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I. INTRODUCTION AND HISTORY

When the Federal Arbitration Act[1] (FAA) was enacted in 1925, it was meant to strengthen commercial associations' internal arbitrations.[2]

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** I would like to thank the attorneys of the firm Freking & Betz in Cincinnati, OH for their thoughtful comments.

In the years since its passage, the type and number of arbitrations have increased exponentially. In part, this increase is due to the fact that predispute arbitration agreements are now widely used for consumer contracts and many employment agreements.[3]

Another reason for the dramatic rise in the number of arbitrations is a change in the United States Supreme Court's attitude toward arbitration. Fifty years ago, the Court held that a securities buyer with a statutory claim against a seller could not be compelled to arbitrate his claim pursuant to an arbitration clause in the sales contract.[4] Twenty years later, after the Court held that an employee's arbitration of a contractual discrimination claim did not preclude subsequent litigation of his independent statutory rights under Title VII,[5] lower courts refused to compel arbitration of statutory claims in employment disputes.[6] However, in the *Mitsubishi* Trilogy,[7] the Supreme Court stated, "by agreeing to arbitrate a statutory claim, the 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."[8] The *Mitsubishi* Trilogy concerned statutory claims arising under antitrust, securities, and racketeering laws.[9] The unanswered question in the *Mitsubishi* Trilogy, whether employees can arbitrate employment statutory claims, was answered in *Gilmer v. Interstate/Johnson Lane Corp.*[10]

"In *Gilmer* the Court held for the first time, that predispute arbitration is enforceable even when statutory discrimination rights are at issue."[11] Robert Gilmer was a terminated financial services manager who sued Interstate claiming age discrimination under the Age

1. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2000)).

2. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 933-44 (1999).

3. This article uses the terms "predispute arbitration" and "mandatory arbitration" interchangeably.

4. Wilko v. Swan, 346 U.S. 427, 438 (1953).

5. *See* Alexander v. Gardner Denver Co., 415 U.S. 36, 59-60 (1974); *see also* Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 336 (2006) [hereinafter Bales, *Normative Consideration*].

6. *See* Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989).

7. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Co. v. Soler Chrysler-Plymouth Co., 473 U.S. 614 (1985).

8. *See Mitsubishi Motors Corp.*, 473 U.S. at 628.

9. *See Rodriguez de Quijas*, 490 U.S. at 478; *McMahon*, 482 U.S. at 222; *Mitsubishi Motors Corp.*, 473 U.S. at 619-20.

10. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

11. Bales, *Normative Consideration*, *supra* note 5, at 338 (citing *Gilmer*, 500 U.S. at 35).

Discrimination Employment Act of 1967 (ADEA).[12] Gilmer had an agreement, as required by the New York Stock Exchange, to arbitrate any dispute arising from his employment or termination.[13] When Gilmer's case went before the United States Court of Appeals for the Fourth Circuit, the court compelled Gilmer to arbitration because it found nothing in the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.[14] The Supreme Court agreed with the Fourth Circuit and compelled Gilmer to arbitration.[15] The Supreme Court used the *Mitsubishi* Trilogy for support, finding statutory claims are arbitrable under the FAA.[16]

Despite the fact that the Court in *Gilmer* found no congressional intent in the history of the ADEA to preclude arbitration of an ADEA claim, the ADEA was enacted in 1967, and at that time, arbitration was the adjudicating forum for labor and commercial disputes only.[17] It is likely that when Congress created the ADEA it never considered that statutory claims would be resolved by arbitration rather than in court. However, the Supreme Court has consistently, and with bipartisan unity, endorsed arbitration whether it is by predispute or post-dispute agreement.

Scholars, commentators, plaintiffs' lawyers, and some members of Congress have not shared the Supreme Court's endorsement of compulsory arbitration, particularly for statutory discrimination claims and consumer disputes. Many employees, as a condition of employment, must sign mandatory arbitration contracts and consumer contracts often contain hidden arbitration clauses.

As Congress continues to create new employment and consumer laws, arbitration of disputes continues to expand. However, Congress has not changed the FAA to keep up with the expansion and to answer the new horizons opened up by legislation and judicial fiat. As a result of this situation, an amended FAA is long overdue.[18]

This article proposes amending the FAA to ensure more equitable arbitration contracts and procedures. An amended FAA will save time

12. *Gilmer*, 500 U.S. at 23-24. The ADEA is codified at 29 U.S.C. §§ 621-34 (2000).

13. *Gilmer*, 500 U.S. at 23.

14. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990), *rev'd*, 500 U.S. 20 (1991).

15. *Gilmer*, 500 U.S. at 35.

16. *Id.* at 26.

17. *Wilko* was controlling law at the time. *See Wilko v. Swan*, 346 U.S. 427 (1953).

18. An amendment to the FAA was proposed in Congress by Senator Russ Feingold in July 2007. This bill proposes to ban all forms of mandatory arbitration for consumer, employment, and franchise contracts. *See* The Arbitration Fairness Act (AFA), S. 1782, 110th Cong. (2007) and H.R. 3010, 111th Cong. (2009). The bill is currently in subcommittee.

and expense in predispute contract enforcement litigation. Part II of this article will briefly describe why the FAA should be amended. Part III will describe proposed changes regarding contract formation. Finally, Part IV will focus on other changes needed beyond contract formation in providing a fair arbitration procedure, such as picking neutral arbiters, adequate discovery, and not severely limiting statutes of limitation.

