RECENT DEVELOPMENTS IN ARBITRATION:

Articles from the Conference Presented by the Center on Civil Justice at NYU School of Law

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CENTER ON CIVIL JUSTICE

RECENT DEVELOPMENTS IN ARBITRATION

Disputes traditionally resolved in our courts are increasingly being resolved in alternative ways. These alternative resolutions are now routinely accomplished through arbitration. NYU's Center on Civil Justice has taken an interest in this development and the legal consequences that result.

As a part of the Center's examination of the prominence of arbitration in resolving today's legal problems, it collaborated to hold a conference with the Center for Transnational Litigation, Arbitration, and Commercial Law at NYU School of Law, as well as the Center for International Commercial & Investment Arbitration at Columbia Law School. The conference, held on November 12, 2022, featured five panels discussing topics that included: gateway issues related to arbitration; due process issues that may arise from arbitration; developments in international arbitration; developments in consumer and employment arbitration; and third-party funding of arbitration. Each panel discussed a paper that was in development at the time. The Center on Civil Justice publishes each of those papers here. We are grateful for the efforts of the authors.

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Gateway and Non-Gateway Issues in The Enforcement of Agreements to Arbitrate

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I. INTRODUCTION

Of ongoing concern in the US law of arbitration, domestic and international alike, is the proper role of courts vis-à-vis arbitral tribunals in determining the enforceability of agreements to arbitrate. What has emerged from decisions of the US Supreme Court over the years is the notion that some issues upon which the enforceability of an arbitration agreement depends are proper for judicial determination at the outset, while others are not. The former, commonly known as "gateway" issues, are ones as to which parties are entitled to an independent judicial determination if they so wish, though they are at liberty to leave the matter to initial arbitral determination if that is their preference. The latter, known, for lack of a better term as "non-gateway" issues, are ones upon which the enforceability of an arbitration agreement likewise depends, but which courts ordinarily decline to address, leaving them for decision by the tribunal. The difference is that gateway issues are viewed as implicating the very consent of the parties to arbitrate their disputes, whereas non-gateway issues presume consent to arbitrate but present circumstances in which enforcement of the agreement would be inopportune.[1] Complicating matters somewhat is the Supreme Court's habit of referring to gateway issues as issues of "arbitrability," even though that is not how that term is understood elsewhere in the world. Arbitrability elsewhere strictly denotes the legal capacity of a given claim or dispute to be arbitrated.[2]

Gateway issues take various forms. They include the question of whether an agreement to arbitrate was ever validly formed,[3] whether—if formed—a non-signatory is bound by it,[4] and whether—if formed and valid—it encompasses

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[1] *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415, 1419 (2019); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 299 (2010); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U. S. 662, 684 (2010); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

[2] The general understanding of arbitrability internationally is the legal capacity of a category of claims to be arbitrated. See George A. Bermann, *Arbitration Trouble*, 23 Am. Rev. Int'l Arb. 367, 369 (2012).

[3] *See, e.g., Painewebber v. Elahi*, 87 F.3d 589 (1st Cir. 1996).

[4] *See, e.g., GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA*, LLC, 140 S.Ct. 1637 (2020).

the dispute at hand.[5] The premise is that, unless these conditions are met, a party cannot be considered as having consented to arbitrate, in which case its right to a judicial forum remains intact.[6] Non-gateway issues likewise take a variety of forms. Each raises the possibility that, while the parties may have agreed to arbitrate the dispute at hand, the dispute nevertheless ought not be arbitrated. An obvious non-gateway issue is the timeliness of a request to compel arbitration of a dispute.[7] Although the defendant may have consented to arbitrate the dispute, the plaintiff may have waited too long in triggering the obligation to arbitrate. The same may be said of a requirement that certain conditions precedent be met prior to initiating arbitration.[8]

There are two other questions that, at least in theory, amount to non-gateway issues. One is whether, although a valid arbitration agreement has been formed and covers the claim at hand, the claim has already been fully adjudicated and the decision enjoys *res judicata* effect. Finally, although an agreement to arbitrate has validly been formed and covers the dispute, the party invoking the agreement may be found, by word or deed, to have waived its right to arbitrate, in which case the agreement will not be enforced. Again, the defendant consented to arbitrate, but the plaintiff committed an act or omission indicating that it gave up its right to arbitrate.

It should not be supposed that the determination of gateway issues is reserved to courts. It is not. Gateway issues are ones that a party may raise in court but is just as free to allow an arbitral tribunal to decide in the first instance.

II. DELEGATION OF GATEWAY ISSUES

Notwithstanding the apparently sharp distinction between consent-based and non-consent-based objections to the enforcement of an agreement to arbitrate, the Supreme Court has ruled that parties are at liberty, if they wish, to withdraw from courts the entitlement they would otherwise have to adjudicate gateway

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[5] *See, e.g., Tracer Rsch. Corp. v. Nat'l Env't Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994).

[6] *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

[7] *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 77 (2002).

[8] S*ee, e.g., BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014).

issues. The explanation for that option lies in the notion of party autonomy, which is so central to the very idea of arbitration. In the leading case of *First Options of Chicago, Inc. v. Kaplan*, the brokerage house, First Options, initiated arbitration against a couple, Mr. and Mrs. Kaplan, on the basis of an arbitration agreement entered into by their wholly owned company and not by them.[9] The tribunal rejected their jurisdictional objection, at which point they proceeded to participate in the arbitration under protest. Losing on the merits, they then sought to annul the resulting award.

When the case reached the Supreme Court, the Court found that the Kaplans, due to the importance of consent, were presumptively entitled to a *de novo* determination of whether they were bound by the arbitration agreement. They could not be deprived of that right unless, in an exercise of party autonomy, they had "clearly and unmistakably" agreed to "delegate" the question of their consent to the tribunal, which the Court found they had not done. Absent clear and unmistakable evidence to the contrary, the Kaplans retained their right to an independent judicial determination of the enforceability of an arbitration agreement on gateway grounds. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. . . . [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[10] The Court, exercising that independent review, found that they had not consented to arbitrate the dispute and proceeded to order that the award be annulled.

In *First Options*, the question whether non-signatories were bound to arbitrate came before a court only on a post-award basis, in an action to set aside the award. However, in point of fact, in most of the decided cases, the question whether a party ever agreed to arbitrate is raised in the context of a motion to compel arbitration—i.e., prior to arbitration even getting underway.

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[9] 514 U.S. 938, 941 (1995).

[10] *Id.* at 944-945 (citations omitted). The Court cited in support of this proposition its prior rulings in *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U. S. 574, 583 n.7 (1960).

III. KOMPETENZ-KOMPETENZ IN INSTITUTIONAL RULES

The Court in *First Options* did not indicate what would establish a sufficiently clear and unmistakable intention to delegate to an arbitral tribunal the question of consent to arbitrate. In most of the cases, parties argued that they had given clear and unmistakable evidence of a delegation by incorporating by reference in their arbitration agreement a set of procedural rules that in turn contained a so-called a "*Kompetenz-Kompetenz*."[11] clause. A *Kompetenz-Kompetenz* clause is a provision expressly stating that an arbitral tribunal has jurisdiction to determine its own jurisdiction if called into question.[12]

The federal district courts were initially in disagreement over whether the presence of a *Kompetenz-Kompetenz* clause found in institutional rules incorporated by reference into an agreement to arbitrate qualified as clear and unmistakable evidence of a delegation. However, every US Court of Appeals that has addressed the matter has held that parties' incorporation by reference of such a provision in their arbitration agreement does in fact clearly and unmistakably signify an intention on their part to vest in an arbitral tribunal primary authority to determine whether the parties had agreed to arbitrate the dispute at hand.[13] Unfortunately, none of those decisions offers any serious reasoning in support of the notion that, if the parties vest authority in tribunals to determine their own jurisdiction, they necessarily divest courts of the power to make that determination. The decision of the Eighth Circuit in the case of *FSC Sec. Corp. v. Freel* is typical. The Court said nothing more than the following:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure. . . . [W]e hold that the parties'

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[11] *See generally* C. Ryan Reetz, *The Limits of the Competence-Competence Doctrine in United States Courts*, 5 Disp. Resol. Int'l 5 (2011).

[12] *See* Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style, in* International Arbitration and International Commercial Law: Synergy, Convergence and Evolution 162 (Stefan Kröll et al. eds., 2011); Joseph L. Franco, Note, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 442, 469-70 (2006).

[13] *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) ("[C]onsider that every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'").

> adoption of this provision is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators.[14]

No other Court of Appeals has done any better. They all simply assume that, if arbitrators have authority to determine arbitral jurisdiction, then the courts necessarily do not have that authority.[15] A good number of federal appellate courts do nothing more than "join" the views of other Courts of Appeal to that effect. In *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, for example, the Fifth Circuit simply said that:

> [w]e agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.[16]

IV. DELEGATION IN THE SUPREME COURT

It was not long before the Supreme Court was called upon to opine on the matter. The first case to raise the issue was *Henry Schein, Inc. v. Archer and White Sales, Inc.* The Court granted certiorari in that case, not on the central question here, namely, whether incorporated rules of procedure containing a *Kompetenz-Kompetenz* constitute clear and unmistakable evidence within the meaning of *First Options*, but rather on whether, assuming a valid delegation had been made, a court could nevertheless avoid referring the case to arbitration on the ground that the particular challenge to arbitrability being advanced was "wholly groundless."[17] The Court in *Schein* ruled unanimously that no such "wholly

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[14] *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994).

[15] *See, e.g., Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) ("We see no reason to deviate from the prevailing view that incorporation of the UNCITRAL arbitration rules is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability."); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006) ("We agree with the Second Circuit's analysis . . . and likewise conclude that the 2001 Agreement, which incorporates the AAA Rules . . . clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator.").

[16] *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

[17] *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 527-28 (2019).

groundless" exception exists.[18]

Even though the question of the existence or nonexistence of a delegation was not before the Court in *Schein*, several Court members expressed some doubt whether the incorporation of institutional rules containing a *Kompetenz-Kompetenz* clause did in itself amount to a delegation within the meaning of *First Options* in the first place. Justice Ruth Bader Ginsburg began by asking counsel why conferral on a tribunal of authority to determine arbitral jurisdiction necessarily divested courts of that authority:

> But clear—clear and unmistakable delegation, why can't it be both; that is, that the arbitrator has this authority to decide questions of arbitrability, but it is not exclusive of the court? We have one brief saying that that is indeed the position that the Restatement has taken.
> . . . .
> When . . . the model case is this Court's [*Rent-A-Center*] decision, and there the—the clause said the arbitrator, not the court, has exclusive authority. And here we—we're missing both the arbitrator, to the exclusion of the court, and the arbitrator has exclusive authority.[19]

Similarly, Justice Elena Kagan inquired:

> *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.[20]

Justice Stephen Breyer observed:

> [S]o you say step 1. Is there clear and unmistakable evidence that an

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[18] *Id.*

[19] Transcript of Oral Argument at 7, 18, *Schein*, 139 S. Ct. 524 (2019) (No. 17-1272) [hereinafter O.A. Tr.].

[20] *Id.* at 17.

> arbitrator is to decide whether a particular matter X is arbitrable? Is that right?
> . . . .
> Step 1 is we have to decide . . . whether there is a clear and unmistakable commitment to have this kind of matter decided in arbitration.[21]

Justice Neil Gorsuch in turn asked:

> [T]here's just maybe a really good argument that clear and unmistakable proof doesn't exist in this case of—of a desire to go to arbitration and have the arbitrator decide arbitrability?[22]

Moreover, in his opinion for the Court remanding the case to the Fifth Circuit, Justice Brett Kavanaugh specifically asked that court to address the question whether the "clear and unmistakable" evidence test in *First Options* had been met.[23]

In fact, the Fifth Circuit on remand did not reconsider that question. Rather, it simply referred back to its prior decision in the case of *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, finding that incorporation in an arbitration agreement of the AAA Rules which contain a *Kompetenz-Kompetenz* clause suffices to establish the required clear and unmistakable evidence."[24] The Court then declined to refer the parties to arbitration on the ground that the claim in question fell within a "carve-out" to the arbitration agreement so that the agreement was simply inapplicable.[25] The Supreme Court granted certiorari on the question of who—court or tribunal—decides whether a dispute does or does not fall within a carve-out. However, after oral argument, the Court dismissed the case on the ground that certiorari had been improvidently granted.[26]

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[21] *Id.* at 20, 24.

[22] *Id.* at 42.

[23] *Schein*, 139 S. Ct. at 531 (citations omitted).

[24] *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 279 (5th Cir. 2019) (citing *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)).

[25] *Archer and White Sales*, 935 F.3d at 281-82.

[26] Writ of Certiorari, *Schein*, 141 S.Ct. 107 (2021) (No. 19-963) (per curiam).

It is unfortunate that the Supreme Court has failed to take up the question of whether a *Kompetenz-Kompetenz* clause in institutional rules constitutes clear and unmistakable evidence of a delegation because the position taken by the Courts of Appeals in these cases is an untenable one. This is so for several independent reasons. First, and most basic, the way for parties to make a delegation clear and unmistakable is to do so in the arbitration agreement itself, not in appended rules of arbitral procedure. Second, simply as a matter of logic, the fact that tribunals may determine their own jurisdiction does not mean that they, and they alone, have that authority. Third, attaching this meaning to the notion of *Kompetenz-Kompetenz* amounts to thoroughly redefining that term as it is understood in US law. Fourth, to posit that a provision as standard, indeed ubiquitous, as *Kompetenz-Kompetenz* in institutional rules establishes clear and unmistakable evidence of a delegation is effectively to reverse the strong presumption that the Supreme Court was at pains to establish in *First Options*, namely that parties are entitled to an independent judicial determination of their consent to arbitrate unless they clearly and unmistakably indicate otherwise.

The following sections take up each of these arguments in turn.

V. INCORPORATION BY REFERENCE

Parties wishing to make it clear for all to see that they have abandoned their right to an independent judicial determination of arbitral jurisdiction under *First Options* would so state directly in their agreement to arbitrate, not bury it in rules of arbitral procedure that few will have studied at the time an arbitration agreement is concluded. It is simple to clearly and unmistakably manifest an intent to delegate if one wishes to. One need do nothing more, for example, than state directly in the arbitration clause that authority to determine arbitral jurisdiction is "exclusively" or simply "primarily" for the arbitrators to determine. That is what the parties had done in *Rent-A-Center, West, Inc. v. Jackson*, the only earlier case in which the Supreme Court has faced a delegation clause,[27] and what any party would do if genuinely committed to making a delegation clear and unmistakable. What they would not do is relegate the delegation to a document that is not only incorporated by reference but that the parties or

[27] *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010).

their counsel simply cannot be expected to study, or even read, at the time the main contract is concluded. Attention is drawn to institutional rules of arbitral procedure, particularly when merely incorporated by reference, only years later when a dispute arises and an arbitration is initiated. Therefore, even were it "clear," a delegation so situated can scarcely be said to be "unmistakable." In fact, as shown below, it is not "clear" either.

VI. THE MEANING OF *KOMPETENZ-KOMPETENZ*

The discussion thus far has focused only on where in a contract a delegation should be placed if it is to be considered clear and unmistakable. But what does it take for a delegation, wherever placed, to be clear and unmistakable as such? The notion that a statement of *Kompetenz-Kompetenz* clearly and unmistakably signifies a delegation is simply untenable. To begin with, a *Kompetenz-Kompetenz* clause does nothing more than enable a tribunal to determine its own jurisdiction if it is challenged. This unquestionably vests authority in an arbitral tribunal to determine its own jurisdiction.[28] The relevant procedural rule in the *Schein* case—Rule 7 of the AAA Commercial Arbitration Rules—is illustrative:

> The arbitrator tribunal shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement(s).[29]

A provision authorizing tribunals to determine their own competence does not also have to divest courts of that competence in order to have value and meaning. If tribunals could not determine their own jurisdiction when challenged, they would arguably be required to suspend proceedings during the pendency of a judicial proceeding to make that determination, with evident disadvantages in terms of speed and economy which are among arbitration's presumed virtues. There is nothing in the least implausible about giving parties the option of raising jurisdictional issues in the first instance, either to a court or a tribunal. A party choosing to raise those issues initially before a tribunal

[28] Gary B. Born, International Commercial Arbitration 1141 (3d ed. 2021).

[29] Am. Arb. Ass'n (AAA), Commercial Arbitration Rules R-7 (Oct. 1, 2013).

knows that, thanks to *Kompetenz-Kompetenz*, the tribunal enjoys authority to decide them.

In sum, not only is a delegation "mistakable" when placed in a set of rules incorporated by reference in an arbitration clause, but it is also "unclear" when sought to be couched in terms of *Kompetenz-Kompetenz*. It is not difficult to make a delegation clear and unmistakable. All one need do is to make the jurisdiction of a tribunal to determine jurisdiction exclusive, which is precisely what the parties, as noted, did in the *Rent-A-Center* case.[30] They expressed that intention in the arbitration agreement itself, rather than in a set of referenced procedural rules, doing so in an admirably straightforward manner, stating that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement including, but not limited to any claim that all or any part of this [Arbitration] Agreement is void or voidable."[31] That is why no one in *Rent-A-Center* even questioned whether a delegation had been made. They questioned only its validity. That a *Kompetenz-Kompetenz* clause, wherever placed, does not make a delegation clear and unmistakable was evident to a good number of federal district courts. One federal district court, in a circuit that has not yet ruled on the issue, could not see matters any other way:

> It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to "clear and unmistakable" evidence that the contracting parties agreed to . . . preclude a court from answering them. To the contrary, that seems anything but 'clear.' . . . The AAA rule simply says that the arbitrator has the authority to decide these questions. It does not say that the arbitrator has the sole authority, the exclusive authority, or anything like that. The language of the rule does not suggest a delegation of authority; at most it indicates that the arbitrator possesses authority, which is not the same as an agreement by the

[30] *Rent-A-Center, W., Inc.*, 561 U.S. at 66.

[31] *Id.* (emphasis added).

parties to give him sole authority to decide those issues.[32]

Another federal district court, in reluctantly following the view of the Court of Appeals that a *Kompetenz-Kompetenz* clause in and of itself clearly and unmistakably signifies a delegation, could not resist condemning it as "incongruous," "ridiculous," and "bordering on the absurd."[33] State courts as well have seen the light.[34]

The only sensible reason that any federal appellate court has given for considering that a *Kompetenz-Kompetenz* provision in incorporated procedural rules constitutes clear and unmistakable evidence of a delegation is that the institution whose rules were invoked in that case—namely, the AAA—had so intended when amending Rule 7 to read as it does today.[35] But what matters is not what the rule drafters may have thought they were doing, but what they did and what reasonable readers of the rule would have understood them to have done.

VII. *KOMPETENZ-KOMPETENZ* IN US LAW

In point of fact, *Kompetenz-Kompetenz* has never been thought of in the US as doing anything more than confer on tribunals authority to determine their

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[32] *Taylor v. Samsung Elecs. Am., Inc.*, No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020).

[33] *Ashworth v. Five Guys Operations, LLC*, No. 3:16-06646, 2016 WL 7422679, at *3 (S.D. W. Va. Dec. 22, 2016).

[34] *See Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 782-83 (Cal. Ct. App. 2012) (citations omitted):

> The "clear and unmistakable" test reflects a "heightened standard" of proof. That is because the question of who would decide the unconscionability of an arbitration provision is not one that the parties would likely focus upon in contracting, and the default expectancy is that the court would decide the matter. Thus . . . a contract's silence or ambiguity about the arbitrator's power in this regard cannot satisfy the clear and unmistakable evidence standard.
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> . . . .
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> Appellants . . . point[] primarily to . . . the arbitration provision['s] . . . proviso that arbitration may be conducted according to the rules of the AAA (under which an arbitrator has the power to determine the validity of an arbitration agreement). [Appellee] disagrees with appellants' arguments . . . [Appellee] – and the trial court—have it right.

[35] *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 849 (6th Cir. 2020).

jurisdiction, without more.[36] Before the current line of cases in the federal appellate courts, no one had maintained that *Kompetenz-Kompetenz* deprived courts of authority to determine arbitral jurisdiction if asked to do so.[37] Indeed, ascribing that meaning to *Kompetenz-Kompetenz* is wholly inconsistent with the basic instruments of US arbitration law. US courts are instructed by the Federal Arbitration Act (FAA) to compel arbitration only if they are "satisfied that the making of the agreement for arbitration . . . [was] not in issue."[38] That role is flatly inconsistent with the notion that courts may not make independent determinations of the enforceability of agreements to arbitrate. The New York Convention is plainly to the same effect, inasmuch as Article II expressly authorizes courts to decline to compel arbitration if they find the arbitration agreement in question to be "null and void, inoperative or incapable of being performed."[39] It would be impossible for courts to perform these functions if *Kompetenz-Kompetenz*, which has been part of US law for an extremely long time, negated judicial authority to determine arbitral jurisdiction.

This is not to say that *Kompetenz-Kompetenz* cannot be defined differently, because it is in fact defined differently in certain other jurisdictions. The best and most influential example is France. All French authorities agree that in that country's legal system, *Kompetenz-Kompetenz* both empowers tribunals and disempowers courts to determine arbitral jurisdiction at the outset of proceedings. They posit, literally, that *Kompetenz-Kompetenz* has both a "positive" and a "negative" dimension,[40] such that, prior to arbitration, courts may not question the validity or applicability of an arbitration agreement

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[36] Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 Pepp. L. Rev. 17, 25 (2014) (explaining that U.S. law does not "even contemplat[e] negative kompetenz-kompetenz"); William Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules* 16, (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Paper No. 15-40, 2015) ("[C]ourts will provide early decisions on the validity of a dispute resolution clause alleged to be *void ab initio* because, for instance, the person signing the contract lacked authority to commit the company sought to be bound."); *see also* Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, in International Arbitration and International Commercial Law: Synergy, Convergence and Evolution 157 (Stefan Kröll et al. eds., 2011).

[37] James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. Int'l Dispute Settlement 3, 15-20 (2010)

[38] Federal Arbitration Act, 9 U.S.C. § 4 (emphasis added).

[39] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1968, 21 U.S.T. 2517, 330 U.N.T.S. 38 (emphasis added). *See also* 9 U.S.C. § 201.

and decline to enforce it on invalidity or inapplicability grounds.[41] The only exception is the circumstance in which a court finds an arbitration agreement to be "manifestly void or manifestly not applicable,"[42] which is an extremely high standard and seldom satisfied.

In sum, wherever it may be placed in an arbitration agreement (i.e., whether or not relegated to procedural rules incorporated by reference), *Kompetenz-Kompetenz* in US law does not deprive courts of authority, when asked, to determine the arbitrability of a dispute prior to arbitration, and certainly does not do so "clearly and unmistakably." Its meaning does not change merely by virtue of its incorporation into a set of procedural rules. This should put to rest any notion that placement of a *Kompetenz-Kompetenz* clause in incorporated rules of arbitral procedure meets the *First Options* standard for a delegation.

VIII. THE EXCEPTION BECOMES THE RULE

In *First Options*, the Supreme Court posited two closely related fundamental principles of arbitration. First, parties may not be compelled to arbitrate disputes without their consent and, second, they are presumptively entitled to an independent judicial decision on the question of consent, should they request it. That presumption may be overcome only by clear and unmistakable evidence that they forfeited those rights. The Court itself subjected the finding of a delegation to a "heightened standard,"[43] by which parties do not lose those rights unless what they said or did can be understood no other way. *First Options* itself stated that finding a delegation too readily "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[44] As Justice Kagan put the matter in *Schein*, "[In *First Options*] we said we're not going to treat these delegation clauses in exactly

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[40] *See generally* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators, in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

[41] Born, *supra* note 28, at 1161.

[42] Code De Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1448 (Fr.).

[43] *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

[44] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

the same way as we treat other clauses. … [W]e're going to hold parties to this higher standard, the clear and unmistakable intent standard."[45]

Yet, under prevailing federal case law, this presumption has now been radically reversed. Indisputably, *Kompetenz-Kompetenz* provisions are ubiquitous, to be found in the vast majority of modern institutional rules of procedure as well as in the UNCITRAL Rules of Arbitration.[46] They are also found in virtually every modern arbitration law world-wide, including the UNCITRAL Model Law, which has even been enacted by several US states.[47] The practical result under the case law of the federal Courts of Appeal is that, in the vast majority of cases, parties no longer have a right to an independent determination of arbitral jurisdiction. Parties need do nothing more than subscribe to a standard arbitration agreement in order to lose the rights that *First Options* emphatically gave them. This simply cannot be what the Supreme Court in that decision intended.

Worse yet, delegations operate not only in actions to enforce an arbitration agreement—i.e. prior to arbitration—but also in post-award actions for annulment of an award (as was the case in *First Options* itself) or for the award's enforcement. According to the Restatement, in order to be overturned, a tribunal's finding of arbitral jurisdiction must be "baseless,"[48] resting this conclusion on the Supreme Court's ruling in the case of *Oxford Health Plans LLC v. Sutter*.[49]

Thus, in point of fact, at no time over an arbitration's life cycle will parties have access to the independent judicial determination that the Supreme Court in *First Options* promised them over the all-important question of consent and, more particularly, whether an arbitration agreement exists, is valid, is applicable

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[45] *O.A. Tr.*, *supra* note 19, at 17.

[46] Thus, Article 23(1) of the UNCITRAL Arbitration Rules (2013) similarly provides that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." G.A. Res. 68/109 (Dec. 16, 2013).

[47] U.N. Comm'n on Int'l Trade L. (UNCITRAL), Model Law on International Commercial Arbitration, art. 16(1), U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2006).

[48] Restatement of the L., U.S. L. of Int'l Com. and Inv.-State Arb. § 4.12, reporters' note e (Am. L. Inst., Proposed Final Draft No. 623, 2019) [hereinafter *Restatement*].

[49] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

to a non-signatory or encompasses the dispute at hand.[50] This is a far more serious consequence than can be justified by the mere presence of a *Kompetenz-Kompetenz* provision in perfectly standard rules of arbitral procedure. Ironically, even in France, where courts have virtually no role in ensuring that a party consented to arbitrate before being compelled to arbitrate, the review of arbitral jurisdiction that they conduct in post-award actions is fully *de novo*.[51]

IX. THE RESTATEMENT AND ACADEMIC COMMENTARY

The federal case law described in this article has also come in for harsh criticism among commentators. Typical is one scholar's assessment of it as "unwise and unlikely to have been intended by parties when they opt for institutional arbitration,"[52] and indeed as "startling" and "misguided."[53] Unfortunately, his call for the Supreme Court "to correct this error" has gone unheeded.[54] The question was also squarely presented to the American Law Institute in its consideration of the recently adopted Restatement of the US Law of International Commercial and Investor-State Arbitration. The Reporters, the ALI Council, and the ALI membership at large focused seriously on the question and concluded that treating the incorporation by reference of Kompetenz-Kompetenz language in sets of arbitral rules into an arbitration agreement as clear and unmistakable evidence of a delegation was unsustainable.[55]

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[50] *See Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 65-67 (D.D.C. 2013).

[51] Ina C. Popova et al., France, in The European Arbitration Review 29-30 (2020).

[52] *Id.*

[53] John J. Barceló III, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View 23* (Cornell L. Sch., Legal Studies Rsch. Paper No. 17-40, 2017) [hereinafter Barceló, *Kompetenz-Kompetenz and Its Negative Effect*]; *see also* John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 Vand. J. Transnat'l L. 1115, 1133 (2003); *see generally* Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict Has To Be Negative,* 2009 Austrian Arb. Y.B. on Int'l Arb. 237.

[54] Barceló, *Kompetenz-Kompetenz and Its Negative Effect, supra* note 53, at 23.

[55] *Restatement, supra* note 48, § 2.8, art. b, reporter's note b(iii).

II. CONCLUSION

The willingness of the federal courts to treat incorporation by reference in an arbitration agreement of procedural rules containing a *Kompetenz-Kompetenz* clause as if it were "clear and unmistakable" evidence of a delegation, within the meaning of *First Options*, is a highly deleterious development for arbitration in the US. A delegation, so understood, is a withdrawal from parties of the right to an independent judicial determination of the question whether they ever validly agreed to arbitrate a given dispute, a right that the Supreme Court itself clearly and unmistakably guaranteed in *First Options*.

The reasoning of the courts—to the extent they reason—is deeply flawed. Simply as a matter of logic, the fact that arbitrators have authority, pursuant to the doctrine of *Kompetenz-Kompetenz*, to determine arbitral jurisdiction does not mean that courts necessarily do not. This country is not France, which has decided, first by case law and then by legislation, that *Kompetenz-Kompetenz* should be understood not only as empowering tribunals to determine arbitral jurisdiction if challenged ("positive competence-competence"), but also as disempowering courts to do so ("negative competence-competence"), unless it can find that an arbitration agreement is "manifestly invalid or inapplicable."[56] That is how France, not the US, has chosen to define *Kompetenz-Kompetenz*. Neither Congress nor the courts in the US have ever subscribed to that definition. The fact that parties have the privilege of raising jurisdictional objections directly with a tribunal has never meant that they do not have the alternative of instead presenting those objections to a court when asked to compel arbitration. This is clear from the FAA, which requires courts to determine that an arbitration agreement is valid and enforceable, if asked to do so, before referring the parties to arbitration.[57] It is also clear from the New York Convention, to which the US has long been a party, that a court is to refuse enforcement of an arbitration agreement if it finds that agreement to be "null, void, inoperative, or incapable of being informed."[58]

The Court could not have spoken more plainly in *First Options*. It ruled that the right to an independent judicial determination of arbitral jurisdiction

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[56] Code De Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1448 (Fr.).

[57] 9 U.S.C. § 2.

[58] Gaillard & Banifatemi, supra note 40, at 257.

is so fundamental that parties cannot be deemed to have forfeited it unless they make their intention to do so crystal clear.[59] The reason is simple. Consent to arbitrate is essential, not only to arbitral jurisdiction but also to the legitimacy of arbitration itself.

There are simple ways to make such an intention clear and unmistakable. Perhaps the best way would be to state in the arbitration agreement that tribunal authority to determine arbitral jurisdiction is exclusive. The parties did precisely that in *Rent-A-Center*.[60] One way not to do that is to find clear and unmistakable evidence of a delegation in a notion (*Kompetenz-Kompetenz*) that need not be—and in the US is not—understood as a forfeiture of the right that *First Options* so clearly affirmed. Worse yet is the situation, which the vast majority of cases illustrate, in which that supposed expression of consent to a delegation is relegated to a document that is only incorporated by reference, namely procedural rules for an eventual arbitration that parties simply cannot be expected to study before signing an agreement to arbitrate. In other words, the idea that *Kompetenz-Kompetenz* has not only a positive but also a negative dimension is simply unclear and its relegation to incorporated rules of procedure is not unmistakable.

It cannot be doubted that the Court in *First Options* viewed delegations, as defined there, as highly exceptional. Parties had to go very much "out of their way" to produce that result. But the prevailing federal case law turns the Supreme Court's instructions to lower courts on its head. Nor can it be supposed that the deprivation of rights that case law produces at the outset of arbitration can be recovered on a post-award basis. *First Options* itself arose not at the outset of arbitration, but in an action to annul the resulting award.

Clauses signifying *Kompetenz-Kompetenz* have also become ubiquitous. Not a single set of modern arbitration rules fails to include a provision empowering tribunals to determine their own jurisdiction. In other words, parties will virtually always be deemed to have made a delegation and therefore virtually always be deprived of their fundamental right, should they choose to exercise it, to an independent judicial determination of arbitral jurisdiction prior to arbitration. *First Options* has essentially been reversed by the federal appellate courts.

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[59] 514 U.S. 938, 944-45 (1995).

[60] *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010).

Due Process Challenges in Federal Court to the Enforcement of International Commercial Arbitration Awards

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INTRODUCTION

International commercial arbitration is the most important method for resolving transnational business disputes. It is the preferred international mechanism to provide an efficient, neutral, and enforceable dispute settlement process. Although compliance with awards is the norm, when such enforcement is sought, one has the impression that national courts, including United States courts, overwhelmingly enforce international commercial arbitration awards and rarely grant a request to vacate an award. But precisely how often national courts enforce or vacate international commercial arbitration awards, and on what grounds, remains a mystery. Nor is there clarity as to which grounds for challenge are most frequently raised by the parties or accepted by national courts.

Despite the significance of international commercial arbitration, until recently there has been almost no empirical research on national court enforcement of international commercial arbitration awards.[1] Earlier this year, we co-authored an article that presented the most comprehensive empirical study ever published of national court vacatur and enforcement of international commercial awards.[2] The research relied on a subset of the larger database of international arbitration materials published by Wolters Kluwer and available at kluwerarbitration.com. The data set includes all national court decisions relating to the enforcement of international commercial arbitration awards available in the Kluwer database

[1] For a summary of recent quantitative and qualitative surveys and country-specific studies regarding enforcement of international commercial awards, see Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview, in Oxford Handbook on International Arbitration*, 643 (Thomas Schultz & Frederico Ortino, eds. 2020); Roger P. Alford, Julian G. Ku & Bei Xiao, *Perception and Reality: The Enforcement of Foreign Arbitral Awards in China*, 33 UCLA Pacific Basin L.J. 1 (2016); Christopher Drahozal, *The State of Empirical Research on International Commercial Arbitration: Ten Years Later, in The Evolution and Future of International Arbitration: The Next 30 Years* 453 (Kluwer Law International 2016); Christopher Drahozal, Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration, 22 Arb. Int'l 291 (2006); Christopher Drahozal and Richard Naimark, Towards a Science of International Arbitration: Collected Empirical Research (Kluwer Law International 2005).

