# CONTRACT FORMATION ISSUES IN EMPLOYMENT ARBITRATION

**Richard A. Bales***



---

* Professor of Law, Northern Kentucky University, Salmon P. Chase College of Law. For the Carl A. Warns, Jr. Labor & Employment Law Institute, Louis D. Brandeis School of Law, 2005. Special thanks to Stephen J. Ware, David S. Schwartz, Richard C. Reuben, Dennis R. Nolan, Kathy Molique, Christopher R. Drahozal, Laura J. Cooper, Annette Burkeen, Pierre H. Bergeron, and Wendy Bauer.

## I. INTRODUCTION

For centuries, common law courts in both England and the United States refused to specifically enforce arbitration agreements.[1] However, the Supreme Court, relying on (some would say reshaping[2]) the Federal Arbitration Act (FAA),[3] has reversed course. Today, courts operate under the strong presumptions that the FAA makes nearly all claims arbitrable[4] and nearly all arbitration agreements enforceable.[5]

One important caveat applies to the formation of arbitration agreements. The FAA Section 2 provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract."[6] Courts have construed the "any contract" language as indicating that state contract law applies to contract-formation issues. However, this apparent reservation of a broad role for state contract law is undercut significantly by two Supreme Court doctrines: the FAA preemption doctrine (which forbids state courts and legislatures from "singling out"[7] arbitration agreements for inferior treatment) and the separability doctrine (which requires that contract-law challenges directed at the contract as a whole – as opposed to the arbitration clause specifically – be decided by arbitrators rather than courts).

---

[1] Vynior's Case, 77 Eng. Rep. 595, 598-99 (K.B. 1609); Scott v. Avery, 10 Eng. Rep. 1121, 1138 (H.L. 1856); Allen v. Watson, 16 Johns. 205, 208-210 (N.Y. Sup. Ct. 1819).

[2] David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541, 627-28 (2004).

[3] 9 U.S.C. §§ 1-16 (2005).

[4] *See* Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 35 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113 (2001); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 110 (2003).

[5] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' manifested by [9 U.S.C. § 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 n.32 (1983) (citation omitted)); Dean Witter v. Byrd, 470 U.S. 213, 220 (1985) (The FAA's enactment "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered . . . .").

[6] 9 U.S.C. § 2 (2005).

[7] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Congress precluded States from singling out arbitration provisions for suspect status . . . .").

The Court has interpreted both of these doctrines broadly. Though the broad interpretation of these doctrines has been extensively criticized, the effect nonetheless has been to constrict the applicability of state contract law to arbitration agreements. This, in turn, has created considerable tension between those doctrines and the Section 2 reservation of state contract law.[8] This article discusses and evaluates several potential limitations on the preemption and separability doctrines, particularly as applied to employment arbitration agreements, which would preserve a broader role for state contract law.

The Supreme Court's FAA preemption and separability doctrines frame the "big picture" of the scope of state authority regarding arbitral contract formation. After discussing and evaluating these doctrines, this article shifts focus and examines in detail how state courts have applied state contract law to employment arbitration agreements. State contract law, of course, differs considerably from state to state. This article will not examine in detail this state-to-state variation generally (e.g., on different approaches to mutuality), but instead will focus specifically on how this variation affects judicial approaches to employment arbitration agreements.[9] This article examines five issues that often are raised in contract-formation challenges to the enforceability of employment arbitration agreements: notice, consent, the employer's retention of a right unilaterally to modify the agreement, non-reciprocal obligations to arbitrate, and consideration.

Part II of this article provides a brief history of employment arbitration. Part III describes and evaluates Section 2 of the FAA and the Supreme Court doctrines of FAA preemption and FAA separability. Part IV examines the contract-formation issues that frequently arise in the context of employment arbitration. Part V provides guidelines for drafters of employment arbitration agreements, and suggests that employers consider giving something of considerable value – such as a term contract or just-cause employment – to employees in exchange for employees agreeing to arbitrate. This approach, in conjunction with the Court's separability doctrine, would significantly expand the universe of arbitrable claims. Finally, Part VI concludes the article.

---

[8] *See, e.g.*, Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 160 (2005) (arguing that the effect of the Supreme Court's preemption doctrine "was to take a statute that was intended to make state law apply in federal court, thus furthering states' rights, and turn it into a statute that federalized the enforcement of arbitration clauses").

[9] Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 KAN. L. REV. 583, 625-26 (2004) (noting that judicial approaches to the enforceability of employment arbitration agreements varies among the states as a result of variation in state contract law).

## II. THE LEGAL BACKGROUND

Common law courts were hostile to arbitration agreements.[10] In 1925, Congress responded by enacting the Federal Arbitration Act (FAA),[11] which required courts to enforce arbitration agreements related to commerce and maritime transactions. However, in the 1953 decision of *Wilko v. Swan*,[12] the Supreme Court held that an arbitration clause invoked in connection with a Securities Act[13] fraud claim was void as an invalid waiver of the substantive statutory law. Lower federal courts subsequently interpreted *Wilko* as creating a "public policy" defense to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.[14]

A different rule, however, applied to arbitration agreements found in collective bargaining agreements. Four years after *Wilko*, the Supreme Court in *Textile Workers Union v. Lincoln Mills*[15] held that federal courts could enforce arbitration clauses contained in such agreements, though the Court relied on Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"),[16] not the FAA, for this holding.[17] The *Lincoln Mills* Court also interpreted the LMRA as both federalizing the contract law governing enforcement of collective bargaining agreements, and as preempting contrary state law.[18] In the

---

[10] *See, e.g.*, Oregon & W. Mortgage Sav. Bank v. Am. Mortgage Co., 35 F. 22 (C.C.D. Or. 1888); Jones v. Harris, 59 Miss. 214 (1881), *overruled by* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96 (Miss. 1998); Allen v. Watson, 16 Johns. 205, 208-210 (N.Y. Sup. Ct. 1819); Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746); Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609).

[11] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (originally enacted as The United States Arbitration Act, ch. 213, §§ 1-15, 43 Stat. 883-86 (1925)).

[12] 346 U.S. 427 (1953).

[13] 15 U.S.C. § 77 (1994).

[14] *See, e.g.*, American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968).

[15] 353 U.S. 448, 458 (1957).

[16] 29 U.S.C. § 185 (1996).

[17] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458 (1957).

[18] *Id.* at 450-51, 456-57; *see also* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-04 (1962) (holding that the Supremacy Clause of the United States Constitution requires this body of federal law to displace any state law regarding the interpretation and enforcement of labor contracts); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) (holding that Section 301 preemption is so expansive that claims based exclusively on state contract law not only are preempted, but also become from their inception federal question claims, and any state law cause of action for violation of a collective bargaining agreement is entirely displaced by Section 301); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) (state law claims for breach of a collective bargaining agreement are removable to federal court

1960 *Steelworkers* Trilogy, the Court strongly endorsed arbitration as a mechanism for resolving collective bargaining disputes, again relying on the LMRA.[19]

In 1964, Congress enacted Title VII, which prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.[20] Subsequent federal statutes extended legal protection to age,[21] pregnancy,[22] and disability.[23] State legislatures passed parallel state statutes,[24] and state courts began to use contract and tort doctrines to soften the common-law rule of employment-at-will.[25] This explosion in employment rights – based on statutory and common-law rights rather than contractual rights conferred by labor agreements – was accompanied by a dramatic increase in litigated employment claims.[26]

An issue soon arose over whether these new rights were arbitrable labor claims or inarbitrable statutory claims. The Supreme Court initially leaned toward the latter, when it ruled in the 1974 case of *Alexander v. Gardner-Denver Co.*[27] that an employee's arbitration of a just-cause claim under a labor agreement did not foreclose subsequent litigation of a statutory discrimination claim based on the same facts. The Court denigrated arbitration as a forum for resolving statutory employment claims, citing the informality of arbitral procedures, the lack of labor arbitrators' expertise on issues of substantive law, and the absence of written opinions.[28] However, in three subsequent cases

---

even if alternative actions are pleaded in the complaint); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985) (state law tort claims that are "inextricably intertwined with consideration of the terms of the labor contract," are preempted even if they are superficially labeled as tort claims rather than claims for breach of contract).

[19] United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[20] 42 U.S.C. § 2000e-2 (2005).

[21] Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (2005).

[22] Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005).

[23] 42 U.S.C. §§ 12101-213 (2005).

[24] Richard A. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOU. L. REV. 1863, 1876-77 (1994).

[25] *Id.* at 1877-78.

[26] *See* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988) (noting that the principal source of worker protection was shifting from contractual rights negotiated through collective bargaining agreements to law-created individual employment rights).

[27] 415 U.S. 36 (1974).

[28] *Id.* at 56-58.

collectively known as the *Mitsubishi* Trilogy,[29] the Court overruled *Wilko* and enforced arbitration agreements covering antitrust, securities, and racketeering laws. The Court declared that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[30]

The watershed employment arbitration case was the 1991 case of *Gilmer v. Interstate/Johnson Lane Corporation*,[31] in which the Supreme Court held that the FAA permitted an employer to require a non-union employee to arbitrate rather than litigate a federal age discrimination claim pursuant to a pre-dispute arbitration agreement that the employee had been required to sign as a condition of employment. The *Gilmer* Court quoted with approval a statement in *Mitsubishi* that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[32] The Court stated that objections of unconscionability and procedural unfairness must be addressed on a case-by-case basis, and that employment arbitration agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[33]

The *Gilmer* Court's enforcement of the arbitration agreement in that case signaled that the arbitral procedures available there met at least the minimum threshold for preserving the "substantive rights afforded by the [employment discrimination] statute"[34] and for overcoming contract claims of unconscionability and procedural unfairness. Beyond such a minimum threshold, however, the Court gave little guidance as to when an employment arbitration agreement would be sufficiently egregious to merit nonenforcement, leaving this to be resolved (often inconsistently)[35] by the lower courts.

---

[29] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[30] *Mitsubishi*, 473 U.S. at 626-27.

[31] 500 U.S. 20 (1991).

[32] *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

[33] *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627).

[34] *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

[35] *See* Bales, *supra* note 9, at 625-26.

## III. THE FAA AND STATE CONTRACT LAW

### A. *FAA Section 2*

After *Gilmer*, the Supreme Court's new-found affinity for arbitration under the FAA began to look strikingly similar to its preexisting affinity for arbitration under Section 301 of the LMRA. This made it appear that, for all practical purposes, there is a single "doctrine" of arbitration, albeit a doctrine that emanated from different sources of law. There remains, however, at least one major difference between arbitration under the LMRA and arbitration under the FAA: the degree to which the Court has federalized the law governing contract formation.

As discussed above in Part II, the Court in *Lincoln Mills* interpreted Section 301 as federalizing the law of labor arbitration and preempting contrary state contract doctrines.[36] Unlike the LMRA,[37] however, the FAA does not provide an independent basis for federal question jurisdiction,[38] so the FAA is frequently enforced in state rather than federal courts.[39] Moreover, the FAA's express terms create room for state law. 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.*"[40] David Schwartz has pointed out that this "savings clause" saves at least some state contract-formation law from preemption,[41] notwithstanding the FAA's policy favoring arbitration[42] and broad preemption of state law disfavoring

---

[36] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458 (1957). *See also supra* notes 15, 17, 18 and accompanying text.

[37] Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968).

[38] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983).

[39] There is a split of authority in the federal circuit courts over whether the presence of a federal question in an underlying dispute is sufficient to support subject matter jurisdiction. *Cf.* Discover Bank v. Vaden, 396 F.3d 366 (4th Cir. 2005) (jurisdiction exists), *and* Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe, 177 F.3d 1212 (11th Cir. 1999) (same), *with* Westmoreland Capital Corp. v. Findlay, 100 F.3d 263 (2d Cir. 1996) (no jurisdiction).

[40] 9 U.S.C. § 2 (2005) (emphasis added).

[41] Schwartz, *supra* note 2, at 557 n.60; *see also, e.g.*, Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931 (9th Cir. 2001) (applying Montana law to decide whether arbitration clause was valid); *but cf.* Cooper v. MRM Investment Co., 367 F.3d 493, 498 (6th Cir. 2004) ("The federal policy favoring arbitration, however, is taken into consideration even in applying ordinary state law." (quoting Garrett v. Hooters-Toledo, 295 F. Supp. 2d 774, 779 (N.D. Ohio 2003))).

[42] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

arbitration.[43] The interplay between the Section 2 savings clause and FAA preemption is discussed in the next section.

### B. *FAA Preemption*[44]

As discussed in the preceding section, the FAA Section 2 expressly permits courts to revoke arbitration agreements on grounds that would support "revocation of any contract."[45] In a series of cases that begin with the 1984 decision of *Southland Corp. v. Keating*,[46] the Supreme Court interpreted this provision to mean that state laws singling out arbitration agreements for disfavored treatment are preempted by the FAA, whereas state laws governing contracts generally are not.[47] As discussed below, this seemingly bright line is more than a little blurry.

