

Louisiana Law Review

Volume 74 | Number 1
Fall 2013

Arbitral Autonomy

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Repository Citation

L. Ali Khan, *Arbitral Autonomy*, 74 La. L. Rev. (2013)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol74/iss1/5>

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Arbitral Autonomy

L. Ali Khan*

ABSTRACT

This Article presents concrete proposals to amend the current arbitration law for minimizing court intervention into arbitration proceedings and enforcement of arbitral awards. As a method of dispute resolution, arbitration offers an alternative to litigation. Yet arbitration is frequently interspersed with litigation. As a true alternative, arbitration can and should be autonomous, that is, litigation free. Arbitral autonomy fails when parties go to court to challenge the validity of the arbitration agreement, to obtain emergency relief, or to contest enforceability of the award, among other reasons. To accomplish litigation-free arbitration, first, the need to go to court must be minimized; second, the desire to go to court must be deterred. In developing arbitral autonomy, this Article offers theoretically defensible and practically feasible proposals to remove both the need and the desire to go to court. In endorsing arbitral autonomy, however, this Article warns against an arbitration blackout that thrives on secrecy, quasi-lawlessness, and pro-arbitration judicial exuberance—a blackout that hurts weak and vulnerable parties drawn into mandatory arbitration.

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* Professor of Law, Washburn University. I am grateful to a number of colleagues for making instructive comments when I presented the thesis of this Article at a faculty development workshop in 2011. Freddy Sourgens and Patricia Judd offered useful suggestions to improve the thesis of the Article. I also wish to thank scores of students who, while studying arbitration law with me, reacted to and commented on the ideas that would over the years develop into the concept of arbitral autonomy. This Article is dedicated to Syed Maqbool Alam and Tanvir Ahmed Khan, friends who died long before death was due.

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I. INTRODUCTION

In 1981, the Connecticut Supreme Court offered an insightful paradigm: “Arbitration is a contractual remedy designed to expedite informal dispute resolution. Its autonomy requires a minimum of judicial intrusion.”¹ Although other jurisdictions rarely cite the Connecticut court’s words,² the autonomy of arbitration, as a guiding paradigm for restraining judicial intrusion, is a topic in need

1. *State v. Conn. Emps. Union Indep.*, 440 A.2d 229, 230 (Conn. 1981) (citations omitted).

2. As of February 14, 2013, the Westlaw “all cases” database revealed only seven cases, all in Connecticut, which repeat this formulation of the autonomy of arbitration.

of scholarly attention. Autonomous arbitration occurs when it is initiated, conducted, and concluded, and the arbitration award is enforced, all without any need or desire for judicial intervention.³ Endorsing the autonomy paradigm in its own words, the U.S. Supreme Court has affirmed “the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”⁴ Derived from the contract theory of arbitration,⁵ arbitration statutes, court rulings, and arbitral institutional rules, the autonomy paradigm proposed in this Article offers concrete suggestions for minimizing court intervention in arbitration processes and outcomes. If these proposals aimed at transforming the technical infrastructure of arbitration law⁶ are adopted, arbitration will undergo a revolutionary change, developing into a complete alternative to litigation. In presenting these proposals, this Article invites scholars, lawyers, and judges to further refine the concept of arbitral autonomy (or the “autonomy paradigm”)⁷ that is framed in this Article.

The autonomy paradigm does not advocate that arbitration, as a method of dispute resolution, is inherently superior to litigation. Rather, litigation conducted in public courts is critical for clarifying cases and statutes for future guidance. Arbitration cannot supplant litigation. In the past few decades, however, arbitration has gone well beyond commercial dispute resolution; it has proliferated in numerous areas of law reserved for litigation, including antitrust laws and statutory rights. The historical common law prejudice against pre-dispute arbitration clauses has waned, expanding the scope of arbitration.⁸ Courts burdened with cases are eager to

3. *Developments in the Law — The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1862–63 (2000) (stating that courts and commentators are conflicted over the efficiency benefits and fairness concerns of arbitration).

4. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

5. The contract theory of arbitration, as explained in this Article, states that arbitration is a creature of contract. Arbitration is a method of dispute resolution that parties choose by means of a contract. Under the contract theory, therefore, arbitration cannot be imposed on a party without the party’s consent.

6. Unless otherwise indicated, “arbitration law” refers to the Federal Arbitration Act, the Uniform Arbitration Act, state and federal cases decided under these statutes, and common law. Even though this Article is confined to the United States, the principles discussed may have universal appeal and application. 9 U.S.C. §§ 1–16 (2006); UNIF. ARBITRATION ACT (amended 2000), 1 U.L.A. 1 (2009).

7. This Article uses “arbitral autonomy” and “autonomy paradigm” as synonymous concepts.

8. Common law was averse to enforcing pre-dispute arbitration agreements but was wholly willing to enforce post-dispute arbitration agreements. In the 19th

uphold arbitration agreements to lighten their dockets.⁹ Even lawmakers facing budget rationing have little interest in opposing arbitration as an alternative method of dispute resolution because litigation costs money to the public treasury.¹⁰

Unfortunately, arbitration as currently practiced does not free up judicial resources, nor does arbitration necessarily lead to arbitral autonomy. Arbitration law has left open numerous escape routes for parties to resort to litigation. Parties may choose arbitration by means of an agreement, either before or after disputes arise.¹¹ In most cases, the agreement obligates parties to settle either specific or all disputes by arbitration. By choosing arbitration, obligated parties¹² give up the right to litigate disputes identified in the arbitration agreement. In reality, however, arbitration parties may not completely abandon litigation and their arbitration may be interspersed with litigated disputes, a phenomenon that may be

century, courts would not enforce the arbitration agreement if a party changed its mind after the dispute arose. Justice Story opined that a “reluctant party” cannot be forced to submit to arbitration and surrender access to common courts of justice. *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845).

9. Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 385 (1995) (arguing that the “hidden motive” behind the pro-arbitration stance is a judicial desire to reduce case load). There are state judges, however, with dissenting voices against the invasion of arbitration. In *Casarotto v. Lombardi*, 886 P.2d 931, 939 (Mont. 1994), for example, Justice Trieweiler took issue with “those federal judges who consider forced arbitration as the panacea for their ‘heavy case loads’ and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy.” *Id.* at 939 (Trieweiler, J., concurring).

10. Harry Arkin, *Dispute Resolution A Comparative Analysis under Differing Legal Systems*, 39A ROCKY. MTN. MIN. L. INST. 11 (1995). (“[I]n litigation, the taxpayers, not the disputing parties, pay for the Courts, (i.e. the rent for the Court Room, salaries of the Judges, their clerks, and their administrators.”). Since 1961, the volume of 42 U.S.C. § 1983 litigation has exploded more than one hundredfold, resulting in substantial costs to taxpayers. See STEVEN H. STEINGLASS, *SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION* 142 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3rd ed. 2006).

11. Arbitration law no longer requires that the arbitration agreement be in writing and signed. Responding to the electronic age of emails, faxes, videos, and audios, the law now requires that there be an authenticated record rather than a signed writing. UNIF. ARBITRATION ACT § 1(6) (amended 2000), 7 U.L.A. 11 (2009).

12. An “obligated party” means a party that has agreed by means of an arbitration agreement to settle selected disputes by means of arbitration.

called “arbitral litigation.”¹³ The autonomy paradigm is designed to minimize, if not to completely eliminate, arbitral litigation.

In arbitral litigation, a “renegade party” is one who undercuts the arbitration agreement and revivifies litigation. The renegade party may resort to arbitral litigation for a host of reasons at various stages of arbitration. For example, the renegade party may refuse to submit to arbitration, challenging the existence of the arbitration agreement. It may contest the arbitrability of issues submitted to arbitration. The renegade party may litigate to seek preliminary relief for the preservation of assets. If arbitration proceedings are successfully completed, the renegade party may petition the court to vacate the arbitration award.¹⁴ Because the definition of award includes certain arbitral decisions delivered during the arbitration proceedings, a party may litigate to vacate such decisions.

As an overarching principle, the autonomy paradigm proposes that state and federal courts summarily reject challenges to all facets of arbitration. This rejection is necessary because law rarely precludes the filing of petitions, including frivolous and meritless petitions. Arbitral autonomy can be activated, and judicial intervention denied, as soon as parties choose arbitration to settle disputes between them. A policy opposing arbitral litigation sends a forceful systemic message that parties should deliberate before committing disputes to arbitration because renegade parties will not be allowed to perforate arbitral autonomy. Arbitral autonomy is further garrisoned when arbitration organizations¹⁵ provide effective mechanisms to redress meritorious grievances emanating from arbitration processes and outcomes, thus eliminating the need to go to court.¹⁶

To understand the autonomy paradigm, *de jure* autonomy must be distinguished from *de facto* autonomy. Generally, parties are free to conduct and conclude arbitration without any court assistance. De

13. “Arbitral litigation” occurs when an arbitration party approaches the court to contest some aspect of arbitration. Arbitral litigation tends to undermine arbitration as a true alternative to litigation.

14. Arbitration law allows judicial relief against the enforcement of arbitration awards for a host of reasons.

15. An “arbitration organization” is “an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.” UNIF. ARBITRATION ACT § 1(1) (amended 2000), 7 U.L.A. 11 (2009).

16. For example, parties should be able to remove partial arbitrators without going to court. See AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES § R-17, at 21 (2009), available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (allowing disqualification of an arbitrator for partiality or lack of independence).

facto autonomy occurs when all stages of arbitration proceedings are successfully concluded and the award is enforced without court intervention. However, when a renegade party seeks court intervention at any stage of arbitration, de facto autonomy ceases to exist. Going beyond de facto autonomy, the autonomy paradigm promotes de jure autonomy. Synonymous with de jure autonomy, the autonomy paradigm requires that arbitration law effectively close escape routes to arbitral litigation so that renegade parties have little incentive to, and might even face penalties if, they seek court intervention to oppose the arbitration agreement, the arbitration proceedings, or the arbitration award.

Jurisprudentially, the legal system has not yet fully recognized that arbitral autonomy offers numerous benefits. In fact, the benefits of arbitration publicized in legal literature should be associated with arbitral autonomy and not with arbitration littered with litigation.¹⁷ For example, arbitral autonomy makes arbitration a more complete alternative to litigation as autonomy disconnects arbitration from litigation. By disconnecting litigation, arbitral autonomy gives parties the confidence to recruit specialists to resolve complex disputes¹⁸ beyond the expertise of state and federal judges.¹⁹ Additionally, cost, efficiency, speed, and the need for confidentiality make arbitral autonomy much more attractive than arbitration punctuated with litigation. For resolving international disputes, parties belonging to different legal systems and traditions may have

17. The advantages of arbitration are listed as following: (1) speedy resolution of disputes in months rather than years; (2) substantial savings in legal fees and costs; (3) avoidance of excessive jury verdicts; (4) avoidance of elected state court judges who favor the plaintiffs' bar; (5) reduced punitive damages claims; (6) uniformity of arbitration law and procedures; (7) reduced class action lawsuits; (8) limited discovery; and (9) limited right to appeal. See Alan S. Kaplinsky & Ballard Spahr, *The Use of Pre-Dispute Arbitration Agreements in Consumer Contracts*, 1946 PLI/CORP 201, 207–08 (2012).

18. For example, disputes arising out of software, structural engineering, patents, and similar sciences and technology require sophisticated knowledge of the relevant field. Experts in the relevant field can be much more effective judges than lay judges. In many such disputes, the knowledge of sciences may be much more relevant than the knowledge of law for an efficacious and fair dispute resolution. See Stuart M. Boyarsky, *Not What They Bargained For: Directing the Arbitration of Statutory Antidiscrimination Rights*, 18 HARV. NEGOT. L. REV. 221, 226 (2013) (stating that arbitrators as experts in the industry can apply the law of the shop.).

19. Arbitrators may be former state judges, experts, academics, lawyers, indeed any person that the parties consider to be qualified to resolve the dispute. Unlike state judges, formally educated in law with considerable law practice experience, arbitrators may have expertise in areas other than law. See *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290 (1984) (noting that many arbitrators are not lawyers and may not have expertise in the law of the land).

little confidence in or familiarity with each other's court system; hence, they seek arbitration fortified with autonomy.²⁰ Most businesses, averse to negative publicity, would prefer autonomous arbitration over arbitration conducted under the Damoclean sword of litigation.²¹

The autonomy paradigm makes several technical proposals dispersed at appropriate places throughout this Article. These proposals expand the arbitrator's²² authority necessary to foreclose corresponding litigation. Most importantly, the paradigm empowers the arbitrator to decide whether an arbitration agreement exists and is enforceable and whether a specific dispute falls within the scope of an arbitration agreement. Further, the autonomy paradigm confers upon the arbitrator severability power, that is, the authority to sever the arbitration agreement from the underlying contract. If the arbitration agreement is enforceable, arbitration proceeds to settle the issues, including voidability of the underlying contract. Additionally, arbitral autonomy empowers the arbitrator to grant preliminary, emergency, and exemplary relief without any court assistance. Likewise, the need to go to court is foreclosed when a private appellate avenue is available to review the arbitration award. Accordingly, the autonomy paradigm endorses private review of arbitration awards.

This Article sets forth the argument for arbitral autonomy in the following sequence. Part II examines the contract theory of arbitration, emphasizing that parties forfeit the right to litigation when they select arbitration. Part III discusses the primary attributes of arbitral autonomy. Part IV examines issues of non-arbitrability, proposing ways to avoid fractional arbitration that leads to litigation. Part V argues that the severability doctrine, under which the validity of an arbitration agreement is analyzed separately from that of the underlying contract, fortifies arbitral autonomy. Part VI presents the parity principle under which arbitrators are granted powers equal to those of trial judges. This parity expedites the arbitration process

20. Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 827–28 (2012). “[A]lthough consensual as a formal matter, accepting arbitration is, in many circumstances, effectively mandatory for states that wish to do business with foreign private parties.” *Id.* at 829.

21. One might argue that parties choose arbitration knowing that if arbitration goes wrong, the safety net of litigation is available; consequently, arbitral autonomy might stifle arbitration. (Professor Patricia Judd made this argument while reviewing this Article.) Whether arbitral autonomy would indeed chill arbitration is an empirical question that cannot be answered via speculation. In any event, arbitral autonomy makes arbitration a more authentic and measured method of dispute resolution.

22. This Article uses the phrase “the arbitrator” to include an arbitration panel of two, three, or more.

and eliminates the need to go to court to seek procedural, emergency, or substantive relief. Part VII makes proposals to avoid arbitral litigation in the enforcement of arbitration awards. Part VIII defines the limits of the autonomy paradigm. The discussion warns against any sightless enforcement of mandatory arbitration clauses (MACs) forced upon consumers and employees. This discussion strengthens the argument for arbitral autonomy.

II. FORFEITING LITIGATION

The autonomy paradigm postulates that parties definitively forfeit the right to litigation when they establish contractual arbitration. As discussed below, the autonomy paradigm respects the right to litigation that parties enjoy in the absence of an arbitration agreement. In most legal systems, state-supported courts are available to settle disputes. Access to courts establishes a systemic right to litigation. This right to litigation, however, may be surrendered in favor of arbitration by means of an agreement. Below is a brief overview of the right to litigation.

