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The Arbitration Clause Controversy in Oklahoma

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THE ARBITRATION CLAUSE CONTROVERSY IN OKLAHOMA

I. INTRODUCTION

For nine years, a battle raged in Oklahoma contract law regarding whether an arbitration clause in a contract is enforceable under the Oklahoma Constitution. The constitution grants individuals the right to trial by jury,[1] and individuals may waive that right.[2] However, the constitution also provides that no constitutional right may be waived by contract.[3] Since arbitration clauses in contracts typically preclude jury trials,[4] they are sometimes viewed as a waiver of the right to a jury trial.[5] Thus it would seem that if an agreement to arbitrate is indeed a waiver of the right to jury trial, an arbitration clause in a contract would violate article XXIII, section 8 of the Oklahoma Constitution as impermissibly waiving by contract a constitutional right.

Recently, the Oklahoma Supreme Court partially resolved the issue in *Rollings v. Thermodyne Industries, Inc.*,[6] by upholding an arbitration clause under the Oklahoma Arbitration Act ("OAA"),[7] the state's adoption of the Uniform Arbitration Act ("UAA").[8] While the result in *Rollings* embraces the vast public policy benefits of arbitration,[9] it is somewhat incomplete in its constitutional exegesis. Because the parties chose to argue that the right waived was only one of access to the courts,[10] and not the right to a jury trial,[11] the decision does not answer the question of whether an agreement to arbitrate future

1. *See* OKLA. CONST. art. II, § 19 ("The right to trial by jury shall be and remain inviolate . . . .").
2. *See* OKLA. STAT. tit. 12, § 591 (1991) ("The trial by jury may be waived by the parties . . . ."). *See also Ex parte* Plaistridge, 173 P. 646, 647 (Okla. 1918) ("[W]here a trial by jury does not constitute an essential part of due process of law it may be waived by the party . . . .").
3. *See* OKLA. CONST. art. XXIII, § 8 ("Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.").
4. *See, e.g.*, Dean Witter Reynolds, Inc. v. Shear, 796 P.2d 296, 296-97 n.1 (Okla. 1990) (setting forth clause in contract requiring that "*[a]ny controversy* between you and the undersigned arising out of or relating to this contract or the breach thereof, *shall be settled by arbitration . . . . [T]he award of the arbitrators, or of a majority of them, shall be final* . . . .").
5. In fact, every jurisdiction which has considered the question deems an arbitration clause to be such a waiver. *See infra* note 86 and accompanying text.
6. 910 P.2d 1030 (Okla. 1996).
7. OKLA. STAT. tit. 15, §§ 801-818 (1991).
8. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 1 (1955).
9. *See Rollings*, 910 P.2d at 1036.
10. *See id.* at 1031.
11. The two rights are separately guaranteed in the Oklahoma Constitution. *See* OKLA. CONST. art. II, § 6 (guaranteeing the right of access to the courts and speedy and certain remedies for wrongs); OKLA. CONST. art. II, § 19 (guaranteeing the right to trial by jury).

disputes violates article XXIII, section 8, as it pertains to the right to trial by jury. As a result, the controversy is only partially resolved.

First, this comment will summarize the backdrop of cases associated with the controversy. Secondly, it will examine the court's holding in *Rollings*. Additionally, it will offer an answer to the question of whether a right to a jury trial is being waived by agreements to arbitrate, and if so, whether such agreements violate article XXIII, section 8.

II. THE CASES

A. *The Backdrop: Cases, 1988-1995*

The issue of the constitutionality of agreements to arbitrate in Oklahoma was first noted by Justice Opala in 1988, in his concurring opinion in *Long v. DeGeer*.[12] This case arose out of a securities account agreement executed in 1983 between Mary L. Long and Kidder, Peabody & Co.[13] The agreement stipulated that all controversies relating to transactions between the parties to the agreement would be settled by arbitration.[14] In 1984, Long brought action against Kidder, Peabody in the United States District Court for the Northern District of Oklahoma alleging, among other things, fraudulent inducement, misrepresentation, and fraudulent and/or negligent dealings regarding her account.[15] The court ordered these claims to be submitted to arbitration as stated in the contract.[16]

Following the order to arbitrate, Long re-filed suit in the Tulsa County District Court naming her stockbroker, Bill DeGeer, as the sole defendant.[17] This time, the trial court denied defendant's motion to compel arbitration; this denial formed the basis for DeGeer's appeal.[18] The Oklahoma Supreme Court reversed the denial of the motion,[19] holding that the language in the arbitration clause applied to controversies involving Kidder, Peabody's agent as well as the firm itself;[20] that Long had waived her right to a jury trial by signing the agreement;[21] and that public policy favors arbitration as a method of settling disputes.[22]

Justice Opala concurred in the judgment, but viewed the case as an opportunity to issue a warning regarding the validity of arbitration agreements in Oklahoma: "If Mary Long's arbitration agreement now in suit were to be con-

12. 753 P.2d 1327 (Okla. 1988).
13. *See id.* at 1327-28.
14. *See id.* at 1328.
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.* at 1330.
20. *See id.* at 1329.
21. *See id.*
22. *See id.* at 1330.

strued as an implicit waiver of her fundamental right to a trial by jury, then, under . . . this state's fundamental law, her promise might be avoidable."[23] However, Opala concurred in judgment because the contract in question was not governed by Oklahoma law; but rather, it stipulated that New York law would govern disputes.[24]

It is important to recognize that the condition that Opala places on the unenforceability of arbitration agreements, that the promise to arbitrate indeed be construed as a waiver of the right to a jury trial, was found by the court to exist in *Long*.[25] As discussed below, one of the proposed solutions to the arbitration clause problem involves viewing such promises as something other than a waiver of rights.[26]

The Oklahoma Supreme Court did not have the opportunity to discuss the arbitration clause problem again until it decided *Cannon v. Lane*[27] in 1993. Mark Cannon, an employee of the State of Oklahoma, had entered into a membership agreement with PacifiCare, a health maintenance organization ("HMO") which was contracted by the State of Oklahoma to care for state employees.[28] Cannon had sued PacifiCare in Tulsa County District Court seeking reimbursement for hemorrhoid surgery and alleging bad faith by PacifiCare in refusing to grant its approval for that surgery.[29] Judge Donald C. Lane granted PacifiCare's motion to compel arbitration pursuant to the membership agreement.[30] Cannon applied to the supreme court for a writ of mandamus to compel withdrawal of the order, or alternatively, a writ of prohibition of enforcement of the order.[31] The court issued the writ of prohibition because it held that the HMO was similar enough to an insurance company so as to render the contract as one with reference to insurance.[32] The OAA does not provide for the enforcement of arbitration agreements in insurance contracts.[33]

Once again, the court passed up the opportunity to rule on the ultimate issue of whether an arbitration clause in a contract violates article XXIII, sec-

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23. *Id.*
24. *See id.*
25. *See id.* at 1329. The Long court stated: "The agreement in this instance, on its face, evidences a clear intent to submit any controversy between appellee and Kidder, Peabody, arising out of the existence of the account or out of transactions on the account, to arbitration." *Id.*
26. *See infra* Part III.A.
27. 867 P.2d 1235 (Okla. 1993).
28. *See id.* at 1236-37.
29. *See id.* at 1236.
30. *See id.* Both the subscriber agreement and Pacificare's member handbook provided that claims related to the performance of Pacificare would be settled by an arbitrator with the American Arbitration Association. *See* Def.'s Application to Compel Arbitration at 2, Cannon v. Multimed Health Plan, No. 91-04279 (Tulsa County Dist. Ct. 1991).
31. *See Cannon*, 867 P.2d at 1236.
32. *See id.* at 1237.
33. *See* OKLA. STAT. tit. 15, § 802 (1991). The section reads:

> [The OAA] shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid . . . . This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

Id.

tion 8 of the Oklahoma Constitution.[34] The occasion did not slip by Justice Opala, however, who issued another concurring opinion, this time joined by Justice Watt, in which he expounded upon the unconstitutionality of such agreements to arbitrate:

> If I were writing today for the court's majority I would go much further. My opinion would *declare that all contracts* which call for submission of future controversies to arbitration are violative of Art. 23, § 8 and hence unenforceable. . . . I would today pronounce as legally infirm *all* agreements which require submission of any future controversy to arbitration.[35]

