development anyway. The most recent Fifth Circuit statistics show that only 400 of 3,210 opinions in 2010 were published (12%).[144] And that's the tip of the iceberg since so few trial court cases are appealed: "In 2006 the [federal] trial courts terminated 198,646 cases, but parties commenced only 32,201" appeals, of which 12,338 were decided on the merits (6.2%).[145] As the writers put it, "notwithstanding the tremendous mass of litigation oozing up from below, the courts of appeal reversed or remanded a mere 1,891 cases."[146] If 1,891 of 198,646 (1%) district court terminations are reversed or remanded, and only three percent of all district court orders were found to be fully reasoned,[147] a number that would be lower in state trial courts where publication rates vary, one might fairly argue that common law is already being developed by exception rather than statistical pool. And a much smaller percentage of the publishable opinions garner publicity. In fact, few of the U.S. Supreme Court's 80 or so opinions each term are widely reported, and two-thirds are decided by a 7-2 margin or better.[148] Of course, the main concern is that egregious cases will be shielded from public view and that several of the one-percent or fewer matters that could set precedent are being quietly determined in a conference room.

Perhaps the biggest objection to arbitration is the lack of judicial review of awards. In the RAND survey, "[p]reserving the right to appeal was the *only* factor cited by a majority of respondents as discouraging arbitration (63%).[149] Professor Rau attributes the use of expanded review provisions to a "desire to ensure predictability in the application of legal standards, a desire to guard against a 'rogue tribunal,' or against the distortions of judgment that can often result from the dynamics of tripartite arbitration."[150] This is of particular concern in "bet-the-company" cases.[151] Until recently, the Fifth Circuit recognized manifest disregard as a non-statutory ground for vacatur.[152] In *Hall Street Associates v. Mattel, Inc.*, the U.S. Supreme Court held that parties cannot by contract expand the grounds for review under the FAA.[153] But *Hall Street* did not foreclose the possibility that parties may be able to utilize other means of obtaining expanded review (arbitral panels)[154] or that state statutes or judicial decisions could not provide safe harbors for such activities.[155] While other circuits have since held that manifest disregard of the law is subsumed within §10(a)(4) of the FAA (vacatur available where arbitrators exceed their powers), a panel of the Fifth

Circuit went the other way by holding that since manifest disregard of the law had been defined as a non-statutory ground in the Fifth Circuit it could not survive *Hall Street*.[156]

The Texas Supreme Court, however, recently joined three other states (California, Connecticut, and New Jersey) in interpreting state arbitration acts (the TAA[157] is based on the Uniform Arbitration Act) differently than the Supreme Court interpreted the FAA, even though the provisions are similar. In *NAFTA Traders, Inc. v. Quinn*,[158] the Court acknowledged that while it must follow *Hall Street* in applying the FAA, it was free to reach its own judgment with regard to the TAA.[159] In doing so, it noted that arbitration is first a creature of contract. And if the parties contracted for judicial review for reversible error, that could not be inconsistent with the TAA. In *Quinn*, the arbitrator had applied federal law to sex discrimination claims brought solely under the Texas Commission on Human Rights Act.[160] Noting that the Supreme Court did not discuss FAA §10(a)(4), which like TAA § 171.088(a)(3)(A) provides for vacatur "where the arbitrators exceed their powers," the Texas Supreme Court held that when the parties agree that the arbitrator should not reach a decision based on reversible error, the arbitrator exceeds her powers by doing so.[161] So it reversed a decision based on the TAA where the arbitration agreement clearly involved interstate commerce and held that its decision was not preempted because the "lesson of *Volt* is that the FAA does not preempt all state-law impediments to arbitration; it preempts state-law impediments to arbitration agreements."[162]

Assuming there is no panacea but a variety of options with strengths and weaknesses, the challenge becomes how to advise dealmakers when they are drafting litigation prenups in the rush to consummate a deal.