II. CONGRESS SHOULD AMEND THE FAA

The FAA is not explicit as to what constitutes an enforceable predispute contract or what makes for a fair proceeding. Because this article focuses on how Congress should amend the FAA, it presupposes several points. First, for some employees and consumers, the present state of predispute arbitration agreements is not entirely fair. Some predispute contracts have the hallmarks of adhesion contracts, with inadequate consideration and unfair terms.[19] Because those employers and corporations that use these contracts do so for the majority of their employees and consumers, and these entities arbitrate many more claims; predispute arbitration may favor these repeat players.[20] Moreover, these arbitration agreements often are presented to employees and consumers on a take-it-or-leave-it basis, often in a context in which the employee or consumer has no real option other than to take it. This situation has led some to conclude that forced arbitration is inherently unfair.[21]

Second, this article presupposes that without predispute arbitration, court dockets would be overloaded with claims. In many cases civil litigation can take years to reach the trial stage. In addition, workers and consumers with relatively small claims and little resources are more likely to get dispute resolution in the alternative forum.[22] This is because some employees' potential recovery does not justify the investment of an experienced labor and employment attorney in litigation preparation.[23]

Third, this article presupposes that employers and corporations that want to use predispute arbitration would rather have fair and equitable agreements than have Congress eliminate mandatory arbitration completely. This article takes the approach of recognizing both

19. *See, e.g.*, Walker v. Ryan's Family Steak Houses Inc., 400 F.3d 370, 373 (6th Cir. 2005) (discussing why the lower court denied Ryan's motion to compel arbitration).

20. For a statistical study on the repeat player effect, see Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

21. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 787 (2008).

22. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

23. *See* St. Antoine, *supra* note 21, at 791-92.

arguments for and against mandatory arbitration and attempts a solution that keeps predispute arbitration but makes it more equitable.[24]

A. Why Changes in Arbitration Must Come From Congress

Although section 2 of the FAA expressly permits courts to revoke arbitration contracts on grounds that support "revocation of any contract,"[25] the Supreme Court has pieced together a federal preemption doctrine under the FAA and "has exhibited singular determination in upholding t[his] federal policy on arbitration."[26] First, the Court interpreted the FAA to preempt any conflicting state laws that specifically target arbitration agreements.[27] Later, it firmly established that state legislatures cannot enact laws that restrict, directly or indirectly, arbitration agreements.[28] The Court has routinely held that the FAA trumps state laws dealing with arbitration.[29] Because the FAA preempts state laws in this way, Professor Thomas Carbonneau states that "the FAA—in reality—is the national American law of arbitration."[30]

The current Supreme Court is enamored with arbitration in a way that even several successive Obama appointees are unlikely to change. Therefore, changes in how to interpret the FAA are unlikely to come from the Supreme Court, at least in the near term. Because the Court *will* not do it and the Court has determined that state legislatures *cannot* do it, any reform of the current system regarding enforceable contracts and procedures governing arbitration must come from Congress, and the one route Congress should consider is amending the FAA.

B. Why Congress Should Amend the FAA

In 1925, Congress passed the FAA to permit judicial enforcement of arbitration agreements covering contract disputes between parties of roughly equal bargaining power.[31] The Court has stressed that arbitration

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24. This article does not address post-dispute arbitration or predispute arbitration agreements under collective bargaining agreements.

25. 9 U.S.C. § 2 (2005); *see also* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 422 (2006).

26. THOMAS CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION xix (2d ed. 2007).

27. *See id.*; *see also* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

28. *See* Doctor's Assocs. v. Cassorotto, 517 U.S. 681, 687 (1996) ("Congress precluded states from singling out arbitration provisions for suspect status. . . .").

29. *See* Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 326 (2007).

30. CARBONNEAU, *supra* note 26, at 80.

31. Richard A. Bales & Christopher Kippley, *Extending OWBA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L.J.

is an extension of the parties' "consent not coercion."[32] But scholars have consistently argued that the current state of mandatory arbitration is unfair and has given power to employers and corporations to displace the judiciary's role in enforcing both common law claims and statutory rights.[33]

Even defenders of mandatory arbitration agree that the statute needs to be updated to add legitimacy to the public's view of arbitration as a means of resolving disputes.[34] An amended FAA will make arbitration agreements easier to draft and enforce.[35] Also, an attorney drafting an arbitration agreement arguably is under an ethical obligation to draft a fair agreement and an amended FAA could eliminate any potential conflict.[36] Amending the FAA would provide consistency to enforceable agreements and ensure parties are accorded due process through equitable procedures.

When considering due process as to arbitration procedure, Congress may want to look at the work begun by the Employment Due Process Protocol. The Protocol was developed under the Dunlop Commission in 1993, which found that labor arbitration was fair to employees because it was a product of the union's presence, but that non-union employees lacked this protection.[37] The Commission then asked the National Academy of Arbitrators to draft a list of standards for arbitration agreements to resolve statutory employment claims.[38] The Protocol recommended standards to help individual employees in the arbitration process; for example, it states that an employee has the right to a spokesperson and access to information relevant to the employee's claims.[39] It also developed criteria for arbiter selection.[40] One of the

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10, 11 (2007); *see also* Matthew W. Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 296 (1996); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 176-80 (2004).