City of Bethany v. Public Employees Relations Board[36] gave the supreme court another opportunity to rule on agreements to arbitrate, this time in the context of legislatively-mandated arbitration. In *Bethany*, the local office of the International Association of Firefighters ("Union") had filed a complaint with the Public Employees Relations Board ("Board") after negotiations with the City of Bethany for a new collective bargaining agreement had failed, primarily because the City wanted to preclude certain issues from arbitration under the new contract.[37] The Union contended, and the Board found, that such collective bargaining agreements could not legally include provisions removing certain claims from the scope of arbitration pursuant to title 11 section 51-111 of the Oklahoma code, which provides that every item of certain types of public employee contracts must be subject to arbitration.[38] The Board issued an order to prevent the City from bargaining in bad faith by insisting on illegal proposals.[39] The court granted the order, and the City filed a petition for review by the district court raising two issues: whether it violated a duty to bargain in good faith by insisting that certain terms of the agreement would not be subject to arbitration, and whether the statute requiring such arbitration is constitutionally valid.[40] The district court affirmed the Board's decision, and the City appealed, again raising both issues.[41]

The supreme court phrased the second issue so as to avoid addressing the issue of whether an arbitration provision in a contract is violative of the Oklahoma Constitution by focussing on the legislative mandate for arbitration: "*Can the Legislature create a method* for dispute resolution which mandates arbitration . . . in collective bargaining agreements without running afoul of the Okla-

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34. *See Cannon*, 867 P.2d at 1240 (Opala, J., concurring) ("The court saves for another day the issue of whether a contract for arbitration of future disputes is violative of Art. 23, § 8, Okl. Const.").

35. *Id.* at 1240-41.

36. 904 P.2d 604 (Okla. 1995).

37. *See id.* at 607.

38. *See id.* The statute governing contracts between municipalities and police officers or fire fighters, states that: "Every [collective bargaining agreement] shall contain a clause establishing arbitration procedures for the immediate and speedy resolution and determination of any dispute which may arise involving the interpretation or application of any of the provisions of such agreement or the actions of any of the parties thereunder." OKLA. STAT. tit. 11, § 51-111 (1991).

39. *See Bethany*, 904 P.2d at 607.

40. *See id.* at 608.

41. *See id.*

homa Constitution?"[42] In so doing, the court not only managed to avoid the arbitration clause controversy, but also found a convenient way to justify affirmance of the trial court since the legislature effectively preempted original jurisdiction of these disputes at the trial court level by requiring arbitration.[43] Thus, the legislature rendered as inappropriate for jury trial controversies which arise out of police or fire fighter contracts,[44] and there is no waiver of a right to jury trial since no right exists.

B. The Latest Jurisprudence: Rollings v. Thermodyne, Inc.[45]

Although the decision in *Bethany* hinted that the court might uphold voluntary agreements to arbitrate, given *Bethany's* emphasis on constitutional provisions favoring arbitration,[46] the court had not yet ruled on the issue of the constitutionality of such voluntary agreements until this past spring, when the *Rollings* decision was handed down. The case involved a dispute between the patent-holder of a new type of industrial water heater, Bill Rollings, and the contracted manufacturer of the water heater, Thermodyne.[47] The contract stipulated that arbitration would be used in dispute resolution.[48]

When such a dispute arose, Rollings began his assertion of rights by sending repeated letters to Thermodyne, which apparently did not reach the result that Rollings desired.[49] He next filed suit in state district court, seeking the termination of the contract and the prohibition of any further manufacture by Thermodyne of water heaters using his design.[50] Thermodyne moved to compel arbitration, but the trial court denied the motion, holding that the arbitration clause in the contract was unconstitutional.[51] Relying on the article II, section 6 guarantee of access to the courts, the court held that Rollings could not have waived such a right under article XXIII, section 8.[52] The court of appeals, however, found differently. Since the OAA provides for judicial review of an arbitrator's decision in a limited number of contexts, the court reasoned, access to the courts was not completely denied to the parties.[53]

It was this argument which eventually swayed the Oklahoma Supreme Court. The court noted that "only if another part of the Constitution is breached can [Article XXIII,] Section 8 be invoked,"[54] meaning that by prohibiting the *ex contractu* waiver of constitutional rights, section 8 depends on some right

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42. *Id.* at 613 (emphasis added).
43. For an explanation of the Legislature's power to determine what constitutes a "wrong" actionable at a trial court, see generally St. Paul Fire & Marine Ins. v. Getty Oil Co., 782 P.2d 915, 918 (Okla. 1989).
44. *See id.* at 615 ("[T]he right to a jury trial depends on the nature of the dispute.").
45. 910 P.2d 1030 (Okla. 1996).
46. *See Bethany*, 904 P.2d at 614. *See also infra* notes 105-09 and accompanying text.
47. *See Rollings*, 910 P.2d at 1031.
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *Id.* at 1036.

which is allegedly waived and which must first exist in another part of the constitution. The court first focused on the access to courts provision of article II, section 6. Examining other states, the court noted that most states had upheld arbitration provisions in contracts despite guarantees in those states' constitutions of access to the courts.[55] The court further relied on the review provisions of the OAA,[56] which grant courts the powers to enforce arbitration provisions, confirm arbitration awards, or even vacate an arbitrator's award on the following bases: fraud, arbitrator's bias, unfair arbitration hearings, lack of a valid agreement to arbitrate, or an arbitrator exceeding his or her power.[57] Because of the possibility of such review, the court held, the access to courts provision of the constitution was not violated.[58]

The court next addressed the guarantee of "speedy and certain remedy afforded for every wrong and for every injury," also found in article II, section 6. This guarantee "does not promise a remedy for every injustice," according to the court; rather, it guarantees a remedy for those wrongs defined by the legislature.[59] The legislature, then, determines what is or is not a "wrong." By enacting the OAA, the legislature has determined that a "wrong" exists to a party to an arbitration agreement only where there exists "fraud, bias, excess of power, or unfair procedure."[60] What *would* have been a "wrong," had an arbitration agreement not been signed, is no longer recognized. In *Rollings*, the alleged dispute was within the scope of the arbitration agreement, and is thus outside the purview of what the court considers a "wrong" for the purposes of section 6.[61] Without a legally recognized "wrong," there is no need for a "speedy and certain remedy," and thus, no violation of article II, section 6.

Synthesizing the two guarantees of section 6, those of access to the courts and remedy for wrongs, the court concluded that there was no violation whatsoever of article II, section 6.[62] Since no other constitutional benefit was alleged by the parties to be waived by use of the arbitration agreement,[63] the court held that there was no violation of article XXIII, section 8, and upheld the arbitration agreement.[64]

However, as a result of the failure of the parties to so argue, the court never thoroughly considered the possibility that other benefits of the constitution may have been waived by the arbitration agreement, especially the guaranteed right to a jury trial in article II, section 19. The court mentioned that the amicus curiae to the case, the Oklahoma Trial Lawyers' Association, did raise the issue, but it disposed of the contention by recalling its decision in *Bethany*:

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55. *See id.* at 1034-35.
56. *See id.* at 1033.
57. *See* OKLA. STAT. tit. 15, § 802 (1991).
58. *See Rollings*, 910 P.2d at 1036.
59. *Id.*
60. *Id.*
61. *See id.*
62. *See id.*
63. *See id.* at 1031 n.1, 1036.
64. *See id.* at 1036.

"[I]n *City of Bethany v. PERB* we held that mandatory arbitration . . . did not violate Art. 2, § 19."[65] Although the court did not develop a full analysis of the article II, section 19 issue, the notion that facts such as those in *Rollings* would be controlled by the *Bethany* decision is somewhat erroneous.

Bethany dealt with the arbitration of disputes between labor and management in the context of civil service.[66] The statute involved, the Fire and Police Arbitration Act,[67] contains an affirmative grant of power to the labor unions (the speedy resolution of disputes by arbitration, which is binding on management) in return for denying those unions the right to strike.[68] The right to a jury trial of the dispute is denied by the legislature since the legislature determined that arbitration clauses in police and fire contracts are mandatory. This type of denial of the right to a trial by jury amounts to a *substantive* denial: the legislature has determined that trial by jury is not appropriate for solving disputes between police or fire fighter unions and municipalities.