So the biggest complaint about arbitration may have been cured in Texas when "an agreement specifically states that it is to be governed by the" TAA.[163] Of course, there are potential downsides to such a provision,[164] and it may be preempted. Several arbitration providers have also responded to this criticism by establishing appellate procedures and appellate tribunals for those seeking review.[165] With such appellate procedures, parties trade some speed and finality for the protection of a second-look.

Drafting Considerations

Assuming there is no panacea but a variety of options with strengths and weaknesses, the challenge becomes how to advise dealmakers when they are drafting litigation prenups in the rush to consummate a deal. And, of course, there are competing interests at play. One contract formation theory suggests that drafting is a simple matter of economics – "the more time the parties spend negotiating and drafting the contract, the lower the probability that a dispute over meaning will arise, because more of the possible contingencies will be covered by explicit contractual language."[166] While elegant theory, perhaps necessity is more often the cause: "Whether a dispute arises depends largely on whether one or both parties becomes unhappy in a relationship, which often turns on the world changing in the way the parties did not expressly anticipate."[167] So the idea that parties agree on what they can at contract formation and imperfect dispute resolution alternatives force them to work out later disputes seems logical: "Deliberate ambiguity may be a necessary condition of making the contract; the parties may be unable to agree on certain points yet be content to take their chances on being able to resolve them, with or without judicial intervention, should the need arise."[168]

Forum Selection

Forum is the best determinant of claim value. "Forum is worth fighting over because outcome often turns on forum," according to Clermont and Eisenberg.[169] The plaintiff obviously gets the first crack at forum selection. If that choice is upset by removal, however, plaintiff win rates are "very low, compared to state court cases and cases originating in federal court."[170] Win rates in original diversity cases (71%) were double win rates in removed diversity cases (34%).[171] The effect is more pronounced in venue transfer cases. "Plaintiff's win rate in all federal civil cases drops from 58%, calculated for cases in which there is no transfer, to 29% in transferred cases."[172] Empiricists prove what litigators instinctively know – forum matters.

Venue in Texas is often tied to the place of performance or designated in "Major Transactions."[173] As David Harrell notes, "if the arbitration is to occur in a particular county, there needs to be some other performance in that county."[174] He goes on to note that this does not "restrict parties' ability to employ a forum selection clause to agree to the jurisdiction and venue of another state."[175] According to another commentator, "U.S. courts have typically indicated that contracts of adhesion with consumers are not automatically unenforceable but will be scrutinized for compliance with existing contract law and with notions of fundamental fairness and reasonableness."[176]

Choice of Law

Choice of law also matters to empiricists. There are states who have distinguished themselves in certain substantive areas – New York in financial transactions, Delaware in corporate governance, etc. But the practitioner knows how difficult it is to the get the forum state court to apply the law of another state – and that might lead some to include an arbitration provision. It turns out that choice of law is inversely correlated with the decision to incorporate an arbitration clause. Eisenberg and Miller suggest that if the parties believe a particular "state's law is highly efficient, that might be viewed as reducing the costs of litigation and providing a reason not to include an arbitration clause."[177] Among the material contracts they studied, New York (47%), Delaware (14%), and California (7%) had the highest choice of law concentrations.[178] Not surprisingly, "New York law was overwhelmingly favored for financing contracts, but also preferred for most other types of contracts." New York law (45.69%) was chosen thirteen times more often than Texas law (3.35%). And forum tended to follow choice of law, with New York (41%) and Delaware (11%) chosen as the forum in the 39% of those material contracts specifying a litigation forum.[179] Since Texas Supreme Court has held that a general choice-of-law provision does not preclude application of the FAA,[180] it would be better practice to designate whether the FAA or TAA is the governing arbitration law, even though parties may not generally confer jurisdiction by agreement.[181]