In *Southland,* the Court held for the first time that the FAA applies in state court and preempts conflicting state laws targeted at arbitration agreements.[48] Several franchisees sued a franchisor claiming that the franchisor had violated disclosure requirements of the California Franchise Investment Law.[49] The California Supreme Court held that the claims were not arbitrable, despite an arbitration clause in the franchise agreements.[50] The California court based its decision on a provision in the California Franchise Investment Law that declared void "[a]ny condition, stipulation or provision purporting . . . to waive compliance with any provision of this law . . . ."[51] The California statute provided for jury trials of franchisor-franchisee disputes.[52] The California court reasoned that the arbitration provision waived the right to a jury trial, and therefore was void under the antiwaiver provision.[53]

---

[43] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

[44] For exhaustive discussions of FAA preemption, *see* Schwartz, *supra* note 2; Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004).

[45] 9 U.S.C. § 2 (2005).

[46] 465 U.S. 1 (1984).

[47] *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996); *see also* Drahozal, *supra* note 44, at 408.

[48] 465 U.S. 1 (1984).

[49] CAL. CORP. CODE § 31512 (West 1977).

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

[51] CAL. CORP. CODE § 31512 (West 1977).

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

[53] Keating v. Superior Court, 645 P.2d 1192, 1198, 1203-04 (Cal. 1982), *rev'd sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

The United States Supreme Court reversed, holding that the FAA applied in state court and preempted the application of the California statute's anti-waiver provision to arbitration cases.[54] The Court concluded that "[i]n enacting [Section] 2 of the federal Act, Congress 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."[55]

The Court's next preemption case was *Perry v. Thomas*,[56] in which the Court preempted a California statute permitting suits to collect wages "without regard to the existence of any private agreement to arbitrate."[57] In a footnote, the Court stated that general contract law defenses, such as unconscionability, are "applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[58] However, the Court continued, a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for" holding the agreement unconscionable, for that would be contrary to the FAA.[59]

In the 1995 case of *Allied-Bruce Terminix Cos. v. Dobson*,[60] the Court enforced a pre-dispute arbitration clause in a home extermination contract notwithstanding an Alabama law precluding specific enforcement of such agreements.[61] Summarizing the FAA § 2 savings clause, the Court stated:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that

---

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

[55] *Id.*

[56] 482 U.S. 483 (1987).

[57] CAL. LAB. CODE § 229 (West 1989).

[58] 482 U.S. at 492 n.9.

[59] *Id.*

[60] 513 U.S. 265 (1995); *see also* Lauri Washington Sawyer, Casenote, Allied-Bruce Terminix Companies v. Dobson: *The Implementation of the Purposes of the Federal Arbitration Act or an Unjustified Intrusion Into State Sovereignty?*, 47 MERCER L. REV. 645 (1996).

[61] ALA. CODE § 8-1-41 (1975).

> kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the [FAA]'s language and Congress' intent.[62]

In *Doctor's Associates, Inc. v. Casarotto*,[63] the Supreme Court invalidated a Montana statute requiring that an arbitration clause be "typed in underlined capital letters on the first page of the contract."[64] The Court rejected the Montana Supreme Court's finding that the notice provision was consistent with and thus not preempted by the FAA. The Montana Court had concluded that the goal of the FAA was not to promote arbitration at any cost, but rather to promote arbitration that was knowingly agreed to by the parties.[65] The United States Supreme Court disagreed, holding that any state law (whether legislative or judicial)[66] that was targeted specifically to void arbitration agreements, and not contracts in general, was preempted by the FAA, even if the purpose of the law was to promote the knowing choice of arbitration.[67]

Most recently, in *Green Tree Financial Corp. v. Bazzle*,[68] the Court considered whether a state court could order class-wide arbitration. The South Carolina Supreme Court had found that the arbitration agreement at issue was silent on the issue of class-wide arbitration, and on this basis had ordered such arbitration.[69] A plurality of the United States Supreme Court held that the arbitrator, rather than the state court, should have decided whether the arbitration agreement permitted class-wide arbitration.[70] Three dissenters, however, argued that the state court's order of class-wide arbitration was contrary to the arbitration agreement and therefore preempted by the FAA.[71]

The black-letter law thus stands as the Court articulated it in *Allied-Bruce*: states may apply "general" contract law to arbitration agreements just as states apply that law to other contracts, but states may not use contract law to "single

---

[62] *Allied-Bruce*, 513 U.S. at 281 (quoting 9 U.S.C. § 2).

[63] 517 U.S. 681 (1996). For a thorough discussion of this case, *see* Burnham, *supra* note 8, at 164-78.

[64] MONT. CODE ANN. § 27-5-114 (4) (1993).

[65] Casarotto v. Lombardi, 901 P.2d 596, 597-98 (Mont. 1995).

[66] *Doctor's Assocs.*, 517 U.S. at 687 n.3.

[67] *Id.* at 688.

[68] 539 U.S. 444 (2003).

[69] Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 359 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

[70] *Id.* at 454.

[71] *Id.* at 455-460 (Rehnquist, J., O'Connor, J., and Kennedy, J., dissenting).

out"[72] arbitration agreements for inferior treatment. However, this formulation of the black-letter law creates at least two interpretive problems.[73] First, how should courts deal with contract law defenses that apply to arbitration clauses plus some other types of clauses, but not necessarily to all contracts?[74] Professor Christopher Drahozal cites as an example state statutes that preclude the parties from contracting for an out-of-state dispute resolution forum.[75] Such statutes apply to some (but not all) arbitration agreements and some (but not all) other contracts, but not to all contracts.[76] He argues that courts should preempt state laws that apply to arbitration clauses and some other types of clauses, not just state laws that "single out" arbitration clauses.[77] Professor David Schwartz, however, points out that legislative contract law typically targets "specific categories of contracts marked by unequal bargaining power and other market failures [such as] consumer contracts, franchise agreements, and employment contracts . . . ."[78] He argues that the Supreme Court's attempt to distinguish general contract law from contract law specifically targeted to arbitration is "fundamentally incoherent."[79]

Second, how should courts deal with contract provisions that are specific to arbitration clauses? Clearly, a court may not invalidate an arbitration clause simply because the court believes in the superiority of a judicial forum, but what about provisions "that go beyond the choice of arbitration itself"[80] and instead specify, for example, how that arbitration is to occur? For example, may a state court strike in its entirety an employment arbitration clause that gives the employer unilateral authority to select the pool of potential arbitrators,[81] or that restricts an arbitrator's authority to award punitive damages? The unconscionability doctrine is a "general" contract doctrine

---

[72] *Doctor's Assocs.*, 517 U.S. at 687 ("Congress precluded States from singling out arbitration provisions for suspect status . . . .").

[73] Drahozal, *supra* note 44, at 408-411; Schwartz, *supra* note 2, at 555-62.

[74] Drahozal, *supra* note 44, at 409.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Schwartz, *supra* note 2, at 559.

[79] *Id.*

[80] *Id.* at 568; Drahozal, *supra* note 44, at 411 ("[C]ourts generally assume that they cannot base a finding of unconscionability solely on the fact that a contract contains an arbitration clause.").

[81] *See, e.g.*, McMullen v. Meijer, Inc., 355 F.3d 485, 488 (6th Cir. 2004) (refusing to enforce such an arbitrator-selection clause because it precluded the employee from effectively vindicating her statutory rights, but remanding for a determination of whether the clause should be severed).

applicable to all contracts, but applied in this way it may be said to single out arbitration clauses. Professor Drahozal points out that lower courts have generally rejected preemption under these circumstances, but that the United States Supreme Court has not addressed the issue.[82]

*C. Separability*

The savings clause of FAA § 2 is further limited by the Supreme Court's separability doctrine. This doctrine is part of the more general issue of arbitrability.[83] The legal concept of arbitrability is, as Professor Alan Scott Rau has eloquently described, an awful mess.[84] I have collected here six things that courts and commentators seem to mean when they use the term.[85] There are probably more that I have overlooked; there is certainly no universal agreement on my list or terminology.[86]

1. *Statutory arbitrability*: whether arbitration is permitted or forbidden by statute.[87] For example, the Ninth Circuit previously held that Title VII forbade courts from enforcing pre-dispute arbitration agreements with respect to claims brought under that statute.[88] The Supreme Court has since rejected this approach.[89]

2. *Contract-scope arbitrability*: whether a dispute is contractually encompassed within an agreement to arbitrate.[90] An example is whether an employee's defamation claim falls within an arbitration clause

---

[82] Drahozal, *supra* note 44, at 411.

[83] Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 838 (2003).

[84] Rau, *supra* note 4, at 120 (arguing that the term "arbitrability" adds nothing "to our understanding of the problems of arbitration practice" and should be "renounce[d]" with "all the other detritus of our case law").

[85] As Professor Rau points out, many of these can be seen simply as different sides of the same coin. *Id.* at 93.

[86] *Cf.* First Options v. Kaplan, 514 U.S. 938, 942 (1985); Rau, *supra* note 4, at 92-93; Reuben, *supra* note 83, at 833, 835.

[87] *See generally* STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION §§ 2.27-28 (2001).

[88] Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).

[89] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[90] WARE, *supra* note 87, at § 2.29. Reuben calls this "substantive arbitrability." Reuben, *supra* note 83, at 835.

requiring the arbitration of common law claims "affecting economic terms of employment."[91]

3. *Contract-enforcement arbitrability*: whether the parties have entered into an enforceable agreement to arbitrate.[92] An example is whether fraud, or a lack of consent or consideration, resulted in no valid contract having been created.[93]

4. *Procedural arbitrability*: whether contractual prerequisites to arbitration (e.g., time limits and notice requirements) have been fulfilled.[94]

5. *Decisional arbitrability*$_1$: whether issues 2-4 above (assuming issue 1 is for the courts) should be decided by a court or by an arbitrator.[95]

6. *Decisional arbitrability*$_2$: whether issue 5 should be decided by a court or by an arbitrator.[96]

Issues 2-6 are a matter of contract interpretation, since an arbitrator's authority is derived exclusively from the parties' arbitration agreement.[97]

Separability is an amalgam of the third and fifth arbitrability issues described above.[98] It addresses the issue of whether a court, or instead an arbitrator, should decide whether the parties have entered into an enforceable agreement to arbitrate. The issue arises when one of the parties argues that the contract containing the arbitration is legally unenforceable.

---

[91] *See, e.g.*, *In re* Dillard Dept. Stores, Inc. and Grizelda Reeder, No. 08-04-00259-CV, 2005 WL 552422, at *6 (Tex. App. March 3, 2005) (last full paragraph of opinion).

[92] Reuben, *supra* note 83, at 835.

[93] *Id.*

[94] *Id.*

[95] Rau, *supra* note 4, at 93.

[96] *Id.*

[97] 9 U.S.C. § 10(a)(4) (2005) (permitting a court to vacate an arbitration award that exceeds the arbitrator's authority); Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion, and parties . . . may limit by contract the issues which they will arbitrate . . . ." (citation omitted)); *accord*, Bales, *supra* note 9, at 602-04 (discussing the contractualism of the FAA).

[98] Reuben, *supra* note 83, at 838.

The Court's separability doctrine arises from the Court's interpretation of the FAA § 4. Section 4 permits a party to obtain specific enforcement of an arbitration agreement by a federal court that would have had jurisdiction over the underlying dispute (e.g., federal question jurisdiction created by a Title VII employment discrimination claim).[99] Section 4 directs that the court "upon being satisfied that the making of the agreement for arbitration . . . is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[100] Section 3 similarly requires a court to stay legal proceedings to permit specific enforcement of enforceable arbitration agreements.[101]

In the 1967 decision of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[102] the Supreme Court, interpreting the FAA § 4, held that contracts containing an arbitration agreement should be treated as two separate contracts – the arbitration contract and the broader "container" contract – and that the enforceability of the former was to be decided by courts and the enforceability of the latter was to be decided by arbitrators. Prima Paint had agreed to acquire Flood & Conklin's paint business.[103] The contract contained a clause providing that "[a]ny controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration . . . ."[104] Prima Paint later sued in federal court to rescind the contract on the ground that Flood & Conklin had committed fraud in the inducement of the contract (although not in the inducement of the arbitration clause in particular) by holding itself out as solvent when in fact it was about to file for bankruptcy.[105] The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts . . . ."[106] In doing so, it adopted the "separability doctrine" divorcing arbitration clauses from the underlying agreements:

> Under § 4 . . . the federal court is instructed to order arbitration to proceed once it is satisfied that the "making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not at issue." Accordingly, if the claim is fraud in the inducement of the arbitration clause

---

[99] 9 U.S.C. § 4 (2005).
[100] *Id.*
[101] *Id.* § 3.
[102] 388 U.S. 395, 403-04 (1967).
[103] *Id.* at 397.
[104] *Id.* at 398.
[105] *Id.*
[106] *Id.* at 399-40.