On the other hand, *Rollings*, and similar cases, such as *Cannon*, deal with arbitration of a dispute relating to a contract which would normally be heard in court. The right to trial by jury is forsaken by the signing of a contract. This type of denial amounts to *procedural* denial: rather than determining that trial by jury is inappropriate for a certain type of controversy, such as the inventor/manufacturer dispute in *Rollings*,[69] or the insurer/insured dispute in *Cannon*,[70] the legislature has decided that signing an agreement estops one from bringing a controversy to a courtroom. Cases like *Bethany* are entirely different from cases like *Rollings*. The former, a case deciding the constitutionality of legislatively mandated grievance arbitration, cannot be brought to bear on the latter, a case determining the constitutionality of voluntarily signed arbitration agreements.

The cases, from *Long* to *Rollings*, illustrate an extensive effort by the court to uphold arbitration clauses in contracts. As *Rollings* demonstrates, such clauses withstand a test against article XXIII, section 8 via article II, section 6, the provision which guarantees access to courts and remedy for wrongs. However, a court has still not decided whether arbitration clauses violate article XXIII, section 8 via article II, section 19, which guarantees the right to trial by jury.

III. RESOLUTION OF THE CONTROVERSY: A PREDICTION

Should the court ever decide the question of whether an arbitration clause is an unconstitutional waiver of the right to a jury trial, it will need to address two questions: whether an arbitration clause in a contract is indeed a waiver of

65. *Id.* at 1031 n.1 (citing City of Bethany v. Public Employees Relations Bd., 904 P.2d 604, 607-08 (Okla. 1995)).
66. *See Bethany*, 904 P.2d at 607-08.
67. OKLA. STAT. tit. 11, § 51-111 (1985).
68. *See id.*
69. *See Rollings*, 910 P.2d at 1031.
70. *See* Cannon v. Lane, 867 P.2d 1235, 1236 (Okla. 1993).

a constitutional right; and if so, whether article XXIII, section 8 was intended to preclude such a contractual waiver of a right to jury trial. Regarding the first question, the court would probably find that by signing an agreement to arbitrate future disputes, an individual is in effect waiving a right to a trial by jury.

However, an affirmative answer to the second question is not so certain. Although not dispositive of the issue, *Bethany* serves as a signpost in this regard; the *reasoning* utilized by the court to uphold legislatively mandated arbitration could be used to uphold voluntary arbitration clauses as well.[71] Public policy also favors arbitration,[72] and the court will probably stretch the law to fit that policy. Additionally, the constitutional provision which purportedly bars arbitration agreements may have been intended for another purpose.

A. Whether an Agreement to Arbitrate Involves a Waiver of Rights

In order to hold that an arbitration agreement is unconstitutional, the court must first determine whether the issue does indeed involve a right to trial by jury since the contractual waiver of such a right would be what, if anything, the Oklahoma Constitution prohibits.[73] One theory, advanced by Richard E. Coulson of the Oklahoma City University School of Law, would hold that such agreements do not constitute a waiver at all since there is no right to a jury trial once an arbitration agreement is signed.[74]

Coulson bases his theory on the differences between legal and equitable remedies.[75] The UAA and the OAA both provide for the enforcement of agreements to arbitrate through the writ of specific performance,[76] an equitable remedy for which no right to a jury trial exists.[77] Once a party has been brought to a court of law in a suit arising out of a contract, that party has the right to counterclaim in equity for the specific performance of the arbitration clause in the contract.[78] The equitable issue of enforcement of the arbitration clause

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71. *See supra* notes 36-44 and accompanying text.

72. *See, e.g.*, Metz v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 39 F.3d 1482, 1488 (10th Cir. 1994) ("[T]here is a strong federal policy encouraging the expeditious and inexpensive resolution of disputes through arbitration."). The advantages of arbitration have not escaped Oklahoma courts: "Ordinarily, agreements of parties to bind themselves to mandatory arbitration are favored." Freeman v. Prudential Sec., Inc., 856 P.2d 592, 594 (Okla. 1993). The Oklahoma Supreme Court recognizes that courts "generally look with favor upon arbitration provisions as a shortcut to substantial justice with a minimum of court interference." Long v. DeGeer, 753 P.2d 1327, 1328 (Okla. 1987).

73. In *Long v. DeGeer*, 753 P.2d 1327 (Okla. 1987), Justice Opala noted: "If Mary Long's arbitration agreement . . . were to be construed as [a] . . . waiver of her fundamental right to a trial by jury, then, under [Article XXIII, section 8], her promise might be avoidable." *Id.* at 1330 (Opala, J., concurring).

74. *See* Richard E. Coulson, *Is Contractual Arbitration An Unconstitutional Waiver of the Right to Trial by Jury in Oklahoma?*, 16 OKLA. CITY U. L. REV. 1 (1991).

75. *See id.* at 60.

76. *See* OKLA. STAT. tit. 15, § 803 (1991); UNIF. ARBITRATION ACT § 3, 7 U.L.A. 1 (1955). *See also* Coulson, *supra* note 74, at 69.

77. *See, e.g.*, Smith v. Ferguson, 622 P.2d 1086, 1087 (Okla. 1980) (holding that a jury is not required as a matter of right in an equity action for the specific performance of a contract); Oklahoma *ex rel.* Dept. of Hwys. v. Martin, 572 P.2d 611, 616 (Okla. Ct. App. 1977) (holding that actions for the specific performance of a contract are of an equity character for which there is no right to a jury trial).

78. *Cf.* Shaw v. Ferguson, 767 P.2d 1358 (Okla. Ct. App. 1986) (illustrating that a defendant/purchaser in a breach of contract action may bring a counterclaim in equity against the plaintiff/vendor for specific

would be resolved without a jury.[79] Coulson focusses on the fact that the specific performance action has no right to a jury trial associated with it, and that by extension, no right to a jury trial exists in any agreement which includes an arbitration clause as well: "[T]here is no basis for a right to a jury trial when a party seeks to compel arbitration . . . . Consequently such agreements do not involve the waiver of any extant constitutional benefit."[80] The argument might best be conceptualized in a circular fashion, putting forth that an agreement to arbitrate is not a waiver of a right to a jury trial because any such right, if one had existed, is waived upon the signing of the agreement and therefore ceases to exist.

Specific performance of an arbitration clause differs from the legal resolution of a substantive claim relating to a contract; the former is an equitable claim,[81] while the latter is legal in nature.[82] Thus, while use of a jury would not be appropriate to decide whether to issue a writ of specific performance of an arbitration clause, a jury would be used to determine legal rights under the contract. A suit for damages, then, carries with it the right to a jury trial while the enforcement of an agreement to arbitrate does not.[83] However, one party's right to a jury trial for decisions of facts relating to substantive claims for relief exists independently of the right of the other party to pursue a writ of specific performance in a court of equity.[84] The court cannot order specific performance of an agreement which might be unconstitutional without first deciding whether the remedy sought violates the constitution. The fact that the legislature provided for the writ of specific performance by directing the courts to enforce arbitration agreements[85] does not settle the matter. Invoking the legislative act would merely shift the target of the unconstitutionality allegation from the individual arbitration clause at issue to the specific performance provisions of the OAA in general. Thus, to order the parties to arbitration through a writ of specific performance would require an equity court to consider two fundamental constitutional questions: whether an agreement to arbitrate represents a contractual waiver of rights, and if so, whether it is prohibited by article XXIII, section 8 of the Oklahoma Constitution.

The mere existence of the equitable remedy of specific performance does not answer the penultimate question of whether a right to jury trial has been waived because the granting of that writ would partially turn on whether or not the right had been waived. Rather, it is the resolution of the constitutional ques-

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performance of the real estate contract).

79. *Cf. Smith*, 622 P.2d at 1087.

80. Coulson, *supra* note 74, at 78.

81. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 16, Topic 3 Introductory Note (1971).

82. *See, e.g.*, Roadway Express v. Gordon, 277 P.2d 146, 151 (Okla. 1954) (illustrating that a dispute over sums due on an account is a question for the fact finder); Busboom v. Smith, 191 P.2d 198, 201 (Okla. 1948) (explaining that a case over a balance due on an account is a jury case).