If state law is perceived to be highly efficient, arbitration clause usage falls. Only 4% of the contracts that chose New York law also chose arbitration, while 24% of those selecting California law did the same.[182] When the company had a Texas place of business, arbitration clauses were used in employment contracts (57.1%) and merger agreements (26.1%) at higher rates than when the same types of contracts involved a California place of business.[183] Contract subject matter also correlates with choice of law. Where arbitration clause usage is higher (settlements, employment contracts, and licensing agreements), choice of law concentrations were found to be low.[184] Arbitration usage also correlates with the "supposed unpredictability and unfairness of adjudication."[185] Eisenberg and Miller plot the Chamber of Commerce rank of each state against arbitration clause usage.[186] Low numerical ratings by the Chamber corresponded to favorably-ranked state liability systems. At the time of the study (2002 data), Texas had the second highest Chamber score (behind Louisiana and only slightly worse than California). Arbitration clause usage was lower than Louisiana, but also lower than California, which had a slightly better Chamber score.[187] Of course, other factors could impact these results. Crowded dockets, for instance, may result in higher arbitration utilization.

States and countries compete to attract business with their laws, including their arbitration statutes. The New York precursor of the FAA was part of a concerted effort to make New York a financial center. "New York's highest court has held that awarding punitive damages in an arbitration proceeding violated public policy," but California and most other jurisdictions went the other way even before the Supreme Court held that the New York position was preempted by the FAA.[188] The English Arbitration Act of 1979 was overtly designed to make the U.K. a friendly forum to arbitration. During its parliamentary debate, Lord Cullen asserted, "that a new arbitration law might attract to England as much as £500 million per year of 'invisible exports,' in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.'"[189] Many have fretted that the Arbitration Fairness Act, recently reintroduced by Senator Al Franken, would have the opposite effect in the United States.[190]

Subject Specific

Not only does arbitration clause usage vary based on forum and law choices, it varies by dispute. Drahozol's review of arbitration literature led him to identify "several types of disputes for which parties might well prefer litigation to arbitration: high stakes ("bet-the-company") disputes, in which the parties may fear an aberrational arbitration award subject only to limited judicial review; disputes in which the parties anticipate needing emergency relief, which arbitration is ill-suited to provide; and disputes in areas with clear and well developed law and contract terms, because the industry expertise of arbitrators is of less value and the limited judicial review in arbitration is more problematic."[191] Although arbitration providers have made provisions for emergency relief, it is often carved out of arbitration agreements.[192]

Jury and Class Waiver

Arbitration "super" clauses are often critiqued as nothing more than jury waivers shrouded in federal preemption. Particularly in national contracts, drafters will opt for the single standard of the FAA rather than perform a state-by-state jury waiver analysis.[193] As a result, pre-dispute arbitration clauses have become common in consumer contracts, especially in the telecommunications and financial services industries.[194] Jury trials are also more frequently waived in consumer and employment disputes than in material business-to-business ("B2B") contracts.[195] This is consistent with RAND's finding that the risk of "excessive or emotionally driven jury awards encourages including arbitration clauses in B2B contracts (75%).[196] Yet, by constitutional dictate, juries decide the

most complex cases – whether someone shall live or die in a capital case.[197]

Perhaps class waivers are even more important to contract drafters. Even before *Concepcion*, Sherwin noted that "[e]very consumer contract with a mandatory arbitration clause also included a waiver of the right to participate in class-wide arbitration, and 60 percent of consumer contracts with mandatory arbitration clauses provided that in the event of class arbitration, the arbitration clause would no longer be effective."[198] So the drafters only wanted arbitration if it precluded class relief. This data, according to the authors, lent "support to the argument that a significant motive for mandatory arbitration clauses in consumer contracts is to prevent aggregation of consumers' claims."[199] As Eisenberg concluded from another study, "Our data suggests that the frequent use of arbitration clauses in the same firms' consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution."[200] Since arbitration "super-clauses" are protected by a strong federal policy, these waiver clauses seemed like calculated bets that paid off in *Concepcion*.