[2] Roger P. Alford, Crina Baltag, Matthew E.K. Hall & Monique Sasson, *Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards*, 39 J. Int'l Arb. 299 (2022).

that were rendered from January 1, 2010, to June 1, 2020.[3] Within the time parameters of this study, there were 504 vacatur actions and 553 offensive enforcement actions. Those decisions were rendered by national courts in 74 different jurisdictions, with 10 jurisdictions making up over 66 percent of all national court decisions in the data set.[4] The United States was the jurisdiction with the greatest number of national court decisions in the database, totaling just under 13 percent. That is, of the 504 vacatur actions in the database, 32 were from the United States, and of the 553 offensive enforcement actions, 103 were from the United States. Further details on the database and the data collection process are available in our previous article.[5]

This article summarizes the key findings with respect to grounds for challenge in the enforcement and vacatur context, and then addresses specific grounds for challenge related to due process. It begins with an analysis in the enforcement context of global approaches to challenges generally, and due process in particular. This analysis includes results regarding the frequency with which due process grounds are raised in enforcement actions and the likelihood that national courts will accept those challenges. It then examines those same questions within the United States context, analyzing the frequency with which all grounds, and due process grounds in particular, are raised in United States enforcement actions and the likelihood that United States courts will accept those challenges. Third, the article analyzes the global approaches to challenges in the vacatur context, including due process challenges in particular. It includes results regarding the frequency with which due process grounds are raised in vacatur actions and the likelihood that national courts will accept those grounds. Finally, the article addresses those same questions within the context of United

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[3] This database does not include the entire universe of national court decisions relating to the enforcement of international commercial awards during the relevant time period. Rather, it reflects the subjective judgment of the contributors to the database from each country based on a determination that the national court decision is likely to be relevant to the international arbitration community, and specifically the subscribers to the database. Those decisions are reviewed by editors of the database, including three of the four authors of this study. As such, the data set is subject to selection bias inasmuch as some jurisdictions' reporters are more complete and detailed than those of other jurisdictions.

[4] United States (12.81%), Switzerland (12.44%), Spain (9.70%), Germany (7.50%), United Kingdom (5.86%), The Netherlands (4.39%), France (4.12%), Brazil (3.66%), China (3.57%), and Russia (2.47%).

[5] Alford, et. al, *supra* note 2, at 302-06.

States courts, analyzing the frequency with which all grounds, and due process grounds in particular, are raised in vacatur actions within United States courts and the likelihood that United States courts will accept those grounds.

I. DUE PROCESS CHALLENGES IN ENFORCEMENT ACTIONS

A. Global Approaches to Due Process Challenges in Enforcement Actions

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[6] includes several provisions relating to due process. These include: (1) improper notice of the appointment of the arbitrator;[7] (2) improper notice of the arbitration proceedings;[8] (3) inability to present one's case;[9] and (4) the award was contrary to public policy.[10] These are the four most notable examples of due process grounds, although occasionally defendants will raise other issues beyond the grounds set forth in the New York Convention, including (5) the award is not in accordance with the rules of procedure of the territory where the award is relied upon; and (6) various other grounds such as improper service of process. And, of course, some of these grounds are not exclusively related to due process, most notably the public policy grounds for vacatur may encompass other concerns beyond due process. Having coded these grounds for not enforcing the award, we coded whether the national court accepted each of those grounds.

Based on the data set we examined, due process challenges were commonly raised by defendants around the world in offensive enforcement actions. As identified in **Figure 1**, defendants raised the New York Convention grounds for

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[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517 [hereinafter New York Convention].

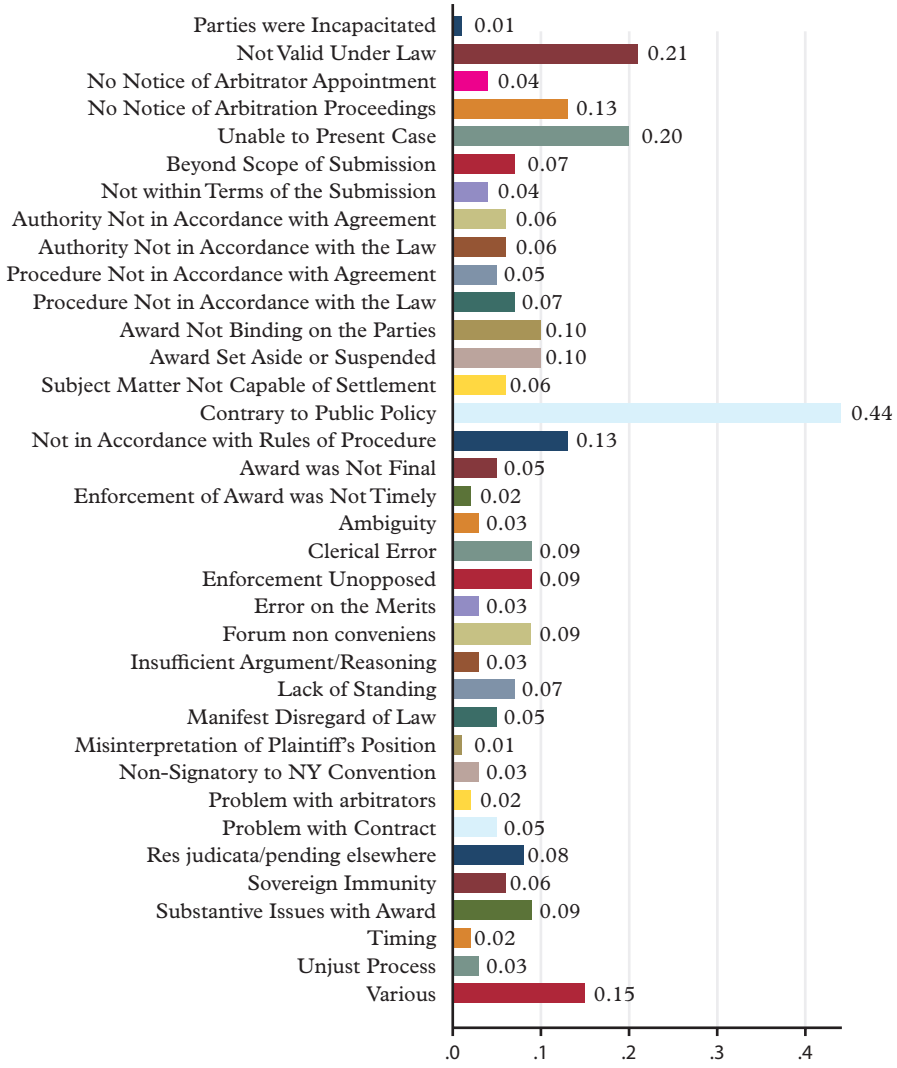
[7] *See id*. art. V(1)(b) ("The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator.").

[8] *See id*. ("The party against whom the award is invoked was not given proper notice … of the arbitration proceedings….").

[9] *See id.* ("The party against whom the award is invoked … was otherwise unable to present his case.").

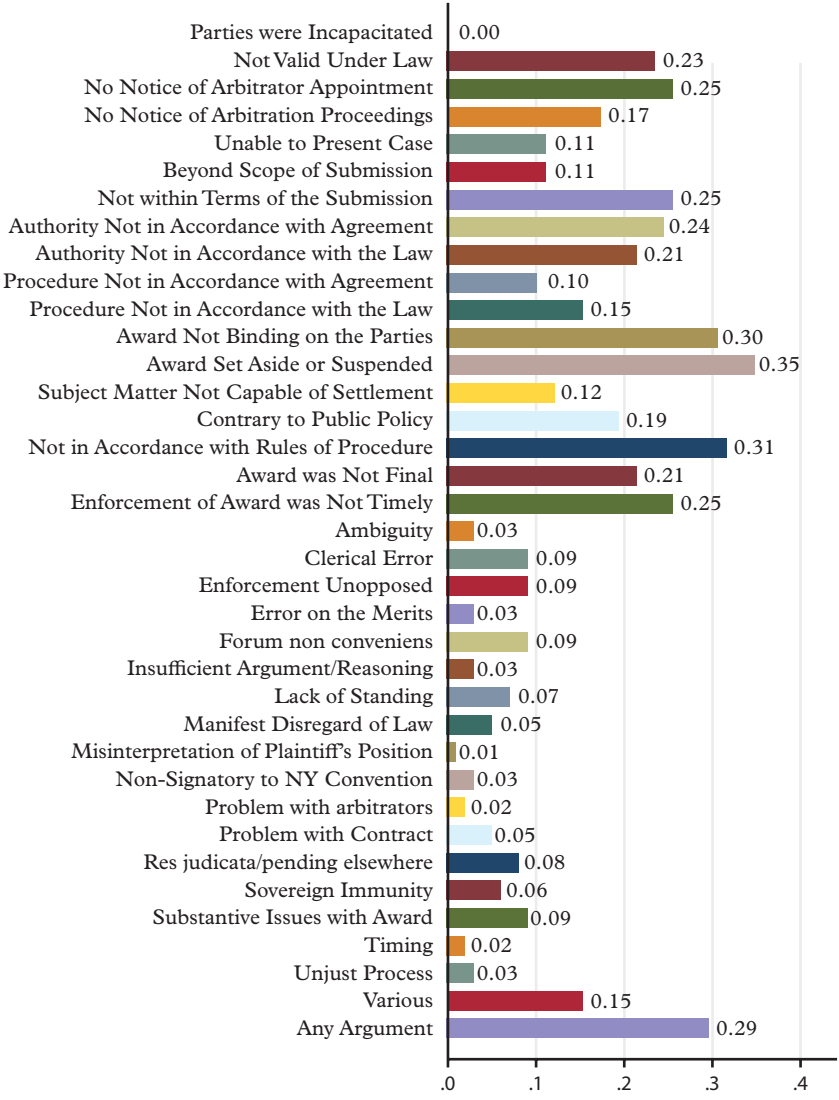
[10] *See id*. art. V(2)(b) ("The recognition or enforcement of the award would be contrary to the public policy of that country.").

Figure 1: Proportion of Offensive Enforcement Actions in which the Defendant Raised Each Type of Argument in All Jurisdictions.



challenge in an enforcement action with varying degrees of frequency. Of the different possible due process grounds for challenge, defendants most frequently raised public policy arguments (44%), the inability to present one's case (20%), no notice of arbitral proceedings (13%), and not in accordance with the rules of

Figure 2: Argument Success Rate by Type of Argument in Offensive Enforcement Actions in All Jurisdictions.



procedure (13%).[11] Other due process challenges were relatively rare, including lack of notice of the arbitrator appointment (4%).

In terms of success, national courts enforced awards 71 percent of the time, and refused to enforce an award on the basis of one or more arguments only 29 percent of the time. **Figure 2** presents the probability of an argument succeeding by the type of argument in offensive enforcement actions. Only three grounds for challenge were successful more than 30 percent of the time: (1) that the award was set aside or suspended (34%); (2) that the award was not in accordance with the rules of procedure (31%); and (3) that the award was not binding on the parties (30%). The three most frequently raised arguments were less successful: Arguments that the award is not valid under the applicable law succeeded 23 percent of the time, public policy arguments succeeded 19 percent of the time, and the inability to present one's case succeeded 11 percent of the time.

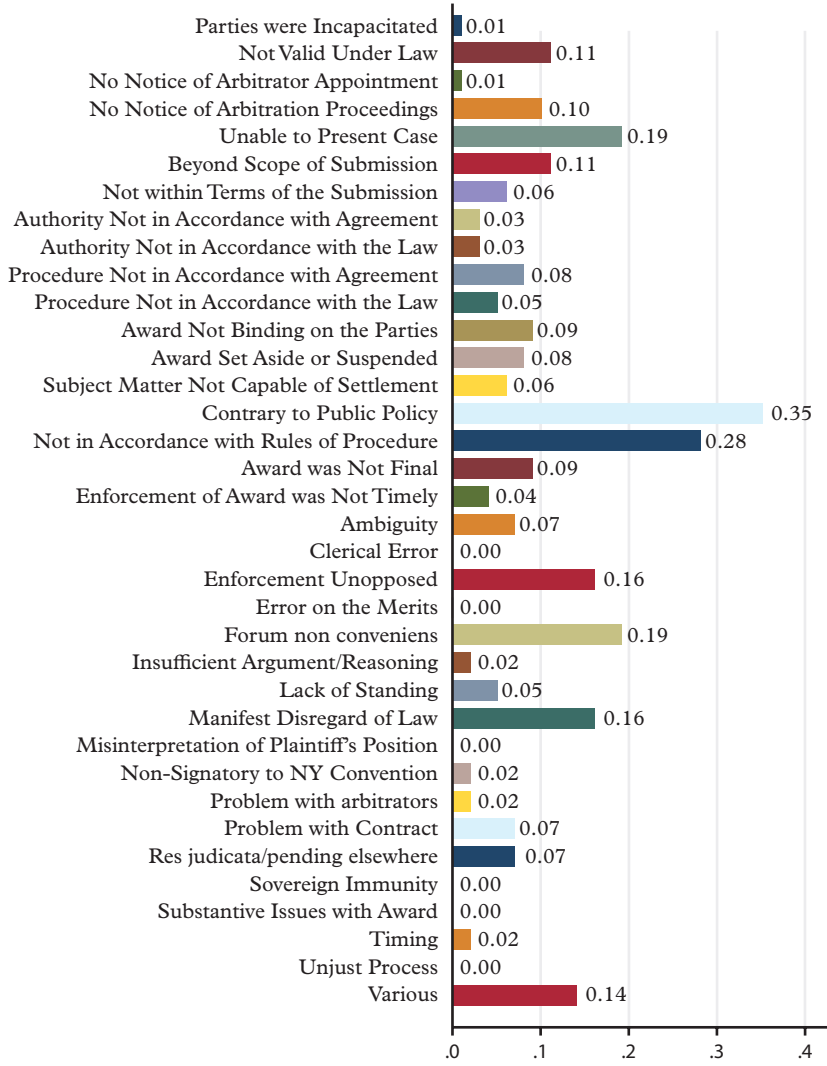
As this figure suggests, due process challenges were successful in varying degrees relative to other grounds for challenge. The success of due process challenges were as follows: (1) the award was not in accordance with rules of procedure (30%); (2) improper notice of arbitrator appointment (25%); (3) the award was contrary to public policy (19%); (4) improper notice of arbitration procedures (17%); (5) and the inability to present one's case (11%).

B. United States Approach to Due Process Challenges in Enforcement Actions

Based on the data set we examined, due process challenges were commonly raised by defendants in United States federal courts in offensive enforcement actions. As identified in **Figure 3**, defendants raised the New York Convention grounds for challenge in an enforcement action in United States federal courts with varying degrees of frequency. Of the different possible due process grounds for challenge, defendants in the United States courts most frequently raised public policy arguments (35%), not in accordance with the rules of procedure (28%), the inability to present one's case (19%) and *forum non conveniens*

[11] Defendants also raised other grounds not set forth in the New York Convention 28 percent of the time. These grounds involve a variety of arguments, including arbitrator misconduct or lack of impartiality, manifest disregard of the law, disputing the merits of the award or error of law, the award was domestic not international, or the award was ambiguous.

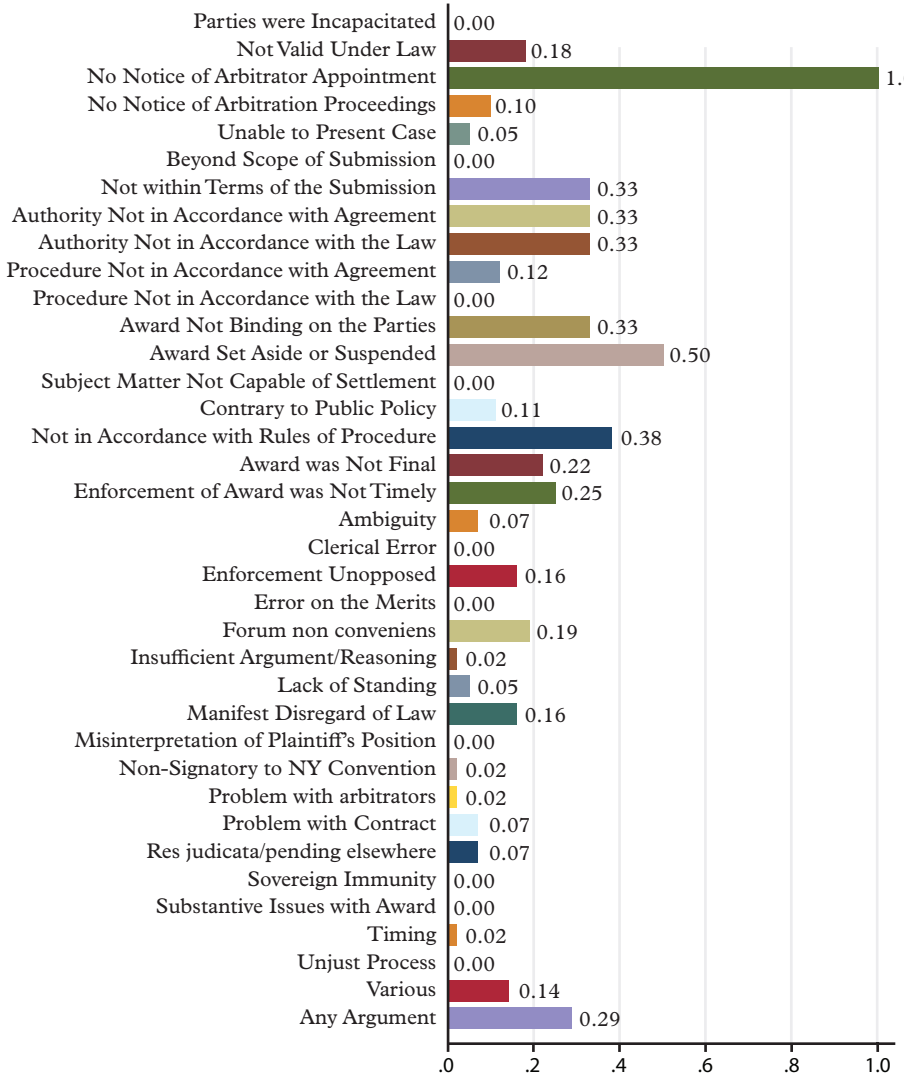
Figure 3: Proportion of Offensive Enforcement Actions in which the Defendant Raised Each Type of Argument in the United States.



(19%). Other due process challenges were relatively rare, including problem with arbitrators (2%), and timing (2%).

In terms of success, United States federal courts enforced awards 71 percent of the time and refused to enforce an award on the basis of one or more arguments 29 percent of the time. **Figure 4** presents the probability of

Figure 4: Argument Success Rate by Type of Argument in Offensive Enforcement Actions in the United States.



an argument succeeding by the type of argument in offensive enforcement actions. Only two grounds for challenge were successful more than 35 percent of the time: (1) award set aside or suspended (50%) and (2) not in accordance with the rules of procedure (38%). (The argument no notice of arbitrator appointment was raised in only one case but was successful in that case.) The

other three most frequently raised arguments were less successful: *forum non conveniens* arguments succeeded 19 percent of the time, public policy arguments succeeded 11 percent of the time, and inability to present one's case arguments succeeded 5 percent of the time.

As this figure suggests, due process challenges in United States federal courts were successful in varying degrees relative to other grounds for challenge. The success of due process challenges were as follows: (1) improper notice of the appointment of the arbitrator (successfully raised once) (100%); (2) the award was not in accordance with the rules of procedure of the territory where the award is relied upon (38%); (3) the award was contrary to public policy (11%); (4) improper notice of the arbitration proceedings (10%); and (5) inability to present one's case (5%).

I. DUE PROCESS CHALLENGES IN VACATUR ACTIONS

A. Global Approaches to Due Process Challenges in Vacatur Actions

The UNCITRAL Model Law on International Commercial Arbitration[12] includes a number of provisions for the vacatur of an award on the basis of due process concerns. They include: (1) improper notice of the appointment of the arbitrator;[13] (2) improper notice of the arbitration proceeding;[14] (3) inability to present one's case;[15] and (4) the award was contrary to public policy.[16] Many countries, including the United States, do not follow the UNCITRAL Model Law, and so we also coded instances in which the defendant raised other issues beyond the grounds set forth in the UNCITRAL Model Law, including: (5) the arbitral award not in accordance with the rules of procedure of the territory where the award was relied upon; (6) improper venue; (7) the arbitral tribunal

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[12] U.N. Comm. on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V4 (2008) [hereinafter UNCITRAL].

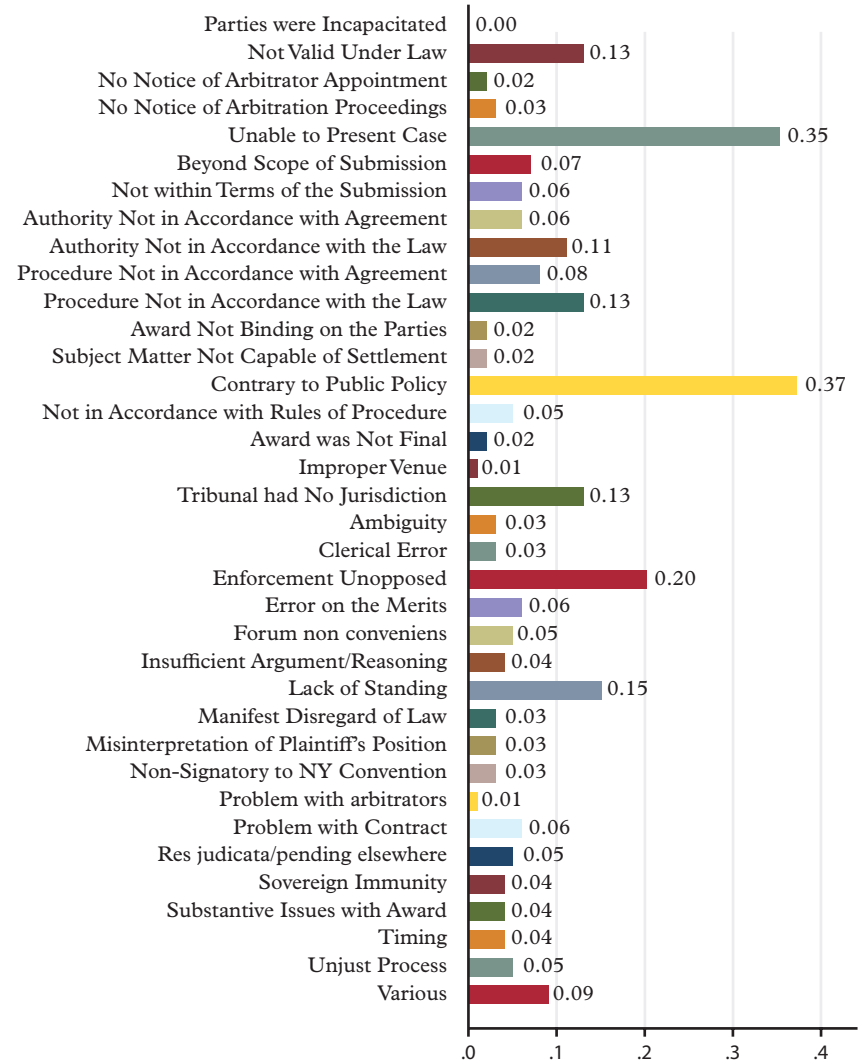
[13] *See id*. art. 34(2)(a)(ii) ("The party making the application was not given proper notice of the appointment of an arbitrator….").

[14] *See id*. ("The party making the application was not given proper notice of the … the arbitration proceedings ….").

[15] *See id*. ("The party making the application … was otherwise unable to present his case…").

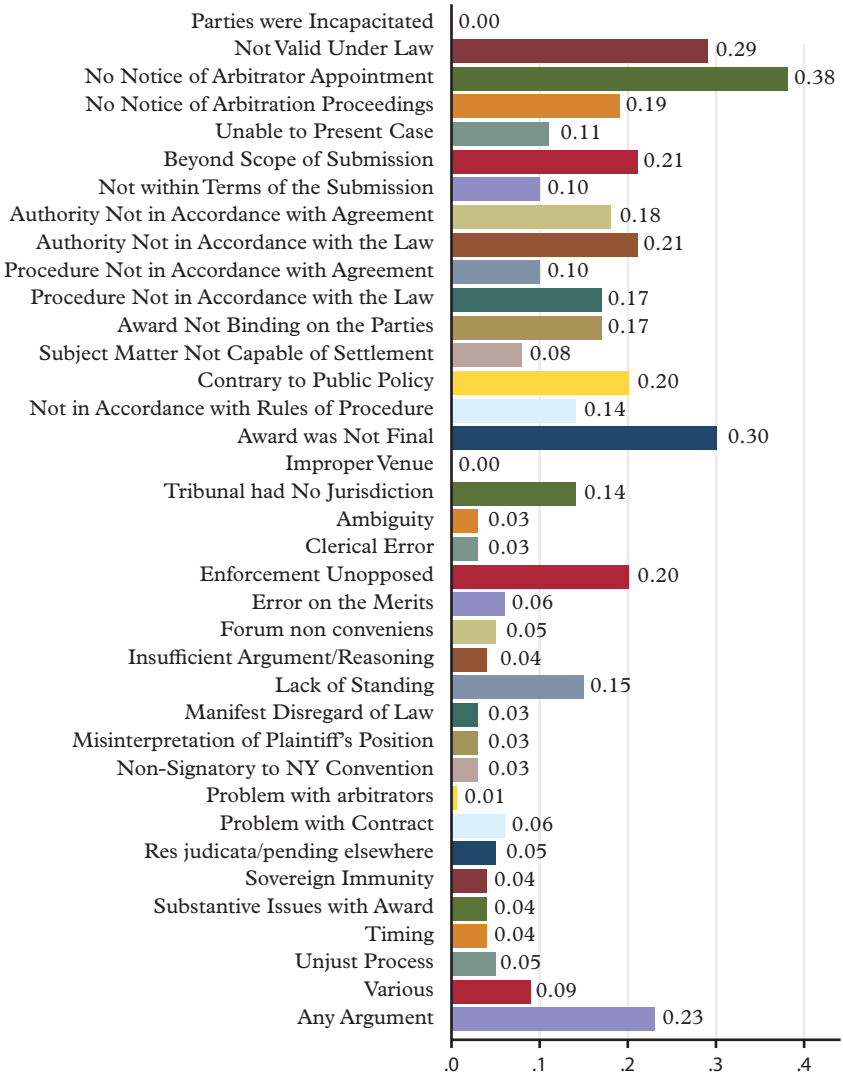
[16] *See id*. art. 34(2)(b)(i) ("the award is in conflict with the public policy of this State.").

Figure 5: Proportion of Vacatur Actions in which the Defendant Raised Each Type of Argument in All Jurisdictions.



had no jurisdiction; and (8) various other grounds such as arbitrator misconduct or lack of impartiality, manifest disregard of the law, disputing the merits of the award or error of law, the award was domestic not international, or the award was ambiguous. Of course, some of these grounds are not exclusively related to due process, most notably the public policy grounds for vacatur may encompass

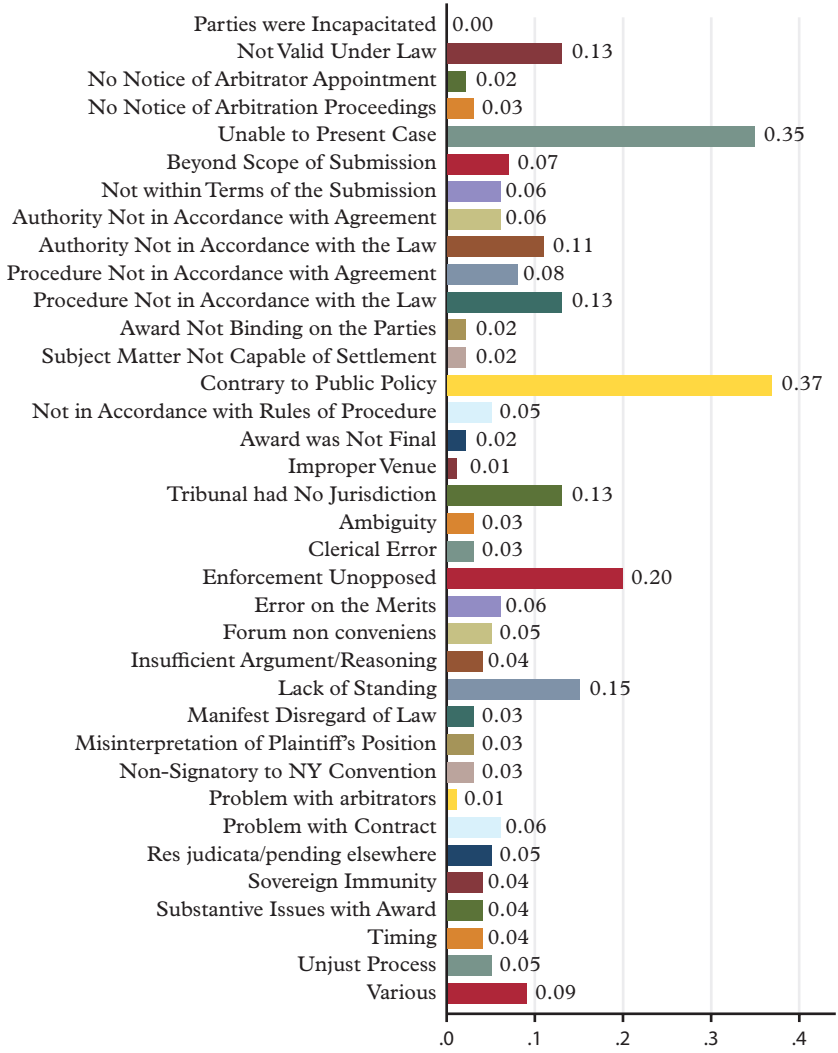
Figure 6: Argument Success Rate by Argument Type in Vacatur Actions in All Jurisdictions.



other concerns beyond due process. Having identified these separate grounds for vacating the award, we coded whether the national court accepted each of those grounds.

As identified in **Figure 5**, plaintiffs raised due process grounds for vacatur

Figure 7: Proportion of Vacatur Actions in which the Defendant Raised Each Type of Argument in the United States.



with varying degrees of frequency. Of the different possible due process grounds for challenge, plaintiffs most frequently raised public policy arguments (37%); the inability to present one's case (35%); and (3) procedure not in accordance with the law (13%). The other due process grounds for vacatur were raised with

less frequency, including (4) award not in accordance with rules of procedure (5%); (5) improper notice of arbitration proceedings (3%); and (6) improper notice of arbitrator appointment (2%).[17]

In terms of success, national courts vacated an award 23 percent of the time, and refused to vacate the award in 77 percent of cases. **Figure 6** presents the probability of an argument succeeding by the type of argument in vacatur actions. Only three grounds for challenge were successful more than 30 percent of the time: (1) that there was no notice of the arbitrator appointment (38%); (2) that the award was not final (30%); and (3) that the award is not valid under the applicable law (29%). The two most frequently raised arguments in vacatur actions were not as successful: arguments that the award violated public policy was successful 20 percent of the time, and the inability to present one's case succeeded in 11 percent of cases.

As this figure suggests, due process challenges were successful in varying degrees relative to other grounds for vacatur. The success of due process vacatur challenges were as follows: (1) improper notice of arbitrator appointment (38%); (2) contrary to public policy (20%); (3) improper notice of arbitrator proceedings (19%); (4) procedure not in accordance with the law (17%); and (5) the inability to present one's case (11%).

B. United States Approach to Due Process Challenges in Vacatur Actions

Based on the data set we examined, due process challenges were commonly raised by plaintiffs in United States federal courts in vacatur actions. As identified in **Figure 5**, plaintiffs raised grounds for challenge in vacatur actions in United States federal courts with varying degrees of frequency. Of the different possible grounds for challenge, plaintiffs in the United States courts most frequently raised public policy arguments (37%), the inability to present one's case (35%), and the award was not valid under law (16%). Other due process challenges were relatively rare, including improper notice of arbitration proceedings (3%),

[17] Plaintiffs also raised other grounds for vacatur not set forth in the UNCITRAL Model Law 17 percent of the time. These grounds include such as arbitrator misconduct or lack of impartiality, manifest disregard of the law, disputing the merits of the award or error of law, the award was domestic not international, or the award was ambiguous.

and improper notice of arbitrator appointment (2%). However, we note that total vacatur actions in the United States were fairly rare: Only 32 of these actions were resolved during our period of analysis.

In terms of success, United States federal courts vacated an award 9 percent of the time (i.e., three of the 32 cases in our data set), and refused to vacate the award 91 percent of the time. Because these wins were so rare, we hesitate to draw conclusions from such limited data, although we note that an argument that an award was not final was successful the only time it was raised. The other successful arguments related to a clerical error and substantive issues with the award.