A. Right to Litigation

One might argue that a general right to litigate civil disputes has not been identified as a constitutional or human right.²³ Even so, a right to access courts has been recognized since the early 19th century.²⁴ The right permeates both criminal and civil cases.²⁵ In criminal cases, the defendant is armed with a series of constitutional and human rights to contest charges. The presumption of innocence is the cardinal principle promised to protect defendants in criminal cases.²⁶ The right to litigation is protected even in civil cases where

23. The author has been unable to find a constitutional or treaty text that proclaims “a right to litigation.” However, the absence of these specific words in constitutions and treaties does not prove that there is no right to litigation. For example, the right to litigation may be phrased as a right to a judicial forum. *See, e.g., Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998) (recognizing employees’ rights to a judicial forum for federal claims of employment discrimination).

24. *See* Michael Correll, *Finding the Limits of Equitable Liberty: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 888 (2011).

25. *See* Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 379–80 (2010) (suggesting that the Due Process clause and the First Amendment Right to Petition are the sources of the right to access to courts in both criminal and civil cases).

26. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (holding that the presumption of innocence is axiomatic and elementary); *Estelle v. Williams*, 425

the state itself engages in unlawful activity.²⁷ For example, the right to litigation is available if the state appropriates private property without just and prompt compensation. Likewise, the right to litigation is protected to enforce the right to free speech, the right to freedom of religion, and, indeed, a complex set of civil, political, and economic rights. In most legal systems, the people enjoy a right to litigate civil disputes against state actors and instrumentalities, a right available to both natural and juridical persons. This right to litigation allows individuals and businesses to use state-administered resources, including courts and agencies, to obtain legal and equitable reliefs.

The right to litigation against non-state entities, including natural persons and businesses, is a bit more complex in its underpinnings. While a general, individual-qua-individual right to litigation is rarely anchored in constitutional protections, one might argue that state dispute resolution services are indispensable for the enforcement of fundamental rights against non-state entities. For example, an employee victimized on the basis of race or religion has the right to seek relief through the courts. Rights against myriad forms of discrimination in the private sector would be meaningless if the state provided no access to remedial litigation. Litigation to protect constitutional and statutory rights against non-state entities, one might argue, is so critical that there indeed exists a *de facto* right to litigation.²⁸ A state cannot discharge its obligations to protect ordered liberty if it does not provide dispute resolution services at an affordable cost.²⁹

U.S. 501, 503 (1976) (holding that the presumption of innocence, though not mentioned in the Constitution, is a basic component of a fair trial).

27. However, under the Eleventh Amendment, an unconsenting state is afforded immunity from suits in federal courts. *See Querm v. Jordan*, 440 U.S. 332 (1979).

28. *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002).

These fundamental rights do not exist just for the benefit of individuals who have disputes, but *for the benefit of all of us*. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends.

Id. at 276.

29. *Id.*

Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws—to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals—tribunals that involve, in the case of the jury, members of the general citizenry.

Id.

The right to litigate must be distinguished from the obligation to litigate. An aggrieved party, whether an individual or business, whose interests have been injured has the right but not the obligation to seek remedies through litigation.³⁰ The legal system rarely imposes an obligation on aggrieved parties to seek remedies through litigation. An aggrieved party may abandon legitimate and meritorious claims and decide not to litigate against the offender. Further, rational litigants take into account the transaction cost of litigation and may not pursue a claim if the cost of litigation exceeds the expected benefit.³¹

While an aggrieved party has no obligation to litigate, the defendant against whom the claim is filed incurs an obligation to defend the civil action. A defendant who does not respond to the civil action runs the risk of facing a default judgment. Even in frivolous and meritless cases, the defendant must litigate to defeat the civil action.³² While a plaintiff is free to walk away from litigation, the defendant cannot do so. In more complex cases where claims are intertwined with counterclaims, a party's right to litigate is also intertwined with the party's obligation to litigate.

The right to litigation levies a financial burden on taxpayers. The state maintains court buildings, pays salaries to judges and staff, and incurs numerous other costs associated with the civil justice system. Parties litigating a civil dispute pay court fees, but these are rarely sufficient to cover the state expenses of litigation.³³ For the most

30. Institutional plaintiffs, such as corporations, may have structural constraints emanating from their charter of organization to pursue legal remedies in certain cases. Organized businesses, therefore, may not have the complete internal freedom to abandon the right to litigation. Individuals, however, enjoy more freedom not to exercise the right to litigation.

31. Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U. L. REV. 69, 94–95 (2007) (stating that a patentee, for example, might not sue for patent infringement because of the prohibitive cost of litigation, running at \$2 million per side).

32. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), Justice Scalia made an interesting commentary on this question:

The books are full of procedural rules that place the perjurer (initially, at least) in a better position than the truthful litigant who makes no response at all. A defendant who fails to answer a complaint will, on motion, suffer a default judgment that a deceitful response could have avoided. A defendant whose answer fails to contest critical averments in the complaint will, on motion, suffer a judgment on the pleadings that untruthful denials could have avoided And a defendant who fails to submit affidavits creating a genuine issue of fact in response to a motion for summary judgment will suffer a dismissal that false affidavits could have avoided. In all of those cases . . . perjury may purchase the defendant a chance at the factfinder.

Id. at 521–22 (citations omitted).

33. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1122–23 (2010) (arguing that court fees should be

part, taxpayers rather than litigants bear the cost of judicial and administrative services available for the resolution of civil disputes. If the law allows litigants to request jury trials, ordinary citizens are summoned to invest time and suffer opportunity cost to assist in dispute resolution.³⁴ Thus, a systemic right to litigation imposes both direct and indirect costs on taxpayers.

Public expenditures on resolution of civil disputes are indispensable for safeguarding ordered liberty. If legal justice is unavailable or unaffordable, social order is undermined. The right to litigation is meaningless without access to courts. Circuit Judge Diana Wood accurately pointed out that “[i]f courts are unavailable or unable to function, as was the case following Hurricane Katrina, little stands between the citizenry and the breakdown of the rule of law.”³⁵ While litigants normally settle their disputes in the shadow of the law, the availability of courts makes apparent the coercive imminence of law. Law without courts may still furnish a normative framework for litigants to articulate and debate issues leading to settlement.³⁶ Yet, the availability of courts and the associated public expense is a steady element in the maintenance of social order and subsidization of legal justice.³⁷

The right to litigation, however, safeguards constitutional rights, including welfare rights.³⁸ The state is under a moral obligation to

increased for foreign litigants accessing U.S. courts to recoup the actual cost of litigation).

34. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systemic Exclusion in Fair Cross Section Claims Must be Expanded*, 59 DRAKE L. REV. 761, 796–97 (2011).

Although courts rarely acknowledge it explicitly, most recognize the jury system is heavily subsidized by the in-kind contributions of jurors, their employers, and their communities. Only a small portion of the actual costs of the jury system are incurred by the courts for administrative expenses, juror fees, and mileage reimbursement. Lost income—or alternatively, lost wages paid by employers who compensate employees while on jury service—averages \$100 per day, and a conservative estimate of lost productivity by employed jurors is \$675 per day.

Id. (footnotes omitted).

35. Diane P. Wood, *The Bedrock of Individual Rights in Time of Natural Disasters*, 51 HOW. L. J. 747, 748 (2008).

36. Linda Ross Meyer, *Just the Facts?*, 106 YALE L. J. 1269, 1293–94 (1997).

37. Nicholas A. Robinson, *Ensuring Access to Justice Through Environmental Courts*, 29 PACE ENVTL. L. REV. 363, 365–66 (2012) (suggesting that access to courts for the vindication of environmental rights has attained the status of customary international law).

38. See David Rudovsky, *Civil Rights Litigation: The Current Paradox*, 5 U. PA. J. CONST. L. 487 (2003) (explaining that the Pennsylvania University

spend public monies to subsidize the right to litigation for the poor and middle classes.³⁹ However, the wealthy can pay to exercise the right to litigation themselves. There is little moral or pragmatic justification for spending public funds to support litigation between wealthy individuals or mega-companies, particularly if litigation involves disputes of marginal social utility.⁴⁰ Even in cases where substantial public interest is at stake, law can simply require that dispute resolution be open and not confidential. Public disclosure of a socially crucial case does not further require that public funds be spent to resolve the dispute.

B. Foregoing Litigation Rights

By choosing arbitration, parties forego several rights accompanying litigation. For example, arbitration parties surrender the Seventh Amendment constitutional right to a jury trial because arbitration is conducted without juries.⁴¹ More broadly, parties surrender the right to access courts. Likewise, parties give up the right to due process of law and equal protection of the laws because arbitration does not rigidly subscribe to these constitutional rights.⁴² Parties also give up the right to discovery under the rules of civil procedure, the right to properly filtered evidence under the rules of evidence, and the right to appeal legally erroneous decisions.⁴³ All of these rights are surrendered to acquire the potential expedition, efficiency, informality, and finality of the arbitration process.⁴⁴ This bargain of swapping litigation rights with arbitration advantages is defended, if not justified, in the name of freedom of contract.⁴⁵

symposium on *Suing the Government* highlighted that access to courts is critical for vindicating constitutional and other rights, including welfare rights).

39. Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717 (2010) (proposing an attorney's fee shifting system under which the poor can successfully assert their rights).

40. Commentators highlight the cost of litigation and its differential impact of the rich and the poor. See George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 162–63 (1999) (stating that overly permissive discovery rules favor the wealthy and disfavor the poor).

41. U.S. CONST. amend. VII.

42. See *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 17 n.1 (Mont. 2002) (Nelson, J., concurring).

43. *Id.*

44. *Id.*

45. Some commentators argue that parties should have the freedom of contract to shape procedural rules in litigation as well. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO.

Further, by choosing arbitration, parties shift the cost of dispute resolution from taxpayers to themselves. On a shared basis, parties pay all costs related to arbitration. Parties pay arbitration organizations, such as the American Arbitration Association (AAA), that provide critical services and default rules for the initiation, continuation, and conclusion of arbitration proceedings.⁴⁶ Parties pay arbitrators for their expertise and time in resolving disputes. Parties pay all other expenses related to renting the place for arbitration, summoning witnesses, and securing translation services and the equipment used in presenting evidence, etc. If the award is voluntarily enforced, parties bear the entire cost of arbitration.⁴⁷

In employment disputes, however, the autonomy paradigm requires that employers, and not low-income employees, pay the entire cost of arbitration. The traditional rule under which both parties shoulder the cost of litigation need not apply to employment disputes.⁴⁸ The low-income employee may surrender the systemic right to litigation if the employer undertakes the full cost of arbitration. Otherwise, arbitration would become oppressive as low-income employees might abandon even meritorious claims to avoid the cost of arbitration. The purpose of employment arbitration is not to defeat meritorious claims but to provide an alternative means of dispute resolution. Employers may offer arbitration as a condition of employment in that an applicant who does not agree to arbitrate employment disputes may be denied the job. In such cases, arbitral autonomy is morally well-founded when low-income employees are exempt from sharing the cost of arbitration.

In sum, arbitral autonomy recognizes that there exists a right to litigate civil disputes that parties may forego by means of an

WASH. L. REV. 461, 462–63 (2007) (proposing that conventional procedural rules should be treated as default rules, rather than as nonnegotiable parameters).

46. Arbitration organizations establish bodies that oversee arbitration awards and appoint arbitrators. For example, the International Chamber of Commerce has instituted the International Court of Arbitration. The London Court of International Arbitration and the International Centre of the American Arbitration Association discharge similar functions. These entities are not courts; they are administrative bodies.

47. Arbitration is called private justice partly because parties pay the cost of dispute resolution through arbitration. If the public judicial system is not used at all, the entire cost of arbitration is borne by the parties. For cost sharing see COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-5-57.

48. However, parties may equally share the cost of arbitration if the dispute arises between the company and the chief executive officer or other well-paid employee. However, equal cost sharing cannot be imposed on clerks, janitors, and other low-income employees.

arbitration agreement. When parties choose arbitration, they forfeit the right to litigation with respect to disputes identified in the arbitration agreement. Arbitration law will do no jurisprudential harm, and it will be consistent with the contract theory of arbitration if it closes all escape routes to litigation for parties who have freely chosen arbitration as an alternative method of dispute resolution.

III. ATTRIBUTES OF ARBITRAL AUTONOMY

This Part lays out the attributes of arbitral autonomy. These attributes, some of which have gradually evolved to become part of arbitration law, minimize arbitral litigation. The autonomy paradigm endorses these attributes. However, the paradigm has serious reservations about the MACs that harm rather than benefit arbitral autonomy.

First, the most important attribute of arbitral autonomy treats arbitration parties with equal respect and concern. This attribute acknowledges that no person can be forced to settle disputes through arbitration. Parties custom design arbitration by authenticating an arbitration agreement that incorporates their mutual will. Party autonomy⁴⁹ is the source of determining issues to be arbitrated, the method of selecting the arbitrator, the language in which arbitration proceedings will be conducted, the place of arbitration, the choice of law that would govern the resolution of substantive disputes, and other related matters.⁵⁰ Equal respect requires that the obligation to arbitrate be reciprocal in that each arbitration party is similarly bound to submit identified disputes to arbitration. The autonomy paradigm rejects asymmetrical arbitration under which one party is bound to arbitrate but the other is free to litigate the same disputes—reaffirming the adage: What is good for the goose is good for the gander.

Second, the autonomy paradigm recognizes the expanding universe of arbitration beyond the classical contours of business-to-business arbitration. Disputes identified in the arbitration agreement

49. See further discussion of party autonomy in Part III.C. See generally Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012) (exploring the normative legitimacy of party autonomy).

50. “Although arbitrators generally enjoy broad powers to resolve disputes, there are occasions when an arbitrator’s authority may be unclear, in the absence of express agreement of the parties. For this reason, parties may wish to specify, in their arbitration agreement, precisely what the arbitrator can and cannot do.” STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 86 (2002). For efficiency purposes, arbitration parties may adopt the rules of an arbitration organization, such as the AAA, that provide the essentials of arbitration.

need not be international or commercial in nature. Nor is arbitration limited to contractual transactions. Arbitration is available to settle a variety of disputes, including the ones arising from torts, labor, consumer transactions, employment, and antitrust laws. Claims involving statutory rights are not barred from arbitration. “By agreeing to arbitrate a statutory claim, [however,] a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”⁵¹ The U.S. Supreme Court has rejected the argument that disputes involving “the pervasive public interest” are not fit for arbitration.⁵² The ever-expanding universe of arbitration excludes fewer and fewer claims from its domain.⁵³

Third, the autonomy paradigm embraces specific performance of arbitration agreements and, therefore, compels renegade parties to submit to arbitration.⁵⁴ It is a fundamental principle of contracts that parties are free not to enter into a contract, but if they do they are obligated to perform the contractual obligations.⁵⁵ The freedom to enter a contract at will does not include the freedom to revoke the contract at will. A party breaching the contract is lawfully obliged to compensate the aggrieved party.⁵⁶ In arbitration, however, opting out of the arbitration agreement by paying damages is unavailable.

51. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

52. *Id.* at 629.

53. See *Marmet Healthcare Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (preempting West Virginia state public policy against pre-dispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes).

54. Ordinarily, a party may compel arbitration if another party renegades against the arbitration agreement and files a civil action. If a party files a civil action and the other party does not compel arbitration, the plaintiff may be held to have waived the contractual right to arbitration and may be denied the request for arbitration. *Kramer v. Hammond*, 943 F.2d 176, 179 (1991). However, the waiver is far from automatic. The plaintiff does not surrender the contractual right to arbitration by filing a civil action. The defendant must show some sort of injury or prejudice for the court to deny plaintiff the exercise of the contractual right to arbitration. Catherine McGuire & Robert Love, *Dispute Resolution Between Investors and Broker-Dealers in the United States Securities Markets*, 14 HASTINGS INT'L & COMP. L. REV. 431, 449 (1991) (stating that parties may approach courts for provisional remedies without waiving the contractual right to arbitration).

55. See Randy E. Barnett, *Contract Scholarship and Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223, 1241–42 (1984) (discussing the consensual transfer of present or future rights as the basis of contract obligations).

56. The breaching party may have to pay compensatory damages. Other forms of damages granted are punitive, liquidated, nominal, and restitutionary damages. See generally L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

Arbitration agreements warrant specific enforcement;⁵⁷ damages are seldom sufficient to opt out of arbitration. Further, arbitration law does not allow the revocation of arbitration agreements.⁵⁸

Fourth, the autonomy paradigm does not discriminate between pre- and post-dispute arbitration agreements, and it enforces both types of agreements with equal resolve.⁵⁹ Historically, post-dispute arbitration has been the most accepted form of arbitration because parties are fully aware of what is at stake in an existing dispute when they surrender the right to litigation in favor of arbitration. Over the centuries, common law courts have had little problem enforcing post-dispute arbitration agreements. However, common law courts have been reluctant to enforce pre-dispute arbitration agreements on the theory that such agreements ought to be revocable after a dispute arises if one of the parties no longer believes that arbitration is the most appropriate method to resolve the dispute.⁶⁰ The so-called common law hostility was primarily against pre-dispute arbitration clauses; it was rarely against post-dispute arbitration agreements.⁶¹

Finally, the autonomy paradigm views MACs inserted in consumer and employment contracts with suspicion. MACs pose equity threats to the autonomy paradigm.⁶² The principle that parties forfeit the right to litigation and willingly opt for arbitration faces distortion in take-it-or-leave-it bargains under which one party

57. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957) (holding that the agreement to arbitrate grievance disputes, contained in a collective bargaining agreement, should be specifically enforced); *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., dissenting) (stating that the purpose of FAA was to annul the common law rule against specific enforcement of arbitration agreements).

58. UNIF. ARBITRATION ACT § 6(a) (amended 2000). This provision is non-waivable. *Id.* § 4(b)(1).

59. *Id.* § 6(a). *See also* *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

60. In the 1950s, the U.S. Supreme Court held that a pre-dispute arbitration clause regarding a claim under the Securities Act is unenforceable. *See Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

61. *See supra* note 8.

62. MACs may be called coercive. However, the word “coercive” seems forceful to describe mandatory arbitration clauses that businesses and employers impose on consumers and employees respectively. Ordinarily, the word implies the use of force or intimidation to obtain compliance. The word coercion as applied to MACs connotes absence of actual consent, even though formal consent might be present, such as initialing the arbitration clauses. *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1246 (2001).

commands disproportionate market power in relation to the other.⁶³ MACs are inseparably tied to take-it-or-leave-it bargains. Consumer and employment arbitration agreements are in most cases coercive contracts. Businesses selling or leasing goods and services include binding arbitration as a mandatory condition in sales and lease contracts. Consumers have the option to turn down the bargain and refuse to buy or lease goods and services from such businesses. But if they need to buy goods and services, consumers must submit to MACs. Likewise, employers may not offer jobs unless applicants accept mandatory arbitration for resolving employment disputes, including racial, religious, gender, or other discrimination claims. Such take-it-or-leave-it bargains distress the contract theory of arbitration, particularly if consumers and employees have no viable market option to turn down the bargain. In such cases, to say that consumers and employees willingly surrender the right to litigation and voluntarily opt for arbitration is a stretched truth.

In sum, the autonomy paradigm is most suitable for the enforcement of arbitration agreements free of procedural coercion and substantive unconscionability. If parties negotiate to surrender the right to litigation in favor of arbitration and they freely negotiate the terms of arbitration, they have little excuse to resort to arbitral litigation. The legal system should disallow any weakening or undermining of freely negotiated arbitration agreements. The autonomy paradigm derives its conceptual clarity and moral vigor from freedom of contract. However, the autonomy paradigm does not endorse MACs that embody substantive unfairness. Foreclosing judicial scrutiny of MACs can entrench market abuse and exploitation of the weak and the vulnerable. This point is further discussed in Part VIII in the context of arbitration blackout.

IV. AUTONOMY AND ARBITRABILITY

This Part explains the relationship between arbitral autonomy and arbitrability. For the most part, arbitral autonomy is compatible with the concept of “arbitrability,” a permanent feature of arbitration law that excludes certain disputes from the scope of arbitration. Non-arbitrability limits arbitration by the very fact that non-arbitrable disputes are reserved for litigation. Arbitral autonomy is relevant only if disputes are arbitrable and have been submitted to arbitration. The distinction is clear: autonomy suppresses arbitral litigation whereas non-arbitrability suppresses arbitration itself. Historically, arbitration

63. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011) (commenting on the popular jurisprudential postulate that arbitration is based on consent, not coercion).

has been a favored method for settling commercial disputes while non-commercial disputes were reserved for litigation. In the past few decades, legislatures and courts have been exceedingly open to arbitration, and the historically limited scope of arbitration has substantially expanded, reaching employment, consumer, and antitrust matters. Fewer and fewer areas of law, civil disputes, and specific issues are non-arbitrable. As non-arbitrability shrinks in scope, the autonomy paradigm becomes more and more valuable.

For analytical purposes, non-arbitrability may be divided into two distinct categories: state non-arbitrability and party non-arbitrability. As discussed below, the autonomy paradigm raises different issues with respect to these categories. As a general principle, with only a few caveats, the autonomy paradigm respects state non-arbitrability that excludes certain matters from arbitration; it similarly respects party non-arbitrability in that arbitration parties may freely identify issues they would submit to arbitration and reserve others for litigation.

A. State Non-arbitrability

“State non-arbitrability” refers to laws and policies that a state may adopt to exclude designated matters from the scope of arbitration. “State arbitral paternalism” is a jurisprudential construct to defend state-initiated non-arbitrability. State arbitral paternalism disallows arbitration, preserves the right to litigation, and consequently guides persons to litigate rather than arbitrate certain disputes.⁶⁴ For example, the state has a monopoly over the dissolution of marriage.⁶⁵ Even though parties may negotiate marital property settlement and child custody issues, the dissolution of

64. For example, in the past few years, the controversy over faith-based arbitrations has stirred legal and political circles. The Sharia-based arbitration intensifies Islamophobia and some legitimate concerns with respect to Western values of female equality. See Jean-Francoise Gaudreault-Desbiens, *Constitutional Values, Faith-Based Arbitrations, and the Limits Private Justice in a Multicultural Society*, 19 NAT'L J. CONST. L. 155 (2005); see also Liaquat Ali Khan, *Kansas Legislature Does Harm in Barring Islamic Law*, THE HUFFINGTON POST (May 15, 2012, 12:05 PM), www.huffingtonpost.com/liaquat-ali-khan/kansas-sharia-law_b_1518144.html.

65. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (“[W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State’s judicial machinery.”). States also exercise control over the formation of marriage; marriage regulations vary from state to state. See generally Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J. L. REFORM 735 (2011).

marriage itself is non-arbitrable, and only courts are empowered to dissolve marriages. In addition, the court is not bound to accept a negotiated settlement, even though most courts defer to the parties. The parental abuse of children also warrants state paternalism.⁶⁶ The state monopoly over dissolution of marriages to the exclusion of arbitration may be judicious for the protection of children's rights.⁶⁷

As a jurisprudential construct, state arbitral paternalism plays a beneficial role in protecting the community's weak and vulnerable sections. In preserving social order, economic justice, or elements of fairness, the state may exclude certain legal matters from the private justice of arbitration and retain them in the public realm of state courts. In modern societies, state arbitral paternalism does not emanate from the will of a "philosopher-judge"⁶⁸ who might see the ills of arbitration that no one else does. State choices of non-arbitrability are frequently democratic choices, made after due debate and deliberations in elected chambers and legislated in state statutes. To declare all such democratic choices in determining the scope of arbitration as "hostility to arbitration" is analytically inaccurate and indefensible.⁶⁹

State non-arbitrability, however, is undergoing serious judicial deconstruction and dismantlement. The state power to freely declare non-arbitrability in certain areas of law has been challenged through the constitutional doctrine of preemption.⁷⁰ Both Congress and federal courts have flattened the fortress of state non-arbitrability. If parties opt for arbitration but the state mandates litigation, federal

66. For example, the state as *parens patriae* protects children from neglectful parents. However, excessive state paternalism over family matters could harm rather than protect children. Coyla J. O'Connor, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131, 146 (2008).

67. See generally Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 500 (1981) (arguing that arbitration resolves competing interests of parties (parents) and because the child is not an arbitration party, the child's welfare may not be fully represented or protected in the arbitration proceedings). But see Lawrence S. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197, 1198 (1964) (arguing that a legal instrument like arbitration is suitable for disputes involving child welfare).

68. Dean Norman Redlich, with whom the author studied a course in Legal Education, offered the phrase "philosopher-judge" to describe Judge Edward Winfield. See Norman Redlich, *Judge Edward Winfield*, 62 N.Y.U. L. REV. 927, 928 (1987).

69. *Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 282 (1995) (O'Connor, J., concurring) (protesting that an expanding scope of FAA will displace state statutes designed to protect consumers).

70. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 409 (2004) (discussing the preemption of state laws that impede the enforcement of arbitration clauses).

courts side with the parties and not the state.⁷¹ As a broad principle, the contractual right to arbitration trumps state non-arbitrability.

By enacting the Federal Arbitration Act (FAA) in 1925, Congress set in motion a process of undermining state non-arbitrability.⁷² The FAA protects the specific enforcement of arbitration agreements.⁷³ Courts have employed the FAA to strike down state statutes that collide with the specific enforcement of arbitration agreements.⁷⁴ According to the U.S. Supreme Court, in enacting the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.”⁷⁵ In conflicts over arbitrability between a state statute and an arbitration agreement, federal courts enforce the arbitration agreement and not the state statute.⁷⁶ Even when state courts favor non-arbitrability, federal courts rely on the FAA to overrule state courts and support the specific enforcement of arbitration agreements.⁷⁷

Consider a state non-arbitrability statute. The California Franchise Investment Law provides: “Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.”⁷⁸ In reading this provision, the California Supreme Court ruled that claims asserted under the Franchise Investment Law are non-arbitrable.⁷⁹ In others words, parties to a franchise agreement cannot surrender their right to litigation in favor of arbitration. Parties must litigate and find judicial solutions to issues arising under the Franchise Law. The U.S. Supreme Court struck down California’s non-arbitrability statute as an unlawful

71. See *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987).

72. 9 U.S.C. §§ 1–16 (2006).

73. *Id.* §§ 9–11. The reluctant party that agreed to arbitrate can be compelled to abide by the agreement.

74. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (preempting the Montana statute that makes arbitration agreements unenforceable unless the notice that the contract was subject to arbitration was underlined in capital letters on the first page of the contract).

75. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

76. *Marmet Healthcare Ctr. v. Brown*, 132 S. Ct. 1201 (2012) (holding that FAA preempts West Virginia statute that excludes from arbitrability pre-dispute arbitration clauses for claims involving injury and wrongful death caused by negligence in nursing homes); *Perry v. Thomas*, 482 U.S. 483 (1987) (holding that FAA preempts state-law requirement that litigants be provided a judicial forum for wage disputes).

77. See, e.g., *Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

78. CAL. CORP. CODE § 31512 (West 2011).

79. *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982).

barrier to the scope of arbitration.⁸⁰ It preempted the statute and upheld the freedom of parties to arbitrate franchise disputes.⁸¹

Under the evolving law of arbitrability, private contracts can preempt state statutes that bar arbitration. Parties may use an arbitration agreement to defeat state non-arbitrability. If a certain matter is non-arbitrable under state law, parties may nonetheless agree to submit such non-arbitrable matter to arbitration. They count on the FAA's supportive role to defeat the state barrier. That arbitration parties may use the power of contract to defeat state non-arbitrability is a remarkable triumph of private law over legislative policies.

It is unclear, however, whether federal courts would remove every conceivable state arbitral barrier under the preemption doctrine. Parties take some risk when they defy state non-arbitrability laws and agree to submit matters to arbitration. In most cases, state non-arbitrability is a non-issue if both parties are committed to arbitration. State non-arbitrability becomes an issue only when a renegade party challenges the arbitration agreement on the basis of a state statute prohibiting arbitration. In such cases, federal courts are disinclined to rescue the renegade party; they uphold the arbitration agreement and not the state barrier.

The autonomy paradigm does not advocate that all state barriers to arbitration be completely removed. As noted before, the autonomy paradigm aims to eliminate arbitral litigation; it does not prefer arbitration over litigation. The state may have weighty policy considerations in excluding certain legal matters from the scope of arbitration. Some such barriers may survive the law of preemption. The autonomy paradigm respects the law of preemption that dismantles non-principled state barriers to arbitration, and it also respects legitimate state concerns for reserving certain matters exclusively for judicial forums.

In addition to dismantling state non-arbitrability, federal courts are equally resolved to dismantle federal non-arbitrability. The Supreme Court has interpreted federal statutes granting the right to sue to include the option to arbitrate.⁸² The theory that Congress can grant a non-waivable right to sue is still good.⁸³ However, unless the language of the federal statute is crystal clear in excluding arbitration as a method of dispute resolution, the right to sue is

80. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

81. *Id.*

82. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

83. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

interpreted to include the right to arbitration. Even “repeated use of the terms ‘action,’ ‘class action,’ and ‘court’—terms that . . . call to mind a judicial proceeding” in a federal statute will not be construed to conclude that the statute requires litigation and prohibits arbitration.⁸⁴ The powerful pro-arbitration trend in federal courts rarely rules in favor of non-arbitrability.

Should the arbitrator have the preemption power to strike down a state statute prohibiting arbitration? The autonomy paradigm is greatly strengthened if arbitrators can lawfully exercise this preemption power and thereby eliminate the need to go to court. To understand this proposition, consider the franchise case discussed above.⁸⁵ The California statute excludes franchise-related matters from the scope of arbitration, requiring litigation. Imagine that parties enter into a franchise agreement that includes an arbitration clause to settle franchise disputes, ignoring the state statute. When a dispute arises, one party requests arbitration while the other objects to arbitration by pleading the state non-arbitrability statute.