83. *See supra* notes 77-82 and accompanying text.

84. *See* RESTATEMENT (SECOND) OF CONTRACTS § 231 (1971).

85. *See* OKLA. STAT. tit. 15, § 802 (1991).

tions presented that will determine whether the equitable remedy of specific performance is available in the arbitration clause context.

If the court were to decide whether an agreement to arbitrate is a waiver of the right to a jury trial, the court would decide in the affirmative. Many of the other forty-nine states have considered this question, and all of these jurisdictions have decided that such a clause is indeed a waiver of constitutional rights.[86] The federal courts agree, holding that by sending a dispute to an arbitrator, the Seventh Amendment remains inviolate if an arbitration clause is in force.[87] More importantly, the Oklahoma Supreme Court has considered the question on occasion,[88] and in each instance has decided that an arbitration clause in a contract suffices as a waiver of the right to trial by jury.[89] It is proper to conclude, then, that the court would answer the first of the two fundamental questions by holding that a party entering into a contractual agreement which stipulates that disputes will be resolved by an arbitrator has, in effect, waived the right to jury trial.

B. Whether Such a Waiver is Prohibited by the Oklahoma Constitution

Although not a necessary component of its decision, the court in *Bethany* hinted that article XXIII, section 8 was not intended by the drafters of the Oklahoma Constitution to preclude agreements to arbitrate.[90] Indeed, it is difficult

86. *See* Coulson, *supra* note 74. Coulson asserts that "apparently in all states, but Oklahoma, a contract providing for future arbitration is viewed as impliedly waiving a constitutional or statutory right to a jury trial." *Id.* at 69. Research indicates, however, that while many of the states have decided the issue of whether an agreement to arbitrate is a waiver of the right to jury trial, not all states have. The jurisdictions which have ruled on the issue, however, have all found in the affirmative, that is, that arbitration agreements are indeed waivers of the right to trial by jury. *See, e.g.*, Jones v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 604 So. 2d 332 (Ala. 1991); Diedrich v. City of Ketchikan, 805 P.2d 362 (Alaska 1991); Broemmer v. Abortion Serv. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992); Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6 (Cal. Ct. App. 1989); Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908 (Del. 1989); Ekereke v. Obong, 462 S.E.2d 372 (Ga. 1995); Leong v. Kaiser Found. Hosp., 788 P.2d 164 (Haw. 1990); Courter v. Simpson Constr. Co., 106 N.E. 350 (Ill. 1914); Jackson v. DeFabis, 553 N.E.2d 1212 (Ind. Ct. App. 1990); Johnson v. Fireman's Fund Ins. Co., 272 N.W.2d 870 (Iowa 1978) (Reynoldson, J., concurring); McKinstry v. Valley Obstetrics-Gynecology Clinic, P.C., 380 N.W.2d 93 (Mich. Ct. App. 1985), Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648 (Minn. 1990); Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921); Molodyh v. Truck Ins. Exch., 714 P.2d 257 (Or. Ct. App. 1986); Forte Bros., Inc. v. State Dep't of Transp., 541 A.2d 1194 (R.I. 1988); Fourakre v. Perry, 667 S.W.2d 483 (Tenn. Ct. App. 1983); Massey v. Galvan, 822 S.W.2d 309 (Tex. Ct. App. 1992).

87. *See* Gelderman, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310, 323-24 (7th Cir. 1987); Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 706 (2d Cir. 1985). *See also* National Iranian Oil Co. v. Ashland Oil, Inc., 641 F. Supp. 211 (S.D. Miss. 1986) (stating that federal policy favoring arbitration requires strict construction of arbitration agreements by the courts).

88. One might wonder why, while considering the issue of whether an agreement to arbitrate is a waiver of a jury trial, the court has never considered if such a contractual waiver would be constitutional. Many of these decisions are from before 1967, during which time the Oklahoma Constitution contained an explicit provision allowing contractual agreements to arbitrate to function as a waiver of the right to jury trial notwithstanding article XXIII, section 8. *See* OKLA. CONST. art. VII, § 20 (repealed 1967). The cases which come after 1967 do not answer the constitutional question, in my opinion, either because the court wished to avoid the issue, or because the issue was never raised by the parties.

89. *See, e.g.*, Dean Witter Reynolds, Inc. v. Shear, 796 P.2d 296, 300 (Okla. 1990); Long v. DeGeer, 753 P.2d 1327, 1330 (Okla. 1987). In both cases it was unnecessary for the court to discuss whether the waiver by contract was unconstitutional; the contract in question in each case had a New York choice-of-law provision. *See Dean Witter Reynolds*, 796 P.2d at 297; *Long*, 753 P.2d at 1330. *Long* is treated in more detail *supra* Part II.A. *Dean Witter Reynolds* is treated in more detail *infra* Part VI.A.

90. *See* City of Bethany v. Public Employees Relations Bd., 904 P.2d 604, 614 (Okla. 1993). *See also*

to imagine that a clause prohibiting arbitration agreements would exist in a constitution which so clearly favors arbitration in certain circumstances.[91] In fact, the legislative history of the Oklahoma Constitution reveals that article XXIII, section 8 was not intended to prohibit parties from waiving their right to a jury trial by entering into agreements to arbitrate future disputes.[92]

Article XXIII, section 8 has its roots in the Colorado, Montana, and Wyoming Constitutions.[93] The sections from which Oklahoma's section 8 is derived each have a scope which is much narrower than Justice Opala's suggested interpretation of the Oklahoma provision.[94] The Colorado provision on which section 8 is based forbade employers to require employees to sign waivers of the employer's liability in case of a work-related injury.[95] The Wyoming Constitution went further; it voided all waivers of liability for injuries sustained in the scope of employment, whether signed as a condition of employment or not.[96] The Montana provision was substantially similar to that of the Colorado Constitution.[97]

Furthermore, although article XXIII of the Oklahoma Constitution is entitled "Miscellaneous," most of the sections therein deal with labor and employment issues.[98] Robert Williams, in his history annotation to section 8, directs

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Dean Witter Reynolds, 796 P.2d at 302 (Kauger, J., concurring) ("Article 23, § 8 was not intended nor should it be construed to preclude arbitration.").

91. *See infra* notes 105-09, 112 and accompanying text.

92. *See infra* notes 99-113 and accompanying text.

93. *See* ROBERT L. WILLIAMS, THE CONSTITUTION OF OKLAHOMA AND ENABLING ACT, ANNOTATED, WITH REFERENCES TO THE CONSTITUTION, STATUTES, AND DECISIONS 301 (1941); Coulson, *supra* note 74, at 69-70 n.402.

94. *See* Cannon v. Lane, 867 P.2d 1235, 1240 (Okla. 1993) (Opala, J., concurring). Justice Opala's opinion, once again, is that section 8 prohibits any contractual waiver of any constitutional right. *See id.*

95. *See* COLO. CONST. art. XV, § 15, *reprinted in* CHARLES KETTLEBOROUGH, THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA, COMPILED AND EDITED 222 (1918). The section reads:

> It shall be unlawful for any person, company, or corporation to require of its servants or employés, as a condition of their employment or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employés while in the service of such person, company or corporation by reason of the negligence of such person, company, or corporation, or the agents or employés thereof; and such contracts shall be absolutely null and void.

Id.

96. *See* WYO. CONST. art. X, § 4, *reprinted in* KETTLEBOROUGH, *supra* note 95, at 1542 ("Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void.").

97. *See* MONT. CONST. art. XV, § 16 (repealed 1972), *reprinted in* KETTLEBOROUGH, *supra* note 95, at 841-42. This section reads:

> It shall be unlawful for any person, company, or corporation to require of its servants or employees, as a condition of their employment or otherwise, any contract or agreement whereby such persons, company, or corporation, shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employees while in the service of such person, company or corporation, by reason of negligence of such person, company or corporation, or the agents or employees thereof; and such contracts shall be absolutely null and void.

Id.