CONCLUSION

This article offers a detailed empirical analysis of national court enforcement of international commercial arbitration awards. But even so, we recognize that it is not comprehensive and that many questions remain unanswered and will require further research. We focused on analysis on cases from January 1, 2010, to June 1, 2020, and coded only national court proceedings that were included in the Kluwer Arbitration database. There is an inherent selectivity bias in analyzing these cases, because the reporters and editors chose to include in that database only those cases that are likely to be relevant to the international commercial arbitration community. Unlike investment arbitration, there simply is no other equivalent database of a similar or larger category of national court decisions.[18] One must therefore draw conclusions and extrapolate from these cases, recognizing the limitations of the database.

Having said that, there are significant findings relating to due process grounds for challenging in offensive enforcement actions or in vacatur actions. Enforcement action challenges around the world are rarely successful, and due process challenges are likewise rarely successful. With one exception, due process challenges fare slightly worse than average. In the United States, enforcement

[18] There is more detailed and comprehensive underlying raw data regarding national court enforcement of arbitration awards in some jurisdictions, such as the United States through PACER electronic filings. However, a comparative analysis of due process rights across jurisdictions required reliance on the Kluwer database, rather than the database of one particular country.

action challenges are also rarely successful, and that is also true with due process grounds for challenge. Challenges in the vacatur context around the world are also rarely successful, and due process challenges are rarely successful. With one exception, due process challenges in vacatur actions fare slightly worse than average. In the United States, vacatur challenges are rarely successful, and that is also true with due process grounds for challenge.

International Arbitration Under US Law

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This paper addresses, with varying degrees of detail, some distinctive issues that arise when US law applies to an international arbitration proceeding: (i) the use of Section 1782 in international arbitration; (ii) the US approach to the enforcement of foreign arbitral awards that have been vacated at their seat; (iii) the availability of the defenses of lack of personal jurisdiction and *forum non conveniens* in US courts in petitions for the confirmation, or the recognition and enforcement, of arbitral awards under the New York Convention; and (iv) the standard of review applicable to the enforcement of arbitral awards in US courts.

A. THE USE OF SECTION 1782 IN INTERNATIONAL ARBITRATION: THE SUPREME COURT'S DECISION IN ZF AUTOMOTIVE

I. Introduction

Section 1782 of Title 28 of the United States Code permits a party to "a proceeding in a foreign or international tribunal" to apply directly to a United States court to take evidence located in the United States for use in such proceeding.[1] Section 1782 has been regularly relied upon by parties to foreign (i.e., non-US) lawsuits to apply to US courts to obtain evidence for use in such lawsuits.

For some years, it had appeared to be settled that Section 1782 could not be relied upon to obtain evidence for use in an international arbitration. Over twenty years ago, on January 26, 1999, the Court of Appeals for the Second

[1] 28 U.S.C. § 1782.

Circuit held[2] that Section 1782 applied only to governmental tribunals, such that a private international arbitration panel, like one administered by the International Chamber of Commerce (ICC), was not a "foreign or international tribunal" for the purposes of that statute, with the result that it was not possible to rely on Section 1782 to obtain evidence for use in international arbitration proceedings.[3] The Fifth Circuit followed its sister circuit on this point later in the same year.[4]

Five years later, in *Intel Corp. v. Advanced Micro Devices, Inc.*[5]—in which the United States Supreme Court considered Section 1782 for the first time—the Court injected some uncertainty into this area. While *Intel* did not involve an application for evidence for use in an international arbitration proceeding, the Court nonetheless chose to take a broad view both of Section 1782 in general and of the term "tribunal," as used in that statute, in particular. More significantly for the purposes of this article, in the course of its decision, the Supreme Court quoted with approval an article written by the late Professor Hans Smit—a principal draftsman of the 1964 amendments to Section 1782—which had revised the older version of the statute to add the language "foreign or international tribunal." In that article, Professor Smit wrote that the term

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[2] Section 1782 provides that federal courts have exclusive jurisdiction over applications made under that section. For those unfamiliar with the US federal court system, the courts of first instance are called "district courts," the intermediate courts of appeals, "circuit courts," and the highest court, the US Supreme Court. Each of the 50 states and the District of Columbia (DC) has at least one district court. New York State, for example, has four, with the jurisdiction of each based on geography: the Northern District of New York, the Eastern District of New York, the Southern District of New York, and the Western District of New York. Manhattan, for example, falls within the Southern District of New York, abbreviated in case citations to SDNY. For the hipsters among you, Brooklyn falls within the Eastern District of New York (EDNY). The District of Columbia has one district court. There are 13 circuit courts of appeals. The jurisdiction of 12 of the 13 is based on geography. These are the First to Eleventh and the DC circuit courts of appeals. For example, the Court of Appeals for the Second Circuit has jurisdiction to hear appeals from the district courts in the states of Connecticut, New York, and Vermont. The DC Court of Appeals has jurisdiction to hear appeals from the DC district court. The other circuit court of appeals is the Federal Circuit Court of Appeals, which has nationwide jurisdiction over certain appeals based on specialized subject matter, such as patent cases.

[3] *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999) [hereinafter "*NBC*"] (holding that an ICC arbitral panel was not a "tribunal" for purposes of Section 1782).

[4] *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881-83 (5th Cir. 1999) (holding that the Stockholm Chamber of Commerce arbitral panel was not a "tribunal" for the purposes of Section 1782).

[5] 542 U.S. 241 (2004).

"tribunal" in Section 1782 included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies."[6] Whether Justice Ruth Bader Ginsburg, who wrote the opinion of the Court in *Intel*, realized that she was casting doubt—albeit in dicta—on an apparently settled issue regarding the interpretation of Section 1782 when she quoted that portion of Professor Smit's article is not clear. But, shortly after the Supreme Court's decision in *Intel*, several commentators noted that it was only a matter of time before a party to an international arbitration proceeding relied on *Intel* to bring a successful application pursuant to Section 1782.[7]

Since *Intel*, there has been a litany of federal court decisions in cases involving applications under Section 1782, with the courts often reaching conflicting decisions on whether Section 1782 can be used to obtain evidence for use in international arbitration proceedings. The uncertain state of the law was finally resolved on June 13, 2022, in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, when the Supreme Court unanimously held that Section 1782 permits the taking of evidence only for use in "bodies exercising governmental authority."[8] As a result, it held that Section 1782 cannot be used to obtain evidence for use before a private international arbitration tribunal, such as those constituted under the auspices of the ICC, CAM-CCBC, ICDR, or SIAC, among many others. The Court also held that Section 1782 cannot be used to obtain evidence for use in an arbitral tribunal constituted pursuant to an investment treaty.[9] The Court left open the question of whether "sovereigns might imbue an ad hoc arbitration panel with official authority" but stressed that "a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it."[10]

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[6] *Id.* at 258 (citing Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 & nn. 71, 73 (1965)) (emphasis added).

[7] In an article I wrote shortly after *Intel*, I noted that the Supreme Court's reliance on Professor Smit's definition of the term "tribunal" "could leave it open to § 1782 applicants in future cases to argue that, in the Supreme Court's view, the term 'tribunal' includes an arbitral panel." *See* John Fellas, *The U.S. Supreme Court Rules on Section 1782*, N.Y.L.J., Aug. 18, 2004; *see also* Barry H. Garfinkel and Yuval M. Miller, *The Supreme Court's Reasoning in Intel Calls Into Question Circuit Court Rulings On Applicability of 28 U.S.C. § 1782 To International Commercial Arbitration*, 19-8 MEALEY'S INTL. ARB. REP. 17, at 25 (2004).

[8] 142 S. Ct. 2078 (2022).

[9] *Id.* at 2091.

[10] *Id.*

Before considering the Supreme Court's decision in *ZF Automotive* in more detail, it might be worth providing some background on Section 1782, because, despite the Court's ruling that it does not apply to arbitration proceedings, it is often used, and can continue to be used, to obtain evidence for use in lawsuits outside of the United States.

II. The Key Elements of Section 1782

Section 1782 is a relatively short statute. Its core elements are set forth in its first two sentences:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.[11]

The key elements of Section 1782 are discussed below:

Who can make a Section 1782 application?

> Under its explicit terms, "any interested person" can make an application directly to a US court to take evidence pursuant to Section 1782.[12] In the litigation context, an "interested person" has been held to include a party to the foreign proceeding.[13] In *Intel*,

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[11] 28 U.S.C. § 1782.

[12] *Id.*

[13] *See* S. Rep. No. 88-1580, as reprinted in 1964 U.S.C.C.A.N. 3782, 3789; *Malev Hungarian Airlines v. United Tech. Int'l.*, 964 F.2d 97, 101 (2d Cir. 1992); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985); see also *In re Roz Trading*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (assuming a party to the international arbitration was an "interested person" for the purposes of Section 1782).

the Supreme Court made it clear that the term "interested person" was not limited simply to a party, noting that, while a litigant "may be the most common example of" an "interested person," that term also includes anyone with "a reasonable interest in obtaining [judicial] assistance."[14] The term also has been held to encompass persons with an interest in foreign criminal matters. For example, the owner of two Lebanese banks in *Ayyash v. Crowe* was found to be an interested person for purposes of documents sought for Lebanese criminal proceedings because he had filed the criminal complaint.[15] The statute explicitly provides that a Section 1782 application may be made directly by the foreign or international tribunal. Thus, if a "foreign or international tribunal" includes an arbitration panel, then an application could be made directly by, or in the name of, the arbitrators.

From whom may evidence be taken?

Section 1782 permits evidence to be taken from a "person" who "resides" or is "found" in the district covered by the United States district court to which the application is made.[16] A "person"—which includes a corporation, company, and partnership, as well as an individual[17]—has been held to encompass both a party and non-party to the foreign proceeding.[18] It is settled that an individual "resides" or is "found" in the United States if he or she is physically present at

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[14] 542 U.S. at 256 (alteration in original) (citations omitted). In *Intel*, the Court found it significant that a complainant "who triggers a European Commission investigation has a significant role in the process . . . . [I]n addition to prompting an investigation, the complainant has the right to submit information for the DG-Competition's consideration, and may proceed to court if the Commission discontinues the investigation or dismisses the complaint." *Id*. (citations omitted).

[15] No. 17-mc-482(AJN), 2018 U.S. Dist. LEXIS 64573 at *6 (S.D.N.Y. Apr. 17, 2018).

[16] 28 U.S.C. § 1782.

[17] *See* 1 U.S.C. § 1 ("[U]nless the context indicates otherwise," the word "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."). It does not include the US government. *See Al Fayed v. CIA*, 229 F.3d 272, 273 (D.C. Cir. 2000).

[18] *See In re Ishihara Chem. Co.*, 121 F. Supp. 2d 209, 218-20 (E.D.N.Y. 2000), *rev'd on other grounds*, 251 F.3d 120 (2d Cir. 2001).

the time he or she is served with a subpoena authorized by Section 1782,[19] but it is also clear that physical presence is not necessary for a person to be a legitimate target of a Section 1782 application.

In *In re Del Valle Ruiz*, the Second Circuit considered the "contours of §1782['s] requirement that a person or entity 'resides or is found' within the district in which discovery is sought."[20] The Second Circuit made clear that while the physical presence of a person in a particular judicial district is sufficient to subject them to Section 1782, such physical presence is not necessary. Rather the language "resides or is found" in Section 1782 "extends §1782's reach to the limits of personal jurisdiction consistent with due process."[21] This is not the place to discuss the complicated rules that determine whether a person is subject to the jurisdiction of US courts. It suffices to stress that a person may be "found" in a judicial district even if she is not physically present at the time she is served with process. Rather, a court will examine the relationship between the person from whom, or entity from which, evidence is sought under Section 1782 and the forum in which the application is made in order to determine whether that person is a legitimate target of a Section 1782 application.

Does Section 1782 reach evidence located outside of the United States?

Assuming an application is made against a person who is found or resides in the United States, a question arises as to whether Section 1782 reaches only evidence, such as documents, located in the

[19] In *In re Edelman*, 295 F.3d 171 (2d Cir. 2002), the Second Circuit held that a person was "found" in the Southern District of New York even though he arrived there only after the Section 1782 order was issued. Id. at 180 ("[I]f a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for the purposes of § 1782(a), he is 'found' in that district. As a matter of law, a person who lives and works in a foreign country is not necessarily beyond the reach of § 1782(a) simply because the district judge signed the discovery order at a time when that prospective deponent was not physically present in the district.").

[20] 939 F.3d 520, 523 (2d Cir. 2019).

[21] *Id.*

United States, or whether it extends to evidence under such person's control located outside of the United States. In 1997, the Second Circuit had suggested that Section 1782 is limited to documents located within the United States.[22] More recently, the Eleventh Circuit took a contrary view, stating that "the location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a per se bar to discovery under § 1782."[23] Similarly, in a District Court granted a Section 1782 application for documents controlled by a US company, but located in Switzerland.[24]

Moreover, recently, the Second Circuit held that a court has the discretion to grant a Section 1782 application for evidence located outside of the United States,[25] stating that "a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery."[26]

For what purpose must the evidence be sought?

Section 1782 requires that the evidence sought be "for use in a proceeding in a foreign or international tribunal." That term has been held to include not only traditional courts, but also "administrative and quasi-judicial proceedings abroad."[27] Thus, in *Intel*, for example, the Court found this term included the Directorate-General for Competition of the Commission of the European Communities

[22] In *Chase Manhattan Corp. v. Sarrio, S.A.*, the court stated that "despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States." 119 F.3d 143, 147 (2d Cir. 1997).

[23] *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016).

[24] *In re Application of De Leon*, No. 1:19-mc-15, 2020 U.S. Dist. LEXIS 42968, at *11 (S.D. Ohio Mar. 12, 2020).

[25] *In re Del Valle Ruiz*, 939 F.3d at 533.

[26] *Id.*

[27] *Intel*, 542 U.S. at 241.

investigating a complaint.[28] The question of whether Section 1782 applies to international arbitration turns on whether a private international arbitration panel is viewed as a "tribunal" for the purposes of Section 1782. This issue is discussed in Section III below.

What type of evidence is available under Section 1782?

Section 1782 is limited on its face to an order that a person "give his testimony or a statement" or "produce a document or other thing." Thus, it permits the taking of pre-hearing depositions from persons who "reside" or are "found" in the United States, as well as the production of documents located in the United States. Section 1782 has been held not to permit the use of other devices common in US litigation, such as interrogatories or requests for admissions.[29]

In what circumstances will courts grant Section 1782 applications?

Even if the facial requirements of Section 1782 are satisfied—that is, (i) an "interested person" (ii) seeks the "testimony or [a] statement" or the production of "a document or other thing" (iii) from a "person" who "resides" or is "found" in the United States, (iv) for use in "a proceeding in a foreign or international tribunal"—a United States court is not required to grant a Section 1782 application.[30] Rather, it can exercise its discretion to determine whether to grant a

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[28] *Id.*

[29] *See In re Ishihara Chem. Co.*, 121 F. Supp. 2d at 221. One rationale the district court offered for this interpretation relies on the fact that, under the Federal Rules of Civil Procedure, interrogatories and requests for admissions can be directed only to parties to a litigation. If Section 1782 were to permit the obtaining of evidence through the use of interrogatories and requests to admit, these devices could be used to seek evidence from "persons"—which term includes both parties and non-parties to the litigation. The anomalous result would be that broader discovery could be obtained in foreign litigation than in domestic litigation. The court stated: "Congress could hardly have intended to subject its citizens to broader discovery demands in foreign litigation than in domestic litigation." *Id.* at 224.

[30] *Intel*, 542 U.S. at 264 ("[A] district court is not required to grant a Section 1782(a) discovery application simply because it has authority to do so.").

Section 1782 order and, if so, the scope of discovery to authorize.[31] In *Intel*, the Court identified certain factors that district courts should consider in deciding whether or not to grant Section 1782 applications:

– whether the person from whom evidence is sought is a party or a non-party to the foreign proceeding. More specifically, the Court noted that "when the person from whom is discovery sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[32] This is because a "foreign tribunal has jurisdiction over those appearing before it and can itself order them to produce evidence."[33]

– he nature of the foreign tribunal, the character of the proceedings under way abroad, and the receptivity of the foreign government or agency abroad to US federal-court assistance. Where a court lacks information regarding the receptivity of the foreign tribunal, the applicant "enjoy[s] a presumption in favor of foreign tribunal receptivity."[34]

– whether the § 1782 application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country; and

– whether the request is "unduly intrusive or burdensome," which may lead to the request being "rejected" or "trimmed."[35]

– As noted above, the Second Circuit has stated that a court may also

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[31] *Id.; see also Metallgesellschaft A.G. v. Hodapp*, 121 F.3d 77, 79 (2d Cir. 1997) ("The permissive language of § 1782 vests district courts with discretion to grant, limit or deny discovery.").

[32] *Intel*, 542 U.S. at 264.

[33] *Id.*

[34] *In re Application of Meydan Grp. LLC*, No. 15-02141, 2015 U.S. Dist. LEXIS 66883, at *11 (D.N.J. May 21, 2015).

[35] *Id.* at 264-65.

consider the location of the documents as a discretionary factor.

It is worth highlighting, however, that if a court does not impose any limitation in its order as to the scope of evidence-taking it has authorized, the Federal Rules of Civil Procedure apply. Thus, Section 1782 further provides, with emphasis added:

> The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. *To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.*
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> A person may not be compelled to give his testimony or statement or to produce a document or other thing, in violation of any legally applicable privilege.[36]

Does a Section 1782 applicant need first to obtain the permission of the foreign or international tribunal?

In the litigation context, courts have held that a party to a lawsuit before a foreign court can make a Section 1782 application directly to a US court, without first obtaining the permission of, or giving notice to, the foreign court before which the case is pending.[37] If this holding were transposed to the arbitration context, a party to an arbitration proceeding could, in principle, apply directly to a US court to take evidence in the United States without first obtaining the permission of, or giving notice to, the arbitration panel assigned to resolve the case.

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[36] 28 U.S.C. § 1782 (2018) (emphasis added).

[37] *See Malev Hungarian Airlines v. United Tech. Int'l*, 964 F.2d 97, 101 (2d Cir. 1992); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985).

Must the foreign proceeding be pending at the time of the Section 1782 application?

Prior to *Intel*, some courts faced with Section 1782 applications had required that the foreign proceeding be "pending or imminent" before a Section 1782 application could be granted.[38] The Supreme Court expressly rejected this view, holding that it was sufficient for the purposes of Section 1782 that the foreign proceeding be within "reasonable contemplation."[39]

What is the procedure for a Section 1782 application?

A Section 1782 application is relatively straightforward, and while the statute does not explicitly address whether an application is required to be made on notice, there is authority for the proposition that it is acceptable to make the application ex parte.[40]

Does Section 1782 contain an implicit discoverability requirement?

One critical question on which the courts were divided—before it was resolved by *Intel*—was whether Section 1782 contained an implicit "discoverability requirement." To understand the notion of a "discoverability requirement," it is important to emphasize that the United States permits far more extensive pre-trial discovery than do other countries. The difference between US pre-trial discovery

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[38] *See, e.g., Ishihara Chem. Co. v. Shipley Co.*, 251 F.3d 120, 125 (2d Cir. 2001).

[39] *Intel*, 542 U.S. at 259.

[40] *In re Sup. Ct. of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991) (quoting *In re Tokyo Dist.*, 539 F.2d 1216, 1219 (9th Cir. 1976)). "[S]uch ex parte applications are typically justified by the fact that the parties will be given adequate notice of any discovery taken pursuant to the request and will then have the opportunity to move to quash the discovery or to participate in it." *Hong Kong*, 138 F.R.D. at 32 n.6 (citing Tokyo Dist., 539 F.2d at 1219). Thus, a dispute over Section 1782, if it occurs at all, takes place not when the application is made, but when the party from whom evidence is sought moves for a protective order or to quash a subpoena. However, one district court has called into question the process of applying ex parte for Section 1782 orders. In *In re Merck & Co.*, 197 F.R.D. 267 (M.D.N.C. 2000), the court stayed an application for a Section 1782 order pending the petitioner's notification of all interested parties in the foreign proceedings.

practices and those of civil law countries is particularly marked. In civil law countries, the gathering of evidence is generally overseen by the court and not the parties.[41]

Because US pretrial discovery practices are broader than those of other jurisdictions, US courts were confronted with Section 1782 applications for material that would not be discoverable under the rules of the foreign jurisdiction in which it was to be used. Section 1782 does not, on its face, preclude an application for such material. However, the courts divided on the question of whether Section 1782 implicitly requires that the material sought should be discoverable under the rules of the foreign jurisdiction. This was labeled the "discoverability requirement."

The First and Eleventh Circuits, which adopted the discoverability requirement,[42] offered two rationales. First, they were concerned that it would be offensive to a foreign court to permit a litigant before it to obtain evidence in the United States that the foreign court itself could not grant. Second, they were concerned that, without the discoverability requirement, a US litigant before a foreign court would be at a disadvantage relative to its foreign opponent because the foreign party could invoke Section 1782 to seek broad discovery against its US opponent, whereas the US party would be limited to the narrower discovery procedures of the foreign jurisdiction.

The Second and Third Circuits, however, rejected the discoverability requirement on the grounds that there is nothing in the language of Section 1782 to suggest that there is any such requirement and

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[41] As one US court has noted: "In the United States . . . civil pretrial discovery is not only extensive, but is in the first instance conducted by the parties themselves. Such a concept is alien to the ways of most civil law countries, where the taking of all evidence is exclusively a function of the court. In those countries, discovery American-style is often considered an affront to the nation's judicial sovereignty." *Boreri v. Fiat S.p.A.*, 763 F.2d 17, 19 (1st Cir. 1985).

[42] *See In re Asta Medica*, S.A., 981 F.2d 1, 5-7 (1st Cir. 1992); *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In re Ministry of Legal Affs. of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

because imposing one would unnecessarily complicate what should be a simple procedure.[43]

In *Intel*, the Supreme Court rejected the discoverability requirement and addressed the concerns raised by the First and Eleventh Circuits. To the objection that a foreign court might be offended, the Court replied that the fact that foreign jurisdictions might permit narrower discovery than that authorized by Section 1782 did not necessarily mean that foreign courts would be offended by its use. By way of example, the Court cited to the English case of *South Carolina Ins. Co. v. Assurantie Maatschappij "de Zeven Provincien" NV*,[44] in which the House of Lords permitted a defendant in a suit to proceed with a Section 1782 application for evidence that would not have been available under English procedures.

To the objection that, without a discoverability requirement, a US litigant before a foreign court would be disadvantaged, the Court responded that when an application is by an interested person, the district court could deal with this concern by "condition[ing] relief upon that person's reciprocal exchange of information."[45] It also noted that the "foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate."[46]

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[43] *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098-1100 (2d Cir. 1995); *Foden v. Gianoli Aldunate*, 3 F.3d 54, 59-60 (2d Cir. 1993); *In re Bayer A.G.*, 146 F.3d 188, 193-94 (3d Cir. 1998). The Fourth Circuit also rejected a discoverability requirement, although it limited its holding to instances where the request is from a foreign tribunal. *See In re Amtsgericht Ingolstadt*, 82 F.3d 590, 592 (4th Cir. 1996) (affirming order to provide a blood sample for a paternity suit pending in Germany).

[44] [1987] 1 App. Cas. 24.

[45] *Intel*, 542 US at 262.

[46] *Id.* The Court also rejected, as not grounded in the statute, an argument by Intel that an applicant for a Section 1782 order show that US law would allow discovery in domestic litigation analogous to the foreign proceeding. *Id.* at 263.

III. International Arbitration and Section 1782

As previously noted, prior to the Supreme Court's decision in *Intel*, the Second Circuit and the Fifth Circuit both had held that Section 1782 could not be used to obtain evidence for a private international arbitration proceeding, such as one constituted under the auspices of a private arbitral institution such as the ICC, ICDR or LCIA. Both circuit courts reaffirmed their approaches in decisions after *Intel*.[47] Moreover, the Seventh Circuit followed the Second and Fifth Circuits in a decision after *Intel*.[48] Other circuit courts have squarely held that Section 1782 applies to private international arbitration panels.[49]

While there was a "circuit split" on whether Section 1782 could be used for the taking of evidence before a "private" international arbitration panel, such as one under the auspices of the ICC, courts have generally held that Section 1782 can be relied upon to take evidence before an arbitral tribunal constituted pursuant to an investment treaty, on the ground that such tribunal is "governmental" rather than "private."

In *In re Oxus Gold PLC*, the district court for the District of New Jersey granted a Section 1782 application for the taking of evidence for use in an investment treaty arbitration.[50] In that case, the court based its decision not on the ground that a private arbitration panel is a "tribunal" for the purposes of Section 1782, but, instead, on the ground that an arbitration conducted under the UNCITRAL Arbitration Rules in connection with a claim under a bilateral investment treaty between the UK and the Kyrgyz Republic was

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[47] *See In re Application of Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020) (holding that Section 1782 cannot be used in private international arbitration); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009) (rejecting the argument that *Biedermann* was "no longer controlling in light of Intel because *Intel* did not "unequivocally" call for its overruling).

[48] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694-95 (7th Cir. 2020).

[49] *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 726 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020).

[50] No. Misc. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006).

not a private arbitration, but a governmental one.[51] The court distinguished the arbitration before it from "international arbitral panels created exclusively by private parties, such as private commercial arbitration administered by the International Chamber of Commerce, a private organization based in Paris, [which] are not included in the statute's [Section 1782's] meaning."[52] It is worth noting that *Oxus* viewed itself as following the Second Circuit's decision in *NBC*, explicitly stating that ICC arbitrations (and presumably all other private arbitrations) "are not included in the statute's meaning."[53] *Oxus* simply distinguished the arbitration before it—which was one arising out of a bilateral investment treaty under the UNCITRAL Rules—from the one at issue in the NBC case on the ground that a BIT arbitration under the UNCITRAL Rules was "governmental."[54]

Similarly, in *In re Chevron Corp.*,[55] the Third Circuit held that the use of the evidence in a BIT arbitration "unquestionably would be 'for use in a proceeding

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[51] More specifically, the court noted that "[t]he international arbitration at issue is being conducted by the United Nations Commission on International Law, a body operating under the United Nations and established by its member states. The arbitration is not the result of a contract or agreement between private parties as in National Broadcasting [the NBC case] . . . The proceedings in issue has [sic] been authorized by the sovereign states of the United Kingdom and the Kyrgyzstan Republic for the purpose of adjudicating disputes under the Bilateral Investment Treaty." *Id*. at *6 (citations omitted). The court's reasoning seems questionable. It is unclear to what extent the court was relying alone on the fact that the UNCITRAL Arbitration Rules were applicable to the arbitration, as opposed to, say, the ICC Rules. But, the fact that parties to a contract designate the UNCITRAL Rules, as opposed to the ICC Rules, to apply to their dispute does not make the ensuing arbitration proceeding any less "private." The designation of the UNCITRAL Rules in a contract, like the designation of the ICC Rules, is the result of a private agreement not an imposition of the state. To the extent the court's analysis rested on the fact that the arbitration arose out of a bilateral investment treaty, rather than a private contract, the court's characterization of the arbitration as "governmental" rather than "private" still seems questionable. Bilateral or multilateral investment treaty arbitration is often explained through the model of a private contract—the state's entry into the treaty is viewed to be an offer to arbitrate, and the investor's filing of a claim an acceptance of that offer. See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.–Foreign Inv. L.J. 232 (1995); Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 Chi. J. Int'l L. 183 (2001).

[52] *In re Oxus Gold*, No. MISC.06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006) (citing NBC, 165 F.3d at 186, 190).

[53] *Id*.

[54] *Id*. at *6.

[55] 633 F.3d 153 (3d Cir. 2011).

in a foreign or international tribunal.'"[56] However, the court did not resolve the question of whether a private—rather than a treaty—international arbitration falls within the ambit of Section 1782. Before the case had reached the Third Circuit, the United States District Court for the District of Maryland granted Chevron's Section 1782 application, noting that because the arbitral bodies at issue "are created by treaty and not private parties, they do in fact constitute 'foreign tribunals for purposes of the statute.'"[57]

IV. The Supreme Court's Decision in ZF Automotive

The question of whether Section 1782 can be used to obtain evidence for use in international arbitration proceedings recently reached the Supreme Court in two consolidated cases, *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLC v. Fund for Protection of Investors' Rights in Foreign States*. The former case involved a private arbitration proceeding in Munich under the Rules of the German Institution of Arbitration ("DIS"), during the course of which one of the parties made a successful Section 1782 application for evidence to the District Court for the Eastern District of Michigan, following which the Sixth Circuit denied a request for a stay.[58] The latter case arose out of

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[56] *Id.* at 161 (internal citations omitted).

[57] *In re Chevron Corp.*, 753 F. Supp. 2d 536, 539 (D. Md. 2010); *see also In re Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 3702427 at *3 (N.D. Cal. Sept. 15, 2010) ("There is case law authority holding that an arbitration pending in a tribunal established by an international treaty constitutes a foreign tribunal for purposes of § 1782."); *In re Chevron Corp.*, Nos. 10-MC-21 JH/LFG, 10-MC-22 JH/LFG, 2010 WL 8786279, *5 (D.N.M. Sept 1, 2010) (finding that both the proceedings in Ecuador and the investment treaty arbitration proceedings at the Hague were within the scope of foreign tribunals for the purposes of Section 1782). One district court has held that Section 1782 applies to arbitrations under the UNCITRAL Rules, whether or not the underlying arbitration arises out of an investment treaty. In *OJSC Urknafta v. Carpatsky Petroleum Corp.*, the United States District Court for the District of Connecticut held that a commercial arbitration administered by the Arbitration Institute of the Stockholm Chamber of Commerce under the UNCITRAL Rules fell within the ambit of Section 1782, because, in part, the court believed that a reasoned distinction can be made "between arbitrations such as those conducted by UNCITRAL, 'a body operating under the United Nations and established by its member states' and purely private arbitrations established by private contract." No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (citations omitted) (internal quotation marks omitted); *see also In re Mesa Power Group, LLC*, Civil Action No. 2:11-mc-280-ES, 2012 WL 6060941, at *5 (D. N.J. Nov. 20, 2012) (finding that international arbitration under the arbitration rules of UNCITRAL and the North American Free Trade Agreement constitutes a foreign or international tribunal for the purposes of Section 1782).

[58] *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2085 (2022).

an investment treaty arbitration between Lithuania and Russia before an ad hoc panel constituted under the UNCITRAL Rules.[59] In that case, after initiating arbitration, but before the selection of arbitrators, the Fund made a successful Section 1782 application to the District Court for the Southern District of New York.[60] The Second Circuit affirmed the District Court's decision to grant the application on the ground the ad hoc panel was "foreign or international" for the purposes of Section 1782, rather than private.[61]

In its decision of June 13, 2022, in *ZF Automotive US, Inc. v. Luxshare, Ltd*, the Supreme Court reversed the decisions of the lower courts in both cases.[62] The Court held that Section 1782 does not permit the taking of evidence for use in arbitrations outside the United States on the ground that the phrase "foreign or international tribunal" encompasses only foreign governmental or intergovernmental adjudicative bodies that exercise governmental authority.[63] The Supreme Court found that neither the DIS tribunal in *ZF Automotive* nor the UNICTRAL tribunal in *AlixPartners, LLC* constituted pursuant to an investment treaty was encompassed by the term "tribunal" for the purposes of Section 1782.[64] However, the Supreme Court left open the possibility that there may be certain public law international arbitration tribunals that do fall within the term "tribunal," even though the one in *AlixPartners* did not.[65]

Given all the *Sturm und Drang* generated by its decision in *Intel*, the Supreme Court's reasoning in *ZF Automotive* was not always persuasive. Justice Amy Coney Barrett, writing for the Court, rested her analysis primarily on the text of Section 1782, and in particular on the words "foreign or international tribunal": In her words, "[t]he key phrase for purposes of this case is 'foreign or international

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[59] *AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States*, 142 S. Ct. 638 (2021).

[60] Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in *Foreign Proceeding v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir.), *cert. granted sub nom. AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States*, 142 S. Ct. 638 (2021), *and rev'd sub nom. ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022).

[61] *Id.*

[62] *ZF Auto. US, Inc.*, 142 S. Ct. at 2091.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 2086.

tribunal.'"[66] Justice Barrett accepted that the term "tribunal," standing alone, could include an arbitral tribunal—"If we had nothing but this single word to go on, there would be a good case for including private arbitral panels."[67] However, she declared that, when modified by the words "foreign or international," it could mean only a governmental tribunal. She wrote: "'Tribunal' does not stand alone—it belongs to the phrase 'foreign or international tribunal.' And attached to these modifiers, 'tribunal' is best understood as an adjudicative body that exercises governmental authority."[68]

This is something of a leap. It is hard to see why "foreign or international" alone would modify the broad word "tribunal" so that it could mean only a body that exercises governmental authority, as opposed to simply highlighting that the tribunal (whether private or governmental) is "foreign or international" (i.e., sitting outside of the United States) rather than domestic (i.e., sitting within the United States.)