If the arbitrator is empowered to decide the non-arbitrability question, the arbitrator may uphold the California statute and conclude that the dispute is non-arbitrable. In that case, arbitration will no longer be available unless the court decides otherwise and preempts the state non-arbitrability statute. A more serious situation arises if the arbitrator believes that the California statute is an unlawful barrier to arbitration. Should the arbitrator be granted the preemption power to decide that the California statute is an unlawful barrier to arbitration under the combined impact of party autonomy and federal law?

The judicial power of preemption is a sensitive constitutional question impinging upon state sovereignty. Granting the preemption power to arbitrators is a non-starter because it will invite stiff opposition from judges, lawmakers, and other legal professionals. Numerous arguments may be summoned against granting preemption power to arbitrators. First, because even non-lawyers can be arbitrators, they might lack the expertise and understanding of the application of preemption law. Second, arbitrators and judges might reach conflicting conclusions on preemption, creating systemic confusion and potentially increasing arbitral litigation. Third, because arbitration awards cannot be set aside for legal or interpretive errors, judges would have little power to overrule erroneous interpretations of preemption law in arbitration circles. Fourth, constitutional matters, such as preemption, should not be privatized because no private person ought to have the power to

84. *CompuCredit*, 132 S. Ct. at 670.

85. See *supra* notes 78–81 and corresponding text.

nullify a state statute. On the basis of these and other arguments, the autonomy paradigm does not propose to disturb the exclusive judicial preemption power to strike down state non-arbitrability statutes.

B. Party Non-arbitrability

“Party autonomy” empowers arbitration parties to determine the scope of the arbitration agreement. “Party non-arbitrability” is the subpart of a broader concept of party autonomy to make and shape bargains.⁸⁶ Arbitration law generally respects party autonomy. “Through their contracts, parties determine the arbitrators’ substantive and procedural powers. Arbitrators who comply with the resulting substantive and procedural limits demonstrate deference to the parties and reinforce the parties’ autonomy.”⁸⁷ Exercising party autonomy, parties to an arbitration agreement may exclude certain matters from arbitration.⁸⁸ The law does not obligate parties to accept arbitration for all disputes between them. Parties are free to hybridize dispute resolution by choosing arbitration for some disputes and reserving litigation for others, a phenomenon that this Article calls “fractional arbitration.” The mere existence of an arbitration agreement does not automatically determine that every dispute between the parties is subject to arbitration.

Arbitral autonomy disapproves of asymmetrical arbitration agreements that retain the right to litigation for one party but not for the other. Asymmetrical clauses rarely emanate from genuine party autonomy. In most cases, the stronger party, such as an employer, imposes an asymmetrical arbitration obligation on the weaker party, such as an employee.⁸⁹ Employment contracts at nonunion

86. In conflict of laws, party autonomy empowers parties “to select the law governing their contract, subject to certain limitations.” *Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 491 (1989) (quoting EUGENE F. SCOLES & PETER H. HAY, *CONFLICT OF LAWS* 632–33 (2d ed. 1991)). Here, the concept of party autonomy is used with a broader meaning to include the power to make legally enforceable bargains.

87. Julia Rabich, Sarah Stoner & Nancy A. Welsh, *Judicial Review of Arbitration Awards and Mediation Agreements: Tips for Sustaining Deference*, 67-APR DISP. RESOL. J. 48, 50 (2012).

88. “Party autonomy” refers to issues that arbitration parties decide to submit to arbitration. It also includes issues that parties reserve for litigation. By contrast, “autonomous arbitration” minimizes court intervention with respect to issues submitted to arbitration. Autonomous arbitration has no bearing on issues reserved for arbitration.

89. “[T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the

workplaces may contain arbitration clauses with asymmetrical obligations. The clause may bind workers but not the employer to submit employment disputes to arbitration. Under such one-sided clauses, the employer does not surrender the right to litigation in favor of arbitration, but the employee does. Courts have refused to enforce asymmetrical clauses by declaring them unconscionable.⁹⁰

1. Prohibiting Fractional Arbitration

Ordinarily, parties select arbitration as the exclusive method of settling all issues arising out of a transaction. A standard arbitration clause may read as follows: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration.”⁹¹ This all-inclusive pre-dispute clause submits all contract controversies and claims to arbitration and reserves nothing for litigation. A similar all-inclusive pre-dispute agreement may be drafted to settle non-contractual claims and controversies by arbitration. Despite this common practice of using all-inclusive arbitration clauses, arbitration law respects fractional arbitration and allows parties to reserve some matters for litigation.

Analytically, there are two distinct questions: “(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.”⁹² These two questions constitute party non-arbitrability. The first question identifies whether parties have selected arbitration as the forum for dispute resolution. The second question identifies whether the parties have selected arbitration for less than all disputes and have thus opted for fractional arbitration. Party non-arbitrability is rarely an issue when parties submit all disputes to arbitration by means of a valid arbitration agreement.

Fractional arbitration, though sound under the contract theory of arbitration, spawns arbitral litigation. When parties establish a hybrid regime reserving some issues for arbitration and some for litigation, they invite confusion and conflict. Parties will inevitably fight over the borderline that separates arbitration issues from litigation issues. This border dispute is even more troublesome if issues reserved for litigation arise under the same contract or relate

weaker party without accepting that forum for itself.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000).

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

91. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-34, at 22.

92. *Kilgore v. KeyBank Nat’l Ass’n*, 673 F.3d 947, 955 (9th Cir. 2012).

to the same transaction. Parties will use courts to delineate the border that the arbitration agreement might have vaguely drawn. Because fractional arbitration breeds arbitral litigation, it clashes with the rationale of the autonomy paradigm.

Arbitral autonomy proposes to prohibit fractional arbitration. This prohibition makes much more sense with respect to pre-dispute arbitration agreements when the nature and scope of future disputes is unknown. Parties are most likely to disagree over the scope of a pre-dispute arbitration agreement because parties may see arbitration differently when a specific dispute arises. (A post-dispute arbitration agreement under which a particular dispute is submitted to arbitration does not fall under the concept of fractional arbitration.) Arbitration institutions may fashion rules to curb pre-dispute fractional arbitration. They already do by proposing broad, comprehensive pre-dispute arbitration clauses. The courts may also refuse to fine comb an arbitration agreement to determine whether a dispute is excluded from arbitration.⁹³

2. Arbitrating Fractional Arbitration

Until the law prohibits fractional arbitration, the autonomy paradigm supports allowing the arbitrator to decide disputes involving party non-arbitrability. While state non-arbitrability barriers to arbitration may be reserved exclusively for courts, party arbitral choices should be subjected to arbitration. In fractional arbitration, if both parties agree that a certain dispute should not be submitted to arbitration and must be litigated, the autonomy paradigm is not in question. If parties disagree over whether a dispute falls within the scope of an arbitration agreement, a scenario that usually occurs after a dispute has arisen, the road to arbitration is no longer clear. If parties agree that the issue of party non-arbitrability may be submitted to arbitration, they may do so and thus preserve the autonomy of arbitration. If parties disagree over the party non-arbitrability of an issue and one party calls for arbitration and the other for litigation, the deadlock invites arbitral litigation and consequently threatens the autonomy paradigm.

To resolve such deadlocks arising from fractional arbitration agreements, the autonomy paradigm confers upon the arbitrator the

93. “Where the arbitration clause is broad, only an express provision excluding a specific dispute, or ‘the most forceful evidence of a purpose to exclude the claim from arbitration,’ will remove the dispute from consideration by the arbitrators.” *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 577 (6th Cir. 2003) (quoting *AT & T Technologies, Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986)).

inherent power to decide whether a particular controversy is arbitrable under the arbitration agreement.⁹⁴ The arbitrator's power to decide fractional arbitration controversies would eliminate the need for the parties to go to court. A fractional arbitration agreement is essentially a contract that does not raise intricate constitutional or statutory questions. Reserving fractional arbitration questions for arbitrators promotes efficiency of dispute resolution. It makes little sense to reserve fractional arbitration disputes exclusively for courts because, in that case, parties will be forced to litigate such disputes, a consequence leading to arbitral litigation that the autonomy paradigm strives to eliminate.

The contract theory of arbitration may be invoked to argue that fractional arbitration disputes must be litigated in courts. Conceptually, arbitration occurs because parties have voluntarily agreed to submit disputes to arbitration. If a certain dispute falls within the scope of the arbitration agreement, the renegade party may be compelled to arbitrate because such compulsion is consistent with specific enforcement of arbitration agreements. However, if a party has not agreed to submit a specific dispute to arbitration, the law cannot compel the party to arbitrate that specific dispute. A party contesting the arbitrability of a specific dispute is not a renegade party but instead a non-party that has not agreed to settle the specific dispute by arbitration. On the basis of this contract-based logic, a party contesting fractional arbitrability makes a credible claim against what it believes to be coercive arbitration.

Arbitration law offers a multilayered solution. First, it draws a distinction between procedural and substantive arbitrability. The arbitrator has the power to decide issues of procedural arbitrability, what arbitration law calls "a condition precedent to arbitrability,"⁹⁵ such as time limits, laches, notice, estoppel, and other objections to the maintenance of a claim. Substantive arbitrability is indeed another name for fractional arbitration. With respect to fractional arbitration, that is, whether a dispute is encompassed by an agreement to arbitrate, arbitration law provides that the court shall decide such a controversy.⁹⁶ The Supreme Court has upheld the judicialization of fractional arbitration.⁹⁷ This solution is consistent

94. The U.S. Supreme Court has ruled that parties may arbitrate the "gateway" questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, W., Inc., v. Jackson*, 130 S. Ct. 2772, 2777 (2010).

95. UNIF. ARBITRATION ACT § 6(c) (amended 2000).

96. *Id.* § 6(b).

97. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

with the contract theory of arbitration that forbids coercive arbitration.⁹⁸

The judicialization of fractional arbitration, however, is not a mandatory rule. It is a default rule that parties may alter to preserve arbitral autonomy.⁹⁹ The parties may include a specific clause in the arbitration agreement empowering the arbitrator to decide the questions of party non-arbitrability. Some arbitration organizations, including the AAA, provide rules under which the arbitrator can decide the questions of party non-arbitrability.¹⁰⁰ By adopting such institutional rules, parties effectively opt out of the existing default rule. The courts have upheld institutional rules that empower the arbitrator to decide the questions of party non-arbitrability.¹⁰¹

To keep fractional arbitration out of courts, the autonomy paradigm proposes that arbitration law should be amended to empower the arbitrator to decide questions of party non-arbitrability. There are different ways to amend the law. First, the law can be amended to switch the default decision maker from judges to arbitrators. Under the new default rule, parties may choose a clause

98. However, arbitration proceedings are not automatically halted if a party files a civil action to contest fractional substantive arbitrability. The arbitration proceedings may continue unless the court issues a restraining order or decides that the controversy is non-arbitrable. UNIF. ARBITRATION ACT § 6(d) (amended 2000). The arbitrator, however, possesses the discretionary power to halt arbitration proceedings until the court reaches a decision on fractional arbitration. *Id.* cmt 6.

99. *Id.* § 4(a). This section allows parties to waive the judicialization of substantive arbitrability.

100. *See, e.g.*, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-7, at 13.

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

Id.

101. *The Daiei Inc. v. U. S. Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991) (noting that parties incorporated by reference in their arbitration agreement the rules of the International Chamber of Commerce providing that “any decision as to the arbitrator’s jurisdiction shall lie with the arbitrator”).

under which judges resolve the questions of party non-arbitrability. If parties fail to include such a clause in the arbitration agreement, the default rule empowers the arbitrator to decide the questions of party non-arbitrability. Second, the law can be amended to take courts completely out of party non-arbitrability. Under this option, the arbitrator will have the exclusive power to decide the questions of party non-arbitrability. This option is most consistent with the autonomy paradigm.

V. SEVERABILITY DOCTRINE

The autonomy paradigm supports, but reconfigures, the severability doctrine under which the arbitration clause is severable from the remainder of the underlying contract and enforceable even if the remainder of the contract is unenforceable.¹⁰² Federal case law allows the separation of arbitration clauses “from the contracts in which they are embedded.”¹⁰³ If an underlying contract containing an arbitration clause is allegedly induced by fraud, the renegade party must separately show that the arbitration clause too is induced by fraud. If the arbitration clause is free of fraudulent inducement, yet the underlying bargain was allegedly procured by fraud, the disputes relating to the fraudulent underlying bargain must be resolved through arbitration, not litigation.¹⁰⁴ Of course, the severability doctrine is irrelevant to cases where the arbitration agreement stands alone and is not a part of a larger contract.

Over the decades, courts have struggled with the enforcement of arbitration clauses embedded in void and voidable contracts.¹⁰⁵ This Article presents two competing models to capture the debate. The older model, which may be called the “organic model,” considers the contract as an organic whole. Under this model, the contract enjoys the unity of existence and enforceability; it is indivisible and no part of the contract can be enforced if any part is infected with

102. The severability doctrine is not free from academic criticism. Professor David Horton called the doctrine “the fiction.” See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1033 (2012).

103. *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967).

104. *Id.* at 406. Because arbitrators are compensated corresponding to the volume of arbitration they perform, they might have a personal interest in prolonging the arbitration and holding that the underlying contract is not void. *Id.* at 416 (Black, J., dissenting).

105. A “void” contract produces no legal obligation. BLACK’S LAW DICTIONARY 1709 (9th ed. 2009). By contrast, a “voidable” contract creates legal obligation but is subject to rescission. *Id.* at 109–10. Voidable contracts may be cured by ratification. *Id.*

illegality. The newer model, which may be called the “mechanical model,” considers the contract as a mechanical assembly of numerous distinct parts. Under this model, the contract consists of many parts; ideally, all parts function together for the best performance of the contract. However, if all parts cannot function together, good parts may be separated from bad parts. Good parts are retained even if bad parts will eventually have to be thrown away.¹⁰⁶

When applied to arbitration cases, the organic and mechanical models yield dramatically opposite outcomes. Under the organic model, if the underlying contract is void, the arbitration clause embedded in the contract cannot be enforced. Accordingly, the parties must litigate their disputes. Under the mechanical model, the problem-free arbitration clause is enforced even if the underlying contract is void. This mechanical model, which focuses on the legality of the arbitration clause separate and free from the underlying contract of which it is a part, is the conceptual foundation of the severability doctrine. If the arbitration clause is itself legally sound, the contractual obligation to arbitrate is enforced, and parties must contest the legality of the underlying contract before the arbitrator.

In order to avoid arbitral litigation, the autonomy paradigm subscribes to the mechanical model and not the organic model. The U.S. Supreme Court has upheld the mechanical model under the FAA to liberate arbitration from the doctrinal niceties of state law.¹⁰⁷ In enforcing the mechanical model, the Court has declined to entertain any distinctions between void and voidable contracts.¹⁰⁸ In a rising trend, most states subscribe to the mechanical model even in purely domestic cases that involve no interstate commerce.¹⁰⁹ A few states, however, have refused to follow the mechanical model in cases subject to the state arbitration statute.¹¹⁰ Accordingly, the

106. Emile Durkheim, the French sociologist, uses organic and mechanical metaphors in his famous book, *The Division of Labor in Society*. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., The Free Press 1997) (1893).