> itself – an issue which goes to the "making" of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.[107]

Thus, after *Prima Paint*, when an arbitration clause is included as part of a container contract, and one of the parties disputes the enforceability of the container contract, the enforceability issue must be decided by an arbitrator. Courts may not consider the enforceability of the contract as a whole, but may only consider enforceability issues that are directed specifically at the arbitration clause.[108]

As Professor Richard Reuben and Pierre Bergeron have pointed out, the separability doctrine has been roundly criticized on many grounds.[109] One is that the doctrine is incorrect as a matter of statutory interpretation: the Court's *Prima Paint* interpretation of the FAA § 4 is inconsistent with § 2's assurance that arbitration clauses should not be enforced unless they are valid under state contract law.[110] A second criticism is that courts are more institutionally competent to decide issues of contractual validity than arbitrators who may or may not be lawyers.[111] A third and related criticism is that it is improper to allocate contract-validity issues to arbitrators who have a direct financial incentive to find that the contract is valid (because they then would be empowered to decide the underlying dispute).[112]

A fourth criticism, advanced by Professor Stephen Ware, is that the separability doctrine of *Prima Paint* perverts contract law by implying a consent to arbitration from an agreement to which at least one of the parties is claiming it never consented.[113] An application of this argument is found in

---

[107] *Id.* at 403-04.

[108] *Id.*

[109] For a thorough discussion of this criticism, *see* Reuben, *supra* note 83, at 841-48; Pierre H. Bergeron, *At the Crossroads of Federalism and Arbitration: The Application of* Prima Paint *to Purportedly Void Contracts*, 93 KY. L.J. 423, 427, 458-60 (2005). Reuben and Bergeron disagree, however, on whether the criticisms are valid; Reuben believes they are, while Bergeron believes they are not.

[110] Reuben, *supra* note 83, at 842.

[111] *Id.* at 843-44.

[112] *Id.* at 846-47.

[113] *Id.* at 845-57; *see also* Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 195-96 (1999); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 965 (1999); Jeffrew W. Stempel, *A Better Approach to*

*Amsouth Bank v. Bowens*.[114] Bank customers alleged that a bank employee had forged their signatures and thereby had stolen money out of their accounts.[115] The allegedly forged "signature cards" used by the employee to access the customers' accounts referred to a customer agreement containing an arbitration clause.[116] When the customers sued the bank in state court, the bank sued in federal court to compel arbitration pursuant to the arbitration clause on the signature cards.[117] The customers filed affidavits denying they had ever agreed to arbitrate anything – they had never received copies of the customer agreement and their names had been forged on the signature cards.[118] Nonetheless, the United States District Court for the Southern District of Mississippi sent the case to arbitration since the "forgery allegation regards the customer agreement as a whole and not just the arbitration clause of the customer agreement."[119]

A fifth criticism is that the *Prima Paint* separability doctrine is just another instrumental method by which federal courts may send cases to arbitration.[120] Professor Jean Sternlight, for example, has pointed out that it is exceptionally improbable that issues of fraud or assent tainting the arbitration agreement would not also affect the container contract generally: why would a party intending to defraud another focus on the arbitration provision rather than "something big like the price or quality of the goods or services at issue"?[121] Since nearly all contract-formation issues will affect the container contract and

---

*Arbitrability*, 65 TUL. L. REV. 1377, 1458-59 (1991); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 131 (1996); *but cf.* Rau, *supra* note 4, at 4 ("It is nothing less than perverse to suggest that the Supreme Court has tried to pass off some notion of 'implied' or 'imputed' consent, or of 'fictitious consent,' to arbitration as the real thing . . . .").

[114] 351 F. Supp. 2d 571, 573-75 (S.D. Miss. 2005).

[115] *Id.* at 572.

[116] *Id.* at 573.

[117] *Id.* at 572.

[118] *Id.* at 573.

[119] *Id.* at 575.

[120] *See, e.g.*, Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., concurring), *cert. granted and judgment vacated sub nom.* Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995) (criticizing "federal judges who consider forced arbitration as the panacea for their 'heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy . . . .").

[121] Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 24 n.87 (1997); *see also* Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1367 (D.N.J. 1989) (concluding that treating arbitration clause separable from remainder of contract "is not wholly logical").

not just the arbitration agreement, nearly all cases will be arbitrable.[122] This may simply be another example of how the Supreme Court has, for all practical purposes, abandoned the statutory text and legislative intent of the FAA and instead fashioned a "federal policy favoring arbitration" from whole cloth.[123]

Nonetheless, there are three possibly-significant limitations on the separability doctrine. First, Sections 3 and 4 of the FAA, which provide the textual basis for the Court's separability doctrine, apply according to their text only in federal courts when the federal court would have had jurisdiction over the underlying dispute (i.e., in federal question and diversity cases).[124] Thus, the separability doctrine may not be binding on state courts. Some state courts have held that *Prima Paint* preempts state law on separability.[125] Other courts have held that it does not.[126] Many courts in this latter group nonetheless have adopted their own versions of the doctrine, but these state versions often are substantially more limited than the federal version[127] – something akin to "separability-lite." This limitation on the separability doctrine would quickly close if the Court were to hold that *Prima Paint* preempts conflicting state law.[128]

A second possibly-significant limitation on the separability doctrine is to distinguish "void" contracts from contracts which are merely "voidable" and to apply the separability doctrine only to the latter.[129] A voidable contract is a

---

[122] Reuben, *supra* note 83, at 851.

[123] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.").

[124] 9 U.S.C. §§ 3-4 (2005).

[125] *See, e.g.*, Utica Mut. Ins. Co. v. Gulf Ins. Co., 306 A.D.2d 877, 879 (N.Y. App. Div. 2003); Eddings v. Southern Orthopedic & Musculoskeletal Assocs., P.A., 555 S.E.2d 649, 655 (N.C. App. 2001); Centra Indus., Inc. v. McGuirewoods, LLP, 270 F. Supp. 2d 386 (S.D.N.Y. 2003); *see also* Rau, *supra* note 4, at 87 ("[T]he presumption underlying *Prima Paint* has become part of the federal common law of arbitration – a body of law that state courts are now obliged to respect.").

[126] Marks v. Bean, 57 S.W.3d 303 (Ky. Ct. App. 2001); Sun Drilling Prods. Corp. v. Rayborn, 703 So. 2d 818, 819 (La. Ct. App. 1997).

[127] Reuben, *supra* note 83, at 852-54.

[128] *Id.* at 852 n. 193.

[129] *See* Bergeron, *supra* note 109, at 471 (arguing that courts should focus on whether the parties manifested assent to arbitrate, instead of deciding cases based on the "artificial distinction" between void and voidable contracts); Andre V. Egle, Note & Comment, *Back to* Prima Paint Corp. v. Flood & Conklin Manufacturing Co.: *To Challenge an Arbitration*

contract which one of the parties has the power to void on the ground that the contract was induced by fraud, duress, or mistake.[130] A void contract is not a contract at all because one of its essential elements, such as mutual assent or consideration, is missing.[131] Some courts considering arbitration clauses within void contracts have distinguished *Prima Paint* and held that the separability doctrine does not apply when the validity of the entire contract is challenged.[132] Other courts, however, have held that the separability doctrine applies to both void and voidable contracts.[133]

One or both of these first two potential limitations on separability may be resolved shortly. In *Cardegna v. Buckeye Check Cashing, Inc.*,[134] the Florida Supreme Court held that void contracts containing an arbitration clause were not subject to arbitration. The United States Supreme Court has granted certiorari in the case.[135] The Court's forthcoming decision might narrowly resolve only the void/voidable issue, or the decision might more broadly address the applicability of *Prima Paint* in state courts.[136]

A third possibly-significant limitation on the separability doctrine is that the doctrine applies only "[w]hen an arbitration provision is included in a larger contract, and the dispute is about the validity of that larger contract . . . ."[137] Employment arbitration clauses *may* be part of a larger contract, as when such clauses are included in a term contract for a high-ranking executive. Often, however, employment arbitration agreements are stand-alone agreements. They tend to be drafted that way precisely because the drafter (the company) wants to

---

*Agreement You Must Challenge the Arbitration Agreement*, 78 WASH. L. REV. 199 (2003) (discussing the circuit split on the issue).

[130] RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (1981).

[131] *Id.* cmt. a.

[132] *See, e.g.*, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000); Alabama Catalog Sales v. Gloria Harris M.Q., Inc., 794 So. 2d 312 (Ala. 2000); Nature's 10 Jewelers v. Gunderson, 648 N.W.2d 804 (S.D. 2002); Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005), *cert. granted*, 125 S. Ct. 2937 (June 20, 2005) (No. 04-1264); Onvoy, Inc. v. SHAL, LLC, 669 N.W.2d 344 (Minn. 2003).

[133] *See, e.g.*, Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002); Snowden v. Checkpoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1161-62 (5th Cir. 1987).

[134] 894 So. 2d 860 (Fla. 2005), *cert. granted*, 125 S. Ct. 2937 (June 20, 2005) (No. 04-1264).

[135] *Id.*

[136] The broader issue of whether *Prima Paint* applies in state courts has not been raised by the plaintiff in *Buckeye*, but nevertheless might be addressed by the Justices.

[137] Reuben, *supra* note 83, at 838.

avoid any implication that the agreement changes any other term or condition of employment, such as the at-will relationship.[138]

For example, *Taylor v. First North American National Bank*[139] involved a dispute between credit card holders and the bank that had issued the credit cards. The bank moved to compel arbitration based on the arbitration clause in the cardholder agreement.[140] The cardholders, opposing arbitration, argued that no consideration supported the arbitration clause and cited several employment cases as examples of where courts, not arbitrators, had decided whether consideration supported the arbitration agreements.[141] The United States District Court for the Northern District of Alabama, however, distinguished these cases, stating that these "courts were not faced with the *Prima Paint* question of whether the employee's claim of inadequate consideration challenged the validity of an arbitration clause or challenged the validity of an employment contract as a whole," because "only the arbitration clauses, not the contracts as a whole," were being challenged for lack of consideration.[142] By this reasoning, the separability doctrine is inapplicable to the vast majority of employment arbitration agreements which are stand-alone agreements.

However, it is not too difficult to imagine an argument that might be made by a court wanting to send these stand-alone employment arbitration agreements to arbitration. Consider what Professor Schwartz calls the "dispute-control terms" - the provisions in an arbitration agreement (such as discovery restrictions, arbitration fee clauses, class action bans, restrictions on discovery, arbitral selection procedures) - "that go beyond the choice of arbitration itself."[143] If these are part of the arbitration agreement itself, then challenges on these bases are focused directly on the arbitration agreement, and under *Prima*

---

[138] *See, e.g.*, Comfort v. Mariner Health Care, Inc., No. CIV.A.304CV2142JCH, 2005 WL 977062, at *3 (D. Conn. Apr. 26, 2005) (employer's right to modify employee handbook did not affect the contractual status of employment arbitration agreement which was an independent agreement); Harmon v. Hartman Mgmt., L.P., No. CIV.A.H-04-1597, 2004 WL 1936211, at *2 (S.D. Tex. Aug. 24, 2004) (refusing to compel arbitration where purported arbitration agreement was contained in employee handbook and such handbook expressly stated that the handbook was not a contract); Salazar v. Citadel Communications Corp., 90 P.3d 466, 468 (N.M. 2004) (same).

[139] 325 F. Supp. 2d 1304 (M.D. Ala. 2004).

[140] *Id.* at 1307.

[141] *Id.* at 1314-15.

[142] *Id.* at 1315.

[143] Schwartz, *supra* note 2, at 567-68.

*Paint* these challenges should be resolved by courts.[144] On the other hand, a court determined to further expand the universe of arbitrable claims might say that the arbitration agreement consists merely of that part of the contract that says "the parties agree to arbitrate," and that all the terms and conditions under which the parties agree to arbitrate constitute a "larger contract." Under this interpretation, a court could use *Prima Paint* to send to an arbitrator challenges directed to the terms and conditions under which arbitration would be conducted, even if the "container contract" is nothing more than a stand-alone arbitration agreement.