32. *See* Bales & Kippley, *supra* note 31, at 12; *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

33. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36-37.

34. *See* CARBONNEAU, *supra* note 26, at 75.

35. *See* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 176 (2005) [hereinafter Bales, *The Employment Due Process Protocol at Ten*].

36. *Id.* at 177. *See also* Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements after* Circuit City *and* Green Tree, 41 BRANDEIS L.J. 779, 780 (2003).

37. Bales, *The Employment Due Process Protocol at Ten*, *supra* note 35, at 171.

38. *Id.*

39. *Id.* at 172.

goals of the Protocol was to create a level playing field for employees and employers.

The Protocol, as important as it was, is now, like the FAA, out of date. Courts are faced with issues that the Employment Due Process Protocol drafters never anticipated.[41] Although the adoption of the Protocol by American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) was an important step, not all arbitrations are conducted by AAA or JAMS. Not all employers use providers that use the Protocol, some employers choose less expensive providers and other less scrupulous employers prefer a for-profit "sham provider."[42] In *Walker v. Ryan Family Steak Houses, Inc.*, the Middle District of Tennessee found that the arbitration provider, EDSI, "relie[d] on the favor of its employer-clients for its livelihood."[43] For those employers that choose providers that use the Protocol, the Protocol does not address important issues such as what constitutes adequate discovery, whether employees can meaningfully participate in the selection of arbiters, and the enforceability of contracts that limit remedies.[44]

Despite the Protocol's problems, it did recognize that non-union employees need additional protection in arbitration. Yet, the FAA has remained relatively unchanged since its 1925 form. Currently the statute is too thin, primarily in the areas of contract formation and due process procedures, to provide adequate protection to employees and individual consumers.

III. CONTRACT FORMATION CHANGES[45]

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[46] The Supreme Court in *Gilmer* held that arbitration agreements should be enforced absent "the sort of fraud or overwhelming economic power that would

40. *See id.*

41. Richard A. Bales, *Beyond the Protocol, Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 301, 302-03 (2007).

42. *Id.* at 340.

43. Walker v. Ryan's Family Steak Houses. Inc., 289 F. Supp. 2d 916, 924 (M.D. Tenn. 2003).

44. Bales, *The Employment Due Process Protocol at Ten*, *supra* note 35, at 190-91.

45. I have extensively discussed arbitration contract formation issues in depth elsewhere and therefore will include only an abbreviated version here. *See, e.g.*, Bales & Kippley, *Extending OWBPA Notice and Consent Protections to Arbitration*, *supra* note 31; Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 25; Bales, *Beyond the Protocol, Recent Trends in Employment Arbitration*, *supra* note 41.

46. 9 U.S.C. § 2 (2005).

provide grounds for revocation of any contract."[47] But the Supreme Court has provided little guidance as to when an employment agreement is so unfair that it should not be enforced because enforcement would undermine a substantive statutory right.[48] Lower courts have had difficulty articulating what defines enforceable arbitration agreements.[49]

A. Problems with the Current Standard

In the mandatory arbitration context, the two most cited contract formation issues are notice and consent. The FAA should be amended to provide explicit notice and consent requirements for consumers and employees who sign predispute arbitration agreements.

1. Lack of Notice

One fundamental problem with the notice requirement is that although the FAA's section 3 requires courts to stay judicial proceedings for "any issue referable to arbitration under an agreement in writing . . .,"[50] courts find the FAA does not require that the writing be signed by the parties.[51] This loophole has led some employers and corporations to provide "notice" of mandatory predispute arbitration through website postings, e-mails, regular mail, paycheck envelopes, office memoranda, and employee handbooks.[52] While some courts have found website postings are not enforceable, that loophole in the FAA must be closed. Requiring the writing to be signed by the parties would provide the consumer or employee with actual knowledge of the arbitration contract.[53] What is more, if employers are required to disclose up front the terms of the arbitration, they are more likely to police themselves to ensure that the terms are at least marginally equitable. Few employers want to develop a reputation among their employees as high-handed and grossly unfair.

An example of an employer providing poor notice is *Campbell v. General Dynamics Government Systems Corp.*, in which the employer sent its employees a mass e-mail containing the arbitration agreement

47. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 627 (1985)).

48. Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 25, at 434.

49. *Id.*

50. *See* 9 U.S.C § 3 (2005).

51. *See* Tinder v. Pinkerton Security, 305 F.3d 728, 736 (7th Cir. 2002) (citing Valero Refining, Inc. v. M/T Lauberhorn, 813 F.2d 60, 64 (5th Cir. 1987)).

52. Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 25, at 436-41.

53. *Id.*

rather than having the employees sign a more traditional paper contract.[54] The First Circuit found that the employer could not produce evidence that its employees possessed actual knowledge of the arbitration contract; this knowledge could include any affirmative response, such as clicking a box on the computer screen.[55] The court found that this particular e-mail was insufficient to alert the employees that they were entering into a contract, but the court did not hold that emails were invalid notices per se.[56]

While *Campbell* was decided in 2005, in today's workplace, acknowledgements on websites, especially internal intranets, are even more common. Clicking a box in response to a mass e-mail should not be considered sufficient notice. For today's employee or consumer, a click on a box does not have the same gravitas as signing a paper contract. Because the FAA does not provide an adequate notice provision, the statute should clearly articulate what constitutes notice for an arbitration agreement so that a person cannot accidently agree to an arbitration contract via an internet acknowledgment.