98. *See* OKLA. CONST. art. XXIII, §§ 1-10, 12. Section 1 prescribes maximum hours of labor on public work, section 2 prohibits the contracting of convict labor, section 3 restricts labor by children under age 15, section 4 restricts employment underground, section 5 covers health and safety concerns in certain occupations, section 7 prohibits waivers of employers' liability, section 10 places limitations on the salaries of public officials, and section 12 deals with retirement. Section 11 was repealed, so, of the ten sections (besides section 8) in article XXIII, eight focus on employment. *See id. See also* Coulson, *supra* note 74, at 69-70.

the reader back to article XXIII, section 7 for additional source material.[99] This section holds that the cause of action for wrongful death shall never be eliminated, and that the damages awarded in such a cause of action should not be limited.[100] In this respect, the Oklahoma Constitution parallels that of Wyoming;[101] the Wyoming provision on which Oklahoma's section 8 is based is also preceded by language accomplishing the same goal as Oklahoma's section 7.[102] In all three of the constitutions which are ancestral to section 8, the article in which the provision lies deals with corporations, employers, or labor.[103]

The history of article XXIII, section 8 is reflected in the application of the section, for the article has never been construed to render a contract void other than in a dispute related to injuries sustained during employment.[104] Therefore, it is a plausible theory that section 8 was not intended to prohibit all contractual waivers of constitutional rights, agreements to arbitrate, or even agreements to arbitrate in employment-injury matters, but rather, to prohibit agreements to waive employer's liability in workers' compensation suits. After all, arbitration is mentioned in the Oklahoma Constitution in three separate contexts:[105] first, prohibiting the legislature from interfering with the decisions of an arbitrator through the passage of procedural laws;[106] second, creating a Board of Arbitration within the Department of Labor;[107] and third, mandating stipulations in corporate charters to submit all labor disputes to arbitration.[108] The *Bethany* court reasoned that because arbitration is so specially recognized within the

99. *See* WILLIAMS, *supra* note 93, at 301.

100. *See* OKLA. CONST. art. XXIII, § 7 ("The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation . . . .").

101. *See* WYO. CONST. art. X, § 4, *reprinted in* KETTLEBOROUGH, *supra* note 95, at 1542. Wyoming includes the following language immediately before the language prohibiting waiver of employer's liability: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." *Id.*

102. Note that in the Wyoming Constitution, the provisions are combined into one section. *See* WYO. CONST. art. X, § 4. In the Oklahoma version, however, the two ideas are given separate treatment. *See* OKLA. CONST. art. XXIII, §§ 7-8. The fact remains, however, that in both constitutions these provisions immediately precede each other.

103. The Colorado and Wyoming articles are entitled: "Corporations." *See* COLO. CONST. art. XV; WYO. CONST. art. X. The Montana provision is headed: "Corporations Other Than Municipal." *See* MONT. CONST. art. XV.

104. *See, e.g.*, Pine Belt Lumber Co. v. Riggs, 193 P. 990, 996 (Okla. 1920) (forbidding employee to release employer from liability for injuries). *Compare* Shoenfelt v. Donna Belle Loan & Inv. Co., 45 P.2d 507, 510 (Okla. 1935) (relieving lender from liability to borrower is valid for the purpose of preventing litigation).

105. *See* City of Bethany v. Public Employees Relations Bd., 904 P.2d 604, 614 (Okla. 1993).

106. *See* OKLA. CONST. art. V, § 46 ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before . . . arbitrator[s] or other tribunals . . . .").

107. *See* OKLA. CONST. art. VI, § 21 ("The Legislature shall create a Board of Arbitration and Conciliation in the Department of Labor and the Commissioner of Labor shall be ex-officio chairman.").

108. *See* OKLA. CONST. art. IX, § 42 ("Every license issued or charter granted to a mining or public service corporation . . . shall contain a stipulation that such corporation will submit any difference it may have with employees in reference to labor, to arbitration, as shall be provided by law.").

Oklahoma Constitution, it is difficult to imagine that the drafters intended the same constitution to prohibit arbitration.[109]

The *Bethany* case, of course, involved the resolution of employment grievances,[110] which are specifically addressed in relation to arbitration in article IX, section 42.[111] This might distinguish the reasoning employed to reach the decision in *Bethany* from that which would be used in other types of cases. But the court summed up its analysis of the constitutional mention of arbitration by generalizing to all types of arbitration, whether employment-related or not: "The framers, *at a minimum*, did not preclude legislatively-mandated grievance arbitration."[112] This deliberate phrasing of the decision leaves the door open for expansion of the application of the constitutional interpretations employed in *Bethany*. With this open-ended language, the court may now extend its views to cover arbitration agreements which are not legislatively mandated, or which are not related to employment.

V. IMPLICATIONS OF A DECISION AGAINST ARBITRATION AGREEMENTS

Were the court to actually decide that clauses in contracts providing for arbitration *do* violate article XXIII, section 8 of the Oklahoma Constitution, the impact on the state would be dramatic. Certain principles of public policy, such as the promotion of fairness and equality in the bargaining process, might be supported by such a decision. However, public policy has also come to favor alternative methods of dispute resolution in the last decade,[113] and a decision which holds arbitration agreements unconstitutional would clearly contravene public policy in this regard.

A. Fairness and Equality in Bargaining

Courts have consistently been reluctant to enforce those contracts which demonstrate terms favoring one party to the contract, and an inequality of bargaining power which disfavors the other party.[114] Since article XXIII, section 8 is a protection of rights, it would seem that a literal reading and strict enforcement of the section would support a policy of striving for fairness in bargaining. After all, if an arbitration clause in a contract is unenforceable on its face, it prevents the inclusion of such a clause in an adhesion or unconscionable contract.[115] Consequently, parties who desire arbitration would not be able to

109. *See Bethany*, 904 P.2d at 614.

110. *See id.* at 607.

111. *See supra* note 108.

112. *Bethany*, 904 P.2d at 614 (emphasis added).

113. *See, e.g.*, City of Muskogee v. Martin, 796 P.2d 337, 340 (Okla. 1990) (expressing federal court policy preferring arbitration).

114. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979). The Uniform Commercial Code gives courts three options when a contract includes such a term: to refuse enforcement of the contract, to enforce the contract without the unfair term, or to limit the application of that term in order to avoid an unfair result. *See* U.C.C. § 2-302(1) (1995).

115. An adhesion contract is one in which one party's will is imposed on the other party, who either

"force" the procedure on individuals who do not want to waive their right to a jury trial but who have no meaningful choice other than to sign the contract.[116] Therefore, to hold all arbitration clauses as unenforceable might be a way to protect the public from being forced into a procedure which might be disfavorable.

However, an adhesion contract must have terms which unreasonably favor the party with the greater bargaining power in order to be unconscionable, and therefore, unenforceable.[117] While parties who are commonly involved in litigation, such as large corporations, might have more experience and wider latitude in selecting an arbitration panel than the average citizen, there is no other advantage to either party which is inherent in the arbitration process.[118] Several courts have held that since an arbitration provision is not inherently unfair, the presence of an arbitration clause in a contract is not a term which unreasonably favors one of the parties.[119] Even in adhesion contracts, then, an arbitration clause does not render the contract unconscionable.[120] Summarily, there is seldom an injustice from which it is necessary to protect the public simply because a contract contains an arbitration provision.

Furthermore, a ruling that arbitration provisions in contracts are unenforceable is not necessary to protect potential victims of unfairness in the bargaining process because the rules governing contract formation still apply.[121] While substantive rights under the contract would be determined by an arbitrator, the decision of whether or not to enforce the arbitration clause still belongs to the courts.[122] An arbitration clause which is unfair, such as one which gives the

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unwillingly or unwittingly accepts a unfavorable term during contract formation. *See* MARTIN A. FREY ET AL., AN INTRODUCTION TO CONTRACTS AND RESTITUTION 209-10 (2d ed. 1993). Unconscionability, which often accompanies a contract of adhesion, exists when the unfavorable term is unreasonable. *See id.* at 210.

116. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (explaining that lack of meaningful choice is one of the criteria for deeming a contract unconscionable).