## IV. CONTRACT FORMATION ISSUES

As discussed in Part II, the Supreme Court in *Gilmer* provided little guidance as to when an employment arbitration agreement would be sufficiently lopsided to merit nonenforcement on the ground that it subverted a substantive statutory right. This has led to tremendous indeterminacy in the lower courts over the enforceability of various employment arbitration agreements. Elsewhere, I have sketched in broad brush this indeterminacy with respect to contract formation issues, barriers to access (such as excessive filing fees or costs), process issues (such as restricted discovery), and remedies issues (such as damage limitations).[145] This Part will examine contract formation issues in detail.

Contract formation issues concern whether a purported arbitration agreement creates an enforceable obligation. These issues turn on interpretation of state contract law because, as discussed in Part III, the FAA Section 2 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.*"[146] Thus, the *Gilmer* Court held that arbitration agreements would be enforced absent "the sort of fraud or overwhelming

---

[144] *See, e.g.*, Nagrampa v. Mailcoups Inc., 401 F.3d 1024, 1029 (9th Cir. 2005) (considering an arbitration clause in a franchise agreement, and holding that the issue of whether the contract was adhesive was an issue pertaining to the contract as a whole and therefore for arbitrator to decide, but that issues concerning notice and cost were issues pertaining specifically to the arbitration clause and therefore were appropriately addressed by the court).

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

[146] 9 U.S.C. § 2 (2005) (emphasis added).

economic power that would provide grounds 'for the revocation of any contract.'"[147]

*A. Notice*

Notice and consent are in many ways flip sides of the same coin: a party normally cannot consent to a contract term of which the party was not given notice.[148] Here, I have grouped under notice the circumstances under which an employee might claim that she had no idea that she was being presented with an arbitration agreement at all. I have grouped under consent the circumstances under which an employee might claim that while she knew she was being presented with an arbitration agreement, she believes she had an inadequate opportunity to consider the terms of that agreement.

The FAA Section 3 requires courts to stay judicial proceedings for "any issue referable to arbitration under an agreement in writing . . . ."[149] Courts consistently have held that while the FAA "requires a writing, it does not require that the writing be signed by the parties."[150] Thus, it is usually sufficient for the party seeking to compel arbitration to show that the other party received a written copy of the arbitration agreement.

In the employment context, this means that an arbitration contract is formed when an employer notifies an employee in writing that continued employment will constitute assent to an arbitration agreement, and the employee continues employment.[151] The argument for enforcement is strongest when the employer can show that the employee had actual knowledge that she was agreeing to arbitration in lieu of litigation.[152] A prudent employer wishing to implement an employment arbitration policy will give an employee a copy of a clearly-drafted arbitration policy several days ahead of time, give the employee an opportunity

---

[147] 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)).

[148] *See, e.g.*, Campbell v. General Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 142, 147 n.3 (D. Mass. 2004) ("[A]n employee's knowledge of the [employer's] offer is obviously a necessity for the inference of acceptance to hold." (citation omitted)).

[149] 9 U.S.C. § 3 (2005).

[150] *See, e.g.*, 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)).

[151] *See* May v. Higbee Co., 372 F.3d 757, 764 (5th Cir. 2004) (citing numerous cases); *but cf.* Melena v. Anheuser-Busch, Inc., 816 N.E.2d 826, 833-34 (Ill. App. 2004) (holding that arbitration agreements presented to employees which are a condition of continued employment are not "voluntary" from the perspective of employees, and therefore are unenforceable).

[152] Campbell v. General Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 142, 147 n.3 (D. Mass. 2004).

to consult an attorney,[153] and then have the employee sign an acknowledgment stating that she has received and read the policy and that she understands and agrees to it.[154] Under these circumstances, courts are likely to enforce the arbitration agreement even if the employee later claims she lacked actual knowledge, such as if she signed the agreement without bothering to read its contents.[155]

*1. Website Postings*

Many employers, however, put considerably less effort into ensuring that employees have actual or constructive notice of the arbitration policies that the employers wish to enforce.[156] For example, in *Acher v. Fujitsu Network Communications, Inc.*,[157] the employer posted an arbitration "agreement" on its internal website, but could proffer no evidence that it had ever notified employees that the arbitration agreement existed or was posted on the website.[158] Not surprisingly, the United States District Court for the District of Massachusetts adopted the magistrate judge's recommendation that the purported arbitration agreement was unenforceable for lack of notice.[159]

Similarly, in *Campbell v. General Dynamics Gov't Sys. Corp.*,[160] General Dynamics sent employees an e-mail message containing intranet links to its new Dispute Resolution Policy (DRP).[161] The DRP itself stated that an employee's continued employment would constitute acceptance of the DRP, which included mandatory arbitration.[162] The text of the e-mail message, however, said little of arbitration and nothing of discrimination claims; nor did it state that employees would be bound by arbitration if they continued to work

---

[153] *See, e.g.*, Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 384 (6th Cir. 2005) (refusing to enforce arbitration agreement that recited that employees had the right to consult an attorney, because "in reality, they had no opportunity to exercise that right because they had to sign the agreements on the spot").

[154] *See, e.g.*, Pennington v. Frisch's Rest., Inc., No. 04-4541, 2005 WL 1432759, at *2 (6th Cir. June 17, 2005) (enforcing employment arbitration agreements where employees signed a form acknowledging that they had "received, read, and underst[ood]" the agreements).

[155] *Campbell*, 321 F. Supp. 2d at 147.

[156] *See, e.g.*, Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 19 (1st Cir. 1999) (observing that an employer who takes a barebones approach to notice runs the risk that its efforts will fall short).

[157] 354 F. Supp. 2d 26 (D. Mass. 2005).

[158] *Id.* at 37.

[159] *Id.* at 27, 37.

[160] 407 F.3d 546 (1st Cir. 2005).

[161] *Id.* at 547-48.

[162] *Id.* at 548.

for the employer.[163] The employee denied having read the e-mail or learning of the arbitration clause until after he had been fired.[164] General Dynamics responded with a tracking log demonstrating that the employee had opened the e-mail, but General Dynamics could not show that the employee had clicked on the link.[165] The United States District Court for the District of Massachusetts held that General Dynamics' notice was insufficient:

> General Dynamics did nothing but send the email . . . . Plainly, even email technology enables the company to do better. The company did not, for example, require an employee to signify by return email that he had read the email, or more importantly, that he had read the attachments and understood their implications. . . . The practice of reflexively opening (so as to remove the unread tag) and deleting a mass email without reading it, or even being aware of it, is not uncommon. . . . [R]eceiving an email in a virtual mailbox is not the same as receiving a letter in a real mailbox.[166]

On appeal, the First Circuit rejected the district court's skepticism toward e-mail as a method of communicating notice of an arbitration agreement.[167] Nonetheless, the First Circuit affirmed the district court's finding that the notice provided in this case was insufficient to create a binding arbitration agreement. The court noted that General Dynamics had implemented all previous personnel matters via signed documents; in this context, the failure to require some sort of affirmative response (such as signing an acknowledgment or clicking a box on a computer screen) was insufficient to alert employees that they were entering into a contract.[168] Moreover, the e-mail was worded so vaguely that "a reasonable employee could read the e-mail announcement and conclude that the [arbitration] Policy presented an optional alternative to litigation rather than a mandatory replacement for it."[169] Thus, the court held that the e-mail failed to put employees "on inquiry notice of the unilateral contract offer contained in the linked materials."[170]

---

[163] *Id.* at 547-48, 557.

[164] *Id.* at 549, 556.

[165] *Id.* at 548-49.

[166] Campbell v. General Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 145, 145, 148-49 (D. Mass. 2004).

[167] *Campbell*, 407 F.3d at 555-56.

[168] *Id.* at 556-57.

[169] *Id.* at 558.

[170] *Id.*

*2. Mail*

As the *Campbell* district court implied, mailing an arbitration agreement through United States mail may provide sufficient notice. In *Caley v. Gulfstream Aerospace Corp.*,[171] the employer Gulfstream was a subsidiary of General Dynamics (the employer in *Campbell*);[172] Gulfstream was implementing what appears to have been the same Dispute Resolution Policy at issue in *Campbell*.[173] Gulfstream, like General Dynamics, posted its DRP on the company intranet, and notified employees of the DRP by e-mail (unlike the e-mail from General Dynamics, the e-mail from Gulfstream was in the form of an electronic company newsletter).[174] Additionally, however, Gulfstream posted notices of the DRP on company bulletin boards and mailed copies of the DRP to all employees' home addresses.[175] The United States District Court for the Northern District of Georgia held that this notice was sufficient.[176] The court cited the common law rebuttable presumption that items mailed have been received.[177] Because the employees could not rebut the presumption that they had received notice that continued employment would constitute acceptance of the DRP, the court enforced the arbitration provision.[178]

Other courts, however, have found the mere mailing of an arbitration agreement insufficient. For example, in *Buckley v. Nabors Drilling USA, Inc.*,[179] the employer mailed copies of its Dispute Resolution Policy to employees with their paychecks. The United States District Court for the Southern District of Texas found that this was insufficient to prove an employee's consent to the DRP:

> Defendant argues that the mailing and assumed receipt of the DRP adequately establishes Buckley's acceptance of the terms of the DRP, including its binding arbitration provision. Portraying the DRP as a permissible contractual modification of the at-will employment relationship between itself and Buckley, Defendant believes that Buckley's continued employment . . . after receiving the DRP constitutes acknowledgment and acceptance of the

---

[171] 333 F. Supp. 2d 1367 (N.D. Ga. 2004).
[172] *Id.* at 1370.
[173] *Id.* at 1371.
[174] *Id.* at 1372.
[175] *Id.* at 1371-72.
[176] *Id.* at 1376.
[177] *Id.* (citing Konst v. Florida E. Coast Ry. Co., 71 F.3d 850, 851 (11th Cir. 1996)); *see also* Hagner v. United States, 285 U.S. 427, 430-31 (1932) (applying the "mailbox rule").
[178] *Caley*, 333 F. Supp. 2d at 1379.
[179] 190 F. Supp. 2d 958, 959 (S.D. Tex. 2002).

> DRP under Louisiana law. The Court agrees with Defendant that an unsigned written arbitration agreement may be valid under the FAA. The Court further recognizes that the mailing of a document may create a presumption that such document was received. However, even assuming that Buckley received the DRP, there is absolutely no evidence that Buckley actually read, or, more importantly, understood the contents of the DRP. Buckley never signed or returned the acknowledgment letter enclosed in the DRP mailing, which generally would tend to indicate that an agreement had been reached. Additionally, there is no indication that [Defendant] made any other attempts to notify Buckley of the DRP and its binding arbitration clause anytime thereafter. Without more proof that Buckley actually read and understood the terms of the DRP, this Court is loath to declare that Buckley entered into a binding arbitration agreement . . . .[180]

Thus, as with the website postings discussed above, merely mailing an arbitration provision to employees may provide insufficient notice to create a binding agreement. Something more may be needed – such as a signed statement by the employee that she has read, understood, and agreed to arbitration.

The issue of whether mailing, by itself, provides notice to support an arbitration agreement has arisen frequently when banks have attempted to add arbitration clauses to their agreements with credit card holders.[181] For example, in *Battels v. Sears Nat'l Bank*,[182] the United States District Court for the Middle District of Alabama enforced an arbitration agreement that the bank mailed to the same addresses to which the cardholders' billing statements were sent; the cardholders' payments in response to billing statements bolstered the presumption of receipt.[183] In many of these credit card cases, however, the primary issue is not notice, but whether the original cardholder agreement contractually permitted the bank to change the terms of the agreement to require arbitration, or whether the original agreement permitted the bank to change only those terms related to interest rates and other similar charges.[184]

---

[180] *Id.* at 965 (citations and footnotes omitted).

[181] For an extensive list of cases, *see* Stone v. Golden Wexler & Sarnese, 341 F. Supp. 2d 189, 193-94 (E.D.N.Y. 2004).

[182] 365 F. Supp. 2d 1205 (M.D. Ala. 2005).

[183] *Id.* at 1213.

[184] *Stone*, 341 F. Supp. 2d at 194-98.