Furthermore, an amended FAA should clarify that actual notice to an individual who is illiterate or who does not speak English requires something more than the individual's signature on a document he or she could neither read nor understand. Recently, the Third Circuit found in *Morales v. Sun Constructors, Inc.*, that a non-English speaking worker was bound by the terms of the company's arbitration agreement even though a fellow worker, at the employer's instance, translated the whole agreement for the applicant except for the arbitration clause.[57] The majority found that failure to understand or explain an arbitration agreement does not constitute the kind of "special circumstances" that relieves an employee from the contract's obligations.[58] It found that even though it was "sympathetic to Morales' situation," the company did not misread or misrepresent the agreement, and the incomplete translation was due to the employee's failure to request any explanation or translation.[59] The dissent, however, found that the agreement lacked mutual assent, particularly when the company inserted itself between the worker and the contract.[60] The dissent's rationale was that when a

54. 407 F.3d 546, 555-56 (1st Cir. 2005); *see also* Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 25, at 437.

55. *Campbell*, 407 F.3d at 555-56.

56. *Id.*

57. Morales v. Sun Constructors Inc., 541 F.3d 218, 222 (3d Cir. 2008).

58. *Id.* at 222 (citing Booker v. Robert Half Int'l, Inc., 315 F. Supp. 2d 94, 101 (D.D.C 2004)).

59. *Id.* at 223 n.2.

60. *Id.* at 225 (Fuentes, J., dissenting) (noting similar facts in Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533 (5th Cir. 2003)).

translation is provided by the other party, that worker would have no reason to suspect that the translation was incorrect or incomplete.[61]

2. Consent

An interrelated but equally troubling issue, particularly in the employment context, is consent. Consent is easy for an employer or corporation to demonstrate; a party's acknowledgement that he or she read and agreed to the contract will suffice.[62] If the employee can show an affirmative act by the employer to impede understanding of the agreement, a court may find the contract unenforceable.[63]

Consent issues sometimes occur when the arbitration clause is buried in fine print or amid pages of documents.[64] Related consent issues include an undue pressure to sign, the hurried presentation of agreements, and a misrepresentation of the effect of the agreement on the employee.[65] The Sixth Circuit's decision in *Walker v. Ryan's Family Steak Houses, Inc.* addressed several of these issues.[66] In *Walker*, the employee's manager explained that "the arbitration agreement meant that if [the plaintiff] ever had any problems with Ryan's, she 'had to go through Ryan's before [she] could go to an attorney.'"[67] When it comes to presentation of the agreements, context may well determine enforceability.[68] For example, in *Walker*, during the hiring interview, the manager hurriedly presented prospective employees with various documents that they were told to sign to be considered for the job.[69] Also, the court stated that the manager rarely explained the arbitration agreement, nor were the applicants allowed to take the agreement home and review the forms.[70]

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61. *Id.* at 226.

62. *See* Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 22, at 442.

63. *Id.*

64. *Id.* at 443; *see also* Nargrampa v. Mailcoups, Inc., 401 F.3d 1024, 1029 (9th Cir. 2005) (enforcing arbitration clause found on the twenty-fifth page of a thirty-page franchise agreement).

65. *See* Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 25, at 444-46.

66. Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 374 (6th Cir. 2005).

67. *Id.*

68. Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 25, at 442; *see also Walker*, 400 F.3d at 374 (finding that employees that needed to sign without explanation and without mentioning the arbitration agreement was not an enforceable agreement). *But see* Maye v. Smith Barney, Inc., 897 F. Supp. 100, 106-07 (S.D.N.Y. 1995) (finding that employees that were told to sign their names about seventy-five times in a "tense" atmosphere was enforceable).

69. *Walker*, 400 F.3d at 373-74.

70. *Id.* at 374.

Scholars and commentators have shown particular interest as to whether a "knowing and voluntary" standard applies to employees that agree to arbitrate statutory claims,[71] but circuits are split on this issue.[72] Some circuits find that because an employee has a constitutional right to a jury trial, waiving that right must come from a "knowing and voluntary waiver."[73] Other circuits have held that it would be inconsistent with the FAA and *Gilmer* to apply the knowing and voluntary standard to enforcing arbitration agreements.[74]

The above examples represent just some of the concerns of mandatory arbitration in contract formation.[75] By amending section 2, the FAA should clearly define that a written contract with adequate notice of a waiver of rights is the minimum required to make an enforceable contract.

B. A Proposed Amendment to Section 2

The current FAA section 2 reads as follows:

> A written provision in any maritime transaction or a 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

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71. Bales, *Contract Formation Issues in Employment Arbitration*, *supra* note 22, at 449.

72. *Compare* Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986) (right to a jury trial is a fundamental right; "[w]here waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed"), *with* Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996) ("[A] party is generally chargeable with knowledge of the existence and scope of an arbitration clause within a document signed by that party, in the absence of fraud, deception, or other misconduct that would excuse the lack of such knowledge."). *See generally* Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Predispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203 (2002).