In *AT&T Mobility LLC v. Concepcion*, the Concepcions entered into a contract for the sale and servicing of cellular telephones with AT&T. That contract "provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[201] The Concepcions later filed a complaint in the Northern District of California alleging false advertising and fraud because AT&T charged sales tax on a "free" phone. That action was consolidated into a putative class action. AT&T moved to compel arbitration. Relying on California's *Discover Bank* rule, the trial court found that "the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions."[202] The Ninth Circuit also found the class waiver in the arbitration provision to be unconscionable under *Discover Bank*. Finding, again, that the FAA was "designed to promote arbitration," embodied a "national policy favoring arbitration," and a "liberal federal policy favoring arbitration agreements,"[203] the Supreme Court found that *Discover Bank* interfered with the FAA. So the Court held that the FAA preempted it. In doing so, the Court found that "the times in which consumer contracts were anything but adhesion are long past."[204] The dissent argued that *Discover Bank* "'applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers'" and, therefore, does not discriminate against arbitration or offend the FAA.[205]

Subject Matter Complexity

Subject matter complexity in B2B contracts encourages general counsel to use arbitration (59%).[206] But while Eisenberg and Miller found that the subject matter of the contract does correlate with *ex ante* use of arbitration clauses, that decision did not turn on contract complexity.[207] Employment (37%) and licensing (33%) bested even international contract (20%) usage and use in settlement agreements (17%), and merger agreements (19%) topped the average (11%) in the material contracts they studied.[208] In another study, almost 90% of international joint venture contracts included arbitration clauses.[209] "[O]ver three-quarters of consumer agreements provided for mandatory arbitration but less than 10% of the firms' material non-consumer, non-employment contracts included arbitration clauses," in another Eisenberg study.[210]

Rise of Specialized (Often Business) Courts

Some states are developing specialized courts that deal with complex matters. Federal courts are also trying specialized courts, like H.R. 628 that allowed the Administrative Office to approve referral of patent disputes to certain judges in the Northern and Eastern Districts of Texas.[211] As arbitration has become arbigation, "business courts illustrate the opposite trend – they provide an example of litigation become more like arbitration, what might be called the "arbitralization" of litigation."[212] Business courts are typically divisions of larger courts, "presided over by only a few specialist judges," with an "emphasis on aggressive case management and the use of alternative dispute resolution."[213] In 1997, an ad hoc committee of the ABA recommended that all states consider adopting some form of business court: "the movement toward specialized business courts" is "gaining strength," and "that there appears thus far to be no criticisms in jurisdictions where business courts have been established."[214] The number of states with business or complex litigation courts went from one in 1992 to 19 in 2008.[215] Studies of those courts have found that "creation of a business court tends to reduce how long it takes to resolve disputes."[216] Drahozol concludes that the "future of arbitration depends not only on arbitration but also on its competitors – the public courts, including business courts."[217] While he would expect business courts to make litigation more attractive, the empirical evidence available at the time did not "show any significant move away from arbitration to business courts."[218] New York has created a commercial division to compete with Delaware Chancery Courts. "Chief Judge Judith Kaye explained that the purpose

of the commercial division is to give the New York business community a level of judicial service 'commensurate with its status as the world financial capital.'"[219]

Gap Between Arbitration Expectations and Experience

Markers favoring arbitration create high expectations, which are tough to meet. Professor Stipanowich has studied the criticisms of arbitration and authored the College of Commercial Arbitrators's Protocols for dealing with them. In two award winning articles, he explores what arbitration providers and users can do to bring arbitration back from the precipice.[220] Several of the reasons he finds for the separation between expectations and experience can be closed with nuanced advice from litigators during deal formation. Stipanowich observes that most companies are reactive and *ad hoc* in dealing with conflict and, therefore, miss the opportunity to manage it before the contract is negotiated and drafted. He further notes that "many transaction lawyers have little experience in mediation, arbitration, or other forms of dispute resolution" and that may factor into the drafting effort.[221] Harrell observes that "parties rarely give sufficient consideration to how that arbitration will work. Their image of arbitration as a non-litigation panacea that will save time and money in the event of future disputes is often shattered when they realize that they put too little thought into how to shape resolution of those future disputes. That lack of planning often causes arbitration to cost more than, and take longer than, the default litigation would have required."[222]