In addition to offering a textual argument, Justice Barrett also offered a purposive one, namely that: "the animating purpose of §1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies would serve that end."[69]

That argument is likewise not convincing. It is just as plausible to say that permitting United States courts to assist foreign courts may encourage reciprocal assistance by foreign courts to United States courts, as it is to say that permitting federal courts to assist arbitral tribunals seated outside of the United States may encourage foreign courts to provide reciprocal assistance to arbitral tribunals seated in the United States. For example, prior to the Supreme Court's decision in *ZF Automotive*, the English Court of Appeal held in the case of *A and B v C, D and E*, that English Courts have the power under Section 44(2)(a) of the English Arbitration Act to order a non-party witness to give evidence for use in a foreign arbitration proceeding, in that case one seated in New York.[70] Thus, it is not a stretch to believe that foreign courts might be motivated to provide

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[67] *Id.*

[68] *Id.*

[69] *Id.* at 2088.

[70] [2020] EWCA Civ. 409.

assistance to arbitral tribunals seated in the United States (over which United States courts have primary jurisdiction) if United States courts were to provide reciprocal assistance to arbitral tribunals seated in their countries.

Justice Barrett was on stronger ground in offering a third reason for declining to find that Section 1782 covered foreign international tribunals—namely the fact that construing Section 1782 to allow for the taking of evidence for arbitrations outside the United States would have the anomalous result that parties to arbitrations seated outside of the United States would have broader evidence-gathering rights in the United States than would parties to arbitrations seated in the United States.[71]

Section 7 of the Federal Arbitration Act (FAA) addresses US court assistance in evidence-gathering for arbitrations seated in the United States. Section 7 authorizes US district courts to enforce an arbitrator's "summons" for evidence.[72] Under Section 7, therefore, court assistance in evidence-gathering for arbitrations seated in the United States is premised on the requirement that the evidence sought has been requested by the arbitrators themselves who, presumably, made some assessment of its relevance and materiality before issuing the summons in the first place. Section 1782, by contrast, permits a party to a foreign arbitration to bypass the arbitrators altogether and to apply to a US court for evidence. As Justice Barrett noted:

> Extending §1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because §1782 permits much broader discovery than the FAA allows. Among other differences, the FAA permits only the arbitration panel to request discovery, see 9 U. S. C. §7, while district courts can entertain §1782 requests from foreign or international tribunals or any "interested person," . . . And as the Seventh Circuit observed, "[i]t's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations." *Rolls-Royce*, 975 F. 3d, at 695.[73]

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[71] *ZF Auto. US, Inc.*, 142 S. Ct. at 2088-89.

[72] 9 U.S.C. § 7.

[73] *ZF Auto. US, Inc.*, 142 S. Ct. at 2088–89.

This reasoning is compelling. If Section 1782 were read to permit its use in the private arbitration context, as a practical matter, most Section 1782 applications would involve the taking of evidence for use in an arbitration proceeding in one of the 170 countries that, like the US, is a party to the New York Convention.[74] It is well-recognized both in the US and elsewhere that, under the New York Convention, there is a difference between the authority of the courts at the seat of the arbitration and the authority of courts elsewhere. US courts have framed the distinction as one between courts of primary jurisdiction (i.e., the courts at the seat of the arbitration) and courts of secondary jurisdiction (i.e., every other court). While in *Karaha Bodas Co. v. Pertambangan Minyak Dan Gas Bumi Negara*, the Fifth Circuit invoked the distinction to explain the exclusive authority of the courts at the seat to set aside an arbitration award, that distinction rests on the well-settled view that courts at the seat of an arbitration possess oversight authority over that arbitration that courts in other countries do not have.[75]

Section 7 of the FAA furnishes an example of a US district court's primary jurisdiction with respect to arbitrations in the US, providing that if a person refuses to comply with the arbitrators' summons for evidence, "upon petition the United States district court for the district in which such arbitrators . . . are sitting may compel the attendance of such person."[76] In every case involving Section 1782, by contrast a US court is ex hypothesi, a court of secondary jurisdiction. But if Section 1782 can be used in the private arbitration context, a US court would have broader evidence-gathering authority under Section 1782, when sitting as a court of secondary jurisdiction, than it would under section 7 of the FAA, when sitting as a court of primary jurisdiction. This would be an anomalous result that the Supreme Court correctly found, in this author's view, was a sound basis to reject a broad interpretation of Section 1782.

Based on the three reasons outlined above, the Supreme Court concluded that to qualify as a "foreign or international tribunal" for the purposes of Section 1782, the tribunal had:

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[74] *Contracting States*, N.Y. Arb. Convention, https://www.newyorkconvention.org/countries

[75] 364 F.3d 274 (5th Cir. 2004); *see also* Gary B. Born, International Commercial Arbitration 1647-1669 (3d ed. 2021).

[76] 9 U.S.C. § 7.

> to be governmental or intergovernmental. Thus, a "foreign tribunal" is one that exercises governmental authority conferred by a single nation, and an "international tribunal" is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within §1782.[77]

Applying that definition of "foreign or international tribunal" to the arbitral panels at issue in the two cases before the Court, the Court concluded that neither of them qualified. In the case of the DIS panel in *ZF Automotive*, the Court stated: "No government is involved in creating the DIS panel or prescribing its procedures. This adjudicative body therefore does not qualify as a governmental body."[78] While the Court acknowledged that the investment treaty panel in *AlixPartners, LLC* "presents a harder question," it also nonetheless found it was not a "foreign or international tribunal" for the purpose of Section 1782.[79] The Court noted:

> the ad hoc panel at issue in the Fund's dispute with Lithuania is materially indistinguishable in form and function from the DIS panel resolving the dispute between ZF and Luxshare. . . . In a private arbitration, the panel derives its authority from the parties' consent to arbitrate. The ad hoc panel in this case derives its authority in essentially the same way. Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it. The Fund took Lithuania up on that offer by initiating such an arbitration, thereby triggering the formation of an ad hoc panel with the authority to resolve the parties' dispute. That authority exists because Lithuania and the Fund consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority.[80]

The Court's decision to view private arbitral tribunals and investment treaty tribunals in the same way is sound given its premise—both are the product of

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[77] *ZF Auto. US, Inc.*, 142 S. Ct. at 2089.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2090 (internal citations omitted).

the consent of the Parties, rather than formed by governmental action, as is a traditional court. The fact that in one case the basis of consent is a private contract and in the other a treaty is neither here nor there. An investment treaty contains a standing offer to arbitrate, which an investor can accept or not. To put the point another way, a particular private arbitral tribunal and a particular investment treaty tribunal would not exist but for the consent of the parties to the dispute those tribunals have been constituted to decide. By contrast, traditional courts and other adjudicative bodies exist, and have authority to resolve a dispute before them, regardless of whether the particular parties to the dispute have consented.

As noted, the Court left open "the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority," but it is clear that private arbitral tribunals and investment treaty tribunals are not "foreign or international tribunals" for the purposes of Section 1782, absent the bestowal upon them of such authority by governmental action.[81] Thus, in *ZF Automotive*, the Supreme Court effectively foreclosed the use of Section 1782 to take evidence for private and investment treaty arbitrations. However, it should not be overlooked that Section 1782 can continue to be used to take evidence for use in non-US lawsuits.

B. THE RECOGNITION OF INTERNATIONAL ARBITRATION AWARDS THAT HAVE BEEN VACATED AT THE ARBITRAL SEAT: THE US APPROACH[82]

Elvis Costello has engaged in various collaborations in his almost 40-year career. Among them was one 20 years ago with Burt Bacharach, the musical legend famous for the pop songs he wrote with Hal David in the 1960s, which include such gems as *Walk On By, Alfie* and *Do You Know The Way To San Jose?* In one of the songs from the album Costello released with Bacharach in 1998, they

[81] *Id.* at 2091.

[82] Much of this section comes directly from an earlier article.John Fellas, *The Recognition of International Arbitration Awards That Have Been Vacated At The Arbitral Seat: The US Approach* (ZDAR Abschiedsheft June 2018), https://fellasarbitration.com/wp-content/uploads/2020/02/Recognition-of-International-Arbitration-Awards-ZDAR.pdf

pose this question: "Does the extinguished candle care about the darkness?"[83] Like most metaphysical questions, pondering too hard about it simply gives one a headache. But in the field of international arbitration a similar metaphysical question abounds: Does an extinguished award exist? And trying to think about it too hard likewise can be migraine-inducing.

The answer to this metaphysical question, of course, has practical implications: Can a court recognize and enforce an arbitration award that has been vacated by a court at the seat of the arbitration? In a country with more than its fair share of renowned philosophers from Descartes to Sartre to Derrida, the French approach to this question does indeed have a metaphysical dimension: An arbitration award, of its nature, exists independently of any legal order, with the result that French courts have no difficulty confirming awards that have been vacated at the seat.[84] By contrast, Germany, which has also produced numerous prominent philosophers (from Kant to Hegel to Schopenhauer) has its own approach. Just as Kant espoused a categorical imperative, so Germany takes a categorical approach to arbitration awards—holding, categorically, that if they are vacated at the seat, they cease to exist.[85] Thus, no German court has recognized an award that has been vacated at the seat.[86] In fact, Germany attaches decisive significance to whether an award has been vacated at the seat, declining to enforce award when it was set aside at the seat by a Russian court, and then, when a higher court in Russia reversed the lower court's decision, doing an about-face and recognizing the award.[87]

I want to discuss the United States' approach to this question. In a country whose distinctive philosophical tradition is pragmatism (as expounded by James, Dewey, and Pierce), it is perhaps no surprise that the US courts have eschewed metaphysics in favor of a practical approach.

Before turning to the details of the US approach to the question of whether a court should recognize and enforce an arbitration award that has been vacated

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[83] Elvis Costello & Burt Bacharach, *This House is Empty Now* (Universal Music Grp. 1998).

[84] *See, e.g.*, Cour de Cassation, 29 June 2007, *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, Rev. de l'Arb. 515 (2007).

[85] Linda J. Silberman & Robert U. Hess, *Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration* 4 (N.Y. Univ. Sch. of L., Pub. L. Rsch. Paper No. 22-14, 2022).

[86] *See, e.g.*, German Supreme Court, 23 April 2013–III ZB 59/12, XXXIX YBCA 394 (2014).

[87] *See* Silberman & Hess, s*upra* note 79; Y.B. Com. Arb. 717, 719 (Albert Jan van den Berg ed., 2000).

by a court at the seat, it is perhaps worth explaining the difference between, on the one hand, the "vacatur" or "set-aside" of an award and, on the other, the recognition and enforcement of an award. I do so by focusing upon awards that fall under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). There is no substantive difference between the two from the standpoint of the enforcement of arbitral awards and, for the sake of simplicity, the term "Convention" refers to both.[88]

One difference between, on the one hand, the recognition and enforcement of an award and, on the other, its vacatur is straightforward and relates to the effect of each. When a court recognizes an arbitration award, it "makes what is already a final arbitration award a judgment of the court."[89] In New York, for example, once an award is recognized and enforced, the prevailing party can use all the post-judgment remedies available to execute upon that award that would be available to a party that had secured a court judgment on the merits.[90] By contrast, when a court vacates an arbitration award, it holds, in essence, that the award has no further force and effect.[91]

A second difference relates to which courts have the authority to recognize or vacate an award. Simplifying things slightly, any court in a Convention country can entertain an application to recognize and enforce an award rendered in another Convention country; if an arbitration award is rendered in London or

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[88] Almost 160 countries are party to the New York Convention, including virtually every country engaged in any significant international commerce. *Contracting States, supra note* 67. The Panama Convention includes virtually all the countries in the Americas, such as the United States, Mexico, and Colombia to name a few; all the Panama Convention countries are a party to the New York Convention. *States Parties to the Inter-American Convention on International Commercial Arbitration*, ORG. OF AM. STATES, http://www.oas.org/juridico/english/Sigs/b-35.html In the United States, the Panama Convention takes precedence over the New York Convention when the majority of the parties to the arbitration agreement are from Panama Convention countries. 9 U.S.C § 305(1). The case of *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, which I spend some time discussing in this article, involved parties from Mexico and the United States, and thus fell under the Panama Convention. 832 F.3d 92 (2d Cir. 2016).

[89] *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984).

[90] *Prudential Blake Realty Inc. v. Schenectady Indus. Dev. Agency Inc.*, 255 A.D.2d 622 (N.Y. App. Div. 1998).

[91] *Cf. United States, v. Williams*, 904 F.2d 7 (7th Cir. 1990) ("a vacated judgment is of no further force and effect").

Singapore or Sao Paolo, it can, in principle, be recognized and enforced by a court in Zurich or Tokyo or Paris.[92] By contrast, only the court at the seat of the arbitration (which in most cases is the place of arbitration designated in the arbitration clause) can set aside an award.[93]

A third difference relates to the standards used by the courts to decide whether to recognize or vacate an award. While Article V of the Convention contains uniform standards that courts of all member states are required to use in deciding whether to recognize and enforce awards,[94] it contains no standards governing their vacatur. Those latter standards are governed by the domestic law at the arbitral seat.[95] Thus, when it comes to the confirmation of awards by US courts, section 207 of the Federal Arbitration Act ("FAA") explicitly incorporates the standards of Article V of the New York Convention.[96] (Section 302 of the FAA does the same for Panama Convention.)[97] By contrast, Section 10 of the FAA contains the unique standards used by US courts for the set-aside of international awards rendered in the US.[98]

While, as noted above, the vacatur of an award entails that it has "no further force or effect,"[99] that can be categorically true only at the place of vacatur. For example, an award that has been vacated at the arbitral seat in, say, Mexico, has no further force and effect in Mexico, and so cannot subsequently be confirmed by the courts there. However, it is an independent and further question whether vacatur at the arbitral seat in Mexico entails that the award has no further force and effect in another country, say the United States or France. That depends on what effect a US or French court gives to the Mexican court's decision to vacate the award. A French court, as noted, would give no categorical effect to the Mexican court's vacatur decision because an arbitration award has an existence independent of any legal order. What's the position in the US?

The question of whether or not an award vacated at the seat should be

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[92] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

[93] *Id.* art.

[94] *Id.*

[95] *Id.*

[96] 9 U.S.C. § 207.

[97] 9 U.S.C. § 302.

[98] 9 U.S.C. § 10.

[99] *United States v. Williams*, 904 F.2d 7 (7th Cir. 1990).

recognized in the US has reached the US courts several times, and the decisions have been mixed. Some courts have recognized vacated awards.[100] Other courts have declined to do so.[101] But it is important to note that this difference in outcome does not reflect an incoherence in the US approach to the question of the recognition of vacated awards. Rather, it reflects the application of what is becoming the prevailing test for determining whether a US court should recognize a vacated award. That test has led to different outcomes depending on the facts of the case. I want to explain this test by examining the *Pemex* case.

In *Pemex*, the Court of Appeals for the Second Circuit affirmed a judgment of the District Court for the Southern District of New York ("SDNY") recognizing and enforcing an international arbitration award rendered in Mexico, even though that award had been vacated by a Mexican court.[102] In doing so, the Second Circuit articulated an analytical framework for courts addressing the question of whether to recognize awards that have been vacated at the arbitral seat.

Pemex arose out of a 1997 contract (superseded by a 2003 contract) between Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. ("COMMISA") with Pemex-Exploracíon Y Produccíon ("Pemex") (a state-owned company) to build oil platforms in the Gulf of Mexico.[103] The contract had a clause requiring that disputes be resolved by arbitration in Mexico City.[104] A dispute arose following which Pemex rescinded the contract and seized the oil platforms, which were 94% complete.[105] COMMISA responded by commencing arbitration proceedings in Mexico City.[106] In 2009, the arbitration tribunal issued an approximately $300 million award in COMMISA's favor.

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[100] *See, e.g.*, In re Chromalloy Aeroservices, 939 F. Supp. 907 (D.D.C. 1996) (recognizing award notwithstanding its vacatur at Egyptian arbitral seat); *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016) (recognizing award notwithstanding its vacatur at Mexican seat).

[101] *See, e.g., Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999) (declining to recognize award on ground that it had been vacated at Nigerian seat); *TermioRio S.A., Esp. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007) (declining to recognize award on ground that it had been vacated at Colombian seat).

[102] *Pemex*, 832 F.3d at 97.

[103] *Id.* at 98.

[104] *Id.*

[105] *Id.*

[106] *Id.*

COMMISA then successfully petitioned to confirm that award in the SDNY; Pemex then appealed the SDNY's decision to the Second Circuit and, at the same time, moved to vacate the award in Mexico.[107]

While the appeal was pending, the Mexico court vacated the award on the ground that Pemex could not be required to arbitrate.[108] And relying on that vacatur, Pemex persuaded the Second Circuit to vacate the SDNY judgment and remand the case so that that the SDNY could consider the effect of the Mexican court's decision.[109]

After hearing expert evidence on Mexican law, the SDNY confirmed the award notwithstanding its vacatur in Mexico.[110] It did so on the ground that the Mexican court's vacatur was based on the retroactive application of Mexican law. Specifically, the SDNY found that the vacatur was based on a 2007 change in the Mexican law made after the underlying contract was executed, the effect of which was to (i) grant exclusive jurisdiction for disputes related to public contracts (as in *Pemex*) in the Tax and Administrative Court and so override any arbitration agreement; and (ii) establish a 45-day limitation period for suits in that Court.[111] The SDNY found that the vacatur judgment "violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed and left COMMISA without an apparent ability to litigate its claim."[112] Pemex, again, appealed to the Second Circuit. The central question for the court was whether a district court can confirm an award that has been vacated at the seat, and, if so, in what circumstances.

On appeal, the Second Circuit began its analysis by focusing on the text of the Convention, noting that Article V states only that a petition to confirm an award "may" be refused when an award has been vacated at the seat.[113] The Second Circuit stated that "the plain text of the [Convention] seems to contemplate the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction."[114] Of course, noting that the question is a matter of

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[107] *Id*. at 99, 101.

[108] *Id*. at 99.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*. at 100.

[113] *Id*. at 105.

[114] *Id*. at 106.

discretion provides little guidance about how that discretion should be exercised.

The Second Circuit went on to provide that guidance by framing the issue as one of a clash between two competing obligations of US courts: on the one hand, the obligation of a district court to confirm an arbitration award pursuant to the Convention and, on the other, its obligation, based on international comity, to respect the judgment of a foreign court.[115]

Thus, the central question for the Second Circuit in deciding whether to confirm an award that had been vacated by a judgment of the court at the seat is this: Should a US court recognize the judgment of a court at the seat vacating an arbitral award? If it chooses to do so, the effect is to treat the arbitral award as extinguished. If, by contrast, it declines to recognize the judgment, the award remains effective and, barring other defenses to enforcement, should be recognized.

US courts traditionally have recognized foreign judgments based on the doctrine of comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[116] However, as the Second Circuit noted in Pemex, the doctrine of comity is not without limits. "[A] final judgment obtained through sound procedures in a foreign country is generally conclusive … unless … enforcement of the judgment would offend the public policy of the state in which enforcement is sought."[117] And a judgment offends public policy when it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."[118] The Second Circuit noted that this standard "is high and infrequently met."[119]

In *Pemex*, the Second Circuit found that the high standard was met as a result of "four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation."[120]

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[115] *Id.*

[116] *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

[117] *Pemex*, 832 F.3d at 106.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 107.

In a recent case, *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petro. Corp.*, the Second Circuit was careful to highlight that the four-part test in *Pemex* was not a formula applicable in every case.[121] In *Esso*, the Second Circuit stressed the importance of comity in the analysis of whether a vacated award should be enforced, noting that "the comity that US courts owe to foreign judgments remains a vital prudential concern."[122] It went on to stress that the four-part test in *Pemex* was not a universal formula applicable in all cases involving petitions to enforce award that had been vacated at the seat. Rather, it stressed that, on the facts of *Pemex*, the four factors relied upon by the Court were sufficient to overcome considerations of comity in that case:

> [T]hose aspects of the *Pemex* analysis did not reduce the applicable standard to a four-factor formula that courts must—or necessarily even should—apply in every case involving set-aside arbitral awards. Rather, the prudential concern of international comity was "surmounted" in the circumstances presented in *Pemex* by four particular considerations that may or may not be relevant to other petitions seeking enforcement of a set-aside award. *Id.*
>
> Although the relevant considerations will vary with the context of an enforcement petition, in no event should the *Pemex* standard be understood as easy to meet. On the contrary, we emphasized there that "[a]ny court should act with trepidation and reluctance in enforcing an arbitral award that has been declared nullity by the courts having jurisdiction over the forum in which the award was rendered." *Id.* at 111. The public policy exception to the principle of comity "does not swallow the rule: the standard is high, and infrequently met." *Id.* at 106 (internal quotation marks and brackets omitted). To carefully balance "the goals of comity and res judicata" with "fairness to litigants," courts being asked to enforce a set-aside arbitral award must evaluate whether the judgment that set aside the award "tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual

[121] 40 F.4th 56 (2d Cir. 2022).

[122] *Id.* at 73.

> rights of personal liberty or of private property." *Id.* (quoting *Ackermann*, 788 F.2d at 841–42). In the absence of a clear adverse effect on these fundamental public policy concerns, comity stands firmly as our guiding value.[123]

In that case, applying the *Pemex* factors, the District Court for the Southern District of New York has declined to enforce an arbitration award in favor of Esso that had been set aside in Nigeria. The Second Circuit held:

> "Although the district court acted well within its discretion by extending comity to the Nigerian Court of Appeal judgments, we conclude still that the district court erred by failing to delineate and enforce those portions of the Award that those judgments reinstated. As described above, US courts are generally bound to enforce an award that has not been set aside in the primary jurisdiction. Because no exceptions to enforcement apply with respect to the portions of the Award that the Nigerian Court of Appeal reinstated, it follows that the district court must enforce those portions of the Award. By failing to do so, the district court erred. (citations omitted)[124]

The Court remanded the case to the district court "to allow it to resolve these issues with the parties' aid. The district court should engage in any additional fact-finding and briefing it deems necessary or appropriate to clarify the effects of the Nigerian judgments. This task includes, at least, determining whether to order any partial damages payment by NNPC and, if so, in what amount and on what basis. After addressing these and any other remaining issues (and any new issues that may surface in time), the district court should fashion a partial enforcement order consistent with this Opinion and with its own additional findings."[125]

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[123] *Id.* at 73–74.

[124] *Id.* at 78.

[125] *Id.*

* * *

The Second Circuit's approach is a pragmatic middle-ground between the French and German approaches, taking into account competing considerations. On the one hand, if US courts were to cavalierly ignore judgments of foreign courts vacating awards, there is a risk that foreign courts would disregard US court judgments doing the same. On the other hand, one of the main reasons parties choose international arbitration is neutrality; they want to arbitrate the merits of a dispute before a neutral arbitration panel, rather than take the risk that a national court may favor the local party. It is important, therefore, that there be some standard for reviewing foreign judgments vacating awards to ensure that any bias that was avoided through arbitration at the merits stage does not creep in at the enforcement stage as a result of a parochial approach to vacatur taken by a national court at the arbitral seat.

It is submitted that US courts have struck a reasonable balance between these competing considerations. US courts take an approach standard that would generally require US courts to respect the vacatur judgments of the courts at the seat of the arbitration. But it gives US courts the authority to disregard those judgments in those rare cases where there is clear evidence that the court at the seat engaged in "hometown justice."

C. THE DEFENSES OF LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS IN ACTIONS TO ENFORCE CONVENTION ARBITRATION AWARDS

The US Court of Appeals for the Second Circuit and other circuit courts have held that the defenses of lack of personal jurisdiction and forum non conveniens can be asserted in actions to enforce international arbitration awards governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[126]

The *Frontera* court's rationale for a requirement of personal jurisdiction rests partly on the text of the New York Convention and partly on its view that it is

[126] *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009) (personal jurisdiction); *Monegasque De Reasurrances v. NakNaftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (forum non conveniens).

a "fundamental requirement."[127] While the Second Circuit acknowledged that Article V of the Convention contains the exclusive defenses to the enforcement of an award, it stated that "Article V's exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."[128]

In *Monegasque*, a court dismissed on grounds of forum non conveniens an action to enforce an award against a party to the arbitration, the award debtor, Naftogaz, and a non-party, the State of Ukraine.[129] But while an arbitral tribunal had resolved the merits of the case against Naftogaz and found it to be liable, it had not as to Ukraine. The *Monegasque* court's rationale for finding that forum non conveniens is an available defense in the award enforcement context rests on the text of the Convention. The court relied on Article III, which states that a court shall enforce an award "in accordance with the rules of procedure of the territory where the award is relied upon."[130] It reasoned that because forum non conveniens is a matter of procedure rather than substance, so it is a "rule of procedure" within Article III and thus a valid defense.[131]

While it is hard to find impropriety in a court requiring that an award debtor be subject to personal jurisdiction, that requirement is a high hurdle for award creditors following *Daimler v. Bauman*—where the US Supreme Court made it harder to assert personal jurisdiction in the US over foreign parties.[132] This raises the question of why it is necessary for an award creditor to have to clear such a high hurdle as a precondition to the enforcement of a foreign arbitral award under the New York Convention.

Given that an award debtor has subjected itself to the jurisdiction of an arbitral tribunal through its own consent, it seems unfair, as a matter of policy, to require an award creditor to satisfy a strict jurisdictional test to be able to assert rights to enforce that award under the New York Convention. After all, an

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[127] *Frontera*, 582 F.3d at 397.

[128] *Id.*

[129] *Monegasque*, 311 F.3d at 501.

[130] *Id.* at 494.

[131] *Id.* at 498 (The procedural rule known as *forum non conveniens* finds its roots in the inherent power of the courts 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'") (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)).

[132] 571 U.S. 117 (2013).

award creditor is likely to select a forum for enforcement where the debtor has assets or is likely to have assets in the future, the last point being an important consideration given the relatively short three-year limitations period for an enforcement action under Section 207 of the FAA.

When it comes to forum non conveniens, while the words "rules of procedure" in Article III could plausibly be read to include the defense of forum non conveniens, as the *Monegasque* court suggested, that is not the only way to read them. The words could reasonably be read in a narrower way to refer to the formal steps involved in an action to enforce an award, such as how to commence an action, the timing of any response, and so on, and not to include the type of intensive legal and factual inquiry contemplated by a forum non conveniens defense.

Indeed, nothing in the New York Convention precludes multiple enforcement actions; award creditors go to where the award debtor has assets, which may be in multiple jurisdictions. As a result, the policy reasons that justify the doctrine of forum non conveniens when it comes to lawsuits relating to the merits of a dispute—ensuring that a single lawsuit on the merits takes place in the most appropriate forum—simply do not apply in the context of the enforcement of arbitration awards. It is worth noting that *Monegasque* was not a typical case. There the enforcement action in the US courts was against the award debtor, Naftogaz, and a non-party, the State of Ukraine.[133] Thus, there was no arbitration award against Ukraine for the US court to enforce. To the extent the action in the US court was directed at Ukraine, the issue before the court was whether Ukraine was liable at all on an alter ego theory. In other words, the merits of claim that Ukraine was liable had yet to be determined. There is good reason to believe that the US court was not the appropriate forum to determine the merits of that claim. Thus, the policy considerations that would justify dispensing with the defense of forum non conveniens in enforcement actions did not apply to Ukraine.

[133] *Monegasque*, 311 F.3d at 495.

D. STANDARDS OF REVIEW

Sometimes parties disagree about whether a particular dispute properly belongs in arbitration. This disagreement has been characterized by US courts as one about "arbitrability." A party might assert that a dispute is not arbitrable on any number of grounds: The arbitration clause does not cover the dispute; a condition precedent to arbitration (e.g., mediation) was not met; the contract is invalid on grounds of illegality. One question that arises is who, as between courts and arbitrators, should decide such questions of arbitrability.

In the US, there is a direct relationship between the "who decides" question that arises at initial stages of a dispute potentially subject to arbitration and the standard of review that courts apply to an award after it is rendered. The "who decides" question asks who, as between courts and arbitrators, should decide on an objection to arbitrability (used in the US sense of whether a case belongs in arbitration for any reason) that arises at the outset of a dispute. In many countries, the allocation of authority between courts and arbitrators has been addressed through the adoption by statute of the doctrine of "competence-competence," which provides that an arbitrator has the jurisdiction to decide on her jurisdiction. For example, Article 16 of the UNCITRAL Model Law, which has been adopted by many countries, provides that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[134] In the United States, the allocation of the authority between courts and arbitrators is not dealt with by statute; the issue of "who decides" is nowhere addressed in the Federal Arbitration Act (FAA). Rather, it has been addressed in a series of decisions by the Supreme Court, one of the most important of which is *Howsam v. Dean Witter Reynolds*.[135]

In addressing the "who decides" question, in Howsam, the Court relied upon a metaphor, a distinction, and an exception. The metaphor is that of a "gateway." According to the Supreme Court, "who decides"—court or arbitrator—depends on the specific type of question that is raised at the

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[134] U.N. Comm'n on Int'l Trade Law [UNCITRAL], *UNCITRAL Model Law on Commercial Arbitration*, art. 17, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2006), available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

[135] 537 U.S. 79 (2002).

"gateway" to arbitration.[136] The distinction is one drawn by the court between those gateway questions that are to be resolved by a court and those to be resolved by arbitrators.[137] How do we know which is which? The Court tells us that this depends on the expectations of the parties. Gateway matters that raise "'question[s] of arbitrability' are for a court to decide."[138] These involve those "narrow circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter," which involve such issues as the validity (but not the formation) of the arbitration agreement or its scope.[139] Gateway matters that go to arbitrators are those "where parties would likely expect that an arbitrator would decide the gateway matter."[140] These include "'procedural' questions which grow out of the dispute and bear on its final disposition" and defenses of "waiver, delay, or a like defense to arbitrability."[141]

This brings us to the exception. While gateway matters that raise questions of arbitrability are presumptively for a court to decide, there is an exception when the parties clearly and unmistakably agreed to delegate those questions to the arbitrators.[142] The Court has referred to this as the "delegation" doctrine.[143] Many courts have held that the use of the AAA and other rules that contain such provisions granting arbitrators the authority to determine their own jurisdiction constitute clear and unmistakable evidence required by First Options to have arbitrators resolve certain gateway issues.[144]

Yet not only does the distinction posited by the Supreme Court in *Howsam* determine the "who decides" question at the beginning of the process, but as the Supreme Court made clear in *BG Group PLC v. Republic of Argentina*, it also impacts the standard of review at the end.[145] The question in that case related to

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[136] *Id*. at 83–84.

[137] *Id*.

[138] *Id*. at 85.

[139] *Id*. at 79.

[140] *Id*. at 79–80.

[141] *Id*.

[142] *First Options v. Kaplan*, 514 U.S. 938 (1995).

[143] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

[144] *See, e.g., Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (using the UNCITRAL Rules); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205 (2d Cir. 2005) (using the AAA Rules); *Shaw Group v. Triplefine, Int'l.*, 322 F.3d 115 (2d Cir. 2003) (using the ICC Rules).

[145] 572 U.S. 25, 29 (2013).

a provision in the UK-Argentina BIT (Article 8) requiring an investor to litigate in the Argentine courts for 18 months before commencing an arbitration.[146] The arbitrators in that case held that the investor's (BG's) failure to do so did not impact their jurisdiction to reach the merits of the case.[147] The arbitrators rendered an award in favor of BG that Argentina sought to vacate in the District Court for the District of Columbia based on the fact that BG had failed to satisfy the "local litigation requirement."[148] The question reached the US Supreme Court.

The main question for the Court related to the standard of review it should apply, which turned on the "who decides" question. Justice Stephen Breyer, writing for the majority, put the point this way: "the question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision. Put in terms of standards of judicial review, should a United States court review the arbitrators' interpretation and application of the provision de novo, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration?"[149]

This turned on how to characterize the local litigation requirement. If it were a question of arbitrability, then the standard of review would be de novo; if a procedural question, the standard of review is deferential.[150] The majority found the local litigation requirement to be a procedural one, stating:

> The text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration. It says that a dispute "shall be submitted to international arbitration" if "one of the Parties so requests," as long as "a period of eighteen months has elapsed" since the dispute was "submitted" to a local tribunal and the tribunal "has not given its final decision." Art. 8(2). It determines when the

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[146] *Id.*

[147] *Id.* at 30.

[148] *Id.*

[149] *Id.* at 33.

[150] *Id.* at 34 ("On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability.' . . . On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.").

> contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all.[151]

As a result, it applied a deferential standard of review and denied Argentina's vacatur application, noting that "The arbitrators did not 'stra[y] from interpretation and application of the agreement' or otherwise effectively dispens[e] their own brand of . . . justice.'"[152]

What is striking is that Chief Justice John Roberts (joined by Justice Anthony Kennedy) disagreed with the majority on the question of whether the local litigation requirement was a procedural question or an arbitrability question: "Given that the Treaty's local litigation requirement is a condition on consent to arbitrate, it follows that whether an investor has complied with that requirement is a question a court must decide de novo, rather than an issue for the arbitrator to decide subject only to the most deferential judicial review."[153]

The fact that the US Supreme Court cannot agree on whether a dispute about whether a case belongs in arbitration raises an arbitrability question (for courts) or a procedural question (for arbitrators) highlights the analytic weakness of the approach advanced by the Court to address the "who decides" question—which looks to the expectations of the parties. The problem with the Court's approach is that it overlooks that courts, through their decisions, create expectations; change those decisions, you change those expectations. For example, if the Supreme Court were to rule that all disputes as to scope were for arbitrators to decide, that is what parties would expect. Because court decisions create expectations, there is something inherently circular in the Court asserting, as it did in *Howsam*, that its decision on the "who decides" questions should be based upon the expectations of the parties. It is no surprise, therefore, that the Supreme Court itself cannot agree on how to apply *Howsam*'s analytic framework.

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[151] *Id*. at 35.

[152] *Id*. at 45.

[153] *Id*. at 60.

Mass Arbitration

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**This Article is current as of March 2022. Unless otherwise stated, subsequent changes in the mass-arbitration landscape are not addressed.

Abstract

For decades, the class action has been in the crosshairs of defense-side procedural warfare. Repeated attacks on the class action by the defense bar, the U.S. Chamber of Commerce, and other defense-side interest groups have been overwhelmingly successful. None proved more successful than the arbitration revolution, a forty-year campaign to eliminate class actions through forced arbitration provisions in private contracts. The effects of this revolution on civil justice have been profound. Scores of claims vanished from the civil justice landscape—claims concerning civil rights, wage theft, sexual harassment, and consumer fraud. The effects on social justice, racial justice, gender justice, and economic justice have been especially profound, as the legal claims of minorities, women, wage-and-hour workers, and the working poor were systematically and disproportionately foreclosed.

Yet now, just when one would expect the defense bar to be taking a victory lap, prominent defendants are abandoning the hard-fought right to disable the class action through arbitration and instead seeking refuge in class-action suits. Why the about-face? A surprising counteroffensive designed to use individual arbitration to the plaintiff's advantage: mass arbitration. This Article presents a foundational analysis of the subject.

The Article develops the first and only case study of mass arbitration and provides a taxonomy of the results. What emerges is not a variation on old themes, but instead a new and distinct model of dispute resolution. The investigation reveals significant ways in which the mass-arbitration model challenges conventional wisdom about the economics of individual claims; uncovers important differences between the mass-arbitration model and existing forms of aggregate dispute resolution; recasts long-standing debates in litigation theory and jurisprudence; and provides new perspective on the relationships among private procedural ordering, public procedural reform, and civil justice. Mass arbitration, in other words, is a phenomenon in its own right. More importantly, mass arbitration offers a window into the future of civil justice.

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INTRODUCTION

In 2018, the minimum wage in Massachusetts and California was $11.00.[1] In Illinois, $8.25.[2] In New Jersey it was $8.60, up from $8.44 the previous year.[3] And in New York it was $10.40, up from a previous $9.70.[4] Drivers in these states for the rideshare service Uber, however, alleged that they had routinely been paid less than those minimum wages—often far less.[5] The Fair Labor Standards Act of 1938 (FLSA)[6] seemed like a good candidate to combat what appeared to be fairly blatant wage theft. Indeed, Congress included a collectiveaction provision in the FLSA because most wage-theft claims by wage-andhour workers are not economically viable on an individual basis.[7] According to their employment agreements with Uber, however, drivers were required to arbitrate any claims

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[1] Office of Commc'ns, Wage & Hour Div., *Changes in Basic Minimum Wages in Non-farm Employment Under State Law: Selected Years 1968 to 2021*, U.S. Dep't Lab., https://perma.cc/VU6S-KSJW (last updated Jan. 2022).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Petition for Order Compelling Arbitration ¶¶ 2, 8, Abadilla v. Uber Techs., Inc., No. 18-cv-07343 (N.D. Cal. Dec. 5, 2018), ECF No. 1 [hereinafter *Abadilla* Petition for Arbitration] (providing a general summary of the arbitration demands of Uber drivers from California, Illinois, Massachusetts, New Jersey, and New York, all of whom brought claims against Uber under the Fair Labor Standards Act and relevant state labor laws).

[6] Ch. 676, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.).

[7] 29 U.S.C. § 216(b); *see, e.g.*, Calvillo v. Bull Rogers, Inc., 267 F. Supp. 3d 1307, 1310 (D.N.M. 2017) ("The purpose of collective action under the FLSA is to give 'plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources,' and to benefit the judicial system 'by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity.' " (alteration in original) (quoting Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989))).

individually. Putative FLSA collective-action claims by many Uber drivers were therefore stayed pending arbitration.[8]

To any individual driver—and, just as importantly, to any individual driver's lawyer—pursuing an individual claim in arbitration appeared to be a nonstarter. Under the applicable fee schedule for Judicial Arbitration and Mediation Services (JAMS), the nonrefundable filing fee for arbitration was $1,500 per demand.[9] Given the value of a single driver's claim for unpaid or underpaid wages, the

[8] *See, e.g.*, Olivares v. Uber Techs., Inc., No. 16-cv-06062, 2017 WL 3008278, at *1, *4 (N.D. Ill. July 14, 2017) (granting Uber's motion to compel arbitration for a class of drivers subject to Uber's arbitration agreement, which prohibited class actions); Singh v. Uber Techs., Inc., 571 F. Supp. 3d 345, 347-52, 365-67 (D.N.J. 2021) (same), *appeal filed*, No. 21-3234 (3d Cir. Dec. 6, 2021). Claims under analogous state laws met the same result. *See, e.g.*, Mumin v. Uber Techs., Inc., 239 F. Supp. 3d 507, 518-20, 541 (E.D.N.Y. 2017) (granting Uber's motion to compel arbitration for those claimants who had not opted out of their arbitration agreements); Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 922-24, 934 (N.D. Cal. 2020) (doing the same, in a case transferred pursuant to a forumselection clause, for Massachusetts drivers who had not opted out of their agreements with Uber), *aff 'd,* 7 F.4th 854 (9th Cir. 2021); O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1090, 1095 (9th Cir. 2018) (reversing the district court's denial of Uber's motions to compel arbitration for three putative driver classes).

[9] *See, e.g.*, *Abadilla* Petition for Arbitration, supra note 5, ¶ 21; Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, Bloomberg L. (Feb. 11, 2019, 3:06 AM), https://perma.cc/XT8Y-TW2S. Although Uber's arbitration agreement provided that Uber would pay at least some of the $1,500, it refused to pay any portion of the fees in the face of multiple arbitration demands (that is, mass arbitration). See Declaration of Michael Colman in Support of Defendant's Motion to Compel Arbitration & to Dismiss the Action at 56, Olivares, 2017 WL 3008278 (No. 16-cv-06062), ECF No. 14-1 (providing for equal sharing of fees unless otherwise required by law); Abadilla Petition for Arbitration, supra note 5, ¶ 21 ("JAMS has repeatedly advised Uber that JAMS is 'missing the . . . filing fee of $1,500 for each demand, made payable to JAMS.' " (quoting a JAMS notice to Uber)). On costs in arbitration generally, see *Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter *Senate Arbitration Hearing*] (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law), https://perma.cc/93RQ-6PW2 ("Under these class-banning arbitration clauses, any claimant must bear 100% of the costs of proceeding in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks.").

up-front investment to advance this filing fee[10] would not be an economically rational proposition for either individual claimants or their attorneys.[11] In effect, then, the arbitration agreement eliminated drivers' FLSA claims, just as similar agreements had done to hundreds of thousands of legal claims for decades. But then a funny thing—an improbable, nearimpossible thing—happened. In a series of filings, the Uber drivers served more than 12,500 individual arbitration demands on Uber.[12] And their lawyers demanded that Uber reimburse the filing fees—$18.75 million in total—just as Uber had agreed to do in its arbitration agreement.[13] This was not a collective action, or a class action, or even class arbitration. This was mass arbitration.

By mass arbitration[14] I mean the following. Some enterprising and (highly) capitalized attorneys file arbitration demands on behalf of individual claimants

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[10] The portion of the filing fee for which claimants bear responsibility may be capped by the applicable arbitral forum's fee schedule at the time of filing. *See, e.g.*, *Arbitration Schedule of Fees and Costs*, JAMS, https://perma.cc/U8F6-TZKK (archived May 9, 2022) ("For matters based on a clause or agreement that is required as a condition of employment, the employee is only required to pay $400."). The relevant arbitration agreement may also provide that the employer will pay a portion of the claimant's filing fees. See supra note 9. Faced with mounting fees from arbitration demands, Uber settled with almost 60,000 of its drivers in 2019 for more than $146 million. *See* Chris Isidore, *Uber Settles Disputes with Thousands of Drivers Ahead of Its IPO*, CNN (May 9, 2019, 8:10 AM EDT), https://perma.cc/PTM3-36T6. Other companies faced with mass arbitration have responded similarly, leading California to enact a law penalizing any company that refuses to pay arbitration fees. CAL. CIV. PROC. CODE § 1281.97 (West 2022); see also Postmates Inc. v. 10,356 Individuals, No. 20-cv-02783, 2021 WL 540155, at *13 (C.D. Cal. Jan. 19, 2021) (denying Postmates' attempt to strike down the California law); Alison Frankel, *Calif. Judge Upholds State Law Penalizing Companies for Stalling on Arbitration Fees*, REUTERS (Jan. 20, 2021, 4:49 PM), https://perma.cc/P9V7-MUWE (describing Postmates' efforts to avoid arbitration as "unrelenting").

[11] *Cf.*, *e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions . . . for the possibility of fees stemming from a $30.22 claim?"); *Senate Arbitration Hearing*, *supra* note 9 (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law) ("Most [consumers] cannot find lawyers to represent them in arbitration . . . .").

[12] Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019, 12:03 PM), https://perma.cc/4VQT-FHHM.

[13] *Id.*

[14] The term "mass arbitration" has been used by one scholar to describe the ubiquity of arbitration agreements in the post–arbitration revolution landscape. David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 476-79 (2014) (reviewing MARGARER JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)). What the author meant in that book review, though, was a massive number of actual agreements. That is not mass arbitration as described in this Article; indeed, it is almost the opposite, given that those agreements tend to result in almost no arbitration. *See infra* Part I.C.

subject to mandatory arbitration agreements. The claims are brought against the same defendant for the same course of conduct. The attorneys then do this again. And again. And again. Mass arbitration is a new model of claiming that is at once entirely individualized (one-on-one arbitration) and aggregate. The individual claims that make up the multifarious one-on-one arbitrations are brought against a single defendant, arising out of similar alleged misconduct.

Mass arbitration is both a response to and a product of a decades-long, wildly successful campaign by defense-side interests to dismantle the infrastructure for enforcing substantive rights.[15] This campaign, waged by the defense bar, the U.S. Chamber of Commerce, multiple Republican presidential administrations, and various defense-side interest groups, involved a series of procedural offensives in the Supreme Court and before Congress.[16] Many decades and scores of victories after its inception, the campaign achieved wide deregulation across the American legal landscape.[17]

In the crosshairs of the campaign: the class-action device. At the urging

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[15] *See generally* Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 Fordham L. Rev. 37, 37, 59 (2018) (explaining how rights-creating statutes enacted during the 1960s and 1970s brought about a procedural counterrevolution against federal litigation); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1140-41 (2012) (detailing the dismantling of private enforcement mechanisms in litigation and noting the United States' unique reliance on private litigation to regulate wrongdoing).

[16] *See, e.g.*, Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. 655, 655-56 (2016) (describing how the Supreme Court adopted the position of the Chamber of Commerce and other business amici in recent class-action suits); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. Pa. L. Rev. 1495, 1524-25 (2017) (characterizing Republican anti–class-action bills in the early 1990s and the Chamber of Commerce's increased amicus activity since 1995 as "part of a wider and concerted campaign of litigation retrenchment"); Brianne J. Gorod, *The First Decade of the Roberts Court: Good For Business Interests, Bad for Legal Accountability*, 67 Case W. Rsrv. L. Rev. 721, 722-23 (2017) ("[T]he Chamber of Commerce . . . appears to have been more successful before the Roberts Court than it was before either of the two Courts that preceded it."); *see also* Joanne Doroshow, *Federal Legislative Attacks on Class Actions*, 31 Loy. Consumer L. Rev. 22, 30-36 (2018) (recounting the history of attacks on Federal Rule of Civil Procedure 23 by corporate lobbying groups and Republican legislators).

[17] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting) (citing Glover, *supra* note 15, at 1150-51) (explaining how private litigation is critical to the regulation of wrongdoing in the United States).

[18] *See* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371, 378-83 (noting that "[t]he President personally met every judicial nominee to ensure their . . . fidelity to his vision," which included a "[s]pecial ire" toward class-action impact litigation).

of conservative administration officials, President Ronald Reagan's judicial appointees received careful vetting as to their views on the class action.[18] President George W. Bush pushed Congress to examine litigation practices and the perceived explosion of "junk" litigation in nearly every State of the Union address.[19] A group of Fortune 100 corporate lawyers helped draft the Class Action Fairness Act (CAFA)—which aimed to reduce the overall number of class certifications in the litigation landscape[20]—and spent somewhere between $50 to $200 million in support of the bill.[21] Meanwhile, the defense bar secured Supreme Court victories in case after class-action case. The Court (often, but not always, in 5–4 decisions) ratcheted up class-certification standards under

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[19] *See* President George W. Bush, Address Before a Joint Session of the Congress on Administration Goals (Feb. 27, 2001), https://perma.cc/GK57-GS2L (discussing the need to avoid "frivolous lawsuits" against medical providers); President George W. Bush, 2003 State of the Union Address (Jan. 28, 2003), https://perma.cc/E9AJ-GXLJ (discussing the need for medical liability reform); President George W. Bush, 2004 State of the Union Address (Jan. 20, 2004), https://perma.cc/5HA3-PLSM (calling for the elimination of "wasteful and frivolous medical lawsuits"); President George W. Bush, 2005 State of the Union Address (Feb. 2, 2005), https://perma.cc/4XAL-FL5Z ("Justice is distorted and our economy is held back by irresponsible class actions . . . ."); President George W. Bush, 2006 State of the Union Address (Jan. 31, 2006), https://perma.cc/ 5AYL-TQGZ ("I ask . . . Congress to pass medical liability reform this year."); President George W. Bush, 2007 State of the Union Address (Jan. 23, 2007), https://perma.cc/ZZ8Z-NU6Q (calling for legislation against "junk lawsuits"); President George W. Bush, 2008 State of the Union Address (Jan. 28, 2008), https://perma.cc/S25K-BDFZ (calling on Congress to address an "epidemic of junk medical lawsuits"); *see also* Gilles, *supra* note 18, at 387. Whether the perceived "litigation explosion" reflects reality is not so obvious. For instance, the number of civil cases filed in state courts decreased by 7.7% between 2008 and 2012. Ct. Stat. Project, Nat'l Ctr. for State Cts., Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads 4 (2014), https://perma.cc/K9G3-8NDL. The picture in federal courts is more nuanced: Federal civil appeals decreased by 11% between 2009 and 2018, but civil filings in U.S. district courts rose 7.1% during the same period (although they declined by 5.2% between 2017 and 2018). *Federal Judicial Caseload Statistics 2018*, U.S. Cts., https://perma.cc/L5ST-JV9K (archived May 13, 2022). Civil filings rose a further 3.4% between 2018 and 2019, *Federal Judicial Caseload Statistics 2019*, U.S. Cts., https://perma.cc/9SDL-WXPE (archived May 13, 2022), and 16.2% between 2019 and 2020, *Federal Judicial Caseload Statistics 2020*, U.S. Cts., https://perma.cc/W89J-F74F (archived May 13, 2022).

[20] *See* S. Rep. No. 109-14, at 4-5, 13-14, 22-23, 53-54 (2005) (expressing concern with the "dramatic explosion of class actions in state courts" and describing how CAFA makes removal to federal courts—which are less likely to grant certification—easier).

[21] *See* David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 Wm. & Mary L. Rev. 1247, 1288 (2007). Despite CAFA's success, more dramatic legislative efforts by class-action opponents met with resistance. See Gilles, supra note 18, at 396-97 (describing one bill that would have limited contingency fees for plaintiffs' attorneys).

Rule 23(a) of the Federal Rules of Civil Procedure;[22] effectively removed the class action from the products liability landscape;[23] made civil rights claims more difficult to pursue on a class-wide basis;[24] and embraced the defense coalition's conception of the class action as procedural pariah.[25]

The campaign's focus on the class action was grounded in conventional wisdom regarding claiming economics. This wisdom holds—and empirical research tends to support[26]—that for an individual with a low-value but potentially meritorious claim, the costs of pursuing an individual case are typically too high for individual claiming to be a rational proposition.[27] The class-action device changes that calculus by allowing cost spreading among claimants, thereby enabling claiming.[28] Destroy the class action, the logic went, destroy the claims.

And indeed, the defense coalition came to bury the class action, not restrict it. None of the coalition's efforts went so far as to eliminate the class action

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[22] *E.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (holding that "undiluted, even heightened, attention" is required for settlement-only class certification under Rule 23); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011) (adopting Richard Nagareda's heightened "predominance" standard for purposes of Rule 23(a) commonality and stating that the only questions relevant for commonality are those that generate "answers apt to drive the resolution of the litigation" (emphasis omitted) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009))); *see also* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 764 (2013) (arguing that courts have "inject[ed] confusion over what is required to satisfy each element of Rule 23(a)" by applying the rule's requirements to class definitions).

[23] *See, e.g.*, *Amchem*, 521 U.S. at 609-11 (discussing the impediments to class certification presented by an asbestos products liability suit); Ortiz v. Fibreboard Corp., 527 U.S. 815, 853 (1999) (noting that having "enough assets to pay all projected claims" would preclude the "certification of any mandatory class on a limited fund rationale").

[24] *See Dukes*, 564 U.S. at 372-78 (Ginsburg, J., concurring in part and dissenting in part).

[25] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) (describing class actions as imposing *in terrorem* settlement pressure and stating that "class arbitration would be no different"); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686- 87 (2010) (stating that the "stakes of class-action arbitration are comparable to those of class-action litigation" and holding that class arbitration may not be compelled absent explicit agreement); *see also In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1296-98 (7th Cir. 1995) (emphasizing the potential for class actions to impose "intense" settlement pressure and refusing to certify an issue class based on this pressure).

[26] *See infra* notes 112-17 and accompanying text.

[27] *See* Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 245 (2013) (Kagan, J., dissenting).

[28] *See* Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 Rev. Litig. 231, 236-38 (1991).

altogether: Doing so would have required upending long-standing precedent or amending the Federal Rules of Civil Procedure. Instead, the coalition waged a forty-year campaign to gain the ability to contract the class action out of existence. Its focus? Mandatory arbitration agreements with class-action waivers in take-it-or-leave-it consumer and employee contracts.

Defendants played the long game.[29] They convinced the Supreme Court to bless arbitration provisions prohibiting class action for state-law claims,[30] for federal claims,[31] and finally for claims under statutes like the FLSA that explicitly provide a right to collective action.[32] The result was a roadmap for corporations to engineer, as a practical matter, contractual immunity against a vast array of claims. The result was also nothing short of a revolution: an arbitration revolution.[33]

Yet less than a decade later, some of the very entities that waged and seemingly won the war are abandoning the whole project. Corporations that engineered the arbitration revolution are now "scared to death" of arbitration.[34] So scared, in fact, that some are retreating to the device they spent decades trying to eliminate: the class action. In May 2021, one of the biggest corporations of all—Amazon—dropped the arbitration requirement from its terms of service entirely. "Fine," it essentially declared, "sue us."[35]

How could this total victory transform into a massive retreat not even a decade later? The answer lies in an unforeseen (and largely unforeseeable)

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[29] *See, e.g.*, Aaron Bruhl, AT&T's *Long Game on Unconscionability*, PrawfsBlawg (May 5, 2011, 9:40 AM), https://perma.cc/DY38-XECL (speculating that counsel for AT&T had, for over a decade, been crafting a strategy for creating, testing, and ultimately bringing a "consumer-friendly" arbitration agreement with a class waiver to the Supreme Court).

[30] *Concepcion*, 563 U.S. at 337-38, 352.

[31] *It. Colors*, 570 U.S. at 231-32, 238-39.

[32] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619-20, 1626 (2018).

[33] *See* David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 457-60 (2016).

[34] Michael Corkery & Jessica Silver-Greenberg, *"Scared to Death" by Arbitration: Companies Drowning in Their Own System*, N.Y. Times (Apr. 6, 2020) (quoting an internal DoorDash document), https://perma.cc/T34V-PJ9X.

[35] Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, Wall St. J. (June 1, 2021, 7:30 AM ET) (capitalization altered), https://perma.cc/R5JQJ26V; Amanda Robert, *Amazon Drops Arbitration Requirement After Facing over 75,000 Demands*, ABA J. (June 2, 2021, 11:45 AM CDT), https://perma.cc/TYG3-GMDU ("Many companies require their employees and customers to resolve disputes through arbitration rather than in the courtroom. Now, Amazon is no longer one of them.").

counteroffensive by a small subset of the plaintiffs' bar—a counteroffensive that I term mass arbitration. This Article presents a foundational analysis of the subject.

Part I traces the backdrop against which mass arbitration emerged. It first provides a short history of the arbitration revolution (in which the Supreme Court allowed for mandatory arbitration agreements in virtually all take-it-or-leave-it contracts) and the concomitant class-action counterrevolution (in which the Supreme Court not only made class certification more difficult but also permitted the use of class-action waivers in mandatory arbitration agreements).[36] It then details the profound consequences of the arbitration revolution for the civil justice landscape. Today, virtually all Americans are subject to mandatory arbitration agreements with class-action waivers. And a broad swath of claims—for consumer fraud, racial discrimination, gender discrimination, wage theft, and workplace sexual harassment—have been all but eliminated.

Decades of attempts at public procedural reform have largely failed. Nonetheless, the analysis of the Supreme Court's arbitration jurisprudence in Part II shows that the arbitration revolution left (narrow) room for private procedural counteroffensives. To be sure, the Supreme Court has made quite clear that neither unconscionability nor the effective-vindication doctrine is sufficient to salvage a representative procedure—the class action—that the Court itself disfavors. But what could happen if defendants "didn't have the class action to kick around anymore"?[37] What did happen—improbably, unexpectedly—was mass arbitration.

The best way to understand mass arbitration is to observe it in a realworld context. Parts III, IV, and V of this Article accordingly provide and analyze

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[36] Stephen Burbank and Sean Farhang characterize efforts to retrench the class-action device as a counterrevolution against federal litigation. *See* Burbank & Farhang, *supra* note 16, at 1496-98. In the context of the arbitration revolution, those same efforts constitute a counterrevolution against the class action itself—and against civil litigation generally. For additional literature discussing the retrenchment of rights through procedural warfare, *see* generally Glover, *supra* note 15, at 1162-70; Laurence Tribe & Joshua Matz, Uncertain Justice: The Roberts Court and the Constitution 291-93 (2014); Stephen B. Burbank & Sean P. Farhang, Rights and Retrenchment: The Counterrevolution Against Federal Litigation (2017); and J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-worker Activism*, 2019 J. Disp. Resol., no. 1, at 129.

[37] To quote Richard Nixon, speaking before reporters at the Beverly Hilton Hotel in 1962: "You won't have Nixon to kick around anymore, because gentlemen, this is my last press conference . . . ." Jason Schwartz, *55 Years Ago—"The Last Press Conference,"* Richard Nixon Found. (Nov. 14, 2017), https://perma.cc/DQ45-B2BN.

a foundational mass-arbitration case study. One scholar has aptly referred to private arbitration as a "black hole."[38] To see beyond the event horizon, I drew from an extensive set of materials, some not publicly available, to create a broad study dataset. These materials included all available claim data from the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention & Resolution (CPR); all relevant judicial filings, opinions, and orders; and all relevant corporate financial disclosures.[39] I also interviewed the principal architects of mass arbitration,[40] leading plaintiffs' attorneys,[41] and a number of leading defense attorneys, including some of the architects of the defense coalition's arbitration revolution.[42]

The study in Part III first uncovers the origin story of mass arbitration—a story about how a few entrepreneurial attorneys marshaled an unlikely combination of experience, capital, innovation, and appetite for risk in an effort to call corporate defendants' arbitration bluff by, well, arbitrating. They demanded the same thing those defendants had sought before the Supreme Court: the enforcement of arbitration agreements "according to their terms."[43] And they did so repeatedly.

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[38] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 682 (2018).

[39] *See infra* Part III.A.2.

[40] Interview with Travis Lenkner, Managing Partner, Keller Lenkner LLC & Warren Postman, Partner, Keller Lenkner LLC, in Queenstown, Md. (Jan. 14, 2021); Interview with Warren Postman, Partner, Keller Lenkner LLC, in Wash., D.C. (July 23, 2021); Interview with Cory L. Zajdel, Principal Att'y, Z Law, LLC, in Wash., D.C. (July 22, 2021); Interview with Matthew C. Helland, Managing Partner, Nichols Kaster, PLLP, in Kennebunk, Me. (Sept. 2, 2021). All transcripts and notes are on file with the Author.

[41] Interview with Anonymous No. 5 in Wash., D.C. (Nov. 8, 2021); Interview with Jonathan D. Selbin, Partner, Lieff Cabraser Heimann & Bernstein, LLP, in Wash., D.C. (July 26, 2021); Interview with Anonymous No. 2 in Wash., D.C. (Mar. 13, 2020); Interview with Adam T. Klein, Managing Partner, Outten & Golden LLC, in Wash., D.C. (Aug. 10, 2021); Interview with Nancy Erika Smith, Att'y, Smith Mullin, P.C., in Kennebunk, Me. (Aug. 24, 2021). All transcripts and notes are on file with the Author.

[42] Interview with Anonymous No. 4 in Wash., D.C. (July 29, 2021); Interviews with Anonymous No. 3 in Wash., D.C. (Apr. & June 2021); Interview with Anonymous No. 1 in Nashville, Tenn. (Jan. 2006). Additionally, I interviewed leading defense attorneys or former defense attorneys who had experience with mass arbitration. Interview with Jonathan E. Paikin, Partner, Wilmer Cutler Pickering Hale & Dorr LLP, in Wash., D.C. (Nov. 9, 2021); Interview with Anonymous No. 5, *supra* note 41. All transcripts and notes are on file with the Author.

[43] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (explaining that requiring class-wide arbitration interferes with the Federal Arbitration Act's aim of enforcing arbitration agreements "according to their terms").

The study in Part III also reveals that mass arbitration is a new and distinct form of aggregate dispute resolution. Part III explains the mass-arbitration model's distinctive features, strategic elements, risks, and benefits. In so doing, it reveals the counterintuitive ways in which mass arbitration challenges— indeed, inverts—the conventional wisdom regarding the economics of claiming. Mass arbitration harnesses individual claiming and eschews class claiming in order to extract settlements for claimants.

Part IV provides a window into the future of mass arbitration by uncovering a series of challenges to the mass-arbitration model. Part V then taxonomizes the case study's findings and compares the mass-arbitration model to more familiar and established models of aggregate dispute resolution—namely, class actions and multidistrict litigation (MDL) consolidations.

As Part VI details, the impact of mass arbitration on the civil justice landscape will be profound. First, mass arbitration recasts long-standing debates in civil justice, particularly those at the intersection of claim facilitation and settlement pressure. Second, because defendants will have to contend with the mass-arbitration model in dispute-resolution contexts they cannot unilaterally change by contract, mass arbitration illuminates the possibilities and pitfalls of informal aggregate dispute resolution in the civil justice landscape. Third, mass arbitration suggests a larger critique of the U.S. civil justice system: It is at best agnostic to many of the systemic injustices it perpetuates, and it increasingly shirks its countermajoritarian commitments as it outsources resolutions to moneyed corporate interests.

The counter-counterrevolution is upon us. Mass arbitration has already driven some corporate defendants into the arms of their longtime nemesis, the class action. But we have only begun to glimpse the enormous change that mass arbitration portends

I. THE ARBITRATION REVOLUTION AND THE CLASS-ACTION COUNTERREVOLUTION

The defense coalition tried to kill the class action by shifting dispute resolution from public litigation to private arbitration. This involved a significant sleight of hand. As this Part explains, what the defense coalition really wanted was to eliminate—or at least drastically reduce—plaintiffs' ability to assert claims

anywhere. Arbitration emerged as an important fig leaf in that effort.

Though disfavored in early American jurisprudence,[44] private procedural ordering is now widely accepted by American courts.[45] Public rules of procedure are increasingly treated as default rules subject to waiver.[46] Judicial endorsement of private procedural ordering paved the way for the expansion of "alternative dispute resolution," namely arbitration. Arbitration agreements in private contracts, in turn, provided the vehicle by which the defense bar achieved the "near-total demise" of the class action.[47] This one-two punch of mandatory arbitration agreements and class-action waivers has now touched virtually all Americans, and it has all but eliminated a wide range of consumer, employee, and civil rights claims.

This Part traces the above developments in three stages. First, it describes the birth of forced arbitration agreements in take-it-or-leave-it contracts—the arbitration revolution. Second, it details the near-total death of class actions—the class-action counterrevolution. Third, it examines the aftermath of the revolution and the counterrevolution, both for American citizens and for scores of claims across the legal landscape.

A. The Arbitration Revolution

The history of binding arbitration agreements begins in the first part of the twentieth century. Following a period of perceived hostility toward arbitration in federal courts,[48] Congress passed the Federal Arbitration Act (FAA) in 1925.[49] The FAA provides that written arbitration agreements "shall be valid,

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[44] *See* Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. Rev. 127, 128, 134 (2018).

[45] *See* Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 Va. L. Rev. 723, 734-38 (2011).

[46] *See* H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 Neb. L. Rev. 787, 788-91 (2017).

[47] *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375-79 (2005) (predicting the "near-total demise of the modern class action" due to the "rise of contractual class action waivers" that "work[] in tandem with standard arbitration provisions").

[48] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). For an alternative historical account regarding early treatment of arbitration agreements, see Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. Econ. & Org. 479, 480-81 (1995).

[49] Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1- 14).

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[50] During debates about the FAA's potential passage, one senator expressed concern that contracts with arbitration clauses might be offered on a take-it-or-leave-it basis to captive customers or employees. The bill's supporters responded that the FAA was intended to facilitate the enforcement of freely and fully negotiated agreements between merchants of equal bargaining power.[51] For decades, the Supreme Court's arbitration jurisprudence aligned with this view of the FAA and disallowed ex ante arbitration agreements when bargaining power was unequal.[52]

The story does not pick up in any meaningful way until the 1980s. After the election of President Ronald Reagan, the defense bar, corporate entities, and related interest groups launched what would become a decades-long campaign to expand the universe of permissible contexts for mandatory arbitration agreements. In a series of cases decided in the 1980s and 1990s, the defense coalition persuaded the Supreme Court to approve the use of forced arbitration for claims under federal antitrust laws,[53] securities laws,[54] and antidiscrimination statutes.[55] Lower courts, meanwhile, enforced arbitration agreements found in mail inserts,[56] in shrink-wrap licenses,[57] and even in "add-ons" to contracts

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[50] 9 U.S.C. § 2.

[51] *See* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. Rev. 1939, 1948 & n.42, 2007 & n.321 (2014) (citing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 8-11 (1923)); see also Pamela S. Karlan, David C. Baum Memorial Lecture, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 204 (noting that Congress may have intended to exclude employment contracts from the FAA); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 38 (asserting that the FAA was not intended to cover contracts of adhesion).

[52] *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435-38 (1953), *overruled* by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[53] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29 (1985).

[54] *Rodriguez de Quijas*, 490 U.S. at 480-81, 484-85.

[55] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-24, 29, 35 (1991).

[56] Sanders v. Comcast Cable Holdings, No. 07-cv-00918, 2008 WL 150479, at *1-3, *12 (M.D. Fla. Jan. 14, 2008).

[57] Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148, 1151 (7th Cir. 1997).

already entered into by consumers.[58] By 2012, the arbitration revolution for legal claims was largely complete: The Court held that all federal statutory claims are arbitrable unless Congress expressly provides otherwise.[59]

After these successes, the scope of the defense coalition's goals expanded. If arbitration agreements could be used to move legal claims out of court and into private dispute resolution, perhaps they could be used to remove them altogether. Aware that directly retrenching substantive rights was politically impractical,[60] the coalition sought to eliminate rights indirectly by targeting the principal mechanism for their enforcement—the class action. And so, as the next Subpart traces, the coalition also waged a class-action counterrevolution.

B. The Class-Action Counterrevolution

In the 1980s, in response to a perceived "litigation explosion" and an increase in Rule 23(b)(3) suits (which tended to extract large settlements from corporate defendants[61]), business leaders and conservative politicians launched a series of public attacks on the class action.[62] According to these individuals, class actions allowed "radical" lawyers to use litigation to subvert "the democratic will as expressed through legislatures or executive action."[63] President Reagan's judicial appointees were vetted on the class-action issue to confirm that they would help effectuate the Reagan Administration's antilitigation agenda.[64] Conservative groups, particularly in the 1990s and 2000s, engaged in numerous efforts to

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[58] For a recent example, *see Miracle-Pond v. Shutterfly, Inc.*, No. 19-cv-04722, 2020 WL 2513099, at *1-2, *6 (N.D. Ill. May 15, 2020) (permitting the addition of an arbitration clause to existing consumer contracts without notice of modification). *But see, e.g.*, Douglas v. U.S. Dist. Ct., 495 F.3d 1062, 1065-67 (9th Cir. 2007) (per curiam) (requiring notice in order to enforce an add-on arbitration clause).