107. See *Prima Paint Corp.*, 388 U.S. at 404.

108. *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 446 (2006).

109. The severability doctrine originated in the jurisprudence of New York courts and was initially contested in other jurisdictions. See, e.g., *Pinze v. Jones*, 345 N.E.2d 295 (N.Y. 1976) (favoring severability of the arbitration agreement from the underlying contract); see also *Weinrott v. Carp*, 298 N.E.2d 42 (N.Y. 1973) (showing how New York shifted from nonseverability approach to severability doctrine).

110. See, e.g., Juan Ramirez, Jr., *Arbitrations in Florida: A Tale of Two Courts*, 25 ST. THOMAS L. REV. 43 (2012) (explaining how state courts are

organic model has not been completely discarded even though the mechanical model dominates federal and state courts.

In embracing the mechanical model, the autonomy paradigm views a large contract as a series of micro-bargains.¹¹¹ Specifically, the autonomy paradigm views the choice of arbitration as a distinct micro-bargain between the parties. If some micro-bargains in the contract are legally unenforceable, a legally sound arbitration bargain need not be thrown away. Enforcing the arbitration micro-bargain under the mechanical model allows arbitration to proceed even if the entire underlying bargain is allegedly fraudulent or unconscionable.

The mechanical model, however, cannot answer the question of whether the arbitrator or the court should have the initial authority to separate and enforce the arbitration clause. If only a court can separate and enforce the arbitration clause, arbitral litigation is inevitable, and consequently arbitral autonomy is punctured. If the arbitrator has the primary power to separate and enforce the arbitration clause, the parties need not go to court.¹¹²

In upholding the autonomy paradigm, the Supreme Court has ruled that “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”¹¹³ The Court declined to confine its rulings to contracts contested in federal courts. The Court declared that “regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”¹¹⁴ This ruling, however, does not answer the more complicated question involving arbitration clauses. The following discussion grapples with the bifurcated issue of the existence and enforceability of an arbitration agreement.

pushing back on the severability doctrine in cases where parties have unequal bargaining power).

111. See G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 940–41 (2000) (applying the idea of “series of bargains” to explain the concept of the firm).

112. See Richard C. Reuben, *FAA Law, Without the Activism: What if the Bellwether Cases Were Decided by a Truly Conservative Court?*, 60 U. KAN. L. REV. 883, 889 (2012).

113. *Buckeye Check Cashing*, 546 U.S. at 445–46.

114. *Id.* at 449.

A. Existence and Enforceability

The mechanical model can separate an arbitration clause from the underlying contract, but it cannot sort out conceptual disputes buried within the arbitration clause. For example, arbitration law maintains a conceptual border between existence and enforceability of an arbitration agreement. However, the mechanical model cannot safeguard this elusive border; hence arbitral litigation is inevitable. Under current law, parties must fight in court to determine if the arbitration agreement exists because the law empowers the court to decide “whether an agreement to arbitrate exists.”¹¹⁵ By exclusion, the arbitrator has no inherent power to decide whether an agreement to arbitrate exists. This exclusion, under which no arbitration can take place without the existence of an arbitration agreement, comports with the contract theory of arbitration. Courts refer to this judicial determination as a “gateway matter.”¹¹⁶ If the court decides that the arbitration agreement exists, parties are then placed under a legal obligation to engage in arbitration to settle enforceability issues. Consequently, questions of the arbitration agreement’s existence are allocated to courts, while questions of its enforceability are allocated to arbitrators.¹¹⁷

The conceptual border between existence and enforceability of an arbitration agreement is problematic and elusive. Problems arise because courts are unsure of whether to fuse the formation of an arbitration agreement with its fairness. Ordinarily, courts undertake to analyze the existence of a *valid* arbitration agreement and not merely the existence of *an* arbitration agreement.¹¹⁸ When existence and validity are fused, judicial approaches are likely to pursue divergent paths. For example, a party asserting that an arbitration agreement is unconscionable admits existence of the agreement. Likewise, a party claiming that the arbitration agreement contains ambiguities regarding the award of attorney’s fees is nonetheless

115. UNIF. ARBITRATION ACT § 6(b) (amended 2000).

116. *Davis v. KB Home of S.C., Inc.*, 713 S.E.2d 799, 804 (S.C. Ct. App. 2011).

117. The FAA provides: “The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4 (2006).

118. Arbitration law empowers the arbitrator to decide “whether a contract containing a valid agreement to arbitrate is enforceable.” UNIF. ARBITRATION ACT § 6(c) (amended 2000). Accordingly, the courts must decide whether a valid agreement to arbitrate exists.

admitting existence of the arbitration agreement.¹¹⁹ Some judges would not only consider whether the agreement is free of formation flaws, such as coercion, they would also consider whether the agreement is valid in light of defenses, such as unconscionability.¹²⁰ Others will focus only on formational validity and decline to consider fairness defenses to the arbitration agreement.¹²¹ This divergence spawns arbitral litigation.

The autonomy paradigm offers two ways to place both existence and enforceability issues within the jurisdiction of arbitration. First, exercising party autonomy, parties may specifically waive the bifurcated stratagem in the arbitration agreement and authorize the arbitrator to decide whether an agreement to arbitrate exists.¹²² Arbitration law does not prohibit such a waiver.¹²³ Some arbitration organizations furnish rules to confer on the arbitrator the power to decide “the existence, scope or validity of the arbitration agreement”¹²⁴ making it unnecessary for parties to specifically waive the bifurcated stratagem. By incorporating institutional rules in the arbitration agreement, parties empower the arbitrator to decide all issues related to existence and enforceability of the arbitration agreement.

Second, arbitration law may be amended to construct a new gateway rule. Under the new gateway rule, unless parties otherwise agree, the arbitrator, and not the court, will have the primary power to decide both existence and enforceability issues.¹²⁵ If the arbitrator decides that the arbitration agreement exists and is enforceable, the need for arbitral litigation is minimized. If the arbitrator decides that the arbitration agreement does not exist or is unenforceable, parties are free to litigate disputes in the court without any further arbitration proceedings. The new gateway rule, though it supports the autonomy paradigm, contaminates the purity of the contract theory of arbitration to the extent that there would be cases in which arbitration proceedings would be initiated without the existence of a valid arbitration agreement. The law might be willing to pay this

119. See *Quilloin v. Tenet Healthsystem Phila., Inc.*, 673 F.3d 221, 231 (3d Cir. 2012).

120. See *Strausberg v. Laurel Healthcare Providers, LLC*, 269 P.3d 914 (N.M. Ct. App. 2011).

121. *Id.* at 923 (Wechsler, J., dissenting).

122. UNIF. ARBITRATION ACT § 4 (a) (amended 2000).

123. *Id.* § 4(b).

124. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-7(a), at 13.

125. Or, the law may simply discard the elusive distinction between existence and enforceability, merge the two concepts, and authorize the arbitrator to declare whether the arbitration agreement is binding.

minor price in compromising the contract theory of arbitration to reap the tangible benefits of arbitral autonomy.

In sum, the autonomy paradigm endorses the severability doctrine to enforce a valid arbitration clause even if the rest of the contract is allegedly voidable or void. The arbitrator should decide voidability disputes arising from the underlying contract. Further, the autonomy paradigm proposes to fuse the existence and enforceability issues, empowering the arbitrator to decide whether an arbitration agreement exists and is enforceable. This fusion will minimize litigation.

B. Revisiting Volt

The contract theory of arbitration needs another minor adjustment to promote the autonomy paradigm. The autonomy paradigm proposes that the choice of law contained in a contract should not be used to defeat the arbitration clause embedded in the same contract if the two clauses are irreconcilable. The conflict arises when the arbitration clause mandates that parties arbitrate a dispute while the choice-of-law clause permits the parties to litigate the same dispute. If the two clauses are incompatible, the autonomy paradigm proposes to enforce the arbitration clause, denying the renegade party the choice to litigate. This proposal, however, would require that the U.S. Supreme Court revisit *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*.¹²⁶

In *Volt*, the parties included a pre-dispute arbitration clause in their underlying construction contract, which mandated that all disputes “arising out of or relating to this contract” be submitted to arbitration.¹²⁷ The choice-of-law clause embedded in the form construction contract opted for the laws of the place of the construction project. When a dispute arose, Stanford, a party to the construction contract, sued Volt, the contractor, in a California court. Stanford joined two other defendants who were not bound by the arbitration agreement. Stanford, the renegade party, relied on the choice-of-law clause to resort to litigation instead of arbitration. Because the project was located in California, the choice-of-law clause triggered the application of the California Civil Procedure Code provision that “permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration

126. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

127. *Id.* at 470.

agreement and third parties not bound by it.”¹²⁸ Suspending arbitration is viewed necessary because simultaneous arbitration and litigation raise the “possibility of conflicting rulings on a common issue of law or fact.”¹²⁹ Invoking the arbitration clause, Volt demanded arbitration.

In view of the incompatibility between the arbitration clause and the choice-of-law clause, the U.S. Supreme Court upheld the choice-of-law clause to allow litigation and denied Volt’s motion to compel arbitration. The Court reasoned that arbitration parties are free to custom design the arbitration clause and may embrace state (civil procedure) barriers to arbitration through the choice-of-law clause. By specifying the laws of California as the governing law of the contract, the Court held that the parties incorporated the rules of the California Civil Procedure Code into the arbitration clause.

The Court relied on the contract theory of arbitration to interpret the scope of an arbitration agreement.¹³⁰ The contract theory of arbitration would allow parties to embrace any arbitration barriers that a state, such as California, allows. That, however, was not the critical question in *Volt*. The critical question involved a conflict analysis between the arbitration clause and the choice-of-law clause. These clauses led in different directions: one toward arbitration, the other toward litigation. The Court did not consider, let alone resolve, the conflicting clauses. By contrast, the dissenting Justices provided a piercing analysis of choice-of-law clauses in general and rightfully concluded that the parties in *Volt* did not intend to defeat the arbitration clause with a generic, non-state-specific, choice-of-law clause preprinted in a form contract.¹³¹

It is common in domestic and international transactions for parties to adopt two clauses in an underlying contract: By choosing the choice-of-law and the choice-of-forum clauses, parties take control of dispute resolution. By adopting these clauses, parties wish to avoid the cost and uncertainty associated with the conflict-of-laws litigation. The autonomy paradigm enforces both clauses because the purpose of the arbitration clause is to provide the forum, whereas the purpose of the choice-of-law clause is to identify the law that would govern resolution of disputes. Arbitration parties rarely intend that the choice-of-law clause nullify the choice-of-forum clause. The conflict between the two clauses arises because parties (and their lawyers) cannot see all possible consequences flowing from the confluence of the two clauses. Most importantly, the choice-of-

128. *Id.* at 471.

129. *Id.*

130. *Id.* at 478.

131. *Id.* at 488–91 (Brennan, J., dissenting).

arbitration clause is much more specific and purposeful than the choice-of-law clause that potentially covers scores of statutes and hundreds of cases that may come to bear on substantive dispute resolution.¹³²

If choice-of-law and choice-of-forum clauses conflict, courts need not reward the renegade party who wishes to litigate after a dispute has arisen, even though it has specifically agreed to arbitrate. Sheltering the renegade party under the choice-of-law clause weakens arbitral autonomy and opens yet another escape route from arbitration to litigation. The autonomy paradigm, therefore, proposes that *Volt* be revisited and confined to its facts involving non-arbitration parties. As a general principle, the autonomy paradigm proposes that in cases of incompatibility, the choice-of-law clause should not be allowed to defeat the arbitration clause.

VI. PARITY PRINCIPLE

In granting case management powers necessary to successfully conduct and conclude arbitration proceedings, the autonomy paradigm proposes a “parity principle” under which the arbitrator wields powers in parity with the trial court.¹³³ The “parity principle” is a principle of powers granted to the arbitrator; its purpose is not to turn arbitration into a mirror image of litigation as the purpose of arbitration would be defeated if arbitration mimicked litigation. Rather, under the parity principle, the arbitrator is granted the same powers of effective case management and disposal as the trial court.¹³⁴ The parity principle is essential to curb arbitral litigation. It is already recognized in arbitration law to some extent and should be further strengthened in light of the following analysis.

In understanding the parity principle, one caveat is necessary. The parity principle does not dictate that the arbitrator follow procedural and evidentiary rules in the same way and to the same extent as the trial court. The arbitrator’s procedural powers should

132. “[T]he inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue.” *Doctor’s Assocs., Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir. 1997).

133. The U.S. Supreme Court used the parity principle in the context of banking “to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States.” *Leather Mfrs’ Nat. Bank v. Cooper*, 120 U.S. 778, 780 (1887).

134. Currently, arbitration does not fully function under the parity principle. For example, the arbitrator might not be able to appoint a receiver. *Marsch v. Williams*, 28 Cal. Rptr. 2d 402 (Cal. Ct. App. 1994) (holding that “the power to appoint receivers is unique and cannot be extended to arbitrators in the absence of legislative action”).

not be confused with the procedural rules that govern litigation. The rules of civil procedure and the rules of evidence provide a complex infrastructure to guide litigation. Many of these rules are designed to conduct jury trials, something that arbitration does not have.¹³⁵ Parties choose arbitration in part to avoid the procedural and evidentiary thicket and the attendant cost and delay of litigation. Parties “trade[] the procedures . . . for the simplicity, informality, and expedition of arbitration.”¹³⁶ Arbitration would lose efficacy, if the arbitrator was obligated to follow procedural and evidentiary rules in their entirety.¹³⁷ In conducting arbitration in a manner “appropriate for a fair and expeditious disposition of the proceeding,”¹³⁸ the arbitrator enjoys the discretion to select the appropriate rules of procedure and evidence. The arbitrator may proactively consult parties before the hearing to determine the admissibility, relevance, materiality, and weight of any evidence. The arbitrator’s proactive management of evidence with the assistance of parties is a feature unavailable to judges in litigation.¹³⁹

A. Preliminary Relief

The autonomy paradigm proposes two distinct sets of procedural powers for the arbitrator. First, the arbitrator must have the authority to grant every form of preliminary relief that the trial court may permit. Second, the arbitrator must be granted the exclusive power to grant preliminary relief, thus eliminating judicial intrusion at the initial stages of the arbitration proceedings. The first set of powers belongs to the parity principle. The second set is designed to further minimize the need to go to court.

Under the parity principle, the arbitrator, just like the trial judge, may grant preliminary relief, such as issuing restraining orders; ordering discovery appropriate for the resolution of the controversy; issuing subpoenas for the attendance of witnesses and for the

135. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 444 (1996) (stating that the rules of evidence were framed to restrict the information available to jurors in rendering verdicts).

136. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

137. “The absence of precise procedural rules is commonly regarded as one of the greatest advantages of arbitration in comparison with the mandatory procedural rules that govern litigation in national courts.” Giacomina Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 174 (2011).