Of course, it's always hard to focus on how a divorce would be conducted in the middle of courtship. So "parties intent on sealing a deal are reluctant to dwell on the subject of relational conflict."[223] The easy answer, then, is plugging the standard clauses of various arbitration providers into the contract, which unsurprisingly adopt their procedural rules, and reduces the likelihood of friction with the other side during negotiation – but not later. "But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, few readily available and reliable guideposts exist that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration."[224] Stipanowich notes that in light of concerns about discovery and finality, providers are offering clauses for expedited case handling and appellate tribunal review.[225] The problem is often magnified when a dispute arises under general clauses. According to the general counsel of FMC Technologies, "Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter."[226] Striking a familiar cord, Stipanowich claims that the most notable "trial-like approach in arbitration involves discovery."[227]

The antidote then is to seek nuanced advice – often from litigators – that fits the forum to the fuss. Stipanowich calls it moving beyond "one-size-fits-all arbitration" to "fit the process to priorities": "no single set of commercial arbitration procedures can effectuate all of the goals that are important to business users in different kinds of cases."[228] With increased frequency, a component of that advice is the inclusion of mediation in a step-clause (negotiation, mediation, and then binding arbitration).[229] Stipanowich offers a number of successful examples in his lengthy articles.

Choice of Arbitration Provider

All arbitration providers are sensitive to these criticisms and are repeatedly holding training sessions for their arbitrators. They are also modifying rules and adding commentaries, like this one in the CPR Rules:

> Arbitration is not for the litigator who will 'leave no stone unturned.' Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items [for] which a party has a substantial, demonstrable need.[230]

It matters whether an arbitration is administered by a provider or self-administered by arbitrators selected from a panel. Both models include fees for the arbitrators. Administered cases also include administrative fees for the arbitral institution, which often scale based on the amount of the claim.[231] Other models do not include up-front filing fees, but charge arbitrators a percentage of their hourly fee.[232] The fees charged by some providers and arbitrators are a frequent source of criticism, especially relative to subsidized courts.[233] Colvin found the average fee resulting from AAA administered employment cases to be $11,070, though AAA shifts the bulk of those costs to employers using its services.[234] Administrative fees in construction cases can run high and have been repeatedly tested by homeowners.[235] And Drahozol found "dissatisfaction with the rules and costs of the AAA" among franchisors.[236] Therefore, it matters which, if any, provider is selected and, like litigation, the individual arbitrators form the process.[237]

Control Arbitrator Qualifications

A super-majority of RAND "respondents indicated that the ability to control the arbitrator's qualifications encouraged the use of contractual arbitration (69%).[238] While that is consis-

tent with the history of arbitration in the merchant context, some of the interviewees threaded this marker back through the jury waiver component: "companies do not want juries to try to interpret complex contracts in the course of reaching a verdict, so arbitrators with experience in contract law are better equipped to rule correctly."[239] Some interviewees said that "industry knowledge is a more important qualification because of the technical nature of disputes."[240]Another study of FINRA arbitrations concludes that "arbitrators who represent brokerage firms or brokers in other arbitrations award significantly less compensation to investor-claimants than do other arbitrators."[241] Yet, they found "no significant effect for attorney-arbitrators who represent investors or both investors and brokerage firms."[242]

Active Management of Cases

In response to the criticisms above, arbitration providers are encouraging more comprehensive early status conferences with party representatives in attendance. There, if not before by agreement, choices are made between more process, and its expense, or more carefully tailored proceedings. As Harrell notes, "discovery is the area in arbitration where parties can exercise the greatest cost savings."[243] He goes on to offer some specific items that parties can limit or define in their arbitration agreements, or after the fact in status conference agreements, that are adapted here:

1. Mediation. Some providers will incorporate mediation into the process. Parties also write mediation into Step-Clauses that require that step prior to filing an arbitration demand.
2. Disclosure. Federal-type disclosures (parties, persons with knowledge, documents, damages).
3. Documents. Documents to be exchanged and timing for exchange. In some instances, parties must provide documents upon making a demand for arbitration and in responding to that demand.
4. Depositions. The number and length of depositions, types of depositions (individuals, third-parties, or corporate representatives), and the total time for depositions.
5. Written Discovery. Other forms of written discovery, such as interrogatories or requests for admissions.
6. Experts. The use of experts, including the time for designation and number of experts.
7. Timing. Specific deadlines to respond to the claimant's demand, engage in discovery, select a neutral or panel, file motions and have them heard, and hold hearings and issue awards.
8. Evidence. Since arbitration awards can be vacated for failure to hear evidence, its often futile to attempt to restrict or define the types of evidence admitted at an arbitration hearing.
9. Remedies. Is the arbitrator prohibited from issuing injunctive relief or allowed to make such an award? Does seeking injunctive relief in court waive arbitration? What about punitive damage and trebling awards? Would limiting the remedies otherwise available in court tip the unconscionability scales? What quality and level of evidence would be required? Can the panel award attorneys' fees?
10. Award Type. What type of award do the parties want? A simple award would resemble a final judgment while a reasoned award would require findings and conclusions.
11. Appellate Review. What, if any, appellate remedies are available? Judicial review under the TAA to the full extent of the court's power? Abuse of discretion? Appellate arbitral panel?

Providers are training arbitrators to streamline cases, much as the federal courts have done through the case management changes. Surveys show support for increased case management from an early stage.[244]

Bench Trials

Several commentators have wondered why parties do not just waive a jury and proceed with a bench trial *in lieu* of litigating arbitration and then arbitrating or not. Harrell notes the advantages of selecting a forum and waiving a jury: it preserves an appeal, reduces costs, fixes venue, minimizes pre-dispute litigation, and preserves ancillary relief.[245] CPR, a New York-based ADR think-tank that maintains a roster of neutrals but does not administer arbitrations, has published "The Model Civil Litigation Prenup" in an effort to allow streamlined bench trials.[246] The Economical Litigation Agreement provides a nice list of drafting considerations, including discovery that scales with the size of the dispute, for any dispute resolution clause.

Mediation

Mediation has benefited from dissatisfaction with arbitration and litigation. Mediation provides a high degree of control to the parties and counsel over process and product, and that control translates into creative solutions that a court might not even be able to fashion as a remedy. Stipanowich calls "mediation the equivalent of a multi-functional Swiss-Army knife" among dispute resolution options.[247] One general counsel, when asked why her company had turned from arbitration to mediation, responded: "Speed, cost, and

control."[248] Lament about the public and private dispute resolutions systems has translated into an "explosion of mediation."[249] Survey "respondents strongly believed that mediation lowered cost and time to resolution, and either increased the likelihood of a fair outcome or made no difference as to fairness."[250] Lipsky and Seeber found that companies use mediation because it saves time (80.1%), money (89.1%), and preserves good relationships (58.7%).[251] And Professor Gross's class found that companies had required or strongly incentivized mediation prior to arbitration or litigation.[252] As a result, many arbitration providers are enhancing their mediation panels and encouraging mediation during the pre-hearing conference.

Settlement Counsel

It's often tough to be the zealous advocate and be tasked with settlement. In fact, peace is rarely negotiated among the generals conducting the war. Some have advocated similarly separating duties in litigation or arbitration.[253] By separating the functions, much like solicitors and barristers in the United Kingdom, one corporate representative noted that perhaps we "would reach a wiser decision if we had one lawyer develop the case for litigation and a different lawyer press on us the case for settlement."[254]

Conclusion – Dispute Resolution is About Choice

Not that long ago, we had one choice in telephones – black – and one choice in service providers. The same was true of dispute resolution in the same era. Now there are lots of choices and users can thin-slice their options. Choosing arbitration is no longer the end of the inquiry. There are a variety of different providers, rules, panels, and options. Just as litigation has venue and law selection, jury waivers, and motions for summary adjudication, parties can tailor procedures to business goals and priorities – almost like choosing lunch items off of a menu. Contract drafters now have the option of how much discovery they want, how many arbitrators will hear the matter in the first instance, and how many, if any, will review that award and by what standard. Some of us prefer flip phones and others need smart phones. But then there's platform and apps. So, too, with dispute resolution system design. Why wouldn't the lawyers drafting the deals that might become tomorrow's disputes seek the advice of the pros who do that every day as they put their deals together?