[59] *See* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 103-05 (2012) ("Because the [Credit Repair Organizations Act] is silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.").

[60] *See* Burbank & Farhang, *supra* note 15, at 43.

[61] *See* Gilles, *supra* note 18, at 376 ("Beginning in the 1980s, class actions racked up many billions of dollars in settlements, spread across an ever-expanding range of subject areas and industries . . . . By the 2000s, as multimillion dollar range settlements became almost commonplace, the power of class cases to coerce lucrative settlements was not much in dispute." (footnotes omitted)).

[62] *Id.* at 378-81, 395-96.

[63] David Luban, Lawyers and Justice: An Ethical Study 301 (1988).

[64] *See supra* note 18 and accompanying text.

retrench class actions through congressional action.[65]

The defense coalition had even more success before the federal judiciary, where its lawyers contested the interpretation of nearly every element of Rule 23. Conservative judges, many of them skeptical of mass-harm claims, were increasingly amenable to these broadsides.[66] The defense coalition's challenges ultimately reached a receptive Supreme Court, which ratcheted up certification standards for 23(b)(2) and 23(b)(3) class actions.[67] The Court's restrictive interpretation of Rule 23(a)'s commonality requirement went a long way toward eliminating nationwide employment-discrimination classes.[68] Its decisions in two asbestos class-action suits made class certification for most

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[65] *See* Burbank & Farhang, supra note 16, at 1508-10, 1509 tbl.1 (finding that the bulk of anti–class-action bill activity occurred between 1991 and 2014, and detecting a statistically significant party effect in favor of anti–class-action measures as congressional power shifted from Democrats to Republicans).

[66] *See* Gilles, *supra* note 18, at 397.

[67] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (explaining that 23(a)(2) commonality requires generating "common answers apt to drive the resolution of the litigation" (emphasis omitted) (quoting Nagareda, *supra* note 22, at 132)); Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (holding that a class action could not be certified absent evidence that damages were common to the class); J. Maria Glover, *The Supreme Court's "Non-transsubstantive" Class Action*, 165 U. Pa. L. Rev. 1625, 1626 (2017) (noting that in *Dukes and Comcast*, the Supreme Court "increas[ed] the cost and difficulty of obtaining [class] certification").

[68] *See Dukes*, 564 U.S. at 357; Scott A. Budow, *How the Roberts Court Has Changed Labor and Employment Law*, 2021 U. Ill. L. Rev. Online 281, 285 (describing the reduction in employment class actions after *Dukes* and noting that the decision was "undeniably favorable to employers"); Robert H. Klonoff, *Class Actions Part II: A Respite From the Decline*, 92 N.Y.U. L. Rev. 971, 992 (2017) ("[S]everal circuits have held that employment class actions involving decentralized decision making cannot go forward under Dukes because of a lack of commonality."); Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, 48 Akron L. Rev. 803, 829-30 (2015) (observing that *Dukes* led plaintiffs "to file smaller regional class actions" rather than nationwide suits); Terrence Reed, Jacqueline Harding & William Kelly, *Employee Class Actions Four Years After Wal-Mart v. Dukes*, 82 Def. Counsel J. 255, 255-56 (2015) (observing that *Dukes* was a victory for employers and made employmentdiscrimination class actions smaller and more regional, even if it did not end all such class actions); Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, ProPublica (Sept. 27, 2013, 9:53 AM EDT), https://perma.cc/5Z56-4LY6 (noting a steep drop-off in the filing of employment-discrimination class actions in the two years after *Dukes*).

mass-tort claims impossible.[69] Choice-of-law issues prevented the certification of nationwide class actions involving state-law claims.[70] Consumer classes ran up against judicially created certification requirements.[71] Although a number of legal justifications were offered for these shifts,[72] judges' motivations were clear to those paying attention: "[I]t is a judicial empathy for the complaint of corporate defendants that large class actions present a great deal of pressure to settle cases."[73]

But the coalition's goals became more ambitious. Also beginning in the 1980s, the coalition launched a broad initiative to harness private procedural ordering,[74] and specifically private contracts for forced arbitration, to all but eliminate the class action.[75] During the campaign, the coalition became more explicit about its normative view that class actions had no place in the regulatory landscape. In its 2000 brief in *Green Tree Financial Corp.-Alabama v. Randolph*,[76] for instance,

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[69] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597, 622-28 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999); Burbank & Farhang, *supra* note 16, at 1522 (noting that "Amchem and Ortiz effectively ended mass tort class actions"); David Marcus, *The Short Life and the Long Afterlife of the Mass Tort Class Action*, 165 U. Pa. L. Rev. 1565, 1588 (2017) ("[The *Amchem* Court] hammered the penultimate nail in the mass tort class action's coffin."); *see also* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. Kan. L. Rev. 775, 793-99 (2010) (tracing the "increasing importance of MDL aggregation" for mass-tort claims following *Amchem* and *Ortiz*).

[70] *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 799, 814-823 (1985); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085-86 (6th Cir. 1996) (decertifying a nationwide class based in part on differences in negligence law across jurisdictions).

[71] *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-94 (3d Cir. 2012) (joining other circuits by introducing an ascertainability requirement into the classcertification inquiry).

[72] *Cf., e.g.*, Gilles, *supra* note 47, at 388-89 (describing the "plausible but shaky" doctrinal underpinnings of the decertification cases).

[73] *Id.* at 389; *see, e.g., In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (explaining that class certification would put the defendants under "intense pressure to settle"); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) (noting that class action and class arbitration can both produce *in terrorem* settlement effects).

[74] The term "procedural private ordering" was first used in the scholarly literature by Jaime Dodge to refer to the modification or elimination of procedure through private contract. See Dodge, *supra* note 45, at 724-26.

[75] *See, e.g.*, Gilles, *supra* note 47, at 393-96; J. Maria Glover, Feature: Arbitration, Transparency, and Privatization, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052, 3064-68 (2015); Judith Resnik, Feature: Arbitration, Transparency, and Privatization, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2872-74 (2015).

[76] 531 U.S. 79 (2000).

the U.S. Chamber of Commerce argued for the validity of an arbitration agreement in connection with the Truth in Lending Act because class actions were not critical to the Act's enforcement regime.[77] Ten years later, in its amicus brief in *AT&T Mobility v. Concepcion*, the Chamber was far less measured: "[W]hether through litigation or arbitration," it argued, "class actions . . . [do] not discourage unlawful behavior."[78] The *Concepcion* Court agreed, holding in 2011 that the FAA preempted any state law "conditioning the enforceability of arbitration agreements on the availability of classwide arbitration procedures."[79] Critically, this included state unconscionability doctrines. Under the FAA, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[80] Unconscionability is, of course, one such ground for contract revocation.

Prior to its watershed decision in *Concepcion*, the Supreme Court had already been moving in the defense bar's direction regarding arbitration and the class action. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[81] decided one year before *Concepcion*, the Court held that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."[82] This is an astonishing statement. The agreement at issue in *Stolt-Nielsen* specified that arbitrators would determine whether the claimants could proceed as a class.[83] Yet the Court took it upon itself to impose its own crabbed understanding of what arbitration entails.

Moreover, the Court's determination in *Stolt-Nielsen* that "arbitration" under the FAA meant "bilateral arbitration," not class arbitration, flowed directly from an all-but-explicit judgment that class arbitrations were normatively

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[77] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 1-4, *Green Tree Fin. Corp*, 531 U.S. 79 (No. 99-1235), 2000 WL 744157.

[78] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3, *Concepcion*, 563 U.S. 333 (No. 09-893), 2010 WL 3167313 [hereinafter Concepcion Chamber of Commerce Brief].

[79] 563 U.S. at 336-38, 344, 352.

[80] 9 U.S.C. § 2 (emphasis added).

[81] 559 U.S. 662 (2010).

[82] *Id.* at 685.

[83] *Id.* at 668-69 ("The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators . . . .").

undesirable.[84] The Court made this judgment fully explicit in *Concepcion*:

> [C]lass arbitration greatly increases risks to defendants. . . . [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.[85]

Arbitration lacks the "multilayered review" of judicial proceedings, particularly those involving class certification,[86] so it is conceivable that the Court could have limited its disdain for class actions to those that occur in arbitration. But it did not. The Court instead made clear that its negative view of class actions was far broader: "[C]ourts have noted the risk of 'in terrorem' settlements that class actions entail, and class arbitration would be no different."[87]

Together, the opinions in *Stolt-Nielsen* and *Concepcion* achieved a bit of a statutory-interpretation sleight of hand. The Court defined arbitration as "bilateral arbitration"—based on its own normative judgment about the in terrorem settlement effects of class actions—and injected that new definition into the meaning of "arbitration" in the FAA. This maneuver was of profound consequence: The notion that the FAA defines "arbitration" as bilateral, nonclass, private dispute resolution was the cornerstone of the defense coalition's revolution and counterrevolution strategy.

The coalition's movement reached its apex when the Supreme Court decided *American Express Co. v. Italian Colors Restaurant*[88] in 2013. The Court in Italian Colors made clear that the statutory term "arbitration"—explicitly defined as both bilateral and anti–class action—applied regardless of whether arbitration would eliminate claims.[89] Before *Italian Colors*, the Supreme Court had

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[84] *See id* at 685-87 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited." (citations omitted)).

[85] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011).

[86] *See id.*

[87] *Id.* (citation omitted).

[88] 570 U.S. 228 (2013).

[89] *See id.* at 231-32, 235-38.

strongly suggested, and courts of appeals had held, that contractual provisions foreclosing the "effective vindication" of federal statutory claims could not be enforced.[90] Italian Colors came to the Court with a factual record demonstrating that it would be wholly uneconomical for most American Express–accepting merchants to assert their federal antitrust claims on an individual basis (as required by their contract).[91] Nonetheless, the Court rejected the effective-vindication principle,[92] holding that the FAA required courts to "'rigorously enforce' arbitration agreements according to their terms."[93] If enforcement of the agreement eliminated statutory claims, that was "[t]oo darn bad."[94] The Court's decisions in *Stolt-Nielsen*, *Concepcion* and *Italian Colors* represent the culmination of the defense bar's near-total victory in the arbitration revolution and class-action counterrevolution.

The Court has only reinforced and expanded the scope of its arbitration jurisprudence since deciding *Italian Colors*. Notably, in 2018, a 5–4 majority held in *Epic Systems Corp. v. Lewi*s that employment contracts could require employees to pursue their claims individually in arbitration despite a federally guaranteed right to collective action under the National Labor Relations Act (NLRA).[95] The holding in *Epic Systems* was a stinging blow to American workers. But in broader context, it merely confirmed what was largely understood in the civil justice landscape after *Concepcion* and *Italian Colors*: Corporate entities could use private procedural ordering to avoid civil liability for wrongdoing.

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[90] *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009); Kristian v. Comcast Corp., 446 F.3d 25, 29 (1st Cir. 2006); In re Am. Express Merchs.' Litig., 667 F.3d 204, 214, 219 (2d Cir. 2012), *rev'd sub nom*. It. Colors, 570 U.S. 228; *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-92 (2000) (stating that arbitration agreements are enforceable so long as "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (alteration in original) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991))).

[91] *It. Colors*, 570 U.S. at 231-32.

[92] *See id*. at 235-38.

[93] *Id*. at 233 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[94] *Id*. at 240 (Kagan, J., dissenting); *cf. id*. at 236 (majority opinion) ("[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.").

[95] 138 S. Ct. 1612, 1619 (2018). *Epic Systems* grew out of a decision by the National Labor Relations Board (NLRB) that class-action waivers in mandatory arbitration agreements violated the NLRA's collective-action guarantee. D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277 (2012). Circuits split as to whether the NLRB decision was correct. *Compare* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) (disagreeing with the NLRB), *with* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1154-57 (7th Cir. 2016) (agreeing with the NLRB), *rev'd*, 138 S. Ct. 1612.

Of course, that was always the gambit.

C. The Aftermath

Today, virtually all Americans are subject to forced arbitration agreements with class-action waivers.[96] They are ubiquitous: in employee handbooks, nursing home admissions forms, credit card bills, cell phone statements, insurance contracts, housing leases, job applications, and countless other contracts.[97]

Indeed, the changes in the legal landscape brought about by the arbitration revolution have been staggering. In the early 1990s, only 2% of nonunionized employee contracts contained arbitration clauses.[98] As of 2019, more than half of such contracts included them.[99] According to a 2017 study, some 40% of private-sector employers with mandatory arbitration clauses had adopted them in the previous five years.[100] A more recent study showed that seventyeight companies in the Fortune 100 use arbitration agreements with classaction waivers.[101] Analysts predict that by 2024, more than 80% of privatesector nonunion workers will be subject to such agreements.[102]

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[96] *See Senate Arbitration Hearing*, *supra* note 9 (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law).

[97] *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T* Mobility v Concepcion, 79 U. Chi. L. Rev. 623, 627 (2012); *see also* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. 1309, 1310 (2015).

[98] *See* Mary Martin, Note, *When Flexibility Sacrifices Security: An Analysis of Amazon's Flex Program*, 54 New Eng. L. Rev. 131, 144 (2019).

[99] *Id.; see* also Alexander J.S. Colvin, Econ. Pol'y Inst., The Growing Use of Mandatory Arbitration 2 (2018), https://perma.cc/TB4G-952Z (noting that 53.9% of nonunion private-sector employers have mandatory arbitration procedures). According to the U.S. Bureau of Labor Statistics, 10.8% of American wage and salary workers (14.3 million individuals) were members of unions as of 2020. Less than 7% of private-sector workers were union members as of that year. Press Release, U.S. Bureau of Lab. Stat., Union Membership (Annual) News Release (Jan. 22, 2021), https://perma.cc/Y789-VFYG.

[100] *See* Alexander J.S. Colvin, Piper Lecture, *The Metastasization of Mandatory Arbitratio*n, 94 Chi.-Kent. L. Rev. 3, 8, 10-11 (2019).

[101] Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019).

[102] Kate Hamaji, Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz & Margaret Poydock, Ctr. for Popular Democracy & Econ. Pol'y Inst., Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back 1 (2019), https://perma.cc/Q4UB-6VZZ.

From 2011 to 2019, the number of businesses that used arbitration agreements with class-action waivers in their consumer contracts tripled.[103] Today, as many as 76.9% of consumer contracts include pre-dispute arbitration clauses;[104] virtually all of these include class-action waivers.[105] The Consumer Financial Protection Bureau (CFPB) found mandatory arbitration agreements in 53% of credit card contracts, 98.5% of storefront payday-loan contracts, and 99.9% of mobile-wireless contracts,[106] and it noted that these agreements "generally extinguish the consumer's ability to participate in class lawsuits."[107] In 2020, *Consumer Reports* found that over two-thirds of the most popular products on its website came with mandatory arbitration clauses.[108]

The widespread use of forced arbitration agreements with class-action waivers has enabled corporations to reduce costs by eliminating aggregate claims altogether.[109] Accordingly, the defense bar routinely and publicly advises clients to "avoid [the] risk" of class actions by requiring arbitration agreements.[110] Indeed, for businesses not yet using them, the question is: "Shouldn't you be using arbitration agreements to reduce . . . the risk of class action claims?"[111]

And no wonder: Eliminating aggregate claims also tends to eliminate

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[103] Ryan Miller, Current Development 2018-2019, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After* Concepcion *and* American Express, 32 Geo. J. Legal Ethics 793, 795, 806, 824-25 (2019). This finding is consistent with the Consumer Financial Protection Bureau's 2015 finding that arbitration agreements typically preclude consumer class actions. CFPB, Arbitration Study § 3.4.3, at 24, § 4.8, at 20-21 (2015).

[104] *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 883 tbl.2 (2008).

[105] *Id*. at 884 tbl.3.

[106] CFPB, *supra* note 103, § 2.3, at 8 tbl.1.

[107] *Id*. § 3.4.3, at 24.

[108] Scott Medintz, *Forced Arbitration: A Clause for Concern*, Consumer Reps. (Jan. 30, 2020), https://perma.cc/D5QE-W7KR.

[109] *Cf*. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 Franchise L.J. 141, 141-42 (1997) (urging franchisors to use arbitration to prevent "catastrophic" class actions by franchisees).

[110] *See, e.g.*, Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, Legal.io, (Apr. 1, 2015), https://perma.cc/U5NK-HLA9.

[111] Jay N. Varon & Jennifer M. Keas, *Shouldn't You Be Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims?*, Foley & Lardner LLP (May 10, 2017) (capitalization altered), https://perma.cc/X6AX-YCD3.

claims generally. Studies have found that almost no one pursues individual arbitration.[112] Although there were about 826,537,000 consumer arbitration provisions in effect in 2018, the AAA and JAMs recorded only 6,000 consumer arbitrations that year.[113] Without mandatory arbitration, consumers likely would have brought many more claims.[114] One 2018 study found that, if employees filed arbitration claims at the same rate they filed claims in court, some 320,000 to 727,000 employment arbitration claims would be filed annually—around 60 to 140 times the current rate.[115] That means forced arbitration has eliminated more than 98% of employment claims.[116] A recent study by the Economic Policy Institute reinforces these findings: Of workers with potentially meritorious claims subject to forced arbitration, virtually none pursue those claims. Indeed, only 1 in 10,400 employees subject to forced arbitration files a claim each year.[117]

Individuals tend to fare poorly even when they do arbitrate,[118] a fact many attribute to the repeat-player advantages that corporate entities enjoy

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[112] *See, e.g.*, Colvin, *supra* note 100, at 17-18 ("Mandatory arbitration has a tendency to suppress claims."); *see also* Dunham, *supra* note 109 at 141.

[113] *See Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary,* 117th Cong. (2021) [hereinafter *House Arbitration Hearing*] (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law), https://perma.cc/V4YS-YZ2K; *see also* Szalai, *supra* note 101, at 238.

[114] *See* CFPB, *supra* note 103, § 1.4.3, at 11, § 1.4.7, at 16 (noting that less than 2,000 consumer arbitration claims were filed with the AAA between 2010 and 2012, while comparable class actions from 2008 to 2012 involved hundreds of millions of claims).

[115] Estlund, *supra* note 38, at 696-97.

[116] *Id.* at 696.

[117] Colvin, *supr*a note 99, at 11.

[118] *See* Estlund, *supra* note 38, at 688. But see Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. Mich. J.L. Reform 789, 858 (2013) (finding that some low-wage workers were able to use arbitration to vindicate their claims).

in arbitration.[119] Indeed, the CFPB found that businesses won 93% of businessinitiated arbitrations and recovered ninety-one cents per dollar claimed, whereas consumers prevailed in about 20% of consumer-initiated arbitrations and recovered twelve cents per dollar claimed.[120] Similarly, a recent study found that employees win only 19% of AAA arbitrations,[121] as opposed to 29.7% of federal employment-discrimination cases.[122] Sexual-harassment claimants also tend to fare worse in arbitration than they do in litigation, particularly with regard to remedies.[123] One study found that, over thirty years and across ninety-seven industry arbitrations, only seventeen women on Wall Street explicitly won their sexual-harassment claims.[124]

Critics of the above studies argue that the CFPB and others overstate the extent to which the judicial system is a "realistic means for obtaining redress,"[125]

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[119] *See, e.g.*, Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp Resol. 19, 32-33, 38-39 (1999) (noting that "representatives of consumers, patients, employees, and other individual claimants" believe arbitration "redound[s] to the benefit of repeat players," including corporations); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 98 (1974) (explaining that, among other advantages, the prototypical repeat player "anticipates repeated litigation," "has low stakes in the outcome of any one case," and "has the resources to pursue its . . . interests"); see also Interview with Nancy Erika Smith, *supra* note 41 (observing that arbitrators are often former defense lawyers and that businesses enjoy important advantages in arbitration); Letter from Nancy Erika Smith, Att'y, Smith Mullin, P.C., to Laura E. VanEtten, Supervisor, Am. Arb. Ass'n & Linda S. Hendrickson, Case Manager, Am. Arb. Ass'n 2-3 (Jan. 14, 2011) (on file with author) (seeking to strike defense attorneys and litigation adversaries from a list of possible arbitrators).

[120] CFPB, *supra* note 103, § 5.6.6, at 41-42, § 5.6.7, at 43-45.

[121] Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR Rev. 1019, 1028 tbl.1 (2015).

[122] Estlund, *supra* note 38, at 688. Earlier studies reached similar findings. *See, e.g., Alexander J.S. Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 5 tbl.1 (2011) (reporting a 21.4% employee win rate in AAA employment arbitration); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, Disp. Resol. J., Nov. 2003/Jan. 2004, at 44, 48 tbl.1 (finding a 36.4% employee win rate in federal employment-discrimination cases and a 56.6% employee win rate in state non–civil rights employment cases).

[123] *See* Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. Pa. J. Lab. & Emp. L. 1, 2-6 (1999) (describing "inadequate . . . arbitration remedies for sexual harassment" and noting that victims' remedies can be limited by arbitration agreements themselves).

[124] *See* Susan Antilla, *FINRA's Black Hole*, Type Investigations (Apr. 18, 2018), https://perma.cc/HTC5-6AWN.

[125] The CFPB's Flawed Arbitration "Study" 1 (n.d.), https://perma.cc/A4RF-3NFW.

an assertion consistent with the findings of key legal scholars.[126] Critics also challenge the empirical findings of the CFPB and academic commentators as incomplete, inasmuch as those findings do not take into account the number of claims that are resolved by pre-dispute settlements secured before the filing of formal arbitral demands.[127] Given the significant filing fees in arbitration, critics are likely correct that corporations have incentives to settle claims via pre-dispute resolution.

It is not arbitration alone, however, that eliminates most claims. Instead, it is the combination of forced arbitration and class-action waivers in contracts of adhesion. The types of claims that tend to arise from these contracts—civil rights claims, wage-theft claims, workplace sexual-harassment claims, and consumer-fraud claims—are those that tend to gain viability from aggregation.[128] Most discrimination suits, for instance, depend on aggregation in order to be feasible, as the Advisory Committee explicitly recognized when promulgating Rule 23 of the Federal Rules of Civil Procedure in 1966.[129] The same is true for wage-and-hour claims under the FLSA, and the FLSA explicitly enables collective action for that reason.[130]

At least to the extent that the arbitration revolution eliminates classable claims, the implications are troubling: Elimination of those claims would tend to be due to the economics of claiming,[131] not due to their underlying merits. Again, individually unmarketable does not mean meritless; individually marketable does not mean meritorious. Settlement pressure is perfectly desirable when

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[126] *See* Eisenberg & Hill, *supra* note 122, at 53 ("In the majority of court actions the cases likely were brought by highly paid employees, while in the arbitrations, high-pay employees represented only a minority of the claimants.").

[127] The CFPB's Flawed Arbitration "Study," *supra* note 125, at 11.

[128] *See* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 241- 42 (2012); Brittany Cangelosi, Note, *Wage War: Arbitration and Class Action Waivers at the Expense of Wage and Hour Claims*, 48 Hofstra L. Rev. 483, 488 (2019).

[129] *See* Interview by Samuel Issacharoff with Arthur R. Miller, Professor, N.Y. Univ. Sch. of L., in N.Y.C., N.Y. (Dec. 3, 2016), *reprinted in* N.Y. Univ. Sch. of L. Ctr. on Civ. Just., Rule 23 @ 50: The 50th Anniversary of Rule 23, at 1, 5 (Peter Zimroth, Arthur R. Miller, Samuel Issacharoff & David Siffert eds., 2016).

[130] *See supra* note 7 and accompanying text; *see also* Seyfarth Shaw LLP, 13th Annual Workplace Class Action Litigation Report 20 (2017), https://perma.cc/JT3H- 4ZRZ ("Virtually all FLSA lawsuits are filed as collective actions . . . .").

[131] *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71, 84-85 (2014).

produced by the merits of claims.[132] It is only undesirable—or in terrorem—when it derives in whole or substantial part from factors unrelated to the merits of claims.[133] The fact that a claim's value is less than the cost of pursuing that claim says nothing of the claim's worth. It may say something about the high cost of litigation.[134] It may also reveal something about the type of claim, the type of claimant, or both—for instance, that the claim is for wage theft by a minimum-wage worker. All of that is orthogonal to whether the claims have legal merit.[135]

Many claims eliminated by forced arbitration and class-action waivers, then, are not so much low merit as they are low value. For a majority of the Supreme Court, though, those two may as well be the same thing. In essence, the Supreme Court's FAA jurisprudence deems a broad range of legal entitlements the wrong types of claims, and by extension, effectively deems a broad swath of Americans—and in particular, racial minorities, women, and the working poor[136]—the wrong types of claimants.

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[132] *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 1713, 1750-78 (2012) (arguing that the Federal Rules of Civil Procedure should be recalibrated to align settlement values with the merits of underlying claims); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1894 (2006) ("What one should make of the amplification effect [of aggregation] in normative terms depends crucially on what explanation one embraces for the underlying probability of plaintiff success that aggregation would amplify.").

[133] *See* Glover, *supra* note 132, at 1727-44 (tracing the numerous ways that non-merits "distortions" can affect settlement values).

[134] *See* Samuel Estreicher, Dwight D. Opperman Professorship Inaugural Lecture, *Beyond Cadillacs and Rickshaws: Towards a Culture of Citizen Service*, 1 N.Y.U. J.L. & Bus. 323, 329- 30 (2005) (describing the "[m]ushrooming" costs of litigation); *see also* Robert Bovarnick, *When Is Litigation Worth the Hassle?*, Forbes (July 21, 2010, 6:40 PM EDT), https://perma.cc/RG3B-MN4T (noting that the hardest decision for a claimant is whether litigation is worth the high cost, and that in many cases it is more economically rational to settle).

[135] In fact, research shows that the filing of meritless claims to extract shakedown settlements is rare. See, e.g., Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1359 (2003) ("[T]he risks of . . . blackmail settlements have been overstated." (alterations in original) (quoting Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy,* 75 Notre Dame L. Rev. 1377, 1379 (2000))); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 225-26 (1983) (stating that, if anything, certain class actions settle too cheaply); Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Legal Uncertainty*, 8 Legal Theory 297, 298 (2002) ("[T]he hostility to 'long-shot' class actions is . . . unsupported on any basis currently articulated in judicial opinions or legal scholarship.").

[136] *A Profile of the Working Poor*, 2019, U.S. Bureau Lab. Stat.: BLS Reps. (May 2021), https://perma.cc/2MVM-966N.

Mandatory arbitration clauses appear more frequently in contracts for frontline jobs like education and healthcare.[137] They are also more common in "low-wage workplaces" and industries that are "disproportionately composed of women . . . [and] African American workers."[138] Indeed, 59.1% of African American workers—7.5 million individuals—are subject to mandatory arbitration agreements that tend to eliminate claims.[139]

Along similar lines, 57.6% of women in the workforce are subject to mandatory arbitration agreements.[140] These agreements suppress a host of claims, from wage theft to gender discrimination to sexual harassment. Notably, forced arbitration agreements tend to prevent sexual-assault and sexual-harassment survivors from speaking up about their experiences.[141] This is true even (and perhaps especially) when well-known, well-capitalized claimants are involved. Famously, Donald Trump used a mandatory arbitration clause to help fend off a lawsuit by Stormy Daniels.[142] And Fox News used forced arbitration to silence scores of women who were sexually harassed by Roger Ailes.[143] Although forced arbitration has come under scrutiny following its use in a range of cases involving sexual harassment allegedly perpetrated by famous men,[144] companies

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[137] Colvin, *supra* note 99, at 8.

[138] *Id*. at 2.

[139] *Id*. at 9. By comparison, only 55.6% of white, non-Hispanic workers are subject to mandatory arbitration agreements. *Id*.

[140] *Id*. at 8-9. By comparison, only 53.5% of men in the workforce are subject to mandatory arbitration agreements. *Id*. at 9.

[141] *See* Rachel M. Schiff, *Note, Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. Davis L. Rev. 2693, 2709-14 (2020); Gretchen Carlson, Opinion, *After Bill Cosby and Fox News, Something Good Is Going to Come of This*, USA Today (updated July 6, 2021, 4:21 PM ET), https://perma.cc/3ZNKHWBA (describing how forced arbitration "can cover up, and allow for, repeated ugly behavior from harassers in every industry").

[142] *See* Jeremy Stahl, *Donald Trump Basically Just Said He Should Lose the Litigation with Stormy Daniels*, Slate (Apr. 5, 2018, 9:54 PM), https://perma.cc/MM63-C35P.

[143] *See* Emily Martin, K*eeping Sexual Assault Under Wraps*, U.S. News & World Rep. (Sept. 28, 2016, 2:10 PM), https://perma.cc/VV93-D3FD.

[144] *See id*.; Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, Atlantic (Oct. 18, 2017), https://perma.cc/C6V5-SF85; cf. Carlson, *supra* note 141 (noting that highly publicized sexual-harassment scandals can draw greater societal attention to the forced arbitration of workplace harassment claims). But cf. Inez Feltscher Stepman, *Once Again, #MeToo Becomes Political Tool to Line Lawyer Pockets*, Indep Women's F. (Sept. 21, 2021), https://perma.cc/V8U2-ZK7D (arguing that "the issue of sexual assault has been politically weaponized" to harm arbitration, which the author states may be good for employees).

have only recently started to move away from forced arbitration, and even then only in response to sustained public outcry.[145]

Publicly, corporations #MeToo their websites and don "Time's Up" ribbons. Privately, many corporations continue to subject their employees to forced arbitration and class-action waivers.[146] Some states have taken steps to limit forced arbitration for sexual-harassment claims.[147] At the federal level, Representatives Pramila Jayapal (D-WA), Cheri Bustos (D-IL), and Morgan Griffith (R-VA), and Senators Kirsten Gillibrand (D-NY), Lindsey Graham (RSC), and Dick Durbin (D-IL) introduced the Ending Forced Arbitration of Sexual Harassment Act in July 2021.[148] That bill has since passed both Houses of Congress,[149] but work to ameliorate forced arbitration's disproportionate impact on women remains.

The arbitration revolution has also disproportionately impacted the working poor, many of whom are racial minorities and women. One 2021 study found that forced arbitration helped employers pocket $9.2 billion from workers in low-paid jobs in 2019 alone.[150] Arbitration is almost always too expensive for typical wage-and-hour employees to pursue, and employees are routinely dismayed to learn that no attorney can afford to represent them in light of forced

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[145] *See* Jena McGregor, *New Database Aims to Expose Companies that Make Employees Arbitrate Sexual Harassment Claims*, Wash. Post (Feb. 27, 2020), https://perma.cc/5GTF-42P7.

[146] Some corporations (for example, Facebook, Google, Microsoft, and Uber) have responded to public pressure by rolling back forced arbitration, particularly for claims of sexual harassment. Abha Bhattarai, *As Closed-Door Arbitrations Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time*, Wash. Post (Oct. 27, 2021, 7:00 AM EDT), https://perma.cc/YY95-U7BD. Many others, however, have "doubled down" on the practice. *Id.; see* Am. Ass'n for Just., Forced Arbitration During a Pandemic: Corporations Double Down 4, 6 (2021), https://perma.cc/3JFTW9VM.

[147] *See* Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #Me-Too- and Time's Up–Inspired Action Against the Federal Arbitration Act*, 87 Fordham L. Rev. 2653, 2677-83 (2019).

[148] Press Release, Rep. Pramila Jayapal, Jayapal Helps Reintroduce Bipartisan Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (July 14, 2021), https://perma.cc/4UFG-TDL6.

[149] Emily Peck & Sophia Cai, *Congress Passes Landmark #MeToo Bill*, Axios (updated Feb. 10, 2022), https://perma.cc/SVF3-Y4C3.

150 *See* Hugh Baran & Elisabeth Campbell, Nat'l Emp. L. Project, Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 from Workers in Low-Paid Jobs 1 (rev. 2021), https://perma.cc/LB8K-S3QZ.

arbitration agreements and class-action waivers.[151] And the conclusion that the Supreme Court's arbitration jurisprudence effectively deems the working poor the "wrong type of claimant" is hard to avoid when comparing it to the Court's class-action–friendly jurisprudence for securities fraud.[152]

All told, the defense coalition's decades-long effort to retrench aggregate dispute resolution through arbitration agreements and class-action waivers resulted in a resounding victory for corporate interests. But that victory was a tremendous loss for consumers and employees, particularly those who were already vulnerable based on race, gender, and class.