*3. Paycheck Envelopes*

Many employers have attempted to implement arbitration agreements by providing notice through a "payroll stuffer" distributed to employees (not necessarily by mail) in the employees' paycheck envelopes. For example, in *Tinder v. Pinkerton Security*,[185] Pinkerton stuffed a color brochure entitled "Pinkerton's Arbitration Program" into its employees' paycheck envelopes.[186] Ilah Tinder subsequently sued for discrimination and claimed that she could not recall receiving or seeing the arbitration brochure.[187] Pinkerton responded with two affidavits.[188] The first, from Pinkerton's Director of Employee Relations, averred that Pinkerton's central office had distributed the brochures to the regional offices with instructions that the brochures be stuffed into employee's paycheck envelopes.[189] The second, from the manager of Tinder's office, asserted that he had distributed the brochures as instructed.[190] The United States Court of Appeals for the Seventh Circuit held that this was sufficient notice, and sent the case to arbitration.[191]

Other courts, however, may not accept the notice provided in *Tinder*. For example, in *Buckley*, discussed above, the employer mailed its dispute resolution policy to employees in their paycheck envelopes, but the court found this insufficient.[192] Similarly, in the consumer arbitration case of *Alltel Corp. v. Sumner*,[193] plaintiffs sued their cell-phone provider.[194] The cell-phone provider sought to compel arbitration and, relying on *Tinder*, submitted the affidavit of its Director of Retail Sales stating that it was the company's "practice and procedure" to give customers its arbitration agreement prior to initiating service.[195] The Supreme Court of Arkansas found this insufficient. Notice cannot be inferred, the court stated, merely from a statement of a company's practices and procedures; instead, as in *Tinder*, "there must be specific evidence that the company implemented those practices and procedures such that notice

---

[185] 305 F.3d 728 (7th Cir. 2002).
[186] *Id.* at 731.
[187] *Id.* at 732.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] Buckley v. Nabors Drilling USA, Inc., 190 F. Supp. 2d 958, 960 (S.D. Tex. 2002).
[193] No. 04-279, 2005 Ark. LEXIS 94 (Ark. Feb 10, 2005).
[194] *Id.* at *1.
[195] *Id.* at *8.

to the affected party can be reasonably inferred from the circumstances."[196] The court therefore declined to compel arbitration.[197]

*4. Other Types of Notice*

Employers have used myriad other types of notice to disseminate arbitration agreements. These include office memoranda coupled with mailings,[198] employee handbooks coupled with mailings,[199] office-wide meetings with sign-in sheets,[200] multiple mailings where delivery was professionally tracked,[201] and office memoranda.[202] Courts tend to find notice sufficient when employees receive actual notice of the arbitration agreement.[203]

Conversely, notice may be insufficient, even if it is reasonably designed to reach most employees, if it is not designed to reach the specific employee at issue. For example, in *Al-Safin v. Circuit City Stores, Inc.*,[204] a discharged employee (Mohammed Al-Safin) sued his employer for discrimination.[205] After the discharge but before the suit, the employer amended its arbitration policy.[206] The employer posted notice of this amendment at all of its stores and included a copy of the amendment in its packet given to employment applicants.[207] The United States Court of Appeals for the Ninth Circuit held that even if this provided "reasonable notice" to current and prospective employees, it was not reasonable notice to former employees who could not be expected to check the postings at the employer's stores regularly and who were unlikely to receive an

---

[196] *Id.* at *10.

[197] *Id.* at *11-12.

[198] Howard v. Oakwood Homes Corp., 516 S.E.2d 879, 880 (1999).

[199] Reese v. Commercial Credit Corp., 955 F. Supp. 567, 569 (D.S.C. 1997).

[200] Hightower v. GMRI, Inc., 272 F.3d 239, 241 (4th Cir. 2001) (enforcing arbitration claim where employee had attended a meeting announcing the policy and signed a form that stated: "I have attended a DRP meeting and have received the information in regards to DRP.").

[201] Cole v. Halliburton Co., No. CIV-00-0862-T, 2000 WL 1531614, at *1 (W.D. Okla. Sept. 6, 2000).

[202] Van Slyke v. Commercial Credit Corp., No. 95-CV-923 (RSP/GJD), 1995 WL 766399, at *2 (N.D.N.Y. Dec. 29, 1995).

[203] *See, e.g.*, Campbell v. General Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 142, 149-50 (D. Mass. 2004) (refusing to enforce arbitration policy where employer could show no actual notice); Alltel Corp. v. Sumner, No. 04-279, 2005 Ark. LEXIS 94, at *11-12 (Ark. Feb 10, 2005) (same).

[204] 394 F.3d 1254 (9th Cir. 2005).

[205] *Id.* at 1256.

[206] *Id.* at 1257.

[207] *Id.* at 1260.

applicant packet.[208] The court therefore held that the amendment did not apply to Al-Safin because he had received no notice of it.[209]

*5. Other Impediments to Notice*

Similarly, courts consistently have refused to enforce arbitration agreements when other circumstances impeded notice to the affected employees. For example, in *Prevot v. Phillips Petroleum Co.*,[210] the United States District Court for the Southern District of Texas refused to enforce arbitration agreements written in English and given to employees who understood only Spanish. Similarly, in the consumer arbitration case of *American Heritage Life Insurance Co. v. Lang*,[211] the Fifth Circuit held that an illiterate borrower who claimed a lender did not inform him that he was signing an arbitration agreement created an issue of fact on whether the borrower had consented to arbitration.[212]

*B. Consent*

As with notice, the most effective way for an employer to demonstrate an employee's consent to arbitration is to produce an employee's signed acknowledgment that the employee has received and read the arbitration agreement and that the employee understands and agrees to it. Courts generally will enforce an arbitration agreement under these circumstances, even if the employee later claims not to have read or understood the agreement, because of the common law rule that a signatory to a contract is bound by the contract's terms absent fraud or incompetence.[213] Courts often will not require arbitration, however, if the employer has committed some sort of affirmative act to impede the employee's understanding of what the employee ostensibly agreed.

---

[208] *Id.*

[209] *Id.*

[210] 133 F. Supp. 2d 937, 939-41 (S.D. Tex. 2001) (applying Texas law).

[211] 321 F.3d 533 (5th Cir. 2003) (applying Mississippi law).

[212] *See also* Voyager Life Ins. Co. v. Caldwell, 353 F. Supp. 2d 748, 760-61 (S.D. Miss. 2005) (in consumer arbitration case, finding issue of fact as to whether company knew of consumer's illiteracy when consumer signed arbitration agreement).

[213] Nagrampa v. Mailcoups, Inc., 401 F.3d 1024, 1030 (9th Cir. 2005) ("'Reasonable diligence requires the reading of a contract before signing it. A party cannot use his own lack of diligence to avoid an arbitration agreement.'" (quoting Brookwood v. Bank of Am., 53 Cal. Rptr. 2d 515, 519 (Cal. Ct. App. 1996))); Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, 140 (7th Cir. 1985); Donovan v. Mercer, 747 F.2d 304, 308 n.4 (5th Cir. 1984); Sarbak v. Citigroup Global Markets, Inc., 354 F. Supp. 2d 531, 541 (D.N.J. 2004).

### 1. *Buried in Fine Print, a Prolix Form Agreement, or a Mountain of Documents*

Employees often argue that arbitration agreements are unenforceable if they are buried in fine print, in a prolix form agreement, or in a mountain of documents. A few courts have found such arguments persuasive in extreme cases, when the arbitration clause is dubiously inconspicuous in the entire agreement as a whole.[214] Most courts, however, have refused to void arbitration agreements on these bases alone.[215] Moreover, courts cannot void an arbitration agreement on these bases while at the same time enforcing other similarly-printed contract clauses. Such a ruling would be preempted[216] by the FAA, just as the Supreme Court, in *Doctor's Associates*, invalidated a Montana statute that declared an arbitration clause unenforceable unless the contract contained underlined capital letters on the first page of the contract stating that it contained an arbitration provision.[217]

Thus, the general rule seems to be that arbitration clauses need not be specially marked or singled out in some way from other contractual provisions.[218] However, courts are likely to look with particular favor on agreements in which the arbitration clause is prominently displayed[219] by font size,[220] bold[221] or italicized or underlined[222] typeface, capital lettering,[223] and/or placement near the signature line.[224]

---

[214] *See, e.g.*, Gaylord Dep't Stores of Alabama, Inc. v. Stephens, 404 So. 2d 586, 588 (Ala. 1981) (jury trial waiver provision "buried in paragraph thirty-four in a contract containing forty-six paragraphs"); Kinkel v. Cingular Wireless, LLC, 828 N.E.2d 812 (Ill. App. 2005) (extremely small typeface); Fairfield Leasing Corp. v. Techni-Graphics, Inc., 607 A.2d 703 (N.J. Super. Ct. Law Div. 1992) (holding jury trial waiver unconscionable and unenforceable where the clause was buried in extremely fine print in an adhesion contract, one-half the ordinary size of print, in the midst of many other clauses); Shaffer v. ACS Government Services, Inc., 321 F. Supp. 2d 682 (D. Md. 2004) (refusing to enforce arbitration clause contained on page 56 of a 71-page employee guidebook).

[215] *See, e.g.*, Nagrampa 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).

[216] *See, e.g.*, Battels v. Sears Nat. Bank, 365 F. Supp. 2d 1205, 1214 (M.D. Ala. 2005) (enforcing arbitration clause in dispute between credit card holders and bank).

[217] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[218] *See* Rollins, Inc. v. Foster, 991 F. Supp. 1426, 1434 (M.D. Ala. 1998).

[219] Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 684-85 (2001).

[220] *See, e.g.*, Adler v. Fred Lind Manor, 103 P.3d 773, 784 (Wash. 2004) (finding that typography alone, which was boldface and normal font, did not raise issue of procedural unconscionability).

*2. Employer Pressure to Sign Without Reading*

The conditions under which employers require employees to sign arbitration agreements can give rise to claims that the agreements should not be enforced. For example, in *Walker v. Ryan's Family Steak Houses, Inc.*,[225] the court found that the employer hurriedly presented employment applicants with various documents that they were instructed to sign.[226] Ryan's managers would place an "x" in every spot the applicant was told to sign and would instruct the applicant to sign without any explanation.[227] Managers "usually would not mention the arbitration agreement . . . and [applicants] had no opportunity to take the . . . [a]greement home or consult an attorney, even though the agreement purport[ed] to afford them that right."[228] Applicants were given no opportunity to revoke their consent to the agreement.[229] Under these circumstances, and for various other reasons, the United States Sixth Circuit Court of Appeals held that there was no enforceable arbitration agreement.[230]

---

[221] *See, e.g.*, *Adler*, 103 P.3d at 784 (finding that typography alone, which was boldface and normal font, did not raise issue of procedural unconscionability); Zuver v. Airtouch Communications, Inc., 103 P.3d 753, 761 (Wash. 2004) (finding no procedural unconscionability where arbitration agreement was underlined, bolded, and in capital letters); Brasington v. EMC Corp., 855 So. 2d 1212, 1218 (Fla. Dist. Ct. App. 2003) (finding no procedural unconscionability where arbitration agreement was bold, underlined, and near employee's signature line).

[222] *See, e.g.*, Walther v. Sovereign Bank, 872 A.2d 735 (Md. 2005) (in dispute between mortgagors and mortgagee, enforcing arbitration clause that was underlined and placed immediately above signature line); *Zuver*, 103 P.3d at 761 (finding no procedural unconscionability where arbitration agreement was underlined, bolded, and in capital letters); *Brasington*, 855 So. 2d at 1218 (finding no procedural unconscionability where arbitration agreement was bold, underlined, and near employee's signature line).

[223] *Zuver*, 103 P.3d at 761 (finding no procedural unconscionability where arbitration agreement was underlined, bolded, and in capital letters).

[224] *See, e.g.*, Sarbak v. Citigroup Global Mkts., Inc., 354 F. Supp. 2d 531, 539 (D.N.J. 2004) (in employment dispute, enforcing arbitration clause that was placed immediately above signature line); Walther v. Sovereign Bank, 872 A.2d 735 (Md. 2005) (in dispute between mortgagors and mortgagee, enforcing arbitration clause that was underlined and placed immediately above signature line); *Brasington*, 855 So. 2d at 1218 (finding no procedural unconscionability where arbitration agreement was bold, underlined, and near employee's signature line).

[225] 400 F.3d 370 (6th Cir. 2005).

[226] *Id.* at 381-82.

[227] *Id.* at 382.

[228] *Id.*

[229] *Id. See also* Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002) (holding that arbitration agreement that gave employee the ability to opt out of arbitration was not procedurally unconscionable).

[230] *Id.* at 388.