73. *See* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994); *see also* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L 685, 694 n.55 (2004) (citing to Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986); Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., 56 F. Supp. 2d 694, 706 (E.D. La. 1999)).

74. *See, e.g.*, Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 184 (3d Cir.1998); *Beauchamp*, 918 F.Supp. at 1098.

75. Other concerns include unilateral modifications. *See* Richard A. Bales & Michael L. DeMichele, *Unilateral Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63 (2006) (arguing that individuals may lack understanding about what a predispute agreement to arbitrate really means); *see also* Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1648-49 (2005).

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.[76]

A new paragraph should be added:

(b) No predispute arbitration clause is valid or enforceable in an employment or consumer contract unless the document within which the clause is contained meets all of the following requirements:

(1) The document contains knowing and voluntary waiver of the right to litigate all claims, including statutory rights, covered by the clause;

(2) The document contains notice to the signing parties of the rules regarding the arbitration procedure;

(3) The document advises the employee or consumer to consult an attorney prior to signing;

(4) The document contains notice informing the employee or consumer of the right to revoke the agreement within seven days of signing it;

(5) The document is signed by all parties; and

(6) The document is written in a manner meant to be understood by all parties signing it. Should a party be unable to read, an audio tape recording of the document must be given to the party at the time the document is signed. Should a party be unable to read the document because the party cannot understand that language, a complete translation must be provided before the document is signed.

(c) The document may not be unilaterally modified.

Even if section 2 of the FAA is amended to cure problems with the contract formation aspect of mandatory arbitration, numerous other changes are needed to ensure the process itself is fair to employees and consumers.

76. 9 U.S.C. § 2 (2000).

IV. DUE PROCESS CHANGES BEYOND CONTRACT FORMATION

An enforceable contract does not necessarily guarantee the arbitration process itself will be fair. The Dunlop Commission and the Task Force on Alternative Dispute Resolution in Employment, which drafted the Due Process Protocol, adopted a number of procedural guarantees in employment arbitration.[77] Although the Protocol was influential, issues remain that the drafters either could not anticipate or chose to avoid. These issues include: arbiter selection, discovery, and limitation of remedies.[78]

The FAA does not provide a mandate for arbitration procedure. For this reason, arbitrations are inconsistent and sometimes unfair to employees and consumers. To provide a fair and consistent procedure the FAA should be amended to provide neutral arbiter selection, provide for adequate discovery, forbid prospective class action waivers, outlaw severely limiting statutes of limitation, and ban any limitations on statutory remedies.

A. Problems with Procedure in the FAA

Codifying an equitable procedure is fundamental in providing protection for employees and consumers in arbitrations. Providing a neutral but knowledgeable pool of arbiters is essential. Discovery must be adequate, particularly in employment disputes. Also, some rights should not be prospectively waived. These include a right to a class action, shortened statutes of limitation, and a waiver of statutory remedies.

1. Arbitral Selection

Arbitral selection is still a hot topic for scholars and plaintiffs' advocates alike. The FAA provides a backwards-looking protection for bias. As the Supreme Court stated in *Gilmer*, quoting section 10(b), the FAA "protects against bias, by providing that courts may overturn arbitration decisions where there was evident partiality or corruption in the arbitrators."[79] This does not prevent, however, a pre-arbitration

77. *See* U.S. DEP'TS OF COMMERCE AND LABOR, REPORT AND RECOMMENDATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, (1994); TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995) (reprinted in 9A Lab. Rel. Rep. (BNA) IERM 534:401 (1996)); *see also* St. Antoine, *supra* note 21, at 797.

78. *See generally* Bales & Kippley, *supra* note 31.

79. *Gilmer*, 500 U.S. at 30 (quoting 9 U.S.C. § 10(b) (2008)); *see also* 9 U.S.C. § 10(b) (2008).

challenge when the entire arbitrator selection process itself is fundamentally unfair.[80] A party should not have to go through the arbitration first and then allege bias in post-arbitration judicial review.[81] Codifying a fair arbitrator selection process in the FAA would eliminate both pre and post judicial review and would deter bad actors that continue to abuse the system.

Some scholars and employment attorneys see possibilities for abuse in arbitration selection or at least a lack of consistency. Anecdotal evidence and a perusal of the ABA employment arbitrators' roster indicate the dearth of neutral arbitrators available. Arbitral selection is complex; scholars have identified several inter-related factors that could influence selection including the repeat player effect, submerged bias, and employer-appointed panels.

The repeat player effect is simply that employers and corporations are likely to arbitrate more than one case over time while individuals usually arbitrate only once.[82] This situation grants an advantage to the employer or corporation because those entities are more familiar with the potential pool of arbitrators, which allows the entity to more easily select a favorable arbitrator.[83] Another advantage, sometimes unintentional, is called submerged bias. This bias occurs when an arbitrator's interest in being hired by the employer or corporation in the future predisposes the arbitrator to favor that organization rather than the individual.[84] Empirical research studies have attempted to track the repeat player effect,[85] but the findings are equivocal.[86]

The most flagrant problem with arbitral selection is when an employer reserves to itself, in the arbitration contract, exclusive or inordinate control in selecting the arbitrator or creating the pool of arbitrators. The Sixth Circuit has found that even if a panel consisted of

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80. Walker v. Ryan's Family Steakhouses, Inc., 400 F.3d 370, 385 (6th Cir. 2005) (quoting McMullen v. Meijer Inc., 355 F.3d 485, 494 n.7 (6th Cir. 2004)).