138. UNIF. ARBITRATION ACT § 15(a) (amended 2000).

139. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-9, R-21, at 14, 18–19.

production of documentary and electronic records; and taking action against a renegade party “to the extent a court could if the controversy were the subject of a civil action.”¹⁴⁰ The arbitrator is granted these preliminary tools to protect the efficacy and integrity of the arbitration process, just as the trial court employs these tools for the efficacy and integrity of a civil action. If these tools were unavailable to the arbitrator, parties would need to go to court to obtain a restraining order, effect discovery, and obtain information pertinent to the case—a consequence that defeats the purpose of arbitration as an alternative method of dispute resolution.¹⁴¹

In order to further minimize arbitral litigation, the autonomy paradigm proposes that the arbitrator should be the sole dispenser of preliminary relief. If a party is granted the option to go either to the arbitrator or to the court to seek preliminary relief, there is no guarantee which the party will choose. The party may approach the court out of convenience or to stall or undermine the arbitration proceedings. To minimize arbitral litigation, the option to go to court to obtain preliminary relief must be taken away. If the renegade party approaches the court to obtain preliminary relief, the court should summarily direct the party to seek such relief from the arbitrator.¹⁴²

While arbitration law recognizes the arbitrator’s power to grant preliminary relief, the law does not grant the arbitrator the exclusive authority to provide preliminary relief. State and federal courts tend to retain the authority to grant relief even if the arbitration proceedings are under way and the arbitrator is available to grant the necessary relief. In a Georgia case, for example, a party presented the exclusivity argument to the Georgia Supreme Court, contending that “the parties’ agreement to arbitrate strips this Court of its equitable powers to enter injunctive relief.”¹⁴³ The Georgia Supreme Court rejected the exclusivity argument, reminding the party that the “overwhelming majority of federal courts . . . have concluded that a binding arbitration clause does not bar a plaintiff from seeking emergency injunctive relief or other provisional remedies in court.”¹⁴⁴ Showing annoyance, the Georgia court concluded that the

140. UNIF. ARBITRATION ACT § 17(d) (amended 2000).

141. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-34, at 22 (granting the arbitrator the authority to provide interim relief).

142. The party may even be fined for litigating a dispute that falls under arbitration. However, this Article does not fully explore this point.

143. Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Compel Arbitration at 6, *Rose Hall Resort, L.P., v. The Ritz-Carlton Hotel Co. Of Jam., Ltd.* No. 09A-08656-7, (Super. Ct. Ga. 2009), 2009 WL 7798803.

144. *Id.* at 7.

law in this area is so well-developed that the party's exclusivity argument that "this Court has no authority to award relief of any kind borders on the sanctionable."¹⁴⁵

The Georgia court fused (and possibly confused) emergency relief with preliminary relief, ignoring the distinction between them. As the discussion in the next Part shows, seeking emergency relief before an arbitrator has been appointed is distinguishable from seeking preliminary relief after the arbitrator has been appointed. The courts need not intervene if the arbitrator is available to grant preliminary or emergency relief.¹⁴⁶

B. Emergency Relief

Even if the law empowers the arbitrator to grant preliminary relief, a key structural difference between arbitration and litigation challenges the autonomy paradigm. Courts are perennial institutions available any time a party needs emergency relief.¹⁴⁷ This is not the case with arbitration. The arbitration panel, consisting of one or more arbitrators conceived in the arbitration agreement, is unavailable at the time a dispute arises. Parties frequently provide a procedure for appointing the arbitrator. For example, they might subscribe to institutional rules for nominating the arbitrator or designating an appointing authority who would select the arbitrator. Regardless of the procedure provided for the appointment of the arbitrator, the appointment occurs after a dispute has arisen and only upon the request of a party seeking arbitration. Sometimes, the selection of the arbitrator takes time. In many cases, therefore, the arbitrator is unavailable when a dispute arises and emergency relief is needed.

The temporality gap between the occurrence of a dispute and appointment of the arbitrator forces the party seeking emergency relief to go to court. The courts are willing to grant emergency relief if "necessary to preserve the status quo and the meaningfulness of the arbitration process."¹⁴⁸ In such cases, a court is not obstructing

145. *Id.* at 8.

146. Ira M. Schwartz, *Interim and Emergency Relief in Arbitration Proceedings*, 63 DISP. RESOL. J. 56, 57–58 (noting that some people erroneously believe that parties cannot obtain interim relief in arbitration).

147. "In important, high-dollar cases, sophisticated parties are sometimes able to secure temporary relief in court almost immediately, even at night from a judge at home in his or her pajamas." Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (Or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 456 (2010).

148. *Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire North Am. Inc.*, 609 F.3d 975, 981 (2010).

or preempting arbitration but stepping in to provide conservatory relief without which arbitration might be undermined. The court provides emergency relief because there is no arbitrator on board to do so.

The autonomy paradigm, however, can be preserved by closing the temporality gap. The parties may construct a mechanism to obtain emergency relief before the arbitrator is appointed. They may name the arbitrator to provide emergency relief. Judicial intervention for emergency relief can be avoided if parties have engaged institutional arbitration services and subscribed to special institutional rules that provide relief through the appointment of an emergency arbitrator.¹⁴⁹ In that case, the party approaches the institution, and not the court, to obtain emergency relief. Many arbitration organizations require parties to specifically adopt emergency relief rules.¹⁵⁰

If parties wish to preserve the autonomy paradigm, the arbitration agreement needs to include an effective mechanism by which an aggrieved party can obtain emergency relief from the arbitrator. To minimize arbitral litigation, the autonomy paradigm proposes that arbitration organizations integrate emergency relief procedures into general institutional rules for arbitration.¹⁵¹

C. Exemplary Relief

The autonomy paradigm proposes that the arbitrator have the inherent power to grant punitive damages, attorney's fees, and other exemplary relief in appropriate cases. If the arbitrator is denied the power to grant these remedies, arbitral litigation is inevitable. Parties will need to go to court to seek and defend claims of punitive

149. Mark Kantor, *Comparing Expedited Emergency Relief under the AAA/ICDR, ICC and LCIA Arbitration Rules*, 24 ALTERNATIVES TO HIGH COST LITIG. 136 (2006).

150. The AAA, for example, requires parties to subscribe to emergency rules, which are part of the general rules of arbitration. See AM. ARBITRATION ASSOC., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) § R-37 (2009), available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002008&_afirLoop=1927387551525279&_afirWindowMode=0&_afirWindowId=19p48rrgk5_208. A recent case shows how emergency relief is sought, granted, and contested. *Yahoo v. Microsoft*, Dist. No. 13 CV 7237, 2013 WL 5708604 (S.D.N.Y. Oct. 21, 2013).

151. The Stockholm Chamber of Commerce (SCC) has adopted emergency rules for urgent relief before the arbitrator is appointed; and the SCC emergency rules are integrated into the SCC rules for arbitration. ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES APP. II at 23 (2010), available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf.

damages and attorney's fees. As noted above, arbitral litigation adds time and cost inefficiencies to dispute resolution.

Judges use the power to grant punitive damages in select cases to deter egregious behavior. "Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might indulge in similar conduct in the future."¹⁵² Even though the plaintiff receives punitive damages as a windfall, punitive damages serve the social purpose of deterrence, retribution, and possibly behavior modification.¹⁵³ Punitive damages are "a social exemplary 'remedy', [and] not a private compensatory remedy."¹⁵⁴ Their imposition is a quasi-criminal sanction.¹⁵⁵

Some courts and commentators argue that arbitrators should not be granted the power to award punitive damages.¹⁵⁶ A New York law specifically prohibits arbitrators from awarding punitive damages, even if agreed upon by the parties; the power to award punitive damages is limited to judicial tribunals.¹⁵⁷ These courts and scholars believe that because punitive damages are unavailable for mere breach of contract, state-appointed judges are best suited to determine whether an award of punitive damages would serve the public purpose. Private judges, such as arbitrators, who are not representing the state, the people, or the rule of law, are hired to do justice between the private parties before them; they cannot be trusted with a punitive power, the sole purpose of which is to guard the welfare of the state and the people.¹⁵⁸

Further, punitive damages granted in litigation are subject to judicial and appellate review.¹⁵⁹ In litigation, juries are empowered

152. Walker v. Sheldon, 179 N.E.2d 497, 498 (N.Y. 1961).

153. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

154. Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 795 (N.Y. 1976).

155. Fabiano v. Philip Morris, Inc., 862 N.Y.S.2d 487, 490 (N.Y. App. Div. 2008).

156. For a commentary on the evolution of the debate about punitive damages, see Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997).

157. *Garrity*, 353 N.E.2d at 796.

158. *Id.* The court summoned theoretical/jurisprudential insights, citing the work of Hans Kelsen, to argue that the state alone has (and should have) a monopoly over the exercise of coercive power. Private use of coercion, the court concluded, is barbaric. *Id.* at 796-97.

159. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (suggesting that excessive punitive damages may violate the Due Process Clause). For a discussion of objections to the granting of punitive damages, see Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000).

to award punitive damages. If lay jurors can award punitive damages, one might argue that arbitrators are frequently more qualified than lay jurors to understand the rationale and gravity of punitive damages. However, there is a difference. The trial court and appellate courts may reject a jury award if the basis or the amount of punitive damages violates the law. Since judicial review of arbitration awards is limited, the argument proceeds, punitive damages arbitral awards may not receive the same systematic judicial review.¹⁶⁰

The U.S. Supreme Court has held that arbitrators are allowed to award punitive damages in arbitration cases involving interstate commerce.¹⁶¹ Unless arbitration parties exclude the award of punitive damages in the arbitration agreement, federal arbitration law preempts state restrictions on an arbitrator's power to award punitive damages.¹⁶² This ruling, however, is limited in its preemptive reach. Parties may still agree to exclude punitive damages from arbitration awards, and states may choose to prohibit arbitrators from awarding punitive damages in cases not involving interstate commerce. States, however, might also allow arbitrators to grant punitive damages.¹⁶³

The Uniform Arbitration Act (UAA) upholds the parity principle and allows the arbitrator to grant punitive damages and other exemplary relief if the law would authorize similar damages and relief involving the same claim in a civil action.¹⁶⁴ To construct further symmetry between litigation and arbitration, the Act requires that the evidence produced at the arbitration hearing justify the award of punitive damages and exemplary relief "under the legal standards otherwise applicable to the claim."¹⁶⁵ This symmetrical standard allows the arbitrator to grant punitive damages and other exemplary relief on par with the court. The arbitrator must consider the legal standards and case law of the relevant jurisdiction and comply with the choice of law.¹⁶⁶

160. *Garrity*, 353 N.E.2d at 796.

161. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

162. *Id.* at 59.

163. *Gomez v. People's United Bank*, No. 3:10-CV-00904 (CSH), 2012 WL 3854956 (D. Conn. Sept. 5, 2012) (upholding the punitive damages award under Connecticut's Unfair Trade Practices Act).

164. UNIF. ARBITRATION ACT § 21(a) (amended 2000). The Act also allows the arbitrator to award attorney's fees. *See id.* § 21(b).

165. *Id.* § 21(a).

166. The Supreme Court offers three guideposts in awarding punitive damages: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by

Although parties may preclude an award of punitive damages by means of an arbitration agreement, the preclusion raises a red flag. Punitive damages preclusions are frequently embedded in take-it-or-leave-it bargains. In most cases, the weaker party waives punitive damages to the benefit of the stronger party that is most likely to engage in misconduct warranting punitive damages. Courts are reluctant to enforce preclusions on the theory that arbitration is an alternative forum to litigation established under the parity principle.¹⁶⁷ Consequently, the remedies available in litigation ought to be available in arbitration. An arbitration agreement is unconscionable if it precludes an employee from recovering punitive damages and attorney's fees in an anti-discrimination claim.¹⁶⁸

The parity principle shores up arbitral autonomy. It empowers the arbitrator to grant preliminary, emergency, and exemplary relief, just as a judge is empowered to provide such relief in litigation. Arbitration is unlikely to be a self-sustaining method of dispute resolution if courts continue to claim a monopoly over the granting of this critical relief when a dispute is designated for arbitration.

VII. VACATING ARBITRATION AWARDS

The judicial review of arbitration awards poses a systemic threat to the autonomy paradigm because it leads to inevitable arbitral litigation. A losing party against whom an arbitration award is rendered may approach the court to vacate the award or challenge its enforcement;¹⁶⁹ in either case, the autonomy paradigm ceases to exist. Confirming an award is a pro-arbitration action,¹⁷⁰ vacating an

the jury and the civil penalties authorized or imposed in comparable cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

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

168. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

169. One must distinguish between vacating and non-enforcement. When an award is vacated, it loses its validity and cannot be enforced. *BLACK'S LAW DICTIONARY*, *supra* note 105, at 1688. However, the mere non-enforcement of an award does not vacate the award. For example, if a country refuses to enforce a foreign award, it is not vacated. The same award may be enforced in another country.

170. "Confirmation is a summary proceeding that converts a final arbitration award into a judgment of the court." *See Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1094 n.1 (9th Cir. 2011). Upon confirmation, an award is treated similarly to a judgment in a civil action and may be similarly enforced. *Id.*

award is an anti-arbitration action.¹⁷¹ Vacatur completely nullifies the time and expense invested in, and the outcome produced by, the arbitration process. Vacatur returns parties back to square one with the dispute unresolved. After the vacatur, the parties may attempt to arbitrate the dispute one more time, settle, or may resort to litigation, depending on why the award was vacated.

Arbitration law provides a number of grounds upon which a court may vacate the award. The FAA, the UAA, the New York Convention,¹⁷² the Panama Convention, and other treaties all provide specific grounds for vacating an award.¹⁷³ Judges have added a few more grounds for vacating awards.¹⁷⁴ As a general principle, judges respect arbitral outcomes and do not lightly vacate arbitration awards. The “judicial review of an arbitration award is extraordinarily narrow” and “exceedingly deferential.”¹⁷⁵ Stringent review standards reduce arbitral litigation surrounding the enforcement of arbitration awards. Yet the goal of the autonomy paradigm is to minimize, and possibly eliminate, the need and desire for judicial review of arbitration awards.

171. The FAA allows three months after the rendering of the award to vacate an award but reserves a year for seeking court confirmation of the award. 9 U.S.C. §§ 9, 12 (2006) After the passage of three months, a party defending a motion to confirm is not allowed to seek vacatur. *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986).

172. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 330 U. N. Treaty Ser. 38. A full discussion of the non-enforcement of awards under the Convention is not within the scope of this Article. The Convention allows non-enforcement of foreign awards; it does not vacate foreign awards. *Id.* art. V.

173. There are regional and global treaties that establish bodies for international arbitration. The Inter-American Convention on International Commercial Arbitration, commonly known as the “Panama Convention,” is a regional treaty that provides rules for arbitration in the Americas. The Inter-American Convention on International Commercial Arbitration is available at <http://www.oas.org/juridico/english/treaties/b-35.html>. The European Convention on International Commercial Arbitration (1961) is another regional arbitration treaty. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349. The 1965 Washington Convention is a global treaty that has instituted the International Center for the Settlement of Investment Disputes, which provides arbitration rules for the settlement of disputes between signatory states and foreign investors. The 1965 Washington Convention is available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

174. Manifest disregard of the law, for example, is a prominent judicially created ground for vacating awards. *See* discussion *infra* Part VII.