117. *See id.* at 449 ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. . . . In many cases, the meaningfulness of the choice is negated by a gross inequality of bargaining power."). *See also* Fotomat Corp. of Fla. v. Chanda, 464 So. 2d 626, 631 (Fla. Dist. Ct. App. 1985) (stating that the contract should be reviewed in light of the circumstances at time contract was made); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (1960) (stating that contractual provisions injurious to the public in some way will be declared void as against public policy); 1 ARTHUR LINTON CORBIN, CONTRACTS § 128, at 551-55 (1963) (discussing unconscionable bargains).

118. *See* Ditto v. RE/MAX Preferred Properties, Inc., 861 P.2d 1000, 1002-04 (Okla. Ct. App. 1993) (holding that where the contract gives one party unreasonable power in determining who will arbitrate the dispute, however, the agreement is unfair).

119. *See* Webb v. R. Rowland & Co., 800 F.2d 803, 807 (8th Cir. 1986); Hall v. Prudential-Bache Sec., Inc., 662 F. Supp. 468, 471 (C.D. Cal. 1987); Sharpe v. Kidder, Peabody & Co., 47 Fair Empl. Prac. Cas. 46, 47 (BNA) (D. Minn. June 13, 1988).

120. *See generally* William G. Phelps, Annotation, *Pre-Emption by Federal Arbitration Act (9 U.S.C.S. §§1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, § 5 (1994) (explaining that the particular provision at issue must be unconscionable).

121. *See, e.g.*, Universal Plumbing & Piping Supply, Inc. v. John C. Grimberg Co., 596 F. Supp. 1383, 1384-85 (W.D. Pa. 1984); Duplan Corp. v. W. B. Davis Hosiery Mills, Inc., 442 F. Supp. 86, 87-88 (S.D.N.Y. 1977). *See also* Phelps, *supra* note 120, at § 3.

122. The Federal Arbitration Act, for example, directs courts to enforce arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). The Oklahoma Arbitration Act parallels the federal statute: "[Arbitration] agreements are valid . . . except upon such grounds as exist at law or in equity for the revocation of any contract." OKLA. STAT. tit. 15, § 802

parties unequal power in determining the composition of the arbitration panel, may still be struck down by the courts as unenforceable due to unconscionability if there is unequal bargaining power accompanying the unfair term.[123] While a decision rendering arbitration clauses unenforceable might ostensibly be seen as a result of a policy promoting fairness in the bargaining process, such a decision would neither effectively promote fairness in bargaining nor be necessary to achieve that result. Certainly, in light of the benefits to the public of alternative dispute resolution,[124] any public policy considerations which favor the unenforceability of arbitration clauses are minimal.

B. The Public Policy Benefits of Arbitration

American public policy on arbitration has shifted from disfavoring arbitration agreements in general, to disfavoring only those agreements that provide for the arbitration of future controversies, to favoring all arbitration agreements.[125] In the 1874 case of *Insurance Co. v. Morse*,[126] the United States Supreme Court took a skeptical view of arbitration, stating that the enforcement of arbitration agreements might substantially interfere with the administration of justice.[127] In fact, prior to the adoption of the Federal Arbitration Act ("FAA")[128] in 1925, courts generally looked with disfavor on arbitration agreements, holding that public policy forbade specific performance thereof.[129]

Since the earlier part of this century, however, American courts have come to embrace arbitration. Crowded dockets and lengthy trials encouraged many jurisdictions to adopt arbitration statutes, and, as long as the dispute to be resolved was present, and not future, public policy began to favor arbitration agreements.[130] In the 1952 case of *Wilson v. Gregg*,[131] the Oklahoma Supreme Court struck down an arbitration agreement because it called for the arbitration of future controversies.[132] The court recognized that agreements to

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(1991).

123. *See* Ditto v. RE/MAX Preferred Properties, Inc., 861 P.2d 1000, 1004 (Okla. 1993). The court was confronted with an action to enforce an arbitration agreement in which one of the parties would have no voice in selecting the arbitrators. *See id.* at 1001-02. The court refused to uphold the agreement, holding that such an agreement "conflicts with [the court's] fundamental notions of fairness, and tends to defeat arbitration's ostensible goals of expeditious and equitable dispute resolution." *Id.* at 1004.

124. *See infra* Part V.B.

125. *See* Lauri Newton, Comment, *Arbitration and Antitrust: A Leg Up for International Arbitration* [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985)], 25 WASHBURN L.J. 536, 536-37 (1986). *See also* Henry C. Strickland, Allied-Bruce Terminix, Inc. v. Dobson: *Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. LAW. 238, 238-39 (1995).

126. 87 U.S. (20 Wall.) 445 (1874).

127. *See id.* at 452.

128. 9 U.S.C. §§ 1-307 (1994).

129. *See In re* Phalberg, Bulk Carriers Corp. v. Kasmu Laeva Omanikud, 43 F. Supp. 761, 762 (S.D.N.Y. 1942). *See also* Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (declaring Congress' motivation for passing the FAA was to mandate enforcement, by the states, of arbitration agreements).

130. *See, e.g.*, Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921); Deal v. Thompson, 151 P. 856 (Okla. 1915).

131. 255 P.2d 517 (Okla. 1952).

132. *See id.* at 519.

arbitrate present disputes had been enforced by the courts on a regular basis by this time, but held that agreements to arbitrate controversies which might arise in the future were contrary to public policy because they deprive the courts of jurisdiction.[133]

The drafters of the Uniform Arbitration Act of 1955 sought to eliminate this reluctance on the part of courts to enforce agreements to arbitrate future disputes. Clauses requiring the arbitration of future disputes, as well as those in the present, are enforceable in jurisdictions, including Oklahoma, that have enacted the UAA.[134] Public policy has evolved accordingly; courts now "generally look with favor upon arbitration statutes and contracts as a shortcut to substantial justice with a minimum of court interference."[135] In fact, the support for arbitration has become so strong that when an arbitration provision exists, there is a presumption favoring the enforcement of that agreement.[136]

Public policy, then, has shifted from disfavoring arbitration to favoring it as a means of resolving controversies. The reasons for the change are clear: arbitration speedily determines disputes and controversies by "quasi judicial means, thus avoiding the formalities, the delay, the expense, and the vexation of ordinary litigation."[137]

To understand fully the benefits of arbitration as a method of dispute resolution, one need only examine the case of Mark Cannon, the plaintiff who successfully challenged the arbitration clause in his health maintenance agreement.[138] After being denied coverage by PacifiCare, Cannon sued the insurance company.[139] The case was dismissed by Judge Lane because of the arbitration provision.[140] Cannon appealed, won, and the case was remanded to the trial court.[141] During trial, PacifiCare pleaded that Cannon had failed to exhaust some administrative remedies, and once again moved for dismissal.[142] While the trial judge was deciding that motion, Cannon and PacifiCare came to terms on a settlement process, one that would be administered by a third party.[143] And, after almost five years of litigation, Cannon and PacifiCare reached an agreement.[144]

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133. *See id.*

134. *See* UNIF. ARBITRATION ACT § 1, 7 U.L.A. 1 (1955) ("[A] provision in a written contract to submit to arbitration any controversy *thereafter arising* between the parties is valid, enforceable and irrevocable . . . .") (emphasis added).

135. Association of Classroom Teachers of Okla. City, Inc. v. Independent Sch. Dist. No. 89 of Okla. County, 540 P.2d 1171, 1176 (Okla. 1975). *See also* Freeman v. Prudential Sec., Inc., 856 P.2d 592, 594 (Okla. Ct. App. 1993) ("Ordinarily, agreements of parties to bind themselves to mandatory arbitration are favored.").

136. *See, e.g.*, Wolverine Exploration Co. v. Natural Gas Pipeline Co. of Am., 842 P.2d 352, 353-54 (Okla. Ct. App. 1991).

137. 3 AM. JUR. *Arbitration and Award* § 2 (1936).

138. *See* Cannon v. Lane, 867 P.2d 1235 (Okla. 1993).

139. *See id.* at 1236.

140. *See id.*

141. *See id.* at 1240.

142. Interview with Elise Brennan, attorney for PacifiCare, Tulsa, Okla. (Sept. 25, 1995).

143. *Id.*

144. *Id.*

The irony of the Cannon situation is, of course, that after striving to strike the arbitration process down in the Oklahoma Supreme Court, Cannon ultimately resolved his controversy through alternative dispute resolution. Five years later, the settlement procedure employed reached a decision that an arbitrator would likely have come up with anyway. It is cases like this which highlight the need for enforcement of arbitration clauses in contracts in Oklahoma.