Other courts have refused to enforce arbitration agreements signed by employees under similar circumstances.[231]

Not all courts, however, are sympathetic to employee claims of undue pressure. In *Maye v. Smith Barney Inc.*,[232] several former employees claimed that they each were told to sign their names approximately seventy-five times on a variety of documents (including an arbitration agreement) in a period of two hours without anyone explaining the contents of the documents and without an adequate opportunity to read most of them.[233] The former employees also complained that when they were told to sign these documents the atmosphere was "intimidating, hurried, and tense."[234] The United States District Court for the Southern District of New York nonetheless granted the employer's motion to compel arbitration.[235] Similarly, in *Kuhn v. Ameriquest Mortgage Co.*,[236] an employee claimed that he was first presented with an arbitration agreement on his first day of work after he had quit his previous job, and that he therefore signed the arbitration agreement under duress.[237] However, the United States District Court for the District of Kansas rejected this argument, noting that the employee had been informed prior to his first day of work that he would be required to sign an arbitration agreement as a condition of his employment.[238]

*3. Misrepresentation*

At least one court has refused to enforce an employment arbitration agreement in part because the employer misrepresented the effect of the agreement to employees. In *Walker v. Ryan's Family Steak Houses, Inc.*,[239] discussed above, the Sixth Circuit noted that one of the employer's managers had explained to employees that the arbitration agreement meant that

---

[231] *See, e.g.*, Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 383 (S.D.N.Y. 2002) (refusing to enforce arbitration agreement where employer gave employee no more than fifteen minutes to review a sixteen-page single-spaced agreement); Quiles v. Fin. Exch. Co., 879 A.2d 281, 286-7 (Pa. Super. Ct. 2005) (refusing to enforce arbitration agreement where manager, in response to employee's request for a copy of the handbook containing detailed arbitration provisions, refused, saying "Just 'f' sign that because I'm going to get in trouble.").

[232] 897 F. Supp. 100 (S.D.N.Y. 1995).

[233] *Id.* at 106.

[234] *Id.* at 107.

[235] *Id.* at 110.

[236] No. 04-2229-JWL, 2004 WL 2782568, at *1 (D. Kan. Dec. 1, 2004).

[237] *Id.* at *5.

[238] *Id.*

[239] 400 F.3d 370 (6th Cir. 2005).

employees "had to 'go through Ryan's' before [they] could go to an attorney."[240] Another manager testified that "supervisors at Ryan's told us during manager meetings with them, that if it came up to tell any job applicant that the arbitration agreement meant that problems would be handled 'up the chain of command,' and that we would handle problems 'in house' first, and if the problem could not be resolved there, then it would be taken to the supervisor to resolve."[241] The court found that these misrepresentations, coupled with Ryan's pressure on employees to sign the arbitration agreements "on the spot" without reading them and without the meaningful opportunity to consult an attorney, were some of several factors indicating that the employees had not consented to arbitration.[242] In a different case, however, the Sixth Circuit rejected employees' arguments that the employer had misrepresented the terms of arbitration.[243] In that case, the court noted that the employees had acknowledged receipt of the arbitration rules, and held that the employees' failure to read the rules foreclosed their misrepresentation claim.[244]

*4. No Access to Arbitration Rules*

Some courts have refused to enforce arbitration agreements which incorporated by reference arbitral rules to which the employer denied the employee access when the employer required the employee to sign the arbitration agreement. These courts have refused enforcement on various contract-law grounds. One example is *Hooters of America, Inc. v. Phillips*,[245] in which the Fourth Circuit found that Hooters had breached its contractual duty to provide a fair and neutral arbitral forum.[246] Similarly, in *Gibson v. Neighborhood Health Clinics, Inc.*,[247] the Seventh Circuit found that the employer's failure to provide arbitration rules to the employee when the employee signed the arbitration agreement[248] demonstrated a lack of consideration, because there can be no consideration "when a promisor does not know of the promise that purportedly serves as consideration."[249] Likewise, in

---

[240] *Id.* at 382.

[241] *Id.*

[242] *Id.* at 384.

[243] Pennington v. Frisch's Rest., Inc., No. 04-4541, 2005 WL 1432759, at *3 (6th Cir. June 17, 2005).

[244] *Id.* (citing McAdams v. McAdams, 88 N.E. 542, 544 (Ohio 1909)).

[245] 173 F.3d 933, 936 (4th Cir. 1999) (noting that "[n]o employee . . . was given a copy of Hooters' arbitration rules and procedures").

[246] *Id.* at 940.

[247] 121 F.3d 1126 (7th Cir. 1997).

[248] *Id.* at 1128-29.

[249] *Id.* at 1131.

*Comfort v. Mariner Health Care, Inc.*,[250] the United States District Court for the District of Connecticut cited the employer's failure to provide an employee with a copy of the arbitration rules as an indication that the purported arbitration agreement lacked mutuality.[251] In *Quiles v. Fin. Exch. Co.*, [252] a Pennsylvania Superior Court found a failure of assent, because "[w]ithout receipt or delivery of the Handbook which was the only document containing the relevant arbitration provisions, [the employee] was unable to knowingly and voluntarily waive all other means of dispute resolution."[253] Finally, in *Berger v. Cantor Fitzgerald Securities*,[254] an employee alleged facts almost identical to those in *Maye v. Smith Barney Inc.*[255] – i.e., that the employer had hurriedly pressured employees to sign multiple documents including an arbitration agreement.[256] *Berger* was brought in the same federal judicial district (the Southern District of New York) as *Maye*, though was assigned to a different judge within the district. While the *Maye* court had granted the employer's motion to compel arbitration, the *Berger* court did not, and instead ordered the parties to engage in discovery concerning the circumstances surrounding the employee's signing of the arbitration agreement.[257] The *Berger* court distinguished *Maye* by noting that, in *Maye*, the one-page arbitration agreement contained a detailed explanation of the arbitration procedures and expressly defined the employment disputes covered by the agreement, whereas in *Berger*, the U-4 form merely referred to the NASD rules with which the employee was not provided.[258]

Other courts, however, have enforced arbitration agreements notwithstanding the failure of employees to receive a copy of the arbitral rules to which they agreed. In *Gold v. Deutsche Aktiengesellschaft*,[259] an employee argued that he should not be bound by an arbitration agreement because the clause stating that the agreement covered employment discrimination claims was in a document that he had not read, which was incorporated by reference in the arbitration agreement itself.[260] The United States Court of Appeals for the

---

[250] No. 304CV2142JCH, 2005 WL 977062, at *1 (D. Conn. Apr. 26, 2005).
[251] *Id.* at *3.
[252] 879 A.2d 281 (Pa. Super. Ct. 2005).
[253] *Id.* at 286 (citation omitted).
[254] 942 F. Supp. 963 (S.D.N.Y. 1996).
[255] 897 F. Supp. 100 (S.D.N.Y. 1995).
[256] *Berger*, 942 F. Supp. at 965.
[257] *Id.* at 967.
[258] *Id.*
[259] 365 F.3d 144 (2d Cir. 2004).
[260] *Id.* at 146.

Second Circuit held that the employee was nonetheless bound, because "the burden was upon him to have his concerns addressed before signing" the agreement.[261]

Similarly, in *Tarulli v. Circuit City Stores, Inc.*,[262] an employee applicant signed an arbitration agreement that incorporated by reference a separate set of rules.[263] The agreement stated that if the applicant did not receive a copy of the rules, she must request one, and gave her three days to withdraw consent to arbitration.[264] The applicant, who later was hired, neither withdrew consent nor requested a copy of the rules.[265] Six years later, she was fired;[266] she then sued the company for sexual harassment.[267] She argued that the arbitration agreement was procedurally unconscionable because, among other things, she had never received a copy of the arbitration rules.[268] However, the United States District Court for the Southern District of New York disagreed, finding that the employee sought "to benefit by her own inaction" in not requesting a copy of the rules.[269]

Another example is *Baldeo v. Darden Restaurants, Inc.*[270] The plaintiff in this case was a restaurant manager, who had signed an arbitration agreement which incorporated by reference the rules of a dispute resolution handbook.[271] The manager was responsible for explaining the company's dispute resolution policy to other employees.[272] She sued the company for discrimination, and argued that her arbitration agreement was unenforceable because she did not receive a copy of the dispute resolution handbook until after she had signed the arbitration agreement.[273] The United States District Court for the Eastern

---

[261] *Id.* at 149.

[262] 333 F. Supp. 2d 151 (S.D.N.Y. 2004).

[263] *Id.* at 153-54.

[264] *Id.* at 154.

[265] *Id.*

[266] *Id.*

[267] *Id.* at 152.

[268] *Id.* at 156-58.

[269] *Id.* at 157-58; *see also* Pennington v. Frisch's Rest., Inc., No. 04-4541, 2005 WL 1432759, at *3 (6th Cir. June 17, 2005) (finding "insufficient evidence to support the district court's vague conclusion that Frisch's declined to provide a copy of the arbitration plan when requested by the employees"; and rejecting employees' claims of misrepresentation where the employees acknowledged they had received a copy of the arbitral rules).

[270] No. 04-CV-2185(JG), 2005 WL 44703, at *1 (E.D.N.Y. Jan. 11, 2005).

[271] *Id.* at *1-3.

[272] *Id.* at *3.

[273] *Id.* at *1, 4-5.

District of New York disagreed, noting that the employee's status as a manager gave her access to the handbook, and that her failure to read it would not excuse enforcement.[274]

These cases taken together seem to suggest a fairly simple rule. If an employee is denied access to the rules governing arbitration, then the employee cannot "consent" to arbitration under those rules. However, if an employee has access to arbitration rules but fails to take advantage of that access (by requesting a copy of the rules, or reading them), then the employee has consented and will be held bound.

*5. The "Knowing and Voluntary" Standard*

The federal circuits are split on whether a "knowing and voluntary" standard should be applied to agreements to arbitrate statutory employment claims.[275] This standard has its genesis in *Prudential Insurance Company of America v. Lai*,[276] in which the Ninth Circuit refused to enforce an employment arbitration agreement that was not knowingly entered into by the aggrieved employee because the agreement did not specify that it applied either to employment or to discrimination claims.[277] Subsequent decisions attributed to *Lai* a "knowing and voluntary" requirement, based on the legislative history cited by the *Lai* court in support of its holding.[278] In *Nelson v. Cyprus Bagdad Copper Corp.*,[279] the Ninth Circuit noted in dicta that the waiver of a judicial forum "may have to be both voluntary and knowing."[280] The Sixth Circuit has expressly adopted the standard,[281] the First[282] and Seventh[283] Circuits have

---

[274] *Id.* at *5.

[275] Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1216-18 (2002).

[276] 42 F.3d 1299 (9th Cir. 1994).

[277] *Id.* at 1305.

[278] *See, e.g.*, Halligan v. Piper Jaffray, 148 F.3d 197, 203 (2d Cir. 1998).

[279] 119 F.3d 756 (9th Cir. 1997).

[280] *Id.* at 761 n.10.

[281] *See, e.g.*, Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (listing five factors which courts should evaluate in determining whether a plaintiff has knowingly and voluntarily waived her right to pursue employment claims in federal court).

[282] Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 143 (1st Cir. 1998) (holding that a plaintiff could be compelled to arbitrate statutory claims "where the plaintiff had *voluntarily* signed an agreement requiring arbitration" (emphasis added)).

endorsed the standard without necessarily adopting it (though the Seventh Circuit subsequently qualified that endorsement),[284] and the Third[285] and Eighth[286] Circuits have expressly rejected it.

Issues concerning the "knowing" part of the standard are addressed above under notice and consent. The "voluntary" part of the standard creates more trouble. Few would doubt that an average employee presented by her employer with an employment arbitration agreement on a "take-it-or-be-fired" basis faces substantial economic pressure to sign the agreement.[287] Some courts have concluded from this that pre-dispute employment arbitration agreements are not voluntary and therefore are unenforceable.[288] However, employees must accept on a "take-it-or-be-fired" basis a substantial number of other employment terms, such as rate-of-pay and work-hours.[289] A court that refuses to enforce arbitration agreements but not other terms or conditions of employment on the ground that economic coercion makes the agreements involuntary runs afoul of the *Allied-Bruce*[290] admonition that state law must treat arbitration agreements no worse than other contractual agreements. If "voluntary" means "free from economic pressure," then the voluntariness requirement is preempted by the FAA; if "voluntary" means something less, then it is probably addressed adequately by the notice and consent requirements discussed above.

### *C. Unilateral Modification*

A large number of recent cases deal with the enforceability of employment arbitration agreements between an employer and an at-will employee that contain a clause giving the employer the unilateral right to modify the agreement at any time. Most courts have refused to enforce such clauses, though for different reasons.

---

[283] Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) (stressing "the advantage of arbitration agreements that are the product of an employee's knowing and voluntary consent").

[284] Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 761 (7th Cir. 2001) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)),

[285] Seus v. John Nuveen & Co., 146 F.3d 175, 183-84 (3d Cir. 1998).

[286] *See* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997).

[287] *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WISC. L. REV. 33, 58 (1997).

[288] *See, e.g.*, Melena v. Anheuser-Busch, Inc., 816 N.E.2d 826, 833-34 (Ill. App. 2004); *see also* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (holding that pre-dispute arbitration agreement was procedurally unconscionable because it was a prerequisite for employment).

[289] LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 638 (2d ed. 2005).

[290] 513 U.S. 265 (1995); *see also* Sawyer, *supra* note 60.