II. CAN'T STOP THE REVOLUTION: PUBLIC-REFORM PITFALLS, PRIVATE- REFORM POSSIBILITIES

As the prior Part detailed, the arbitration revolution and class-action counterrevolution had sweeping effects on the civil justice landscape. For over a decade, legal commentators, legislators, policymakers, interest-group advocates, the plaintiffs' bar, and others have called for reform, largely from Congress. As Subpart A below details, however, few public procedural-reform efforts have succeeded, and none have provided a meaningful response to the arbitration revolution. Given public procedural ordering's inability to stem the arbitration revolution's tide, the general perception has been that arbitration agreements with class-action waivers are (and will remain) near-bulletproof claim eliminators.[153]

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[151] *See, e.g.*, Estlund, *supra* note 38, at 700-02; Interview with Nancy Erika Smith, *supra* note 41 ("Minimum-wage workers get screwed by arbitration. . . . [An arbitration agreement with a] class-action waiver is the first thing lawyers look for."); Interview with Cory L. Zajdel, *supra* note 40 (observing that lawyers screen out consumer cases with arbitration agreements).

[152] *See* Glover, *supra* note 67, at 1628-33 (describing the Supreme Court's tendency toward "pro–class action" opinions in the securities-fraud context); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 Ariz. L. Rev. 161, 181 (2015) (noting that securities fraud is the one "exception" to the arbitration revolution's elimination of claims).

[153] *See*, e.g., Effron, *supra* note 44, at 136 (explaining that although certain substantive rights may exist in theory, they are eliminated in practice through class-action waivers); Fitzpatrick, *supra* note 152, at 162-63 (concluding that, given *Concepcion*, "businesses will eventually be able to eliminate virtually all class actions that are brought against them"); Resnik, *supra* note 75, at 2836-40 (describing certain waivers as erasing substantive rights); Gilles & Friedman, *supra* note 97, at 628 (questioning whether any grounds remain for finding class-action waivers unenforceable).

My analysis of the Supreme Court's arbitration jurisprudence in Subpart B, however, challenges this view. I do not think reform by way of public procedural ordering is particularly likely to occur, at least not on any broad scale. Instead, it is my long-held view that the Court's FAA jurisprudence—broad as it may be—left narrow room for a private procedural response to the arbitration revolution. It left room for a procedural offensive like mass arbitration.

A. The Failure of Public Procedural-Ordering Efforts

In one of her very last dissents, the late Justice Ginsburg recognized that the Court's reading of the FAA[154] had reached, in the words of one commentator, a "critical tipping point."[155] Accordingly, Justice Ginsburg "urgently" pled for "'[c]ongressional correction of the Court's elevation of the FAA over' the rights of employees and consumers 'to act in concert.'"[156] Justice Ginsburg no doubt knew that her plea to Congress was a long shot. For decades, Congress has been presented with opportunity upon opportunity to reform arbitration through "arbitration-fairness" bills. Almost all have died in committee.[157] And though Congress in 2010 passed the Dodd–Frank Act and created the CFPB, which it directed to study mandatory arbitration agreements,[158] hope for reform was short-lived. The CFPB formulated a rule that restricted the use of class-action

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[154] For criticisms of the Court's reading, see, for example, Anthony J. Sebok, *The Unwritten Federal Arbitration Act*, 65 DePaul L. Rev. 687, 688, 720 (2016) (arguing that the FAA supports "a substantive theory of arbitration" and suggesting that states "can experiment with different interpretations of the FAA's theory"); and Aragaki, *supra* note 51, at 1946-53 (arguing that the Supreme Court's expansive reading of the FAA is based on "isolated snippets" of legislative history that do not correctly capture the history and purpose of the law). But *see* Amalia D. Kessler, Feature: Arbitration, Transparency, and Privatization, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 Yale L.J. 2940, 2943-44, 2991 (2015) (noting that, in part because of the FAA's progressive history, efforts to determine whether the Act was intended to enable access to justice or empower corporate elites are "bound to disappoint").

[155] *House Arbitration Hearing*, *supra* note 113 (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law).

[156] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting)).

[157] Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 Utah L. Rev. 1309, 1332-33, app. (cataloging 139 arbitration bills introduced between 1995 and 2010, most of which did not make it past the committee stage). "[T]he few [bills] that ultimately passed" from 1995 to 2010 "applied only to relatively narrow categories of disputes." Id. at 1333.

[158] *See* CFPB, *supra* note 103, § 1, at 1.

waivers,[159] but the Senate rejected it 51–50 under the Congressional Review Act. Then–Vice President Mike Pence, himself no stranger to the business community,[160] cast the tiebreaking vote.[161]

While the narrow Ending Forced Arbitration of Sexual Harassment Act, which had rare bipartisan support, finally passed in February 2022,[162] the Forced Arbitration Injustice Repeal (FAIR) Act, a sweeping arbitration-reform bill, remains in the Senate Judiciary Committee.[163] The defense coalition is actively fighting the FAIR Act; the Chamber of Commerce has even offered to pay attorneys if their clients sign op-eds opposing the bill.[164] And although there have been rumblings of congressional action after forced arbitration provisions appeared in payments made under the Coronavirus Aid, Relief, and Economic Security (CARES) Act,[165] the passage of broad arbitration reform remains unlikely.[166]

Congress has introduced more targeted bills on the issue of forced arbitration with varying success. The Ending Forced Arbitration of Sexual Harassment Act was one such successful bill. But compare this Act to the Nursing Home Improvement and Accountability Act of 2021, which would prohibit forced arbitration clauses in contracts between nursing home facilities and their patients.[167] Congress has tried to end the use of forced arbitration in nursing

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[159] Press Release, CFPB, CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017), https://perma.cc/VG92-9Q9Q.

[160] *See* Jane Mayer, *The Danger of President Pence*, New Yorker (Oct. 16, 2017) https://perma.cc/Q4GV-TYZC.

[161] Zachary Warmbrodt, *Pence Breaks Tie in Senate Vote to Ax Arbitration Rule*, Politico (updated Oct. 24, 2017, 11:25 PM EDT), https://perma.cc/72KR-9ZQ3.

[162] *See supra* notes 148-49 and accompanying text.

[163] *See* S.505—*Forced Arbitration Injustice Repeal Act*, Congress.gov, https://perma.cc/L9R5-8ECG (archived June 26, 2022).

[164] *See* Amelia Pollard, *Corporate Lobbyists Seek "Grassroots" Support for Forced Arbitration*, Am. Prospect (Aug. 10, 2021), https://perma.cc/SUF6-MYUG (reporting that the Chamber of Commerce offered an attorney $2,000 in exchange for a client willing to sign a prewritten op-ed opposing the FAIR Act); Karl Bode, *U.S. Chamber of Commerce Paying People $2,000 to Pretend Binding Arbitration Is Good*, Techdirt (Aug. 13, 2021, 6:14 AM), https://perma.cc/3932-BXYE (same).

[165] *See* David Dayen, *Unsanitized: Stimulus Debit Cards Come with a Forced Arbitration Clause*, Am. Prospect (June 26, 2020), https://perma.cc/H976-4EYY.

166 *See* Glover, *supra* note 75, at 3083-91; David L. Noll & Zachary D. Clopton, *An Arbitration Agenda for the Biden Administration*, 2021 U. Ill. L. Rev. Online 104, 105-06; Mike LaSusa, *Dems' Bid to Ban Workplace Arbitration Faces Uphill Fight*, Law360 (Aug. 5, 2021, 7:09 PM EDT), https://perma.cc/4MPH-3449 (to locate, select "View the live page").

[167] *See* H.R. 5169, 117th Cong. § 105 (2021); S. 2694, 117th Cong. § 105 (2021).

homes for over a decade; the Nursing Home Improvement and Accountability Act, a Charlie Brown football of a bill, is simply the latest version of that effort.[168] It is unclear, then, whether Congress will be able to enact even targeted reforms going forward.

There have been a few modest arbitration-reform successes at the state level, but none have had a particularly meaningful impact on the post– arbitration revolution landscape. Some scholars had hoped that suits brought under the parens patriae doctrine (which provides a state with third-party standing to bring a case on behalf of its citizens for their well-being) would help fill the void created by the elimination of class actions.[169] But these suits are limited by political and resource constraints.[170] As an alternative, private– attorneys general acts (PAGAs) can circumvent the problems that hinder parens patriae suits by allowing citizens to take on the mantle of the state and bring suit, in a representative capacity, against a defendant with whom they would otherwise be required to arbitrate. California currently has an employment-litigation PAGA.[171] A number of other states have been considering similar legislation, but some bills have struggled to gain passage and the future of PAGA-like laws

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[168] *See, e.g.*, Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. (2012); Fairness in Nursing Home Arbitration Act, H.R. 5326, 116th Cong. (2019); Fairness in Nursing Home Arbitration Act, H.R. 2812, 117th Cong. (2021); *see also* Glover, *supra* note 75, at 3090-91 (detailing the failed legislative efforts to end forced arbitration in various contexts, including in nursing home contracts, that began in 2008).

[169] *See* Gilles & Friedman, *supra* note 97, at 629-30, 661.

[170] *See, e.g.*, Jack Ratliff, Parens Patriae: *An Overview*, 74 Tul. L. Rev. 1847, 1857-58 (2000) (describing how the "political motivations" behind *parens patriae* decisions can create "intractable conflicts" between states and individuals); Gilles & Friedman, *supra* note 97, at 668 n.205 ("[Industry groups] know that public officials don't have the resources to finance complicated law suits [sic] that often take years to work their way through the courts." (alterations in original) (quoting Ohio Att'y Gen. Marc Dann, Address to the City Club of Cleveland 5 (June 29, 2007), https://perma.cc/4X3L-RLBU)); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 523 n.154 (2012) (noting "instances where states were outgunned by large corporations [and] there was substantial pressure to settle on terms that were not desirable and not in the public interest" (alteration in original) (quoting remarks made by Iowa Attorney General Tom Miller at a 2003 Columbia Law School symposium)).

[171] *See* Cal. Lab. Code § 2699, 2699.3 (West 2022).

is uncertain.[172] In addition, the Supreme Court dealt a recent blow to PAGAs by holding that an individual PAGA claim can be severed from a representative PAGA claim—the former of which can be compelled to arbitration, leaving the individual without standing to pursue the representative claim in court.[173] And new, controversial uses of the private attorney general (most notably S.B. 8, Texas's "heartbeat" abortion ban) could generate reticence around private–attorneys general enforcement frameworks.[174]

B. The Possibility of Private Procedural Counteroffensives

With government entities unwilling or unable to engage in meaningful reform,

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[172] At least nine states were actively considering PAGA-like bills by the 2019-2020 legislative session. Charles Thompson, Anthony Guzman & Linda Ricci, *Employers Must Brace for PAGA-Like Bills Across US*, LAW360 (June 18, 2021, 3:25 PM EDT), https://perma.cc/CKQ8-M26H (to locate, select "View the live page") (noting that Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington were considering bills with the same basic structure as California's law). In Connecticut, Massachusetts, New Jersey, New York, and Washington, these bills are still pending as of this writing. *See* H.R. 5245, 2022 Gen. Assemb., Feb. Sess. (Conn. 2022) (allowing plaintiffs to sue for labor law violations on behalf of the state even "after having waived their personal rights to sue by signing forced arbitration agreements"); H.R. 1959, 192d Gen. Ct. (Mass. 2021) (creating a "public enforcement action" for whistleblowers or "representative organization[s]" to sue employers for wage theft); S. 362, 220th Leg. (N.J. 2022) (permitting an employee or representative to bring the same action as state officials against an employer for unlawful workscheduling practices); S. 12, 244th Leg., Reg. Sess. (N.Y. 2021) (creating "a means of empowering citizens as private attorneys general to enforce" labor laws through "a public enforcement action to collect civil penalties"); H.R. 1076, 67th Leg., Reg. Sess. (Wash. 2021) (creating a "qui tam action" for whistleblowers or "representative organization[s]" to sue for violations of workplace laws). PAGA-like bills in Oregon and Vermont have died. *See* H.R. 2205, 81st Leg., Reg. Sess. (Or. 2021) (creating a "public enforcement action" for an individual or "representative organization" to seek "civil penalties" for violation of state laws); S. 139, 2019 Leg. (Vt. 2019) (allowing "an aggrieved employee, representative organization, or whistleblower" to bring a "public enforcement action" for labor law violations). Maine's PAGA-like bill passed both houses but was vetoed by the governor. *See* S. 525, 130th Leg., 1st Spec. Sess. (Me. 2021) (providing a "private enforcement action" for a "whistleblower" or "representative organization" to enforce employment law violations); Letter from Maine Governor Janet T. Mills to the 130th Legislature of the State of Maine 1-2 (July 12, 2021), https://perma.cc/3CSD-WRAS.

[173] *See* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1915-17, 1924-25 (2022). In her concurrence, however, Justice Sotomayor noted that state legislatures are "free to modify the scope of statutory standing under [their PAGAs] within state and federal constitutional limits." *Id.* at 1925-26 (Sotomayor, J., concurring).

[174] *See generally, e.g.*, Jon D. Michaels and David L. Noll, *Vigilante Federalism*, 108 Cornell L. Rev. (forthcoming 2023), https://perma.cc/RB6P-5JC2; Aziz Huq, *What Texas's Abortion Law Has in Common with the Fugitive Slave Act*, Wash. Post (Nov. 1, 2021, 10:42 AM EDT), https://perma.cc/5WLP-JH6N.

the focus returns to the private sphere. Private procedural warfare, after all, created the current landscape; perhaps it could reverse it. The defense coalition, however, has long sought to anticipate and block any potential counteroffensive by the plaintiffs' bar. This Subpart analyzes how the defense coalition and the Court left little room—but not no room—for private procedural innovations to reverse the revolution.

Every year since the Supreme Court decided *Italian Colors*, I have told my complex-litigation students about a lucrative dispute-resolution opportunity lurking in arbitration agreements themselves. That opportunity, I warned, would be high-risk. It would be costly (perhaps prohibitively so). It would be legally uncertain. If it worked, though, it might well stop the arbitration revolution in its tracks. That opportunity was mass arbitration.

How could any plaintiffs' attorney, enterprising or otherwise, get away with mass arbitration—especially given the Supreme Court's arbitration jurisprudence? I believed that something like mass arbitration could happen for three main reasons. One, nature abhors a vacuum. The elimination of a mechanism for aggregating claims does not eliminate mass harm or the mass of individuals affected by such harm.[175]

Two, the terms of arbitration agreements made something like mass arbitration tempting, at least for plaintiffs' attorneys with the resources and risk tolerance to attempt it. As I have traced in prior work, arbitration agreements in the early 2000s tended to get struck down on unconscionability and effective-vindication grounds.[176] To avoid such rulings, corporations removed some of their more draconian arbitration-related clauses and added provisions that they described as "friendly" to consumers and employees: provisions requiring them to reimburse some or all of a claimant's arbitration fees, or even to pay bonuses to prevailing claimants.[177] Effectively, corporations injected fee shifting into any arbitral proceedings pursuant to their contracts.

The not-so-secret secret behind these "friendly" fee-shifting provisions was

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[175] *See generally* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (challenging the perception of American litigation as typically individualized and tracing the importance of repeat-play agents for tort claimants).

[176] *See* J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1751-55, 1767-69 (2006).

[177] *See* Miller, *supra* note 103, at 799-800.

that none of them were intended to have any real effect. That is because these provisions existed alongside the one provision businesses would not remove from their agreements: the class-action waiver. More than that, the "friendly" fee-shifting provisions existed to facilitate the enforcement of classaction waivers. While dodging unconscionability rulings might have been a short-term benefit to corporations, the long-term (and far more ambitious) strategy of the "friendly" provisions was to tee up for the Supreme Court an arbitration agreement that contained a class-action waiver, but which otherwise seemed to bend over backwards to facilitate individual claiming— thus creating a plausible basis to deny that upholding the class waiver would abrogate the substantive claim.[178]

The calculus by corporations here was as obvious as it was rational. Even with the fee-shifting provisions in arbitration agreements, individual arbitration would not frequently be economically feasible for an ordinary claimant or her lawyer.[179] From the corporate perspective, far better to foot the bill associated with "friendly" fee-shifting provisions in a small handful of individual arbitrations than to bear the expense of litigating class actions that purported to resolve the claims of all customers or employees. The gambit worked.

The opportunity for mass arbitration, then, lurked in the unlikely but devastating possibility that a significant number of individual arbitration claims would be filed all at once.

Given this possibility, remote as it may have been, why did corporations keep "friendly" arbitration provisions in their contracts? One likely reason is that the "friendly" provisions did a fair amount of work for Justice Scalia in *Concepcion*. Justice Scalia recounted these provisions in some detail in his opinion for the

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[178] *See* Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party at 4-7, T-Mobile USA, Inc. v. Laster, 553 U.S. 1064 (2008) (No. 07-976), 2008 U.S. S. Ct. Briefs LEXIS 2319, at *5-9 (encouraging the Court to deny certiorari and suggesting that TMobile's arbitration clause did not look "friendly" enough to be a vehicle for evaluating the legality of class-action waivers); see also Interview with Anonymous No. 1, supra note 42 (stating that AT&T wanted its arbitration clause in front of the Supreme Court, believing it to be the best vehicle for obtaining a favorable ruling on class-action waivers); Bruhl, supra note 29 (speculating that AT&T filed briefs opposing certiorari in cases involving other companies' arbitration clauses because it "had developed a brand new arbitration clause that was so amazingly consumer-friendly that if any court struck it down, such a ruling would [in AT&T's view] have to be preempted because it would represent a per se bar against class waivers even when consumers could profitably pursue individual arbitration," a move that made AT&T's attorneys "very unpopular at cocktail parties for a while").

[179] *See supra* notes 26-28 and accompanying text.

Court, and he essentially offered them up as a template for corporations to use in their contracts with consumers and employees going forward.[180] Another likely reason is that post-*Concepcion*, businesses believed they had arrived at a "more or less optimal form of blocking consumer disputes."[181] Even after the Court cast doubt on the necessity of "friendly" provisions to the enforceability of arbitration agreements in *Italian Color*s,[182] corporations generally did not remove pro-consumer terms or add probusiness ones.[183] The class-action waiver was all that mattered. The Court's full-throated embrace of class-action waivers directed the pressure generated by mass harm away from private enforcement; mass arbitration, which required both arbitration and aggregation, seemed conceptually incoherent (and thus a dead letter).

Yet my third reason for thinking that something like mass arbitration could happen, at least theoretically, was that the Supreme Court's class arbitration jurisprudence did not give defendants a strong basis to foreclose mass arbitration. To be sure, the Court's arbitration opinions, particularly Italian Colors, read broadly. And cases like *Italian Colors* likely leave room— perhaps substantial room—for less "friendly" arbitration contracts under the FAA.[184] Expressing this concern, Justice Kagan criticized the *Italian Colors* majority for essentially limiting its effective-vindication jurisprudence to "baldly exculpatory provisions."[185] But Justice Kagan may have overstated the point.

One can conceive of other provisions, not quite baldly exculpatory, that would seem to ask too much of the FAA. Consider a provision requiring an individual claimant to pay the defendant a $100,000 up-front fee to pursue statutory claims. Or a provision specifying that all disputes will be arbitrated by someone on the board of directors of the defendant company. Surely the preemptive scope of the FAA is not so broad as to prohibit legislatures (or courts) from deeming "pay-defendant-to-play" or "adjudication-by-defendant"

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[180] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336-38, 351-52 (2011); see also Miller, *supra* note 103, at 800-01 (describing how *Concepcion* "ensur[ed] companies that [contracts like AT&T's] were undoubtedly safe").

[181] Miller, *supra* note 103, at 824.

[182] *See* Glover, *supra* note 75, at 3057.

[183] Miller, *supra* note 103, at 826.

[184] *See supra* note 182 and accompanying text.

[185] *See* Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 240-43, 247-48, 253 (2013) (Kagan, J., dissenting).

provisions void as against public policy.[186] Surely those provisions interfere impermissibly with the effective vindication of rights.

Along similar lines, the logic of the Court's arbitration jurisprudence does not easily extend to individual claims—even a substantial number of them—as opposed to claims brought on a representative basis. In representative litigation, one individual can litigate on behalf of 999 others who do not have to participate at all.[187] The class-waiver cases hinge on the fact that representative devices like the class action create a form of dispute resolution that (at least according to the Court) is fundamentally inconsistent with the FAA's preference for bilateral arbitration.[188] But having established bilateral arbitration as the paradigm the FAA was intended to protect, it would be a stretch, even for a defense-minded Court, to disapprove of any quantity of bilateral arbitration proceedings.

Of course, the Court has not addressed mass arbitration. In my mind, however, the Supreme Court's jurisprudence cannot go so far as to prohibit a parade of proverbial fools and fanatics from pursuing negative-value claims on an individual basis.[189] Imagine that 1,000 similarly situated individuals filed individual arbitration claims. There is no doubt that a judge—at least one who views aggregation as a mechanism for imposing in terrorem settlement pressure—would find the settlement pressure generated by these 1,000 claims normatively undesirable. But it is doubtful that the same judge could use *Stolt-Nielsen, Concepcion, Italian Colors, Epic Systems*, or any other arbitration case to prevent those 1,000 claimants from pursuing their 1,000 individual cases.

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[186] Some courts have said as much. *See*, e.g., Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 926-27 (9th Cir. 2013) ("If state law could not require some level of fairness in an arbitration agreement, there would be nothing to stop an employer from imposing an arbitration clause that, for example, made its own president the arbitratior of all claims brought by its employees.").

[187] *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 (1985).

[188] *See supra* notes 81-87 and accompanying text. Indeed, the *Stolt-Nielsen* Court indicated that the "shift from bilateral arbitration to class-action arbitration" would cause "fundamental" (and presumably undesirable) changes. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686-87 (2010) (expressing concern that, among other things, the arbitrator's award would "adjudicate[] the rights of absent parties").

[189] *Cf*. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("[O]nly a lunatic or a fanatic sues for $30.").

Indeed, during oral argument in *Italian Colors*, Chief Justice Roberts all but stated as much.[190]

For decades, the defense coalition proceeded on the assumption that a campaign targeting the class-action device, but not underlying substantive rights, would achieve the holy grail of defense-side goals: avoiding legal liability.[191] Defendants' extended honeymoon with the class action, however, may have obscured the ways in which the aggregate unit itself was the true source of their discontent. The potential for low-value cases to generate significant settlement pressure comes from a mass of claims, which can exist independently of any specific aggregate device.[192] But the Supreme Court's jurisprudence has targeted the class action, not the aggregate unit generally. Individual claims are the boundary—and a mass of individual claims now the price—of the arbitration revolution's legal immortality.[193]

III. MASS-ARBITRATION CASE STUDY

Consistent with the analysis in Part I.C above, the opportunity for mass arbitration arose from two consequences of the arbitration revolution. First, the revolution produced orphaned aggregate claim units—groups of classable claims deprived of any civil justice home, but which still had potential legal merit. Second, the revolution produced millions of "friendly" arbitration agreements.

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[190] The full exchange was as follows:

> Chief Justice Roberts. Well, again, that doesn't seem too difficult. You either have your trade association or you have a big meeting of all [the plaintiffs] and say we need to pay for this expert report and once we've got it, you know, I'm going to represent each of you individually in individual arbitrations and I'm going to win the first one, and then the others are going to fall into place and they'll get a settlement from American Express that's going to . . . satisfy their concerns.
> Mr. Kellogg. Absolutely right.
> Chief Justice Roberts. Okay. And you have no problem with that.
> Mr. Kellogg. I have no problem with that.
> Transcript of Oral Argument at 21-22, *It. Colors*, 570 U.S. 228 (No. 12-133).

[191] *See generally* Gilles, *supr*a note 47.

[192] *Cf.* Nagareda, *supra* note 132, at 1882-85 ("Aggregation operates harmoniously with remedial design by making feasible private litigation . . . to enforce strictures against misconduct that otherwise would not give rise to marketable claims . . . .").

[193] *Cf.* Indiana Jones and the Last Crusade, at 01:54:16 (Steven Spielberg dir., 1989) ("But the [Holy] Grail cannot pass beyond the great seal. That is the boundary, and the price, of immortality.").

If corporations were forced to comply with the "friendly" contractual terms they had drafted, orphaned aggregate claim units could increase the settlement pressure stemming from their claims. As it turns out, enforcement of those terms is not only expressly permitted but explicitly required: After all, the FAA says that "courts must 'rigorously enforce' arbitration agreements according to their terms."[194]

To say that an opportunity for mass arbitration existed, however, is not to say that mass arbitration was likely to occur. As this Part demonstrates, mass arbitration's path from theoretical opportunity to viable model of dispute resolution was economically prohibitive, legally uncertain, and, in the view of most attorneys who considered it, intolerably risky.[195] And yet, mass arbitration emerged.

Parts III, IV, and V now present the first and only case study of mass arbitration. Part III investigates the origins of and obstacles to mass arbitration and describes mass arbitration's key features. Part IV uncovers and analyzes a number of contemporaneous developments to which mass arbitration must adapt. What emerges from this investigation is a new and distinct model of aggregate dispute resolution, which Part V.A taxonomizes and compares to taxonomies I developed for two other firmly established models of aggregate dispute resolution (class actions and MDL consolidations). Part V.B discusses some limitations of this Article's case study and highlights important open questions that those limitations reveal.

The case-study method "explores a real-life, contemporary bounded system (a case) or multiple bounded systems (cases) over time."[196] As such, it is the most effective way to understand a real-life phenomenon like mass arbitration. The case study begins with a brief background section, followed by a discussion section that investigates two questions. One, what were the principal obstacles to the development of viable mass arbitration, and how were they overcome? Two, what are the key features of the mass-arbitration model? The case study continues by asking a third question: What are the current challenges to mass arbitration, and what do they reveal about its future? After investigating these

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[194] *It. Colors*, 570 U.S. at 233 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[195] *See, e.g.*, Interview with Cory L. Zajdel, *supra* note 40.

[196] John W. Creswell, Qualitative Inquiry & Research Design: Choosing Among Five Approaches 97 (3d ed. 2013) (emphasis omitted).

questions, the case study presents the taxonomy described above.

A quick note on taxonomy: I chose to compare mass arbitration to class actions and MDL consolidations for two reasons. First, class action and MDL consolidation are the most established mechanisms for aggregate claiming in litigation.[197] As such, they serve as important reference points against which other forms of formal or informal aggregate dispute resolution can be compared. Second, mass arbitration is fundamentally a reactionary phenomenon. It is almost impossible to imagine the development of a massarbitration model without the existence of some external driving force. Corporations created such a force not only through their resistance to the class action, but also through their resistance to MDL consolidation.[198] Contractual avoidance of MDL consolidation has received relatively little discussion, but it is not insignificant: Like class actions, MDL consolidations allow cost spreading among claimants,[199]

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[197] *See, e.g.*, Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DePaul L. Rev. 497, 499-504 (2016) (describing the "golden age" of classaction suits); Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831, 833 (2017) ("With the Supreme Court and lower courts cutting back the viability of the class action . . . MDL has become the leading mechanism for resolving mass torts.").

[198] *See generally* 28 U.S.C. § 1407 (providing for the transfer of related cases "to any district for coordinated or consolidated pretrial proceedings"). The most recent and highprofile attempt by a corporation to avoid MDL consolidation involved Johnson & Johnson, which tried to channel consolidated mass-tort claims through a new legal entity, LTL Management LLC, in Chapter 11 bankruptcy proceedings. Informational Brief of LTL Management LLC at 1, In re LTL Mgmt. LLC, No. 21-30589 (Bankr. W.D.N.C. Oct. 14, 2021), ECF No. 3; Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case ¶¶ 1-3, *In re* LTL Mgmt., LLC, 637 B.R. 396 (Bankr. D.N.J. 2022) (No. 21-30589), ECF No. 632-1; Memorandum of Law of Amici Curiae by Certain Complex Litigation Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case ¶¶ 4-6, *In re* LTL Mgmt., 637 B.R. 396 (No. 21-30589), ECF No. 1410 (describing, in a brief submitted by the Author, the MDL process as an alternative to such a novel bankruptcy plan); Memorandum of Law of Amicus Curiae by Erwin Chemerinsky in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case ¶ 4, *In re LTL Mgmt.*, 637 B.R. 396 (No. 21-30589), ECF No. 1396 (warning that the "bankruptcy petition stretches the Bankruptcy Code beyond the breaking point"). Despite the arguments of complex-litigation, constitutional law, and bankruptcy professors, Judge Michael Kaplan of the Bankruptcy Court of the District of New Jersey denied the tort claimants' motions to dismiss. *In re LTL Mgmt.*, 637 B.R. at 399-400. In his sweeping opinion, Judge Kaplan stated that LTL's Chapter 11 filing "was not undertaken to secure a tactical advantage" and that, to the extent such a tactic would open the floodgates to the use of bankruptcy proceedings to terminate and resolve legal claims, "maybe the gates . . . should be opened." *Id.* at 421, 428 (capitalization altered).

[199] Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 347-48 (2014).

thereby facilitating claiming and imposing significant settlement pressure on defendants.[200]

A. Background

1. Definitions

There are two distinct models of dispute resolution that one might hear referred to as "mass arbitration." The first model, which has existed for many years, was developed principally by a subset of labor and employment firms, which would arbitrate the relatively small number of claims by employeeclients against their employers.[201] After proceeding through arbitration on those test cases, the firms would attempt to leverage successful individual results as de facto bellwethers to obtain settlements for unfiled claims.[202] This model might sound a bit familiar: It closely resembles Chief Justice Roberts's observations about arbitration during oral argument in *Italian Colors*. As a claimant, Chief Justice Roberts noted, you could "have your trade association . . . represent each of you individually in individual arbitrations and . . . win the first one, and then the others are going to fall into place and [you'll] get a settlement."[203] This "test-case" model is not what this Article terms mass arbitration.

In the second model—what this Article refers to as mass arbitration—firms amass thousands of clients who have allegedly suffered a common harm by a common defendant.[204] Rather than file a handful of claims in arbitration for

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[200] *Id*. at 345-46 ("[T]he cost-spreading MDL enables counsel to pursue many meritorious cases that would have been negative-value claims outside of an aggregative context."); John M. Majoras, Steven N. Geise, Christopher R.J. Pace, Sharyl A. Reisman & Leon F. DeJulius, Jr., *Settlement Strategy in MDL*, *in* 2 Business and Commercial Litigation in Federal Courts § 19:52 (Robert L. Haig ed., West 2021) (describing how MDL consolidation can encourage settlement).

[201] Interview with Travis Lenkner & Warren Postman, *supra* note 40.

[202] *Id*.

[203] Transcript of Oral Argument at 21, Am. Express Co. v. It. Colors Rest., 570 U.S. 228 (2013) (No. 12-133); *see supra* note 190 and accompanying text.

[204] Between 2010 and 2018, some employment firms filed what might be called "mini mass arbitrations" in the employment context. These arbitrations generally consisted of 100 or 200 claims. S*ee, e.g.*, Aguilera v. Prospect Mortg., LLC, No. 13-cv-05070, 2013 WL 4779179, at *1-2 (C.D. Cal. Sept. 5, 2013) (describing how 188 plaintiffs who signed arbitration agreements with the defendant company filed individual demands against the company through the AAA and JAMS).

potential use as bellwethers or test cases,[205] the firms then file hundreds or thousands of individual arbitration demands. And they do so with the stated intent of arbitrating each individual case until a satisfactory aggregate settlement is reached.

The first example of this second model occurred, largely unnoticed, in 2011. That year a California firm, Bursor & Fisher, filed over 1,000 identical arbitral demands seeking to enjoin a proposed merger between AT&T and T-Mobile.[206] AT&T responded with eight separate lawsuits arguing that the demands, which arose under the Clayton Act, fell outside the scope of the arbitration agreement with its customers.[207] Courts agreed with AT&T in at least five of these cases;[208] several stated that the demands bore "all the hallmarks of 'class arbitration' laid out in *Concepcion*."[209] Nothing about this attempted mass arbitration seems to have been written since.[210]

A few other small-scale mass arbitrations popped up in the mid-2010s. Small-scale mass arbitrations share some of the same features as large-scale mass arbitrations, and they may have laid some of the groundwork for the mass-

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[205] This model closely tracks that of a large MDL. *See, e.g.*, Richard J. Arsenault & J.R. Whaley, Practice Tip, *Multidistrict Litigation and Bellwether Trials: Leading Litigants to Resolution in Complex Litigation*, Brief, Fall 2009, at 60, 60-62 (discussing the MDL bellwether model).

[206] *See* Daniel Fisher, *AT&T's Arbitration Victory Breeds Swarm Of Antitrust Cases*, Forbes (Aug. 18, 2011, 4:36 PM EDT), https://perma.cc/Y6TX-M4H4 (noting that Bursor & Fisher attracted "more than 1,000 people who agreed to file arbitration complaints against AT&T seeking to block the merger"); Letter from Kevin Ranlett to the Hon. Dennis M. Cavanaugh at 1, AT&T Mobility LLC v. Keller, No. 11-cv-04671 (D.N.J. Oct. 28, 2011), ECF No. 34 [hereinafter Ranlett Letter] (describing the arbitral demands as identical).

[207] Ranlett Letter, *supra* note 206, at 1 (describing the relevant case as "one of eight lawsuits"); *see, e.g.*, AT&T Mobility LLC v. Fisher, No. 11-cv-02245, 2011 WL 5169349, at *3 (D. Md. Oct. 28, 2011) (describing AT&T's contention that "the Clayton Act claim brought in the demand for arbitration exceeds the scope of the Arbitration Agreement.").