81. *Id.*

82. Bales, *Normative Consideration*, *supra* note 5, at 383.

83. *Id.*

84. *Id.*

85. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 224 (1998); Lisa B. Bingham & Simon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference, Alternative Dispute Resolution in the Employment Arena*, PROC. OF N.Y. UNIV. 53RD ANN. CONF. ON LAB. 303 (2001); *see also* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J. (May-July 2003).

86. *See* Bingham & Sarraf, *supra* note 84, at 321-25; *see* Bales, *Normative Consideration*, *supra* note 5, at 384.

some of the most respected arbitrators in the region, when the employer still has exclusive control in creating the pool of arbitrators, that agreement is unenforceable.[87]

The Protocol considered a standard procedure whereby the parties select from a panel list compiled by a neutral agency such as AAA.[88] However, even this standard procedure has problems. Within the AAA's acceptable list, there are current practicing employment advocates. A currently practicing advocate is likely to see the issues framed in his or her worldview, and has current relationships with local counsel. It is unlikely that most attorneys who have defended employers or represented employees for twenty years can one day flip an internal switch and become truly "neutral."

In the AAA rules, a plaintiff or defendant can strike a practicing attorney, but this gives the parties fewer arbitrators to choose from in the remaining pool. One problem with statutory employment cases is that they are complex and need experienced attorneys or former judges to arbitrate.[89] The Protocol's guideline provides that the procedure should include "a jointly selected neutral arbitrator who knows the law."[90] But some mandatory arbitration contracts do not follow the Protocol.[91]

The FAA should be amended so that all arbitrations with statutory employment claims, even those not following the Protocol, provide the best potential neutral pool of arbiters and that the neutral pool should not include currently practicing employment law advocates.

2. Discovery

The FAA provides little guidance, aside from stating that the arbiter has subpoena power and should not unfairly restrict the parties from presenting relevant evidence on how the arbitration proceeding's discovery should be conducted.[92] Discovery is at the heart of today's litigation and it is essential in employment discrimination suits. For arbitration to be seen as a fair alternative to litigation, full and fair discovery must be available to the participants.

The Due Process Protocol provides little guidance on the minimum standard needed for discovery. Many courts allow arbitration clauses that give the arbitrator discretion to limit discovery, but do not enforce

87. Walker v. Ryan's Family Steakhouses, Inc., 400 F.3d 370, 373 (6th Cir. 2005).

88. St. Antoine, *supra* note 21, at 801.

89. This is also a concern for litigators in forum selection.

90. *See* Bales, *Beyond the Protocol, Recent Trends in Employment Arbitration*, *supra* note 41.

91. *See Walker*, 400 F.3d at 373.

92. David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400, 404 (2007).

those clauses that impose absolute limitations or forbid discovery completely.[93] However, discovery can take many forms. Interrogatories, although relatively inexpensive, rarely provide the kind of information needed to develop pretext. To develop discriminatory pretext, deposing the decision-makers is essential. How much discovery is adequate varies from case to case.

Some arbitration procedures do not allow for depositions at all. For example, the Financial Industry Regulatory Authority ("FINRA"),[94] which regulates stock brokers and makes them sign mandatory arbitration agreements regardless of employment, does not allow depositions in arbitration, except in statutory discrimination claims.[95] Absent statutory discrimination claims, FINRA's Code of Arbitration Procedure for Industry Disputes only allows depositions if the party can show extraordinary circumstances, such as when a witness is ill or unavailable.[96] FINRA's exception for depositions in statutory discrimination claims is a relatively recent change to its code.[97] FINRA's "no deposition rule" also applies to whistle-blower retaliation claims, making it difficult for the attorney to adequately prepare for a whistle-blower case, particularly when proving pretext.[98]

Employees need information from decision-makers, supervisors, and sometimes co-workers to fully develop disputed facts. Without adequate discovery, including depositions, an employee is not afforded a fair process and the lack of information impedes employee statutory rights when trying to prove pretext.

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93. *See* Bales, *Beyond the Protocol, Recent Trends in Employment Arbitration*, *supra* note 41, at 333.

94. FINRA is the successor to the National Association of Securities Dealers ("NASD"). *See* FINRA, http://www.finra.org/AboutFINRA/index.htm (last vistited Mar. 3, 2009).

95. *See* FINRA CODE OF ARBITRATION PROCEDURE R. 13510 (2007), *available at* http://www.finra.org/finramanual/rules/r13510/ (last visited Mar. 3, 2009). Note that FINRA recently changed its rules regarding statutory discrimination claims, which do not *require* mandatory predispute arbitration through FINRA. *See id.* R. 13201. FINRA does provide special rules if the parties agree, including agreeing to arbitrate either before or after the dispute arises. *See id.* R. 13802.

96. *Id.* R. 13510.

97. The special rules for statutory employment disputes are interesting as they provide for a lower filing fee than for other disputes; have specific criteria for the panel of arbitrators; allow for depositions; allow for attorneys' fees and any remedy allowable under the law. *See id.* 10210 *et seq.*

98. *See, e.g.*, Bahravati v. Josenthal, Lyon, and Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (employee arbitrated a whistleblower retaliation and defamation claim against former employer).