Some courts have noted that unilateral-modification clauses would give employers the right to alter the rules of arbitration after a dispute has arisen, perhaps even in the middle of an arbitral hearing.[291] Other courts have reasoned that since the employer has retained "an unlimited right to decide later the nature or extent of [its] performance,"[292] the employer's promise is indefinite and therefore unenforceable.[293]

By far the vast majority of courts, however, have cited lack of consideration as the rationale for refusing to enforce employment arbitration agreements containing unilateral modification clauses. For example, in *Hill v. PeopleSoft USA, Inc.*,[294] the employer expressly reserved "the right to make changes and adjustments to" its Internal Dispute Solution program (which included arbitration) "without notice."[295] The United States District Court for the District of Maryland held that the employer's reservation of the right to change its policy at any time without notice "create[d] no real promise to arbitrate," and therefore lacked "sufficient consideration to constitute an enforceable agreement."[296] Many other courts, interpreting similar unilateral-modification clauses, have ruled identically.[297]

The Third Circuit, however, appears to have held that unilateral-modification clauses are enforceable. In *Blair v. Scott Specialty Gases*,[298] an employee signed an arbitration agreement providing that the employer "can change this Handbook, and the change must be in writing. If [the employer]

---

[291] *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 939 (4th Cir. 1999) (refusing to enforce arbitration agreement that gave employer the unilateral right to modify arbitral procedures; "[n]othing in the rules even prohibits [the employer] from changing the rules in the middle of an arbitration proceeding").

[292] 1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed. 1957).

[293] Dumais v. American Golf Corp., 299 F.3d 1216, 1219-20 (10th Cir. 2002) (holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is indefinite, illusory, and unenforceable); Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315-16 (6th Cir. 2000) (same).

[294] 333 F. Supp. 2d 398 (D. Md. 2004), *vacated*, 412 F.3d 540 (4th Cir. 2005).

[295] *Id.* at 405.

[296] *Id.*

[297] *See, e.g.*, Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 379, 385-86 (6th Cir. 2005); Kai v. Asia Source, Inc., No. CIV.A.304CV1188M, 2004 WL 2545006, at *2 (N.D. Tex. Nov. 4, 2004); Saylor v. Wilkes, 613 S.E.2d 914, 922-3 (W. Va. 2005); Piano v. Premier Distrib. Co., 107 P.3d 11, 15-17 (N.M. Ct. App. 2004); Cheek v. United Healthcare, 835 A.2d 656, 662-63 (Md. 2003); *see also* Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1261 (9th Cir. 2005) (arbitration agreement containing unilateral-modification clause is substantively unconscionable).

[298] 283 F.3d 595 (3d Cir. 2002).

makes any material changes, it will give me a copy of them, and by remaining employed by [the employer] thereafter I will be deemed to have accepted these changes."[299]

The Third Circuit interpreted this provision as permitting the employer to make only "non-material" changes to the arbitration agreement.[300] The plain language of the agreement, however, indicates otherwise. The agreement expressly states that "material changes" must be given to the employee.[301] The preceding sentence, however, (the "writing" sentence) is not so limited, indicating that the employer can make non-material changes as well, only these changes (which must be in writing) need not be given to the employee.[302] Moreover, the unilateral nature of the employer's right to modify the agreement is further underscored by the "deemed . . . accepted" sentence, which effectively makes the employer's modification effective immediately. Thus, because the employer retained the unilateral and immediate right to modify the entire arbitration agreement and was required to provide the employee with notice only as to "material" modifications, this case is properly understood as inconsistent with the majority rule that the employer's retention of a unilateral right to modify an employer's arbitration agreement with an at-will employee renders that agreement unenforceable for lack of consideration.

The persistence of unilateral-modification clauses in the face of near-universal judicial disapproval is rather curious given how easy courts have made it to avoid the consideration problem. Two courts, for example, including the Sixth Circuit, have held that an employer's promise to provide thirty days written notice of any modification is sufficient consideration to support an arbitration agreement.[303] The Texas Supreme Court has held that a notice requirement, plus an employer's promise that modifications would not apply retroactively, is sufficient consideration.[304] Moreover, an employer can avoid the consideration problem altogether by including in an arbitration agreement a reciprocal promise to arbitrate[305] or a binding promise to give the employee some other type of benefit, such as a term contract or a monetary bonus.

---

[299] *Id.* at 604.

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 667-68 (6th Cir. 2003); Holloman v. Circuit City Stores, Inc., 873 A.2d 1261, 1265 (Md. Ct. Spec. App. 2005).

[304] *In re* Halliburton Co., 80 S.W.3d 566, 569-70 (Tex. 2002).

[305] *See, e.g.*, J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 228 (Tex. 2003).

*D. Non-Reciprocal Obligations*

Another contract-formation issue concerns the enforceability of arbitration agreements that apply to employee claims against the employer but not to employer claims against the employee, or that require arbitration of claims brought by employees against employers but allow employers to choose whether to arbitrate or litigate their claims against employees. Some courts have held that such non-reciprocal arbitration agreements are unenforceable for lack of mutuality.[306] For example, in *Gibson v. Neighborhood Health Clinics, Inc.*,[307] the Seventh Circuit noted that the arbitration agreement at issue was "worded entirely in terms of [the employee's] obligation to submit her claims to arbitration (using phrases such as 'I agree' 'I understand' 'I am waiving')"; because it contained no promise by the employer, it lacked consideration.[308]

Other courts, however, have held that mutuality is not required so long as the employer has provided the employee with some other type of consideration.[309] For example, in *Circuit City Stores, Inc. v. Najd*,[310] the Ninth

---

[306] *See, e.g.*, Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1108 (9th Cir. 2003) (even where arbitration clause requires both parties to arbitrate, because the possibility of the employer initiating an action against the employee is "so remote," arbitration clauses are unenforceable unless employer can show the arbitration clause is "bilateral" (quoting Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1174-75 (9th Cir. 2003))); Zimmer v. Cooperneff Advisors, Inc., No. 04-3816, 2004 WL 2933979, at *8 (E.D. Pa. Dec. 20, 2004) ("By giving [the employer] the exclusive right to choose between judicial action or arbitration in intellectual property disputes, yet forcing [the employee] to arbitrate all of his claims, the arbitration agreement is presumed to be unconscionable."); *see also* Lytle v. Citifinancial Servs., Inc., 810 A.2d 643, 665 (Pa. Super. Ct. 2002) ("[T]he reservation by [one party] of access to the courts for itself to the exclusion of the consumer creates a presumption of unconscionability, which in the absence of 'business realities' that *compel* inclusion of such a provision in an arbitration provision, renders the arbitration provision unconscionable and unenforceable under Pennsylvania law."); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (2002) (in arbitration agreement between credit card company and credit card consumers, a "mutual" ban on arbitral class actions was presumptively unconscionable because "it is difficult to envision the circumstances under which the provision might negatively impact [the bank], because credit card companies typically do not sue their customers in class action lawsuits").

[307] 121 F.3d 1126 (7th Cir. 1997).

[308] *Id.* at 1131; *see also* Harmon v. Phillip Morris, Inc., 697 N.E.2d 270, 272 (Ohio Ct. App. 1997) (finding no consideration where arbitration agreement required employees to arbitrate claims against the employer but not vice-versa).

[309] *See, e.g.*, Oblix, Inc. v. Winiecki, 374 F.3d 488, 490-91 (7th Cir. 2004) (employer's failure to promise to arbitrate its claims against employee "is neither here nor there" because employee's promise to arbitrate her claims against employer was supported by other consideration); Batory v. Sears, Roebuck & Co., No. CV-02-2026-EHC, 2005 WL 434457, at *3 (9th Cir. Feb. 25, 2005) (holding that employer's promise to arbitrate claims brought by

Circuit held that an employer's "promise to be bound by the arbitration process itself" is adequate consideration to support the employee's promise to arbitrate his claims; it was irrelevant that the employer did not promise to arbitrate its own claims against employee.[311]

As with unilateral-modification clauses, mutuality problems are easy to avoid. The easiest way to ensure mutuality is to make the arbitration promises

---

employee provided sufficient consideration for employee's promise to arbitrate his claims; it was irrelevant that employer did not promise to arbitrate its own claims against employee); Harris v. Green Tree Fin. Corp., 183 F.3d 173, 180 (3d Cir. 1999) (arbitration agreement is enforceable where one party had option of litigating in court but other party was required to arbitrate); Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 451-53 (2d Cir.1995) (mutuality of obligation or remedy not required to enforce arbitration agreement if underlying contract is supported by consideration); Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 168-69 (6th Cir. 1989) (rejecting claim that arbitration clause is an independent contract that requires separate consideration to be enforceable); Raasch v. NCR Corp., 254 F. Supp. 2d 847, 856-57 (S.D. Ohio 2003) (mutuality satisfied where both parties agree to be bound to the terms of any dispute that is contractually required to be submitted to the arbitrator; mutuality does not require that parties agree to arbitrate all disputes); Dorsey v. H.C.P. Sales, Inc., 46 F. Supp. 2d 804, 806-07 (N.D. Ill. 1999) (arbitration clause is enforceable despite lack of identical obligations); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1421-22 (M.D. Ala.1997) (rejecting claim that arbitration clause that required one party to arbitrate all claims, while giving the second party the option not to arbitrate anything was invalid); Smith v. Sanderson Group, Inc., 736 So. 2d 604, 612-13 (Ala. 1999) (rejecting claim that arbitration clause is unenforceable due to lack of mutuality of remedy); Parker v. Green Tree Fin. Corp., 730 So. 2d 168, 170-71 (Ala. 1999) (same); Lackey v. Green Tree Fin. Corp., 498 S.E.2d 898, 904 (S.C. Ct. App. 1998) (holding that mutuality of obligation existed because consideration flowed to each contracting party); *see also* Pate v. Melvin Williams Manufactured Homes, Inc., 198 B.R. 841, 844 (Bankr. S.D. Ga. 1996) (rejecting argument that arbitration agreement lacked mutuality because defendant company could sue over certain issues, while consumer had to arbitrate all claims); Conseco Finance Servicing Corp. v. Wilder, 47 S.W.3d 335, 343 (Ky. Ct. App. 2001) (holding that a consumer arbitration agreement was enforceable despite a clause specifying that it applied only to claims brought by the consumer against the company, and not vice-versa); Ishmael v. Dutch Housing Inc., No. 96AP100084, 1997 Ohio App. LEXIS 3974, at *4-6 (Ohio Ct. App. 1997) (rejecting consumer's argument that company's exclusion from requirement to arbitrate certain issues made arbitration clause unenforceable).

Professor Rau explains this view cogently:

> [T]here is absolutely nothing . . . that requires us to look for mutual promises to arbitrate – nothing that prevents us from "borrowing" the consideration that sustains the overall agreement for use in upholding the arbitration clause as well. This, too, is hornbook law: A lease's "one-sided option" to renew is, after all, supported by consideration in the form of the lessee's payment of rent for the principal term.

Rau, *supra* note 4, at 76 (citing 2 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 5.12 (rev. ed. 1995)).

[310] 294 F.3d 1104 (9th Cir. 2002).

[311] *Id.* at 1108.

reciprocal: both the employer and the employee agree to arbitrate any legal claims that one has against the other.[312] Additionally, the mutuality problem may be avoided by making arbitration part of a larger contract, in which the employer provides some other type of consideration, such as a pay increase or a term contract.[313] Such a contract would make it far easier for employers to get cases out of court and into arbitration, since under the Supreme Court's separability doctrine employees would not be able to challenge in court contract-formation issues related to the contract as a whole.

*E. Consideration*

As discussed above in Parts IV.C and IV.D, many courts have cited lack of consideration as a basis for refusing to enforce employment arbitration agreements that give the employer the unilateral right to modify the agreement and/or when the arbitration agreement applies only to employee claims. Some of these courts focus on the nature of at-will employment. Ordinarily, an employer may modify the terms of at-will employment (such as the rate of pay or scheduled work hours) at any time, so long as the employer notifies the employee.[314] If the employee continues to work, she is deemed to have "accepted" the modified employment terms; the employer's promise to continue paying the employee's salary constitutes sufficient consideration to support the modified terms.[315]

In some contexts, however, courts have found that the promises underlying at-will employment are insufficient consideration to support a major change in the employment relationship. A traditional example is the non-compete agreement. Some courts have held that continued at-will employment cannot

---

[312] *See, e.g.*, Dantz v. American Apple Group, LLC, No. 03-4128, 2005 WL 465253, at *5 (6th Cir. March 1, 2005) (finding consideration present where both employer and employee agreed to arbitrate claims against each other); Cooper v. MRM Invest. Co., 367 F.3d 493, 505 (6th Cir. 2004) (bilaterality satisfied where arbitration agreement required both parties to arbitrate); Blair v. Scott Specialty Gasses, 283 F.3d 595, 603-04 (3d Cir. 2002) (consideration satisfied where both parties agreed to arbitrate employment disputes and to be bound by the arbitral decision); Collie v. Wehr Dissolution Corp., 345 F. Supp. 2d 555, 559 (M.D.N.C. 2004) (consideration satisfied where both parties agreed to arbitrate employment disputes); Kinko's, Inc. v. Payne, 901 So. 2d 354, 356 (Fla. Dist. Ct. App. 2005) (same).