Although holding arbitration clauses in contracts violative of the Oklahoma Constitution may arguably protect the public from unfair bargaining practices, there already exist mechanisms for the public's protection. Furthermore, there is nothing inherently unfair about arbitration provisions. Instead, such a holding would possibly deprive Oklahomans of the benefits of contractual arbitration as a method for resolving disputes.

VI. CIRCUMVENTING A DECISION RENDERING ARBITRATION AGREEMENTS UNENFORCEABLE

Although the court will likely, in the light of the legislative history of the section, decide that article XXIII, section 8 does not render arbitration agreements unenforceable,[145] there is still the chance that the court will interpret the section literally. If the court chooses to do so, there are methods which might be employed to enforce arbitration agreements notwithstanding the court's decision.

A. Choice of Law Provisions

A provision that a contract will be governed by the laws of a state or territory other than Oklahoma might succeed in taking the arbitration clause out of the ambit of article XXIII, section 8. In his concurring opinion to *Long,* Justice Opala conceded that the arbitration provision in Long's contract with Kidder, Peabody, and Company should be upheld notwithstanding the Oklahoma Constitution because he could not "conclude that Mary Long's arbitration agreement [was] governed by Oklahoma law."[146]

Justice Opala tempered the choice-of law argument with his opinion in *Dean Witter Reynolds, Inc. v. Shear.*[147] On appeal, Warren Shear sought to reverse the trial court's enforcement of his contract by asserting that the choice-of-law provision, which called for New York law, should not be enforced.[148] Since Shear did not raise the choice-of-law issue at the trial court level, the court found that he could not raise the issue on appeal.[149] However, in so ruling, the court noted that a challenge to the choice-of-law provision might succeed if a party was able to establish that "(a) application of the chosen state's

145. *See supra* Part III.
146. Long v. DeGeer, 753 P.2d 1327, 1330 (Okla. 1988).
147. 796 P.2d 296 (Okla. 1990).
148. *See id.* at 298.
149. *See id.* at 299.

legal system [was] 'contrary to a fundamental policy' of the state with the materially greater interest in determining the question at hand and (b) the laws of the latter state would govern in the absence of an effective choice of law."[150] In that case, Oklahoma law would still apply, and the question of whether the arbitration clause violates the Oklahoma Constitution would still need to be addressed.

It is not likely that a challenge to a choice-of-law provision calling for another state's law would succeed, however, because such a challenge would probably fail the first part of the test for two reasons. First, part (a) of the test requires that one state have a "materially greater interest" than the chosen state.[151] Since parties may not arbitrarily choose one state's law over another, but must opt for the law of a state which has some substantial relationship to the transaction or the parties involved,[152] both the chosen state and the forum state would have some interest in the resolution of the dispute.[153] It is doubtful whether the standard of "materially greater interest" could be satisfied.[154] Certainly in *Dean Witter Reynolds*, wherein one of the parties had the chosen state as its principal place of business,[155] it could not be said that Oklahoma had a materially greater interest than that of New York, the chosen state.

Second, part (a) of the test set out in *Dean Witter Reynolds* also requires that "'*application of the law of the chosen state would be contrary to a fundamental policy*'" of a state with a materially greater interest.[156] While there remains a controversy on whether arbitration clauses in contracts violate the Oklahoma Constitution, it could not be successfully argued that arbitration is contrary to state public policy in Oklahoma. The constitution, as noted above, does embrace arbitration in three separate contexts.[157] Furthermore, Oklahoma courts have held recently that public policy favors arbitration because it provides a method of solving disputes without resorting to the courts.[158]

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150. *Id.* at 298-99 (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187-188 (1971)).

151. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest . . . .").

152. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971). The law of the chosen state will govern unless "the chosen state has no substantial relationship to the parties or the transaction." *Id. See also* Moore v. Subaru of Am., 891 F.2d 1445 (10th Cir. 1989). Oklahoma's choice of law rules for contracts include the application of the law chosen by the parties, the law of the state in which the contract was entered into, or the place of performance of the contract if that place is indicated in the contract. *See id.* at 1449.

153. *See, e.g.*, Shearson Lehman Bros., Inc. v. M & L Inv., 10 F.3d 1510, 1514 (10th Cir. 1993) (explaining that a state which is a principal place of business of one of the parties has a material interest in the transaction); Equifax Serv., Inc. v. Hitz, 905 F.2d 1355, 1360 (10th Cir. 1990) (requiring that in an employment contract, the state which is the principal place of business of the employer has an interest in the transaction).

154. *See, e.g., Shearson Lehman Bros.*, 10 F.3d at 1514; *Equifax*, 905 F.2d at 1360.

155. *See Dean Witter Reynolds*, 796 P.2d at 299.

156. *Id.* (alteration in original) (citations omitted). *See also Moore*, 891 F.2d at 1449 (10th Cir. 1989). In *Moore*, this was applied to invoke Oklahoma law even though the contract provided for the application of Arkansas law because the contract, which was a loan-receipt agreement, was void according to Oklahoma statutory law. *See id.*

157. *See* OKLA. CONST. art. V, § 46; art. VI, § 21; art. IX, § 42. *See also supra* notes 106-08 and accompanying text.

158. *See* Freeman v. Prudential Sec., Inc., 856 P.2d 592 (Okla. Ct. App. 1993). *See also* Association of

Therefore, a choice of law provision should successfully remove the arbitration clause from the effects, if any, of article XXIII, section 8, of the Oklahoma Constitution. As long as the chosen state does have a substantial relationship to either the transaction or the parties to the contract, an arbitration provision in that contract should be enforced by Oklahoma courts.[159]

B. Invocation of Federal Law[160]

An even more effective method of precluding the application of any Oklahoma law invalidating arbitration agreements would be to invoke federal law. The Federal Arbitration Act[161] will govern in any case which evidences an effect on interstate commerce. Section 2 of the Act provides that a provision in a contract calling for arbitration for the resolution of disputes will generally be upheld if the transaction is one involving commerce, unless there exists grounds for the revocation of the contract as a whole.[162] In *Southland Corp. v. Keating*,[163] the leading case on enforceability of arbitration agreements through the FAA in the face of state law which is contrary to such enforcement, the United States Supreme Court recognized two limitations on the enforceability of arbitration provisions through the Act.[164]

First, the Court noted that the arbitration provision "must be part of . . . a contract 'evidencing a transaction involving commerce.'"[165] Section 1 of the Act defines commerce as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia [and] any State or Territory or foreign nation."[166] This section also explicitly excludes "contracts of employment of . . . any . . . class of workers engaged in

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Classroom Teachers of Okla. City, Inc. v. Independent Sch. Dist. No. 89 of Okla. County, 540 P.2d 1171, 1176 (Okla. 1975) ("[A]rbitration . . . [provides] a shortcut to substantial justice with a minimum of court interference.").

159. It appears that any of the other forty-nine states will do; Oklahoma's constitution is the only one which has a provision against contractual waivers of rights as broadly stated as article XXIII, section 8. *See Dean Witter Reynolds*, 796 P.2d at 301 (Kauger, J., concurring) (expressing that Oklahoma's article XXIII, section 8 is unique).

160. This section will primarily deal with the application of the Federal Arbitration Act codified at 9 U.S.C. §§ 1-307 (1994). However, there is additional federal law, besides the FAA, that provides for arbitration in specific types of controversies and that would also override state law that seeks to avoid the enforcement of an arbitration clause. *See, e.g.*, Labor Management Relations Act, 29 U.S.C. § 173(d) (1994), *applied in* NLRB v. Roswil, Inc., 55 F.3d 382 (8th Cir. 1995). *See also Dean Witter Reynolds*, 796 P.2d at 301 (Kauger, J., concurring) (suggesting that the application of the Labor Management Relations Act would override any Oklahoma law which refused to enforce the arbitration provision in question in that case).

161. 9 U.S.C. §§ 1-307 (1994).

162. *See id.* § 2. The section reads:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

163. 465 U.S. 1 (1984).

164. *See id.* at 10.

165. *Id.* at 11.