175. *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 471–72 (5th Cir. 2012) (quoting *Brook v. Peak Int’l. Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002) and *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir. 2007)).

The grounds for vacating the award may be grouped into two distinct categories. First, a lawful arbitration award must preserve the process integrity of arbitration. The grounds safeguarding the process integrity of arbitration are nearly universal. Process integrity mandates that an award be vacated if procured by illegal means, including corruption and fraud.¹⁷⁶ Undue means employed in the procurement of an award vitiates the integrity of the arbitration process.¹⁷⁷ Likewise, the arbitrator's misconduct that prejudices the rights of a party may also compromise the process integrity of arbitration. If the neutral arbitrator is evidently partial in favor of a party, the arbitration process loses integrity. Even if the arbitrator is unbiased, he or she may nonetheless conduct the arbitration hearing in a manner that substantially prejudices the rights of a party. For example, the integrity of an arbitration hearing is questionable if the arbitrator refuses to consider evidence material to the controversy.¹⁷⁸ A substantially defective hearing lacks integrity. Non-arbitrability and blatant violations of law, though substantive questions, may also undermine the process integrity of arbitration. An award may be challenged on the ground that the law (including public policy) forbids the arbitration of claims included in the award or that the award was rendered in manifest disregard of the law.¹⁷⁹

Second, a lawful arbitration award must preserve the contractual integrity of an arbitration agreement. An award may be vacated if obtained in violation of the arbitration agreement. "Where arbitrators act 'contrary to express contractual provisions,' they have exceeded their powers."¹⁸⁰ As discussed before, the right and

176. UNIF. ARBITRATION ACT § 23 (amended 2000); 9 U.S.C. § 10 (2006); UNITED NATIONS, UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION ART. V at 50 (1958), available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [hereinafter New York Convention].

177. "Undue means" is the employment of immoral behavior to procure an award. However, meritless arguments made to win an award do not constitute undue means. *A.G. Edwards & Sons, Inc., v. McCollough*, 967 F.2d 1401, 1403-04 (9th Cir. 1992).

178. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997).

179. "A court's refusal to enforce an arbitrator's award on the basis of a violation of public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *City of Hartford v. Hartford Mun. Emps. Ass'n*, 39 A.3d 1146, 1153 (Conn. App. Ct. 2012). The New York Convention specifically provides for the non-enforcement of an award if the "subject matter of the difference is not capable of settlement by arbitration under the law of [the enforcing] country." New York Convention, *supra* note 176, art. V(2)(a), at 50.

180. *Apache Bohai Corp.*, 480 F.3d at 401 (quoting *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs. Beneficial Ass'n, AFL-CIO*, 889 F.2d 599, 604 (5th Cir. 1989)).

obligation to arbitrate chosen disputes are anchored in the arbitration contract, a device by which parties surrender the right to litigation in favor of arbitration.¹⁸¹ The arbitration agreement defines the scope of arbitration and empowers the arbitrator to render an award. Logically, therefore, an award cannot be enforced if there was no agreement to arbitrate. In the absence of a valid arbitration agreement, the award-holder had no right to arbitration in the first place.¹⁸² Under a similar logic, an award is vacated if the arbitrator exceeded the powers that the agreement conferred on the arbitrator. For example, the arbitrator cannot render an enforceable award with respect to a claim that parties have excluded from the scope of arbitration.

Note, however, that arbitration law does not require judicial confirmation or review of arbitration awards. If an award is accepted and voluntarily enforced, no judicial confirmation is needed, and the autonomy paradigm remains intact.¹⁸³ However, a party seeks court confirmation of an award only when the award is likely to remain unsatisfied. Likewise, an unhappy losing party may not comply with the award and seek judicial review for its vacatur.

The availability of judicial review of arbitral awards cannot be abandoned to fortify the autonomy paradigm. However, the autonomy paradigm can be preserved by shifting the award review from courts to arbitration organizations. Already, arbitration organizations provide appellate award review on the same grounds available to courts.¹⁸⁴ Once the parties have used the organizational appellate review of an award, any further review by a court should be foreclosed. This foreclosure is necessary to deter parties from seeking court intervention after the organizational appellate review is complete; otherwise, the organizational appellate review will turn into an additional, and perhaps unnecessary, layer in the enforcement of awards.

181. *See supra* Part II.

182. However, this ground is unavailable if the party denying the arbitration agreement does not object to the arbitration proceeding in a timely fashion. UNIF. ARBITRATION ACT § 23(a)(5) (amended 2000).

183. However, if the losing party does not accept the award or refuses to comply, the arbitral award needs to be enforced through a court; arbitral awards are not self-enforcing. *See* Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 743–44 (2007).

184. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, at 36.

VIII. ARBITRATION BLACKOUT

Does arbitral autonomy breed a counterculture of quasi-lawlessness shrouded in secrecy, disregard of the law, preclusions of remedies, and waivers of rights? The general answer is no. In some cases, however, arbitral autonomy may lead to a quasi-lawless blackout. Consider a MAC embedded in a take-it-or-leave-it bargain. In such a bargain, the weaker party has no negotiating power to modify any feature of the MAC.¹⁸⁵ The MAC might waive class action, punitive damages, and attorney's fees. The MAC might further state that arbitration proceedings will be confidential and that the arbitrator need not render a reasoned award. Added to these features are the limited statutory grounds available to vacate an award rendered in secrecy without reasons. Although each provision of the MAC is lawful, the combined effect of the provisions produces quasi-lawlessness that hides in the fold of secrecy without arbitral accountability, systemic deterrence, or meaningful judicial scrutiny.

The U.S. Supreme Court has upheld take-it-or-leave-it bargains mandating arbitration as the sole method of dispute resolution despite a compelling dissenting voice.¹⁸⁶ This judicial concession in favor of MACs must not be construed to conclude that the Court has also discarded or weakened the doctrine of unconscionability. State and federal courts analyze MACs in terms of unconscionability.¹⁸⁷ They administer a two-tier analysis.¹⁸⁸ First, they determine whether an arbitration contract is procedurally unfair.¹⁸⁹ Second, they determine whether the substantive bargain of the arbitration contract is unfair.¹⁹⁰ The courts hold arbitration contracts unconscionable only if the combined procedural and substantive unfairness is oppressive.¹⁹¹ Under this analysis, take-it-or-leave-it arbitration clauses are procedurally unfair because one party imposes arbitration on the other.¹⁹² However, the court would find no

185. See Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (With Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. 67, 120–122 (1997) for an explanation of power relation in unconscionable bargains.

186. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 676 (2012) (Ginsburg, J., dissenting).

187. See, e.g., *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012).

188. See, e.g., *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 690 (Cal. 2000) (analyzing unconscionability in terms of procedural and substantive portions).

189. See, e.g., *id.*

190. See, e.g., *id.*

191. See, e.g., *id.* at 689.

192. See *id.* at 690–92.

unconscionability if the terms of the arbitration are fair. In procedurally coercive arbitration contracts, therefore, the critical question is to assess the substantive fairness of the arbitration terms. The academic literature is divided over the issue. Some academics criticize MACs in consumer and employment contracts.¹⁹³ Others argue that MACs benefit consumers and employees.¹⁹⁴

Another genre of MACs tends to circumvent rights and remedies available in litigation. For example, an arbitration agreement may shorten the statute of limitations for filing claims; another may limit the amount of damages to actual damages for breach of contract; and yet another may waive federal statutory remedies.¹⁹⁵ Such arbitration agreements are coercive in nature because no rational party would willingly surrender the rights and remedies available in litigation. A party with superior bargaining power cannot, therefore, be allowed to use arbitration autonomy to unfairly tilt the playing field in its own favor, dramatically reduce its legal obligations, and deprive the weaker party of the rights and remedies that law guarantees in a civil action.¹⁹⁶

Despite endorsing the lawfulness of MACs, courts are reluctant to endorse class action waivers. The enforceability of class action waivers appears to be a special matter that courts mull over with extensive analytical anguish.¹⁹⁷ Courts point out that class action lawsuits are indispensable for vindicating statutory rights.¹⁹⁸ Class action “is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.”¹⁹⁹ Courts do not wish to completely outlaw class action waivers, but they want to retain the authority to analyze and rule upon each waiver on its own merit.²⁰⁰ Class action waivers, therefore, will continue to spawn arbitral litigation.

193. See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283–1316 (2009).

194. See, e.g., David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578–81 (2005).

195. *Graham Oil Co. v. Arco Prods. Co.*, a Div. of Atl. Richfield Co., 43 F.3d 1244, 1248–49 (9th Cir. 1994) (holding such clauses to be unenforceable), *cert. denied*, 516 U.S. 907 (1995).

196. This type of arbitration agreement breaches the parity principle discussed in Part VI of this Article.

197. *Compare AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), with *In re Am. Express Merchs. Litig.*, 667 F.3d 204 (2d Cir. 2012).

198. *In re Am. Express*, 667 F.3d at 214.

199. *Id.*

200. *Id.* at 219.

Critics of arbitration highlight points of contrast between litigation and arbitration.²⁰¹ Litigation is open and accessible to the public; arbitration is frequently confidential, and its records are unavailable to the public. Litigation produces judicial opinions justifying orders and judgments; arbitration renders standard awards without supportive rationale. Published judicial opinions make litigation intellectually transparent; unpublished arbitration awards make arbitration relatively opaque. Judicialization of dispute resolution generates legal precedents that are binding in similar cases; arbitration rarely offers or relies on binding precedents. Most importantly, the law is closely applied in litigation, and appellate courts overturn lower court judgments resting on violations of law or abuse of judicial discretion. No such safeguards are available in arbitration where awards cannot be vacated for erroneous understandings or interpretations of statutes and cases. Errors of law may proliferate in an arbitration blackout where arbitrators are not lawyers.

The arbitration blackout would joyously embrace the arbitral autonomy presented in this Article, which minimizes court intervention in arbitration. MACs peppered with preclusion of remedies and waivers of rights would draw strength from the autonomy paradigm that restrains court scrutiny. Businesses and employers, in forcing arbitration on consumers and employees, would welcome arbitral autonomy that promises even less judicial oversight than currently available. The autonomy paradigm does not benefit persons desperately looking for jobs, who have little negotiating power to modify boilerplate arbitration clauses embedded in employment contracts. If the autonomy paradigm is a force of good, it cannot be permitted to favor the powerful and the privileged and hurt the weak and the vulnerable.²⁰² The following

201. See, e.g., Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1432 (2008) (noting the opposition of state courts to expanding arbitration beyond commercial disputes).

202. Professor Thomas Stipanowich proposes the establishment of “The Arbitration Fairness Index” to promote fair and effective arbitration of employment and consumer disputes. See Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985 (2012).

Given the fact that binding arbitration serves as the adjudicative backdrop for consumer disputes or employer-employee conflict, the choice of arbitration and the kind of justice available under arbitration agreements may be every bit as important as consumer warranties and other substantive rights and remedies set forth in the contract.

Id. at 1069.

corrective measures are necessary to ensure that arbitral autonomy does not support an arbitration blackout.

A. Arbitration Secrecy

The arbitration blackout is pro-secrecy. Companies and employers prefer confidential arbitration. Secrecy allows businesses to avoid adverse publicity associated with embarrassing discriminating treatments against which employees seek relief. Secrecy “diminishes the likelihood that the success of one claim by a consumer or employee will encourage others like it.”²⁰³ Defenders of arbitration confidentiality, however, point out that even mediations and negotiated settlements are confidential.²⁰⁴ Arbitration as an alternative method of dispute resolution might lose some of its appeal, defenders argue, if arbitration confidentiality is restricted or outlawed.²⁰⁵ Some scholars distinguish between privacy and secrecy, though the distinction is elusive,²⁰⁶ but even if there is a conceptual distinction, arbitration rules may preempt the distinction requiring that arbitration deliberations be both private and secret.²⁰⁷

Certainly, there are degrees of secrecy, some benign, others unconscionable. The autonomy paradigm does not protect unconscionable secrecy that harms the public interest; it allows confidential arbitration in some but not all cases. The purpose of the autonomy paradigm is to minimize court intervention and not to maximize the secrecy of arbitration proceedings. Secrecy is not an indispensable attribute of arbitral autonomy. If arbitration secrecy is harmful to the public interest, the autonomy paradigm should

203. Paul D. Carrington, *Self-Deregulation, The “National Policy” of the Supreme Court*, 3 NEV. L. J. 259, 283 (2003).

204. Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4, 47 (2002).

205. *Id.*

206. CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 417–18 (2002) (distinguishing between privacy and confidentiality). For example, arbitration proceedings are conducted in privacy, but the information is released after the proceedings are concluded. In such cases, the arbitration proceedings are private but not secret. It is, however, likely that not all information is released to the public. Privacy thus acts as a forerunner of secrecy.

207. RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES) ART 15 (1), available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap02.htm>. “The deliberation of the Tribunal shall take place in private and remain secret.” *Id.*

require that arbitration proceedings be open and arbitration records and outcomes be made public.²⁰⁸

Arbitration secrecy is unconscionable when it exclusively benefits one arbitration party and hurts the other. In *Ting v. AT&T*, for example, the Consumer Services Agreement (CSA), an adhesion contract that AT&T offered its customers, restricted numerous rights and remedies in the event of a dispute with AT&T.²⁰⁹ The CSA mandated secret arbitration; it banned class actions, and it limited AT&T's liability for non-negligence claims to the amount of service charges and precluded the company's liability for punitive, reliance, special, and consequential damages. The CSA reserved benefits for AT&T and burdened the consumers. In view of this imbalance, the Ninth Circuit Court of Appeals concluded that the secrecy provisions of the CSA were unconscionable.²¹⁰

The *Ting* court noted more broadly that secrecy provisions, though facially neutral, favor companies rather than individuals.²¹¹ Companies, as repeat players in arbitration, accumulate a body of knowledge unavailable to consumer-plaintiffs due to arbitration secrecy.²¹² As repeat players, companies master the issues, develop winning arguments, and know what works, all which is unknown to new plaintiffs who might request arbitration for similar grievances. The court noted "the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against [the company]."²¹³ Thus, secrecy provisions included in arbitration agreements "gag" critical information from reaching future plaintiffs, tilting arbitration in favor of companies.²¹⁴

With respect to secrecy provisions, the autonomy paradigm proposes the parity principle under which arbitration may be confidential to the extent a civil action involving the same issues protects confidentiality. For example, a company may shield trade secrets from disclosure. The Supreme Court has treated confidential

208. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. R. 1211, 1238-40 (2006) (arguing for public disclosure of arbitration proceedings involving public health, public safety, and other public concerns).

209. *Ting v. AT&T*, 319 F.3d 1126, 1133 (9th Cir. 2003).

210. *Id.* at 1151-52.

211. *Id.*

212. One court articulated the repeat player effect with the following observation: "The fact an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee. These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like" *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671, 678-79 (Cal. Ct. App. 2002).

213. *Ting*, 319 F.3d at 1152.

214. *Id.*

business information, including trade secrets, as private property that cannot be converted into public property through forced disclosure.²¹⁵ Likewise, privileged information recognized in civil actions may be similarly protected in arbitration proceedings. However, companies cannot use arbitration to shield patterns of wrongdoing that they cannot protect in litigation. A cloak of confidentiality in all aspects of arbitration should rarely be available.