[313] *See, e.g.*, Stenzel v. Dell, Inc., 870 A.2d 133, 143-44 (Maine 2005) (holding that arbitration clause between consumer and computer company was enforceable even though consumer – not computer company – was required to submit claims to arbitration; underlying contract for sale of computers was supported by consideration in the form of the computer company's delivery of computer).

[314] *See, e.g.*, Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986).

[315] *Id.*

serve as consideration for a non-compete agreement[316] because the employer's "promise" of continued employment is nullified by the at-will employer's right to fire the employee at any time.[317]

Some courts apply the same analysis to arbitration agreements. For example, in *J.M. Davidson, Inc. v. Webster*,[318] an employer sought to enforce an arbitration agreement against an at-will employee. An employment manual reserved for the employer "the right to unilaterally abolish or modify any personnel policy without prior notice."[319] The Texas Supreme Court reasoned that if this language permitted the employer to nullify the arbitration agreement, its employees would have received nothing of value in exchange for their unconditional promises to arbitrate disputes.[320] The Court remanded the case, directing the trial court to determine whether the "personnel policy" language covered the arbitration agreement so that it could be amended unilaterally.[321] If the trial court found that arbitration was a "personnel policy," then the arbitration agreement would be unenforceable for lack of consideration.[322]

A contrasting case is *Oblix, Inc. v. Winiecki*.[323] The arbitration agreement in this case required the employee to arbitrate her claims against the employer, but not vice-versa. [324] When the employer sought to enforce the arbitration agreement, the employee argued that the lack of mutuality rendered the arbitration agreement unenforceable.[325] The United States Circuit Court for the Seventh Circuit, in an opinion authored by Judge Frank Easterbrook, disagreed. Finding that the employee's salary was sufficient consideration to support the

---

[316] *See, e.g.*, Labriola v. Pollard Group, Inc., 100 P.3d 791, 794-95 (Wash. 2004); Poole v. Incentives Unlimited, Inc., 525 S.E.2d 898, 900 (S.C. Ct. App. 1999); TMC Worldwide, Inc. v. Gray, No. 01-04-00624-CV, 2005 WL 1251078, at *6 (Tex. App. May 26, 2005); *cf.* Lake Land Employment Group of Akron, LLC, v. Columber, 804 N.E.2d 27, 31-32 (Ohio 2004) (finding that continued employment alone was sufficient consideration to support a noncompetition agreement between an employer and an employee); Open Magnetic Imaging, Inc. v. Nieves-Garcia, 826 So. 2d 415, 417-18 (Fla. Dist. Ct. App. 2002); Research & Trading Corp. v. Powell, 468 A.2d 1301, 1305 (Del. Ch. 1983) ("[O]ur courts have held that continued employment of an employee whose position is terminable at will constitutes sufficient consideration to support an enforceable contract.").

[317] *See* 31-W Insulation Co., Inc. v. Dickey, 144 S.W.3d 153, 158 (Tex. App. 2004).

[318] 128 S.W.3d 223 (Tex. 2003).

[319] *Id.* at 229.

[320] *Id.*

[321] *Id.* at 232.

[322] *Id.*

[323] 374 F.3d 488, 490-91 (7th Cir. 2004).

[324] *Id.*

[325] *Id.* at 490.

arbitration agreement, the court noted that the employer "paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution."[326] Other courts have similarly held that continued at-will employment provides sufficient consideration for an employment arbitration agreement.[327]

A related argument advanced by the employee in *Oblix* was that the arbitration agreement was unenforceable because it was not bargained-for – the employer presented the agreement to her on a take-it-or-be-fired basis.[328] Under California law (which applied to the case due to a choice-of-law provision in the arbitration agreement),[329] such an agreement is procedurally unconscionable, and both California courts and the Ninth Circuit have consistently refused to enforce arbitration agreements on this basis.[330] However, Judge Easterbrook enforced the arbitration agreement notwithstanding the California rule. He wrote:

> It is hard to see how the arbitration clause is any more suspect, or any less enforceable, than the others – or, for that matter, than her salary. A person who accepts a "non-negotiable" offer of $50,000 salary would be laughed out of court if she filed suit for an extra $10,000, contending that the employer's refusal to negotiate made the deal "unconscionable" and entitled her to better terms. Well, arbitration was as much a part of this deal as [the employee's] salary and commissions, the rules about handling trade secrets, and other terms. All stand or fall together.[331]

Moreover, Judge Easterbrook noted, California courts "routinely enforce[] limited warranties and other terms found in form contracts."[332] A state rule permitting enforcement of these non-negotiable clauses, while restricting enforcement of non-negotiable arbitration clauses, would be preempted by the

---

[326] *Id.* at 491.

[327] *See, e.g.*, Tinder v. Pinkerton Security, 305 F.3d 728, 734-35 (7th Cir. 2002); *see also* Batory v. Sears, Roebuck & Co., No. 03-15661, 2005 WL 434457, at *3 (9th Cir. Feb. 25, 2005) (finding that consideration exists when the employer merely agrees to be bound by the arbitral decision).

[328] *Oblix*, 374 F.3d at 490-91.

[329] *Id.* at 489.

[330] *See* Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 784 (9th Cir. 2002); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002).

[331] *Oblix*, 374 F.3d at 491.

[332] *Id.* at 491-92 (citations omitted).

FAA.[333] Thus, the Seventh Circuit enforced the arbitration agreement notwithstanding the inability of the employee to bargain over it.[334]

Several courts have recently considered the issue of whether, in an arbitration agreement otherwise unsupported by consideration, the employer's mere promise to consider an applicant's employment application constitutes sufficient consideration to support the arbitration agreement. So far, courts universally have held that it does not.[335] As with the mutuality and reciprocity issues discussed above, consideration issues are easily avoided, either by making the arbitration promises reciprocal or by providing some other type of consideration, such as a pay increase or term contract.[336] The latter option would enable employers to invoke the Supreme Court's separability doctrine to prevent employees from challenging in court contract-formation issues related to the entire employment contract.

## V. GUIDELINES FOR DRAFTING ENFORCEABLE ARBITRATION AGREEMENTS

State law governing contract-formation varies considerably from state-to-state. Consequently, there is variation in how that law is applied to employment arbitration agreements; courts applying different state law to the same arbitration agreement may legitimately reach different conclusions regarding whether the agreement is enforceable. Most employers wanting to implement an employment arbitration program, however, want to ensure that their program is enforceable, often in multiple states. Employers can avoid most contract-formation problems by adhering to the following guidelines.

---

[333] *Id.* at 492.

[334] *Id.*; *see also* Caley v. Gulfstream Aerospace Corp., 333 F. Supp. 2d 1367, 1377 (N.D. Ga. 2004) (finding sufficient consideration to enforce unilaterally-implemented arbitration clause over employees' objection that they had no opportunity to bargain over its terms).

[335] Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 380-81 (6th Cir. 2005); Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 1001-02 (S.D. Ind. 2001); Saylor v. Wilkes, 613 S.E.2d 914, 923-24 (W. Va. 2005); *see also* Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 760-61 (7th Cir. 2001) (holding that there was no consideration for the employee's arbitration agreement, and noting that "the defendants provide no evidence that any Indiana court has ever held that a mere promise to consider an application for employment would provide consideration for a separate contract").

[336] *See, e.g.*, Stenzel v. Dell, Inc., 870 A.2d 133, 143-44 (Maine 2005) (holding that arbitration clause between consumer and computer company was enforceable even though consumer – not computer company – was required to submit claims to arbitration; underlying contract for sale of computers was supported by consideration in the form of the computer company's delivery of computer).

First, the employer should provide employees with a clearly-drafted arbitration agreement that delineates the types of claims that are and are not arbitrable. Second, employers should provide employees with sufficient time to read the agreement (and perhaps to consult an attorney) before signing the agreement, to avoid employees later claiming that they were unduly pressured into signing an agreement which they were not given an adequate opportunity to read or understand. Third, the employer should provide something to employees in return for the employees' signing of the arbitration agreement, such as a reciprocal promise to arbitrate or some other form of consideration (whether this is a fair bargain is an issue I leave for another day). Finally, the employer should obtain from each employee a signed acknowledgment stating that the employee has received and read the arbitration agreement and that she understands and agrees to it.[337] Although the FAA does not require a signed acknowledgment form as a precondition to enforcing an arbitration agreement, obtaining such a form will make it much easier for the employer to demonstrate the employee's notice of and consent to arbitration.

Most employers that, to date, have implemented company-wide employment arbitration policies have carefully avoided any contractual language that might be interpreted as altering the at-will employment status of employees. However, the Supreme Court's separability doctrine,[338] and recent lower-court applications of that doctrine,[339] suggests that employers might consider an alternative strategy. Under the separability doctrine, a party to a

---

[337] *See, e.g.*, Pennington v. Frisch's Rest., Inc., No. 04-4541, 2005 WL 1432759, at *2-4 (6th Cir. June 17, 2005) (enforcing employment arbitration agreements where employees signed a form acknowledging that they had "received, read, and underst[ood]" the agreements).

[338] Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 403-04 (1967).

[339] *See, e.g.*, Nagrampa v. Mailcoups, Inc., 401 F.3d 1024, 1029 (9th Cir. 2005) (considering an arbitration clause in a franchise agreement, and holding that the issue of whether the contract was adhesive was an issue pertaining to the contract as a whole and therefore for arbitrator to decide, but that issues concerning notice and cost were issues pertaining specifically to the arbitration clause and therefore were appropriately addressed by the court); Rojas v. TK Communications, Inc., 87 F.3d 745, 749 (5th Cir. 1996) (claims of adhesion address contract as a whole and therefore should be decided by arbitrators); JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 170 (2d Cir. 2004) ("According to the principle announced in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the issue of whether the [parties' agreement] – as opposed to the arbitration clause alone – is a contract of adhesion is itself an arbitrable matter not properly considered by a court." (citation omitted)); Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483, 492 n.3 (6th Cir. 2001) ("an additional claim of Plaintiffs, that the arbitration agreements are unenforceable because they were contained in contracts of adhesion, also does not concern the making of the arbitration agreements because the claim does not attack the arbitration clause, separate from the underlying loan agreements").

broad contract containing an arbitration clause may not challenge the enforceability of the broader contract in court, but instead must present such a challenge to an arbitrator; only challenges directed specifically at the arbitration clause may be made in court. This doctrine removes from judicial determination many of the contract-formation issues discussed in this article. The doctrine does not apply to stand-alone employment arbitration agreements, because by definition they are not contained in a broader employment contract. However, an employer could obtain the benefit of the separability doctrine by making the arbitration clause a part of a broader employment contract – perhaps a term-contract, or a contract that included a just-cause provision. No doubt most employers would prefer to retain at-will employment at any cost. Some employers, however, might be willing to provide employees with some level of job security in return for keeping an even wider spectrum of employment claims out of the courts. I leave for another day a discussion of the normative (de)merits of such a trade-off.

## VI. CONCLUSION

The FAA permits courts to revoke arbitration agreements on grounds that would support "revocation of any contract," thus preserving a role for state contract law on arbitral contract-formation issues. The Supreme Court's preemption and separability doctrines, however, have constricted the role of state law somewhat: state contract law cannot single out arbitration agreements for unfavorable treatment, and courts may only consider enforceability issues directed specifically at arbitration clauses rather than to broader contracts as a whole. Although significant open issues remain concerning the scope of these doctrines, there remains, for now, considerable room to apply the state law of contract-formation to employment arbitration agreements.

Because state law governing contract-formation varies considerably from state to state, there is a corresponding variation on how that law is applied to employment arbitration agreements. This article has examined five issues that are often raised in contract-formation challenges to the enforceability of employment arbitration agreements: notice, consent, the employer's retention of a right unilaterally to modify the agreement, non-reciprocal obligations, and consideration. As a general rule, courts will enforce employment arbitration agreements when the employer (1) provides employees with a clearly-drafted arbitration agreement, (2) provides employees with sufficient time to read the agreement (and perhaps to consult an attorney) before signing the agreement, (3) provides something to the employee in return for the employee's signing of the arbitration agreement, such as a reciprocal promise to arbitrate or some other form of consideration, and (4) obtains from the employee a signed

acknowledgment stating that the employee has received and read the arbitration agreement and that she understands and agrees to it.