3. Class Action Waivers

To resolve the current state of the law concerning class action waivers, the FAA should be amended to ban prospective class action waivers. Courts currently are split on the enforceability of such clauses. Even where courts are inclined to find the clauses unconscionable or a burden on the vindication of statutory rights, the parties seeking invalidation still bear the burden of proof.[99]

A case on point was decided by the California Supreme Court which provided factors for courts to consider in evaluating a waiver, but did not categorically ban all class action waivers.[100] In *Gentry v. Superior Court*, the court held that "class arbitration waivers cannot, consistent with the strong public policy behind [California's wage and hour statute], be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees' prosecution of those claims."[101] Other courts, however, have consistently enforced class action waivers with no restrictions.

With the exception of wage and hour cases, class action waivers appear more often in the consumer context, but courts are inconsistent as to whether these provisions are unconscionable.[102] Some courts in these consumer cases argue that companies are using these waivers to avoid liability on meritorious claims, leaving consumers without an appropriate remedy.[103] For these reasons, the FAA should be amended to forbid class action waivers, because waiving this right prospectively is not appropriate for mandatory arbitration.

This does not necessarily mean, however, that class claims should be arbitrated. As Thomas Doyle and Mark Irvings have pointed out,[104]

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99. Nagrampa v. Mailcorps, 469 F.3d 1257, 1298 (9th Cir. 2006); Sherr v. Dell Inc., 2006 WL 210936, at *3 (S.D.NY 2006); *see also* St. Antoine, *supra* note 21, at 807.

100. Gentry v. Sup. Ct., 165 P.3d 556 (Cal. 2007).

101. *Id.* at 569.

102. *Compare* Kinkel v. Cingular Wireless LLC, 857 N.E. 2d 250, 267-68, 274-75 (Ill. 2006) (holding that a mandatory arbitration provision was substantively unconscionable because the cost of pursuing the claim would likely equal or surpass the amount the consumer could recover, therefore leaving the consumer without an effective remedy in any forum), *with* Wong v. T-Mobile USA, No. 05-73922, 2006 WL 2042512, at *5 (E.D. Mich. July 20, 2006) (holding that, under similar facts, a class action was essential to vindicating the consumer's statutory cause of action where the statute on which the claim was based expressly provided for class recovery, regardless of whether the waiver provision was unconscionable).

103. *See Wong*, 2006 WL 2042512 at *4.

104. Thomas A. Doyle, Practical and Ethical Issues Involving Non-Party Class Members in Class Arbitrations, Paper presented at the American Bar Association, Section of Labor & Employment Law, Midwinter Meeting of the Committee on ADR in Labor and Employment Law (Feb. 15-18, 2009); Mark Irvings, panel presentation at same.

class arbitration of employment claims can create difficult ethical issues for arbitrators. A judge in class-action litigation often must decide which of several competing lawyers will serve as class counsel.[105] An arbitrator faced with the same decision may have a conflict of interest. If the original class counsel chose the arbitrator, and/or advanced arbitration fees, this would create at least the appearance that the arbitrator is likely to favor that candidate.

Similarly, when a class action lawsuit settles, the trial judge must ensure that absent class members receive a fair settlement[106]—i.e., that class counsel have not colluded with the defendant to sell out the class in exchange for large attorneys' fees. An obvious conflict of interest occurs if this role must be played by an arbitrator

> who has been retained by, and paid by, the parties in a lengthy arbitration. That role may be even more awkward if the arbitrator has to make a fee award to Class Counsel out of a common fund from a settlement; worse still, the arbitrator may have to decide whether that common fund should reimburse Class Counsel for arbitration expenses (including the arbitrator's own fees) that Class Counsel advanced during the course of the proceedings.[107]

For this reason, Congress should additionally consider either requiring that all class actions be litigated, or should create special safeguards (e.g., by permitting interlocutory certification to a federal judge) for class-wide arbitration.

4. Limitations Periods

Courts have been inconsistent as to whether an arbitration agreement can contractually shorten the claim's statute of limitations.[108] Whether the provision offends public policy is the touchstone as to whether the limitation is enforceable. Furthermore, the type of claim asserted is relevant, as the Western District of Michigan found in *Conway v. Stryker Medical Division*.[109] The court held that an arbitration provision that effectively imposed a six-month limitation on a claim brought under the Family and Medical Leave Act of 1993 ("FMLA")

105. FED.R. CIV. P. 23(g)(2).

106. Thorogood v. Sears Roebuck & Co., 547 F.3d 742 (7th Cir. 2008).

107. Doyle, *supra* note 103, at 10.

108. *Compare* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003) (holding that an arbitration agreement that imposed a one-year statute of limitations was unenforceable), *with* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 230-32 (3d Cir. 1997) (holding that an arbitration agreement that imposed a one-year statute of limitations was not unenforceable per se).