B. Quasi-lawlessness

The arbitration blackout nurtures quasi-lawlessness. As noted earlier, arbitration awards cannot be vacated for erroneous applications or interpretations of law. Legal error as a ground for vacatur is not listed in the FAA or the UAA.²¹⁶ Legal error is tolerated because arbitrators, while they bring valuable trade-related expertise to dispute resolution, may not be trained in law or adjudication. In choosing arbitration, parties risk that the arbitrator might misunderstand and misinterpret the applicable law. Vacating awards for legal errors would undermine arbitration as an alternative method of dispute resolution. The Supreme Court has further foreclosed legal error as a ground for vacatur, holding that arbitration parties cannot, by means of a contract, expand the statutory scope of judicial review to include legal errors.²¹⁷

Some courts vacate arbitration awards rendered in manifest disregard of the law, a non-statutory standard of judicial review.²¹⁸ In 1953, the Supreme Court invented the manifest-disregard-of-law standard, declaring “that a failure of the arbitrators to decide in accordance with [the law or] . . . the interpretations of the law by . . . arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”²¹⁹ The standard opposes the arbitration blackout of rendering legally vacuous decisions. However, the manifest-disregard-of-law standard sets a high bar; it “means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply

215. *Carpenter v. United States*, 484 U.S. 19 (1987).

216. See UNIF. ARBITRATION ACT (amended 2000).

217. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2010).

218. Circuits are split over whether the manifest-disregard-of-law ground is valid. The Second and Ninth Circuits favor survival. See *Comedy Club Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2008). The Fifth and Eleventh Circuits, however, have held that the doctrine is no longer valid. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010); *Citigroup Global Markets v. Bacon*, 562 F.3d 349, 357 (5th Cir. 2009).

219. *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds* by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

the law.”²²⁰ The standard is met only if the arbitrator understands the law and yet renders a decision contrary to it. The “manifest” part of the standard obliges the party challenging the award to show that the disregard of law is more than mere legal error. In some cases, the reasoning of the award might itself reveal the manifest disregard of the law;²²¹ while in other cases, the arbitrator’s conduct during the arbitration proceedings might evidence the arbitrator’s intentional dismissal of the law.²²²

The autonomy paradigm supports manifest disregard of the law as a valid standard for vacating arbitration awards rendered under MACs; thus, it suppresses the blackout that enforces the MACs’ arbitration awards regardless of their compliance with the law.²²³ The MACs’ weaker parties rarely bargain for arbitration to avoid the applicable law. Almost always, arbitration agreements contain choice-of-law clauses that govern in resolving substantive issues.²²⁴ The standard may or may not be useful in vacating awards related to freely negotiated arbitration clauses between sophisticated parties. The manifest-disregard-of-law standard is most beneficial to review awards rendered under MACs where the weaker party does not negotiate the terms of the arbitration agreement. In MACs, if the weaker party fails to prevail in arbitration, it needs to know the legal reasons for the arbitral decision. However, the standard is meaningful only if arbitrators write reasoned opinions supporting awards.

C. Reasonless Awards

The arbitration blackout prospers when arbitrators fail to render reasoned awards.²²⁵ Standard arbitration awards are reasonless awards; they simply announce the result without providing supportive reasoning.²²⁶ Reasonless awards, if made public, have no

220. *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995).

221. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc).

222. *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 641 (9th Cir. 2010) (citing *Mich. Mut. Ins. Co.*, 44 F.3d at 832).

223. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008) (holding that the “manifest disregard” standard survived the decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 n.3 (2008), which declined to decide whether the manifest disregard standard survived it).

224. See, e.g., *Lukowski v. Dankert*, 515 N.W.2d 883 (Wis. 1994).

225. See *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (holding that arbitrators have no obligation to the court to give their reasons for an award).

226. *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011).

informational or precedential value. Arbitration parties themselves may not know why they have lost or won their competing claims. An arbitral decision is transparent when it is rendered in writing and includes supportive reasons. If no reasoning is provided and the award simply states that, say, the defendant is liable for a certain amount of money with interest, parties and courts alike cannot determine which facts, law, or legal analysis the arbitrator relied on to reach the award.²²⁷ This minimalist methodology of rendering bare awards without giving supportive analysis is in sharp contrast to adjudication in which judicial decisions furnish the facts, applicable law, and legal reasoning, including the public policy, supporting the judgment.

Institutional rules designed for arbitration may or may not support decisional transparency. Most institutions allow arbitration parties to opt out of reasoned awards. The AAA arbitration rules do not require that the arbitrator “render a reasoned award.”²²⁸ The arbitrator can deliver the award in writing but without furnishing the facts or law or other reasons that support the award. The London Court of International Arbitration Rules furnish a default rule under which the arbitrator states the reasons upon which the award is based.²²⁹ However, arbitration parties may change the default rule by agreeing otherwise in writing.²³⁰ The International Chamber of Commerce (ICC) Rules, however, require that the arbitrator state the reasons upon which the award is based.²³¹ There is nothing in the ICC rules under which arbitration parties may modify the rule and opt for an award without supportive analysis.

Unlike judicial opinions, reasoned awards may be written in a variety of ways.²³² A standard judicial opinion contains key facts,

227. *Morgan Keegan v. Pessel*, No. 11-cv-03293-RPM (D. Colo. May 1, 2012) (declining to vacate the award), *available at* http://scholar.google.com/scholar_case?case=106279756669913932&q=morgan+keegan+v.+pessel+2012&hl=en&as_sdt=2,5.

228. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 16, § R-46(b) at 27. Arbitration parties may change this default rule and agree to have a reasoned award. They must request a reasoned award in writing prior to appointment of the arbitrator. The arbitrator has the discretion to deviate from the default rule if the arbitrator determines that a reasoned award is appropriate. *Id.*

229. ARBITRATION RULES, LONDON COURT OF INT’L ARBITRATION, ART. 26.1, *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article26.

230. *Id.*

231. INT’L CHAMBER OF COMMERCE, ICC RULES OF ARBITRATION ART. 31(2), *available at* <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/>.

232. *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011) (“Logically, the varying forms of awards may be considered along a spectrum of increasingly reasoned awards, with a standard award requiring the least

issues, relevant law, legal analysis (parties' arguments accepted and parties' arguments rejected), and the order or judgment. Some opinions are more elaborate than others. Reasoned arbitration awards may be written following the format of a standard judicial opinion.²³³ Mostly, they are not.²³⁴ The amount of explanation offered in reasoned awards may vary from a short analysis to detailed "findings of facts and conclusions of law."²³⁵ However, courts, reluctant to recognize new grounds for vacatur, refuse to vacate awards merely because the arbitrator's explanation supporting the award is substandard.²³⁶

The autonomy paradigm embraces the ICC rule that requires arbitrators to render reasoned awards in cases founded on MACs. Parties may request that the arbitrator provide the explanation of facts and law critical to the rendering of the award.²³⁷ The rendered award, however, may not meet the analytical standards of a good judicial opinion. The autonomy paradigm, which strives to minimize court intervention at all stages of arbitration, opposes vacating awards for inadequate supportive analysis.

What good is the reasoned award, one might ask, if the quality of supportive analysis is immune from judicial review? Reasoned awards provide numerous benefits other than the basis for judicial review. Reasoned awards reflect the arbitrator's expertise and ability, enabling future arbitration parties to make more informed decisions in hiring arbitrators.²³⁸ Reasoned awards may provide reliable clues on whether the arbitrator exceeded his or her powers or engaged in manifest disregard of the law. If reasoned awards' supportive analyses are regularly substandard, arbitration organizations may face market accountability. The market pressure may force arbitration

explanation and findings of fact and conclusions of law requiring the most." (internal quotation marks omitted)).

233. *Id.*

234. *Id.* ("Generally, an arbitrator need not explain her decision; thus, in a typical arbitration where no specific form of award is requested, arbitrators may provide a 'standard award' and simply announce a result.").

235. *Id.* (internal quotation marks omitted).

236. *Id.*

237. Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 118-19 (1998) (stating that reasoned awards build public confidence in arbitration).

238. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 501 (1998) (suggesting that the parties should be vigilant on the front end to obtain credible reasoned awards rather than relying on the judicial safety net of vacatur).

organizations to train arbitrators in writing more effectively reasoned awards. The availability of published reasoned awards, like that of judicial opinions, will establish arbitration jurisprudence providing informative guidance in future cases.²³⁹ Judges too may benefit from reading reasoned awards in cases where arbitrators have trade-specific expertise that judges do not have.²⁴⁰

D. Pro-arbitration Exuberance

State skepticism of arbitration makes most sense with respect to MACs embedded in take-it-or-leave-it bargains. State legislatures make rational and moral choices when they pass legislation to protect consumers against corporate misconduct. For example, businesses disfavor class action lawsuits. Ordinarily, consumers, while buying goods and services, retain the right to a class action lawsuit. Businesses, however, may be unwilling to do business unless consumers sign arbitration agreements and waive class actions.²⁴¹ Thus arbitration has become a business tool to circumvent class actions.²⁴² A state legislature does no wrong if it outlaws class action waivers in arbitration agreements.²⁴³ This legislative choice reflects the reality of markets in which consumers do not freely sign class action waivers. The state legislature has every right, indeed a duty, to correct market conduct that undermines consumer rights.

Pro-business judges use preemptive power under the FAA to provide relief to businesses that cannot be obtained from state legislatures.²⁴⁴ Businesses wield money and influence in democratic processes at both federal and state levels.²⁴⁵ Business lobbies may petition a state legislature against present and future barriers to

239. Labor arbitral awards are the most frequently published reasoned awards and provide valuable information to unions and employers. Many publishers provide labor arbitration awards. See *Labor Arbitration Awards*, WOLTERS KLUWER, <http://hr.cch.com/products/ProductID-158.asp>.

240. W. Mark C. Weidemaier, *Judging-Lite, How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1143 (2012) (finding that arbitrators in many cases write detailed awards using court cases and other arbitral decisions).

241. See Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997) (businesses use arbitration to shield themselves against class action).

242. José Felipe Anderson, *The Viability of Multi-Party Litigation as a Tool for Social Engineering Six Decades After Restrictive Covenant Cases*, 42 MCGEORGE L. REV. 765, 807 (2011) (criticizing the limiting of group litigation).

243. *Id.*

244. William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1203 (2010).

245. *Id.* at 1203–04.

arbitration.²⁴⁶ If the legislature, despite lobbying, retains an old barrier or enacts a new barrier to arbitration, the legislative action embodies the will of the people of the state. Pro-business federal judges should respect state arbitration policy choices.²⁴⁷ They should not grant businesses an arbitration favor that the state legislature has denied.²⁴⁸ Nor should they use the power of preemption to dismantle “hundreds of state common law claims” and regulations made to protect “consumers and workers against corporate misconduct.”²⁴⁹ It is ironic that conservative judges, otherwise vociferous defenders of states’ rights, abandon their ideology of states’ rights in arbitration.

The autonomy paradigm views pro-arbitration exuberance with caution and skepticism. Pro-business federal judges, enamored with arbitration, are predisposed to strike down state barriers to arbitration under the now worn-out slogan that state barriers are vestiges of “judicial prejudice against arbitration.”²⁵⁰ Surely, centuries ago, common law courts were reluctant to enforce predispute arbitration agreements. There is a difference, however, between the so-called “historical prejudice” of common law judges and the rational policy choices that elected state legislatures make after due democratic deliberations. To protect consumers and employees, state legislatures may exclude certain matters from the scope of arbitration. Federal courts need to be careful, if not reluctant, in preempting state legislation that refuses to ride the pro-business arbitration bandwagon.

The autonomy paradigm endorses congressional efforts to oppose the unconscionability of MACs.²⁵¹ State judges can also undertake a more aggressive approach to reviewing MACs for their compliance with fairness and freedom of contract. If pro-business federal judges do not dampen their pro-arbitration exuberance in upholding MACs, they will further entrench the arbitration blackout of quasi-lawlessness.²⁵²

246. *Id.*

247. *See id.*

248. *See id.*

249. *Id.* at 1202.

250. *AT&T v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (holding that the FAA preempted the California law barring the enforcement of class action waivers in consumer contracts).

251. The autonomy of arbitration welcomes congressional efforts to regulate MACs. *See* Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). This bill would amend the FAA to include a provision stating: “[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.” *Id.* § 402(a).

252. *See* Liaquat Ali Khan, *Taking Ownership of Legal Outcomes: An Argument Against Dissociation Paradigm and Analytical Gaming*, 55 ST. LOUIS

IX. CONCLUSION

The autonomy of arbitration proposed in this Article minimizes court intervention into arbitration proceedings and outcomes. Arbitration's efficacy as an alternative method of dispute resolution is dramatically increased when the arbitrator enjoys the same powers as the trial judge in litigation. Arbitration law recognizes the arbitrator's procedural powers to order discovery, issue injunctions, and issue subpoenas for the attendance of witnesses, etc.²⁵³ The law also recognizes the arbitrator's powers to grant punitive damages, attorney's fees, and other forms of exemplary relief.²⁵⁴ In order to further fortify the autonomy paradigm, parties should authorize the arbitrator to decide questions of the existence, validity, and enforceability of the arbitration agreement, including questions of arbitrability arising under fractional arbitration.²⁵⁵ Parties should subscribe to the emergency procedures of an arbitration organization to eliminate the need to go to court to obtain relief before the arbitrator is selected.²⁵⁶ Likewise, parties should opt for the appellate procedures of an arbitration organization to review the legality and enforceability of an arbitration award.²⁵⁷ Under the combined powers of arbitration law and arbitration agreements, arbitral litigation can be minimized.

Arbitral autonomy refuses to support an arbitration blackout that promotes deviations from legal values critical to the maintenance of fairness and justice.²⁵⁸ Specifically, MACs threaten the integrity and morality of arbitral autonomy.²⁵⁹ These clauses are embedded in take-it-or-leave-it bargains to undermine the right to class actions, punitive damages, and other remedies.²⁶⁰ MACs, coupled with arbitration secrecy and lack of reasoned awards, establish a regime

U. L.J. 887 (2011) (arguing that judges are responsible for the legal outcomes their reasonings produce).

253. *See* *Amgen, Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995) (holding that arbitrator had the power under FAA to subpoena a third party to produce documents and to testify at a deposition); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994) (holding that because the burden was minimal, the nonparty would have to produce documents pursuant to arbitrator's subpoena under FAA).

254. UNIF. ARBITRATION ACT § 21(amended 2000).

255. *See supra* Parts IV, V.

256. *See supra* Part VI.B.

257. *See supra* Part VII.

258. *See supra* Part VIII.

259. *See supra* Part VIII.

260. *See supra* Part VIII.

of dispute resolution detrimental to arbitral autonomy.²⁶¹ If MACs are made immune from judicial scrutiny, arbitral autonomy will be disparaged as a jurisprudential construct that favors corporate interests, hides corporate misconduct, and harms the weak and the vulnerable.²⁶²

261. *See supra* Part VIII.

262. *See supra* Part VIII.