166. 9 U.S.C. § 1 (1994).

foreign or interstate commerce,"[167] but this provision has been limited to workers employed in transportation industries.[168]

The Act exercises authority to the full extent that Congress has the power to regulate under the Constitution.[169] In *Allied-Bruce Terminix Companies, Inc. v. Dobson*,[170] the Supreme Court held that the words "involving commerce" in section 2 of the FAA are the functional equivalent of the phrase "affecting commerce,"[171] which, at the time,[172] had been established by the Court as the test for whether Congressional action is proper under the Commerce Clause.[173] This commerce requirement for congressional action has been interpreted broadly throughout the latter part of this century; as long as the activity being regulated, such as the signing of a contract in *Allied-Bruce*, has an effect on interstate commerce, Congress has the authority to regulate the activity.[174] Recently, the commerce power has been slightly limited in *United States v. Lopez*,[175] but it appears that as long as the activity being regulated is indeed commercial, Congress still has the authority to regulate it, even if it is an intrastate activity.[176] Since contracts are, by their nature, commercial, Con-

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167. *Id.*

168. *See, e.g.*, Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984). *Cf.* Conley v. San Carlo Opera Co., 163 F.2d 310, 311 (2d Cir. 1947) (holding that an entertainer who travelled across state lines successfully avoided arbitration provision because no interstate commerce was found; not because the contract was one of employment). *But see* Mittendorf v. Stone Lumber Co., 874 F. Supp. 292, 295 (D. Or. 1994) (holding that FAA does not govern employment contracts).

169. *See* U. S. CONST. art. 1, § 8 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

170. 115 S. Ct. 834 (1995).

171. *See id.* at 840. The court also held that the scope of the FAA is broader than "'only persons or activities within the flow of commerce.'" *Id.* at 839 (quoting United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 276 (1975)).

172. This test has been modified slightly by the court's ruling in *United States v. Lopez*, 115 S. Ct. 1624 (1995). The basic adjustment has been a move from "affecting" to "substantially affecting" commerce. *See id.* at 1630. By extension, the *Allied-Bruce* court would hold today that "involving commerce" is the functional equivalent of "substantially affecting commerce." The *Lopez* decision is treated more fully *infra* notes 175-76 and accompanying text.

173. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). Congressional exercise of the commerce power to pass a statute is proper when Congress has determined that an activity affects interstate commerce, and the courts need only inquire whether Congress' finding is rational. *See id.* at 277. The commerce power extends to intrastate activities which affect interstate commerce. *See id.* The court must defer to a congressional finding that a regulated activity affects interstate commerce. *See id.* at 276. *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

174. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (holding that a restaurant affects interstate commerce when it offers food to interstate travelers); Wickard v. Filburn, 317 U.S. 111, 124-28 (1942) (holding that production and consumption of home-grown wheat affected interstate commerce).

175. 115 S. Ct. 1624 (1995).

176. Chief Justice Rehnquist, writing for the majority, asserted that Congressional power to regulate commerce should be reduced from the regulation of that which "affects" commerce to that which "substantially affects" commerce. *See Lopez*, 115 S.Ct. at 1630. His application of that "new" standard, however, seems to cover all activities which are commercial in nature. *Lopez* struck down a federal statute prohibiting the possession of handguns in school zones, but Rehnquist held that other Court decisions which upheld congressional regulation of economic activities were indeed decided correctly, no matter how slim the nexus between the economic activity and interstate commerce: "Examples include the regulation of *intrastate* coal mining . . . *intrastate* extortionate credit transactions . . . and production and consumption of *home-grown* wheat . . . ." *Id.* at 1630 (emphasis added). That the activity regulated be economic, then, appears to be the requirement for Congressional action.

gress has the power to regulate them, and the FAA will apply in the vast majority of disputes.

The second limitation recognized by the Court in *Southland* is that no grounds may exist for the revocation of the contract.[177] This limitation will apply in situations where a rule of contract formation has been violated; for example, whether a written arbitration provision added onto a written confirmation of an already existing oral contract is valid,[178] or whether a boilerplate arbitration provision on the back of a contract is considered part of the contract under state law.[179] However, this limitation will not render arbitration agreements invalid simply because state law prevents the formation of such agreements.[180] Such a proposal was rejected by the *Southland* majority because to adopt it would allow states to override the declared policy in favor of arbitration with statutory provisions to the contrary.[181]

Once the FAA is deemed applicable in a controversy, its effect is to completely preclude the application of state law to the determination of whether or not an arbitration agreement is enforceable.[182] In *Southland*, owners of 7-Eleven franchises sued Southland, the franchisor, in California state court, claiming fraud, misrepresentation, and violations of the California Investment Disclosure Law, among other allegations.[183] The California Supreme Court had reinstated a ruling by the trial court, which had been reversed on the first appeal, that the arbitration provisions in the franchise agreement were unenforceable.[184] The United States Supreme Court reversed that decision, holding that the FAA preempted the application of state law to the arbitration agreement through the Supremacy Clause[185] of the United States Constitution.[186] In so doing, the Court stated that by passing the FAA, Congress had "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[187]

There were two factors involved in the Court's decision to pre-empt state law by the FAA. First, the Court noted that to fail to uphold the FAA in state court cases would be to promote forum shopping,[188] which is actively discouraged by the federal courts.[189] Second, the Court asserted that since Congress

177. *See Southland*, 465 U.S. at 16 n.11.
178. *See, e.g.*, Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135 (4th Cir. 1979).
179. *See, e.g.*, Universal Plumbing & Piping Supply, Inc. v. John C. Grimberg Co., 596 F. Supp. 1383 (W.D. Pa. 1984).
180. *See Southland*, 465 U.S. at 16 n.11.
181. *See id.*
182. *See id.* at 10-11.
183. *See id.* at 4.
184. *See id.* at 5.
185. *See* U. S. CONST. art. 6, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
186. *See Southland*, 465 U.S. at 17.
187. *Id.* at 10.
188. *See id.* at 15-16.
189. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 75 (1938). One of the twin aims of *Erie* is to discourage

extended the effect of the statute to all contracts evidencing a transaction "involving commerce," it was Congress' clear intent to make the FAA binding on the states.[190] In any contract which affects interstate trade, then, state courts have no choice but to enforce an arbitration clause.

The applicability of the FAA to most disputes almost renders the arbitration clause controversy in Oklahoma moot. In her concurring opinion to *Dean Witter Reynolds*, Justice Kauger recognized that Oklahoma law could not have been used to defeat the arbitration provision at issue since the FAA would have preempted application of the Oklahoma Constitution.[191] Further, in his concurring opinion in *Rollings*, Justice Opala stated that he would uphold the arbitration agreement in that case through the FAA although, in his opinion, it was invalid against the Oklahoma Constitution.[192] When a transaction in a contract has an effect on interstate commerce, the FAA applies. Because, upon enacting the FAA, Congress "declared a national policy favoring arbitration," any arbitration agreement which falls under the rubric of the FAA will be enforced in the vast majority of circumstances.

VII. CONCLUSION

It is probable that the Oklahoma Supreme Court will have the opportunity to decide whether arbitration clauses violate article XXIII, section 8 of the Oklahoma Constitution in the near future. Given the legislative history of the section, and the overwhelming public policy considerations which support agreements to arbitrate, it is likely that the court will answer in the negative. However, if the court does choose to invalidate arbitration agreements, the vast majority of them will still be enforceable through the application of federal law or the addition of a choice-of-law provision to the contract. The controversy raised by Justice Opala presents the Oklahoma Supreme Court with two choices; however, it seems that it will not make much difference which choice the court selects.

Gregory R. J. Zini

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forum shopping. *See* Hanna v. Plumer, 380 U.S. 460, 466-69 (1965).

190. *See Southland*, 465 U.S. at 16 ("Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

191. *See* Dean Witter Reynolds, Inc. v. Shear, 796 P.2d 296, 301 (Okla. 1990) ("If federal law is impacted, state law is pre-empted by the Federal Arbitration Act . . . ."). *See also* Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1117 (1st Cir. 1989) (holding that state law is preempted by the FAA).

192. *See* Rollings v. Thermodyne Indus., Inc., 910 P.2d 1030, 1038 (Okla. 1996).