109. No. 4:05-CV-40, 2006 WL 1008670 (W.D. Mich. Apr. 18, 2006).

was unenforceable as a matter of public policy.[110] But in a consumer contract case, the Middle District of Florida found, quoting the Eleventh Circuit, that the shortened period *should* be enforced, because "such an agreement does not conflict with public policy but, in fact, more effectively secures the end sought to be attained by the statute of limitations."[111]

The FAA should be amended either to forbid making the statute of limitations on arbitral claims shorter than it otherwise would be if the claim were litigated, or to provide that the statute of limitations on arbitrated claims will be a minimum of one year. A one-year time period would not burden employee rights as employees are already confined to 180-day periods for filing charges with the Equal Employment Opportunity Commission.[112] For other disputes, one year may be shorter than some state law contract statutes,[113] but one-year limitation periods are not uncommon.[114] Because statutes of limitations may completely foreclose the parties' rights to any adjudication, limitation periods significantly shorter than those most state legislatures have deemed appropriate are too short for mandatory arbitration contracts.

5. Limitations on Remedies

Professor Theodore St. Antoine argues that "[i]t is hard to imagine any provision in an arbitration agreement that would seem more contrary to public policy than one preventing the full relief authorized by an applicable statute."[115] But there is a circuit split on the issue as to whether a party can agree to waive the right to a full statutory remedy.[116] Normally this takes the form of a contractual limitation on the arbitrator's authority to award relief.[117]

The Seventh Circuit takes the position that parties can contract for whatever terms they want. Judge Posner, in his usual colorful style, states:

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110. *Id.* at *1.

111. Sanders v. Comcast Cable Holdings LLC, No. 3:07-CV-918, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008) (quoting Maxcess, Inc. v. Lucent Technologies, Inc., 433 F.3d 1337, 1341 (11th Cir.2005)).

112. *See* 42 U.S.C. § 2000e-5(e)(1) (2000).

113. *See, e.g.*, OHIO REV. CODE ANN. § 1302.98 (West 2008) (providing that breach of contract for sale claims must be brought within four years; however, the parties, by agreement, may limit this period to no less than one year); N.C. GEN. STAT. § 1-52 (2008) (providing a three-year statute of limitations for breach of contract).

114. *See, e.g.*, KY. REV. STAT. ANN. § 413.245 (West 2008).

115. St. Antoine, *supra* note 21, at 808.

116. *Id.* at 809.

117. Bales, *Beyond the Protocol, Recent Trends in Employment Arbitration*, *supra* note 41, at 335.

> Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[118]

Fellow Seventh Circuit Judge Frank Easterbrook goes ever further and believes a party, absent a statutory anti-waiver provision, could agree to waive a right even as significant as the full statutory remedy.[119]

The majority of circuits, like the Sixth, sever the offending provision and allow the arbitrator to offer the full statutory remedy despite the contract.[120] In *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit held that in enforcing the parties' arbitration agreement, the plaintiff would be forgoing her substantive rights to all the remedies available under Title VII.[121] The court held that the provision undermined the remedial goal of the statute to make plaintiffs whole for the injuries suffered because of discrimination.[122]

Other circuits offer different solutions, including striking the arbitration clause altogether and allowing the claims to go to court.[123] Some courts sever the claim for relief and allow the court to resolve the remedy portion after the arbitrator makes an award.[124] Based on the Supreme Court's endorsement of arbitration as a substitute for a judicial forum, the FAA should be amended to explicitly provide that arbitration agreements cannot waive statutory remedies.

B. How FAA Section 2 Should be Amended Beyond Contract Formation

In addition to the proposed FAA amended section 2 provided in part III(B) of this article, section 2 should add:

> (d) No predispute arbitration clause is valid and enforceable in an employment or consumer contract unless the clause provides for the following procedural requirements:

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118. Bahravati v. Josenthal, Lyon, and Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

119. Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 393-94 (2007).

120. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670-75 (6th Cir. 2003) (holding that an arbitration agreement that limited back pay damages was unenforceable).

121. *Id.* at 670.

122. *Id.*

123. *See, e.g.*, Alexander v. Anthony Int'l L.P., 341 F.3d 256, 267 (3d Cir. 2003).

124. *See, e.g.*, DiCristi v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947, 953-54 (W.D.N.Y. 1992).

(1) A jointly selected neutral arbitrator familiar with the applicable law;

(2) In employment disputes, a neutral arbitrator may not have represented the views of employees or employers within the last three years, or must have a practice in which the arbitrator represents both employers and employees on a roughly equal basis;

(3) Adequate discovery;

(4) Cost sharing to be split between the claimant and respondent, unless the party with greater resources pays a disproportionate share of the cost and the other party so agrees;

(5) The right to representation by a person of the claimant's choice, including the right to recoup attorney's fees if allowed by law;

(6) The right to remedies that are equal to those provided by law;

(7) The right to pursue a class or collective action;

(8) A written opinion with award, a statement of the law applied, and reasons for the award;

(9) A minimum one year statute of limitation for all claims; and

(10) Limited judicial review.

(e) Any party found by a court of law to be in willful violation of this section shall be assessed a penalty which includes:

(1) The contract is unenforceable;

(2) A private right of action providing the aggrieved party the right to equitable relief; and

(3) Civil penalties no greater than $100 a day to a maximum of two years for which the contract was in force.

V. CONCLUSION

Amending the FAA is long overdue. Because individuals are waiving valuable rights, codifying the appropriate contract terms will ease drafting, minimize litigation, and provide a more uniform standard. Providing, in the statute, the minimum due process required for adjudication of claims will be more equitable for individuals. It will also provide more transparency and deter bad actors. It is up to Congress to update the FAA to provide a fair alternative to litigation for individuals to resolve disputes.