Don Philbin, J.D., M.B.A., LL.M., is an AV-rated attorney-mediator, arbitrator, negotiation consultant, and software publisher. He is an adjunct professor at Pepperdine Law's Straus Institute for Dispute Resolution and an elected Fellow of the American Academy of Civil Trial Mediators, the International Academy of Mediators, and the National Academy of Distinguished Neutrals. ★

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1 *AT&T v. Concepcion*, 131 S.Ct. 1740 (Apr. 27, 2011).

2 *NAFTA Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex., May 13, 2011).

3 Harvard Professor Frank A.E. Sander proposed a "multi-door courthouse" where disputants would not all have to stand in the same line for litigation, but would be offered a range of alternatives from mediation to arbitration (binding or non-binding) to case evaluations or summary jury and mini-trials. Frank A.E. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

4 For a figure depicting dispute resolution options, *see* Donald R. Philbin, Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation*, 13 Harv. Negot. L. Rev. 249, 308 (2008), *updated at* Donald R. Philbin, Jr., *ADR Decision Tree: Fit The Forum to the Specific Fuss*, http://www.adrtoolbox.com/decision-resources/adr-decision-tree/ (last visited on Jul. 17, 2011).

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10 Donald R. Philbin, Jr., *Trends in Litigating Arbitration: Using Motions to Compel Arbitration and Motions to Vacate Arbitration Awards*, 76 Def. Couns. J. 338, 338 (2009).

11 Tex. Const. of 1845, art. VII, § 15 ("It shall be the duty of the Legislature, to pass such laws as may be necessary and proper, to decide differences by arbitration, when the parties shall elect that method of trial.").

12 Alternative Dispute Resolution Section of the State Bar of Texas, *White Paper on Arbitration* 1, *available at* http://www.texasadr.org/pdf/white_paper_arbitration_adr_sectin.pdf (2008).

13 Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of* Ex Ante *Arbitration Clauses in the Contracts*

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[14] Jeffrey W. Stemple, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380 (1991).

[15] Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2003); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009). It's worth noting that the highly respected JOURNAL OF EMPIRICAL LEGAL STUDIES is housed at Cornell, where Eisenberg serves as its editor.

[16] Theodore Eisenberg & Elizabeth T. Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (NYU Law School, Public Law Research Paper No. 65, 2003; Cornell Law School Working Paper, 2003), *available at* http://ssrn.com/abstract=389780 or DOI: 10.2139/ssrn.389780 (2003); Eisenberg & Miller, *supra* note 14; Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Mandatory Arbitration for Customers But Not Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118 (2009); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008).

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[18] *Id.* at 1482-83.

[19] *AT&T v. Concepcion*, 131 S.Ct. 1740, 1745 (Apr. 27, 2011).

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[21] *Concepcion*, 131 S.Ct. at 1748, *quoting Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989).

[22] Jeffrey W. Stemple, Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism, 19 OHIO ST. J. DISP. RESOL. 757, 760 (2004).

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[24] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); Justice O'Connor dissented in Southland (the legislative history of the FAA "establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute", *Southland*, 465 U.S. at 25) and Justices Scalia and Thomas dissenting in *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 286 (1995) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . and not one of substantive law").

[25] *Southland*, 465 U.S. at 12; *Allied-Bruce*, 513 U.S. at 272 & 277; *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *see also* Philbin, *supra* note 11, at 338-39.

[26] *Southland*, 465 U.S. at 10.

[27] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

[28] *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 88-92 (2000).

[29] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

[30] *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-86 (1989) and *Shearson Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227-40 (1987).

[31] *Mitsubishi Motors*, 473 U.S. at 628-40.

[32] *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967).

[33] *American Employers Ins. Co. v. Aiken*, 942 S.W.2d 156 (Tex. App. – Fort Worth 1997, no writ).

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[35] *In re Sun Communications, Inc.*, 86 S.W.3d 313 (Tex. App. – Austin 2002, orig. proceeding).

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