[208] *Fisher*, 2011 WL 5169349, at *7; AT&T Mobility LLC v. Bernardi, Nos. 11-cv-03992 & 11-cv-04412, 2011 WL 5079549, at *13 (N.D. Cal. Oct. 26, 2011); AT&T Mobility LLC v. Smith, No. 11-cv-05157, 2011 WL 5924460, at *11 (E.D. Pa. Oct. 7, 2011); AT&T Mobility LLC v. Gonnello, No. 11-cv-05636, 2011 WL 4716617, at *5 (S.D.N.Y. Oct. 7, 2011); AT&T Mobility LLC v. Bushman, No. 11-cv-80922, 2011 WL 5924666, at *4 (S.D. Fla. Sept. 23, 2011).

[209] *Smith*, 2011 WL 5924460, at *7; *see also, e.g.*, *Bernardi*, 2011 WL 5079549, at *7. The remaining arbitral demands likely disappeared in light of judicial skepticism. Interview with Daniel Fisher, Senior Ed., Forbes, in Wash., D.C. (Aug. 5, 2021).

[210] That said, the attorneys pursuing these types of claims were later referred to as "arbitration entrepreneurs." David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Geo. L.J. 57, 63 & n.38 (2015).

arbitration model. Accordingly, this Article includes them in its study.[211] But small-scale mass arbitrations did not provide a meaningful substitute for the class actions eliminated by the arbitration revolution, in large part because of their size. As such, they did not capture much attention, much less affect the arbitration revolution generally.

Mass arbitration on a significant scale did not materialize until around 2018, when (seemingly out of nowhere) a group of plaintiffs' firms and attorneys—a startup named Keller Lenkner LLC, a small Maryland consumer firm called Z Law Group, and a Minnesota lawyer named Kent Williams— began filing thousands of arbitration demands against some of the biggest corporations in the United States. In 2018: Uber. Lyft. Chipotle. In 2019: CenturyLink. DoorDash. Family Dollar. Peloton. Intuit. In 2020: Chegg. Amazon. In 2021: DoorDash, again (different claimants; different claims). Uber, again (different claimants; different claims). These corporate defendants are represented by some of the most well-known firms in "big law": Gibson Dunn, Morrison & Foerster, and Mayer Brown.

2. Methodology

"When a study includes more than one single case, a multiple case study is needed."[212] This case study draws from multiple cases and therefore uses the "multiple-case study" method.[213] A multiple-case study enables the researcher to understand key similarities and differences and allows her to analyze data both within and across cases.[214] The multiple-case study method calls for "detailed . . . data collection involving multiple sources of information."[215] Accordingly, for this study, I collected case-related materials from multiple sources to form the

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[211] *See infra* Appendix.

[212] Johanna Gustafsson, Single Case Studies vs. Multiple Case Studies: A Comparative Study 3 (2017), https://perma.cc/2XD7-GUSC.

[213] *See* Robert K. Yin, Case Study Research: Design and Methods 46-47 (3d ed. 2003) (comparing single-case and multiple-case study designs); *see also, e.g.*, Mark Gil A. Vega, *Investigating the Learning Action Cell (LAC) Experiences of Science Teachers in Secondary Schools: A Multiple Case Study*, IOER Int'l Multidisciplinary Rsch. J., Mar. 2020, at 20, 20-22 (evaluating an educational program in the Philippines via "multiple case studies that utilized . . . survey questionnaires, individual interviews, focus group discussions, and . . . observations").

[214] *See* Yin, *supra* note 213, at 47-48.

[215] *See* Creswell, *supra* note 196, at 97 (emphasis omitted).

underlying dataset. Those materials included (1) all publicly available data on arbitral claims in the AAA, JAMS, and CPR databases;[216] (2) publicly available filings, judicial opinions, and orders from a broad and representative sample of mass-arbitration cases; (3) publicly available financial disclosures relevant to certain companies' mass-arbitration liability; (4) interviews I conducted with the principal architects of mass arbitration[217] and with other leading plaintiffs' attorneys;[218] (5) interviews I conducted with the principal architects and leaders of the defense coalition's arbitration revolution;[219] and (6) public media reports on mass arbitration.

Given that mass arbitration did not emerge until around 2018, I established the following criteria to ensure a sufficiently developed and representative case sample for the study's dataset. These criteria ensured that the dataset was representative across time (criteria 1 and 2), claim size and number (criteria 3, 4, and 5), substantive legal context (criteria 6 and 7), and procedural origin (criteria 8 and 9).

1. First-mover cases[220] (necessary to investigate how mass arbitration emerged);
2. Second-mover cases[221] (necessary to investigate the evolution and future of mass arbitration);
3. At least one case with claims that are claim-marketability failures in

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[216] *See Consumer and Employment Arbitration Statistics*, Am. Arb. Ass'n, https://perma.cc/ J6R8-GRHC (archived May 14, 2022) (to locate, select "View the live page," and then select the first link under "AAA Consumer and Employment Arbitration Statistics") (listing AAA consumer cases closed within the last five years); *JAMS Consumer Case Information Spreadsheet*, JAMS, https://perma.cc/7V8J-MFCX (archived May 14, 2022) (to locate, select "View the live page," and then select "JAMS Consumer Case Information spreadsheet") (listing consumer arbitrations administered by JAMS and completed in the last five years); *CPR Consumer Case Information*, Int'l Inst. for Conflict Prevention & Resol., https://perma.cc/GV8C-PCH6 (archived May 14, 2022) (to locate, select "View the live page," and then select "CPR Consumer Case Information") (providing information on CPR consumer matters closed within the last five years); *see also* Colvin, *supra* note 122, at 21 (describing the AAA's records as a "bestcase example" of arbitration).

[217] *See supra* note 40.

[218] *See supra* note 41.

[219] *See supra* note 42.

[220] I classify first-mover cases as those mass arbitrations where claim filing began in 2018.

[221] I classify second-mover cases as those mass arbitrations where claim filing began in 2019 or later.

arbitration[222] (necessary to investigate the claim-value threshold[223] of the mass-arbitration model in the abstract and in comparison with other aggregate dispute resolution mechanisms);
4. Cases of diverse scale, as measured by number of claimants (necessary to investigate the mass-arbitration model's scaling capabilities);
5. Cases involving (relatively) high-value individual claims and (relatively) low-value individual claims (necessary to investigate claim-value ranges for the mass-arbitration model's economic viability);
6. Cases arising out of employment contracts;
7. Cases arising out of consumer contracts;
8. Cases that began as class actions; and
9. Cases that were initiated in arbitration.

Once a sufficient number of mass arbitrations emerged and developed to satisfy these criteria, I compiled them into a dataset for study here.[224] The overall dataset spans the mass-arbitration landscape (including some mass arbitrations that never appear publicly), enabling thorough investigation of the mass-arbitration model as it exists today.

B. Overcoming the Principal Obstacles to Mass Arbitration

The path to a viable model of mass arbitration was a narrow one. Corporate defendants and their attorneys were experienced, sophisticated, well-capitalized,

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[222] For purposes of this study, I define a claim that is a "claim-marketability failure" in arbitration as one that would have been economically viable in litigation (via a class action or other aggregate claiming mechanism) but is not economically viable in arbitration, as the costs of arbitration relative to the value of the claim make it economically irrational to pursue.

[223] By "claim-value threshold," I mean the following: the value of individual claims that mass-arbitration attorneys have found to be the minimum—the threshold—for such claims to be economically viable in the mass-arbitration model.

[224] The full dataset is on file with the Author. A subset of the data is reproduced in the Appendix below.

and steadfastly devoted to preserving the bounty of the arbitration revolution.[225] The win–loss and recovery rates for consumers and employees in arbitration were too discouraging for even optimistic attorneys to ignore.[226] The startup costs of mass arbitration were likely too high for most attorneys, particularly those with the experience needed to go toe-to-toe with the defense bar.

How, then, did mass arbitration ever come to be? Who could do it? Who would do it?

1. Competing with the defense bar

Any path to mass arbitration had to go through the defense bar—the same defense bar that engineered the arbitration revolution and the class-action counterrevolution. While the proverbial "enterprising young attorney" might be willing to devote countless hours to individualized claim management and pursuit, that young attorney would be no match for the defense bar. And an attorney with the skill and experience necessary to challenge the defense bar would almost certainly lack the willingness to abandon a well-established and lucrative practice for a risky and unfamiliar endeavor.[227]

Unsurprisingly, then, first-mover firms in mass arbitration were unique among plaintiffs' firms. Keller Lenkner, the firm behind the Uber, Lyft, Postmates, DoorDash, Intuit, Amazon, and FanDuel mass arbitrations, is uniquely well

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[225] Indeed, in many ways they still are. In a 2021 study, the American Association for Justice (AAJ) noted that "[c]onsumer and employee win rates decreased" and "consumer and employment forced arbitrations increased during the pandemic." Am. Ass'n for Just., *supra* note 146, at 2. Many of the cases studied by the AAJ, however, involved claims in the mass arbitrations analyzed in this Article. *See id*. at 4 (listing the top ten corporate defendants for employment arbitration in 2020, including Family Dollar, Dollar Tree, and Chipotle); *infra* Appendix. The increase in arbitration between 2018 and 2021 is thus partly attributable (if not highly attributable) to the emergence of mass arbitration. Accordingly, any analysis of the AAJ's study must consider the distinction between an increase in *arbitration cases* and an increase in mandatory arbitration agreements. *Cf.*, *e.g.*, Bhattarai, *supra* note 146 (using the fact that Family Dollar closed 1,135 arbitration cases in 2020, as opposed to three cases in 2019, to show that "U.S. companies are increasingly relying [on] . . . arbitration . . . during the pandemic," a conclusion that conflates an increase in cases with an increase in arbitration agreements). For any given defendant, and in particular Family Dollar, the increase in 2020 cases would seem largely (if not exclusively) due to mass arbitration. Indeed, the fact that Family Dollar closed three arbitration cases in 2019 likely reflects the general tendency of mandatory arbitration agreements to *suppress* case filings, not facilitate them. *See supra* Part I.C.

[226] *See* Interview with Cory L. Zajdel, *supra* note 40.

[227] Even now, well-capitalized plaintiff-side powerhouses are hesitant about the risk–benefit calculus. Interview with Jonathan D. Selbin, *supra* note 41.

capitalized for a startup firm, especially one founded just three years ago. Two years before starting Keller Lenkner, Adam Gerchen, Ashley Keller, and Travis Lenkner sold Gerchen Keller Capital—a litigation-funding firm Gerchen and Keller had founded in 2013—to Burford Capital for $160 million.[228] Keller Lenkner is also unusual among plaintiffs' firms in that its attorneys were "trained at leading defense firms and commercial litigation boutiques."[229] Indeed, Keller Lenkner's ranks include Warren Postman, the former vice president and chief counsel for appellate litigation at the U.S. Chamber of Commerce.[230] Other attorneys come from shops like Kirkland & Ellis, Williams & Connolly, and Kellogg Hansen.[231] The marketing implication is obvious: "Keller Lenkner's lawyers can match the best lawyers on the other side because they've been there."[232]

Cory Zajdel, whose firm, Z Law Group, is behind both the Chegg and DoorDash (consumer) mass arbitrations, is also unique among plaintiffs' attorneys. Zajdel invested his life savings into mass arbitration.[233] His reasoning? The arbitration revolution left consumers, including many of his clients, with virtually no access to justice. Zajdel knew that attorneys across the country would routinely screen out cases where an arbitration clause was present.[234] Because of this, he was concerned that no consumers subject to arbitration

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[228] Press Release, Burford Cap., Burford Capital Adds Scale and Significant Private Capital Management Business Through Acquisition of Gerchen Keller Capital (Dec. 14, 2016), https://perma.cc/V8PU-M3BJ; Press Release, Gerchen Keller Cap., LLC, Gerchen Keller Capital, LLC Launches New $250 Million Commercial Litigation Finance Fund (Jan. 13, 2014), https://perma.cc/9YNP-LP5H.

[229] *About Us*, Keller Postman LLC, https://perma.cc/U574-WY4X (archived July 12, 2022). Keller Lenkner changed its name to Keller Postman after the departure of Travis Lenkner in April 2022. Andrew Strickler, *"Mass Action" Firm Keller Lenkner Becomes Keller Postman*, LAW360 (Apr. 25, 2022, 4:54 PM EDT), https://perma.cc/9RWD-YRN5 (to locate, select "View the live page"). I refer to the firm as Keller Lenkner throughout the Article.

[230] *Our Team*, Keller Postman LLC, https://perma.cc/R3WZ-TBHD (archived May 14, 2022). Lenkner himself worked as an attorney at Gibson Dunn. Press Release, Burford Cap., supra note 228.

[231] *See Our Team*, supra note 230.

[232] Alison Frankel, *DQ from Facebook Class Action Shows Risk of Keller Lenkner's Model*, Reuters (July 21, 2021, 1:34 PM PDT), https://perma.cc/32JS-NFTW.

[233] Interview with Cory L. Zajdel, *supra* note 40

[234] *Id.*

agreements would be able to secure representation for their claims.[235] If Zajdel didn't do it, who would?[236]

Other plaintiffs' firms that have gotten involved in mass arbitration are well established and well capitalized. Quinn Emanuel joined Keller Lenkner in the DoorDash (employment) mass arbitration,[237] and it is on record as counsel in the Ticketmaster mass arbitration.[238] Lieff Cabraser, class council against Fitbit,[239] is considering dipping its toes into the mass-arbitration waters in the context of Telephone Consumer Protection Act (TCPA) claims against DirecTV.[240] Firms like Lieff Cabraser and Quinn Emanuel are large enough to handle the volume of individual cases—and the attendant ethical obligations to clients—generated by mass arbitration.

2. Overcoming substantial startup costs

The economic barriers to initiating a mass arbitration are substantial. Creating the "mass" is a particularly expensive endeavor, both in the abstract and relative to class actions and MDL consolidations. The filing of even a single arbitration demand requires the claimant to pay a filing fee. (That is generally true even if that filing fee is reimbursable under the terms of the relevant arbitration agreement.)

The thousands of arbitration demands in this study were subject to a web of multifarious, frequently amended fee schedules. Initial filing fees for individual arbitration claims during the study period often fell somewhere between $200

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[235] *Id.*

[236] *Id.*

[237] Alison Frankel, *DoorDash Accused of Changing Driver Rules to Block Mass Arbitration Campaign*, Reuters (Nov. 20, 2019, 3:34 PM), https://perma.cc/EFW9-7SW7.

[238] Complaint, Heckman v. Live Nation Ent., Inc., No. 22-cv-00047 (C.D. Cal. Jan. 4, 2022), ECF No. 1 (listing Keller Lenkner and Quinn Emanuel as counsel for the plaintiffs).

[239] *See infra* notes 384-88 and accompanying text.

[240] Interview with Jonathan D. Selbin, *supra* note 41 (noting that privacy claims stemming from a TCPA class action had been sent to arbitration and that Lieff Cabraser was seeking individual names in order to help claimants arbitrate). The underlying case is Cordoba v. DirectTV, LLC, No. 15-cv-03755 (N.D. Ga. filed Oct. 27, 2015).

and $400,[241] although under some schedules and some agreements they could have been much higher.[242]

In many cases, just the filing fee for the arbitration demand can exceed the value of any individual claim. Indeed, the initial filing fee is the reason that most individual consumer and employment demands, at least if unconnected to a mass arbitration, are never brought. As an example: To a couple earning $32,877 a year, $200 owed by Intuit is a significant amount of money.[243] But pursuant to the couple's arbitration agreement, the filing fee to recover that $200 would have been $200.[244] This made the claim economically irrational for the couple (and their counsel) to pursue.

In order to launch a mass arbitration, then, a law firm typically must advance the filing fees owed by its clients.[245] Given the number of individual demands that mass arbitration entails, this is a substantial (and potentially risky) up-front investment. In the Intuit mass arbitration, Keller Lenkner invested more than $8 million dollars of its own capital to advance filing fees for the first wave

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[241] *See* Am. Arb. Ass'n, Consumer Arbitration Rules: Costs of Arbitration 1 (2016), https://perma.cc/TQ3J-H22N (setting out a default filing fee of $200 for consumers); *Arbitration Schedule of Fees and Costs*, JAMS, https://perma.cc/L7US-MB6T (archived May 19, 2022) (setting default fees of $250 for consumers and $400 for employees). These fees can generally be altered via contract. At least prior to mass arbitration, agreements that amended filing fees tended to lower the claimant's fee or provide that the defendant would reimburse the claimant's fee. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336-37 (2011).

[242] *See, e.g., Rule 13900. Fees Due When a Claim Is Filed,* Fin. Indus. Regul. Auth., https://perma.cc/C9BD-GGPJ (archived May 19, 2022) (setting up a sliding scale where filing fees vary based on the amount in controversy).

[243] [Proposed] Brief of Amici Curiae the Office of the Los Angeles City Attorney & the Office [sic] the County Counsel, County of Santa Clara Opposing Plaintiffs' Motion for Preliminary Approval at 40, Arena v. Intuit Inc., No. 19-cv-02546, 2021 WL 834253 (N.D. Cal. Mar. 5, 2021), ECF No. 176-1.

[244] *See* Motion to Intervene & in Opposition to Preliminary Approval of Class Action Settlement at 5, *Intuit*, 2021 WL 834253 (No. 19-cv-02546), ECF No. 177 [hereinafter Intuit Motion to Intervene]. The AAA changed its fee schedule in November 2020 to adjust for mass arbitration, reducing the required outlay for similarly situated claimants to as low as $50. Mark Levin, *New AAA Consumer Fee Schedule Addresses Mass Arbitration Costs*, JD Supra (Mar. 2, 2021), https://perma.cc/6YR9-C9EB; Am. Arb. Ass'n, Consumer Arbitration Rules: Costs of Arbitration 1 (2020), https://perma.cc/K43E-URXP.

[245] This is not always the case. For instance, the AAA waives filing fees when a California consumer-claimant establishes a condition of "poverty" via affidavit. *See* Am. Arb. Ass'n, American Arbitration Association Affidavit for Waiver of Fees Notice 1 (n.d.), https://perma.cc/AJW2-45FM.

of individual arbitration demands.[246] In the DoorDash (employment) mass arbitration, filing the first wave of claims for wage theft cost counsel around $1.2 million.[247] By May 2020, Keller Lenkner had fronted more than $10 million in filing fees for its clients.[248] In the Chegg mass arbitration, Cory Zajdel put up his "life savings" to front the filing fees for more than 15,000 arbitration demands.[249] There is no analogue to this up-front capital outlay in a class action. In a class action in court, there is typically only one filing for which a fee could be assessed—the class complaint.

Before a firm can even reach this expensive filing stage, it must expend significant time and resources in order to amass claims to file. The "mass" in a mass arbitration is the sum of hundreds or thousands of individual claimants, all of whom the firm must identify, notify, contact, and ultimately retain. Creating the "mass" requires firms to develop (internally) or hire (externally) an advertising and marketing team capable of designing and implementing an expansive, but also targeted, multimedia campaign. That campaign must not only identify and reach a diffuse set of potential claimants; it must also persuade those individuals to reach out to the firm so that the firm can file claims on their behalf.[250]

The outlay of resources required to create the "mass" in a mass arbitration substantially exceeds that required in a typical class-action proceeding. First,

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[246] Defendant Intuit Inc.'s Opposition to Motion to Intervene & Motion for Leave to File Brief of Amici Curiae at 7, *Intuit*, 2021 WL 834253 (No. 19-cv-02546), ECF No. 189 [hereinafter *Intuit* Opposition to Motion].

[247] *See* Susan Antilla, *Arbitration Storm at DoorDash*, Am. Prospect (Feb. 27, 2020) https://perma.cc/AWE3-C6P4.

[248] Declaration of Warren Postman in Opposition to CenturyLink's Motion to Disqualify Counsel & Require Corrective Notice ¶ 6, *In re* CenturyLink Sales Pracs. & Sec. Litig., No. 17-md-02795, 2020 WL 3513547 (D. Minn. June 29, 2020), ECF No. 715 [hereinafter *CenturyLink* Postman Declaration].

[249] Interview with Cory L. Zajdel, *supra* note 40; Alison Frankel, *Mass Consumer Arbitration is On! Ed Tech Company Hit with 15,000 Data Breach Claims*, Reuters (May 12, 2020, 1:51 PM), https://perma.cc/68TS-KCMH.

[250] One example of such a campaign is Labaton Sucharow's outreach via Facebook to individuals who might have claims against MoneyLion for charging excessive interest rates. The MoneyLion advertisement did not appear on Labaton Sucharow's main Facebook feed. Instead, the ad appeared on a targeted subset of Facebook users' feeds. A copy of the ad is on file with the Author. For more on advertising campaigns, see generally Interview with Cory L. Zajdel, *supra* note 40 (discussing the need for a marketing budget and a targeted advertising plan); and Interview with Warren Postman, *supra* note 40 (listing as a mass-arbitration startup requirement an intake process to target and find clients).

in a class action, the relevant "mass" (a class) is created through the relatively inexpensive process of crafting a class definition in the complaint. Second, notifying individuals of their inclusion in the class is typically done via a formal court-ordered and court-supervised notice campaign.[251] And while Rule 23(c)(2)(B) requires plaintiffs to bear the costs of notice, at least at the outset, a judge can order reimbursement of those costs by the defendant at the end of the case.[252] Reimbursement can also occur through the negotiated terms of a settlement agreement.[253]

Finally, unlike mass-arbitration counsel, class counsel does not need to individually retain the members of a class. At most, a court might require counsel to produce a class list for purposes of satisfying the class-action ascertainability requirement.[254]

The outlay of resources required to create the "mass" in a mass arbitration likely also exceeds that required in an MDL consolidation. In contrast with

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[251] *See* Fed. R. Civ. P. 23(c)(2)(B).

[252] *See, e.g.*, Irving Tr. Co. v. Nationwide Leisure Corp., 93 F.R.D. 102, 111 (S.D.N.Y. 1981) ("Notice must be financed by the class claimants. However, class claimants may apply to this court for an order shifting the costs of some class member identification procedures . . . . And, of course, if the class claimants prevail, an application to garner costs and fees from the recovery fund can be made." (citations omitted)).

[253] *See, e.g.*, Brief in Support of Unopposed Motion for Certification of Settlement Class, Preliminary Approval of Settlement, & Approval of Class Notice at 25, *In re* Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig., No. 14-cv-03722 (D.N.J. Apr. 11, 2016), ECF No. 211-1 ("The costs of [class] notice will be paid out of the Settlement Fund.").

[254] *Compare, e.g.*, Cherry v. Dometic Corp., 986 F.3d 1296, 1304 (11th Cir. 2021) ("[A] proposed class is ascertainable if it is adequately defined such that its membership is *capable* of determination." (emphasis added)), *and* Seeligson v. Devon Energy Prod. Co., 761 F. App'x 329, 334 (5th Cir. 2019) (rejecting the idea that a class must be currently ascertainable), *with* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-94 (3d Cir. 2012) (holding that "[a] class must be currently and readily ascertainable based on objective criteria" and noting that class-member identification must be administratively feasible). Although it insisted it was not changing circuit precedent, the Third Circuit recently issued an opinion that seemed to weaken its heightened ascertainability standard. Hargrove v. Sleepy's LLC, 974 F.3d 467, 477-81 (3d Cir. 2020) (finding the district court "too exacting" in its demand that the plaintiffs "identify the class members at the certification stage"); *see* James Bogan III, T*hird Circuit Weakens Ascertainability Requirement by Lowering Evidentiary Bar*, JD Supra (Oct. 1, 2020), https://perma.cc/3VGY-Z5UW.

MDL proceedings, which are public and often widely publicized,[255] arbitration proceedings are private and less publicized (if publicized at all).[256] Potential MDL claimants are thus more likely to know about the case against the relevant defendant(s) and more likely to self-identify their claims. One might think of it this way: In mass arbitration, attorneys must find the would-be claimants, typically by way of costly and proprietary targeted advertising systems. In an MDL consolidation, would-be claimants can and often do find the attorneys. Relatedly, the public (and publicized) nature of an MDL allows plaintiff leadership to rely on a nationwide network of firms to amass and refer claims.[257] Referral networks like those seen in MDL consolidations are less conceivable in mass arbitration. Without some form of publicity or an expensive advertising apparatus, claim-collection websites by potential massarbitration referral firms would be largely invisible.

Along these lines—and perhaps unsurprisingly—all of the first-mover mass arbitrations and most of the second-mover mass arbitrations occurred after or alongside the stay (or dismissal) of a class or collective action[258] on a defendant's

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[255] *See, e.g.*, Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. Times (Mar. 5, 2018), https://perma.cc/RDF3-Y6G3 (covering the Judicial Panel on Multidistrict Litigation's transfer of opioid cases to Northern District of Ohio Judge Dan Polster for MDL consolidation); Alyse Shorland, *Johnson & Johnson Lawsuits Raise Fears Over Baby Powder*, N.Y. Times: The Wkly. (updated Dec. 8, 2019), https://perma.cc/S3AM-7G37 (to locate, select "View the live page") (covering the Johnson & Johnson asbestos-in-baby-powder products liability MDL); *see also* Interview with Cory L. Zajdel, *supra* note 40 (noting that aggregate proceedings in court tend to generate more publicity than arbitration proceedings, even those related to mass arbitration).

[256] *See, e.g.*, Judith Resnik, Norman Shachoy Lecture, *Courts: In and out of Sight, Site, and Cite*, 53 Vill. L. Rev. 771, 799-810 (2008) (advocating for more "sunshine" in arbitration and other private dispute-resolution arrangements).

[257] *See generally, e.g.*, D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 Fordham L. Rev. 2175, 2190 (2017) ("The network of client solicitation and referral arrangements that exists on the plaintiffs' side in mass litigation tends to consolidate groups of claimants in the hands of major aggregators.").

[258] Note that the FLSA provides for class-wide proceedings by way of an opt-in collective action. *See* 29 U.S.C. § 216(b).

motion to compel arbitration.[259] This procedural posture makes sense for two reasons. One, the contractual right to arbitration is generally waivable. Plaintiffs' firms may well file class actions (or in the FLSA context, collective actions) as a matter of strategy to see whether defendants will exercise their right to compel arbitration via motion.[260] Two, the filing of a class or collective action often leads to the formation and release of a class list (that is, a list of claimants), and many mass arbitrations need something like a class list to get started. According to Kent Williams, one of the lead attorneys in the Chipotle mass arbitration: "Had the claimants not already been in a collective action, the mass arbitration strategy likely wouldn't have been possible . . . ."[261]

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[259] For example: (1) Uber (employment): First arbitration claims filed in August 2018 after *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016) (reversing the denial of Uber's motion to compel arbitration regarding certain labor law claims), and alongside *O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087, 1090-91 (9th Cir. 2018) (doing the same, and reversing class certification, for cases involving wage-theft claims by Uber drivers); (2) Lyft: First arbitration claims filed in October 2018 after *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 288 (D. Mass. 2016) (granting Lyft's motion to compel arbitration and dismissing the putative labor class action), *aff'd*, 918 F.3d 181 (1st Cir. 2019); (3) Postmates: First wave of arbitration demands filed in March 2019 after *Lee v. Postmates Inc.*, No. 18-cv-03421, 2018 WL 6605659, at *1-3, *11 (N.D. Cal. Dec. 17, 2018) (granting Postmates' motion to compel arbitration and dismissing the plaintiffs' wagetheft claims) and alongside *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248, 1255-56 (N.D. Cal. 2019) (staying wage-theft claims pending arbitration), *aff 'd*, 823 F. App'x 535 (9th Cir. 2020); (3) DoorDash (employment): First arbitration demands filed in August 2019 after *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 895-96, 901-02 (N.D. Cal. 2018) (same); (4) Chipotle: First arbitration claims filed in August 2018 after T*urner v. Chipotle Mexican Grill, Inc.*, No. 14-cv-02612, 2018 WL 11314701, at *1 (D. Colo. Aug. 3, 2018) (dismissing plaintiffs bound by Chipotle's arbitration agreement from the wage-theft action); (5) Intuit: First arbitration claims filed in October 2019 alongside *Arena v. Intuit Inc.*, 444 F. Supp. 3d 1086, 1088 (N.D. Cal.) (denying Intuit's motion to compel arbitration regarding deceptive consumer practices), *rev'd sub nom*. Dohrmann v. Intuit, Inc., 823 F. App'x 482 (9th Cir. 2020); (6) Fitbit: Named plaintiff filed arbitration demand following *McLellan v. Fitbit, Inc.*, No. 16-cv-00036, 2017 WL 4551484, at *1, *5 (N.D. Cal. Oct. 11, 2017) (granting, for those plaintiffs who did not opt out of arbitration, Fitbit's motion to compel arbitration regarding deceptive consumer practices); (7) FanDuel/ DraftKings: First arbitration claims filed in October 2019 alongside *In re Daily Fantasy Sports Litigation*, No. 16-md-02677, 2019 WL 6337762, at *1-5, *13 (D. Mass. Nov. 27, 2019) (granting the defendants' motions to compel arbitration for certain classes of plaintiffs); (8) Chegg: First arbitration claims filed in April 2020 just after *Lyles v. Chegg, Inc.*, No. 19-cv-03235, 2020 WL 1985043, at *1, *4 (D. Md. Apr. 27, 2020) (granting Chegg's motion to dismiss and compel arbitration regarding databreach claims). If Ticketmaster becomes a mass arbitration, it will follow on the heels of *Oberstein v. Live Nation Entertainment, Inc.*, No. 20-cv-03888, 2021 WL 4772885, at *1 (C.D. Cal. Sept. 20, 2021) (granting the defendants' motion to compel arbitration regarding antitrust claims and staying proceedings), *appeal filed*, No. 21-56200 (9th Cir. Oct. 29, 2021).

[260] *See, e.g.*, Interview with Matthew C. Helland, *supra* note 40.

[261] Wallender, *supra* note 9.

Investigation shows, however, that a class list is not necessary in all cases. In some instances, the amassing of wage-and-hour claims against a defendant can grow organically—at least when employees are connected and vocally disgruntled about wage theft.[262] Family Dollar, for example, started and ended as a mass arbitration.[263] In other instances, and in an ironic procedural reversal, mass arbitrations can spawn class actions preferred by defendants who refuse to arbitrate individual demands.[264] But both of these scenarios still require spending on advertising, marketing, and outreach.[265]

Nonetheless, in many cases the class list (or a similar data source) is necessary for a mass arbitration to begin. This is especially true in cases where claimants are disconnected or otherwise diffuse. In the potential Arise mass arbitration, for instance, employees are spread out, isolated, and working from home.[266] Arise has a list of its employees, but unless a court orders that list to be released, a mass arbitration will be challenging to initiate.[267] The same result is likely when claimant information is in the hands of defendants and not easily obtainable by others. This is the situation in the potential mass arbitration

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[262] Interview with Matthew C. Helland, *supra* note 40.

[263] *See* Plaintiff 's Complaint ¶¶ 8-9, Fam. Dollar, Inc. v. Am. Arb. Ass'n, No. 20-cv-00248 (E.D. Va. May 15, 2020), ECF No. 1 [hereinafter *Family Dollar Complaint*] (discussing the arbitration demands brought against Family Dollar without any reference to a prior class action).

[264] *See, e.g.*, Fishon v. Peloton Interactive, Inc., 336 F.R.D. 67, 68 (S.D.N.Y. 2020) (indicating that, after more than 2,700 Peloton consumers filed individual arbitration demands with the AAA, Peloton failed to pay its required arbitration fees and instead chose to defend a class-action suit in federal court); John O'Brien, *Peloton Shifts Focus from Arbitration to Courtroom to Defend Itself*, Legal Newsline (July 30, 2020), https://perma.cc/6UAE-KPY9 ("Peloton first tried to fight the case by pointing to an arbitration clause in its terms of service, but it appears to prefer defending one class action instead of dozens of arbitration claims.").

[265] *See supra* notes 250-57 and accompanying text (discussing the high costs of advertising and intake in mass arbitrations relative to class actions and MDL consolidations).

[266] Plaintiff 's Motion for Notice to Be Issued Pursuant to 29 U.S.C. § 216(b), & Suggestions in Support at 1, Bell v. Arise Virtual Sols., Inc., No. 21-cv-00538, 2022 WL 567841 (W.D. Mo. Feb. 24, 2022), ECF No. 2.

[267] *See, e.g.*, Ken Armstrong & Ariana Tobin, *A New Suit Seeks to Turn Arbitrations, a Tool of Big Corporations, Against a Top Customer Service Provider*, ProPublica (Aug. 3, 2021, 5:00 AM EDT), https://perma.cc/Z8A3-73MF ("Without a court-ordered list, finding and contacting Arise's network of customer service agents would present significant challenges.").

against DirecTV.[268] Ultimately, the class-list element of mass arbitration faces an uncertain future. Some courts have begun to disallow the release of class lists—or disallow notifications to employees regarding their claims—in cases involving arbitration agreements.[269]

The up-front costs associated with the preparation of individual arbitration demands are another financial obstacle to mass arbitration. To prepare an arbitration demand, attorneys must gather and record all personal information for each individual: name, age, address, contact information, employer, employment dates, company customer status, and so on. In some instances, the attorneys might also have to collect factual documentation to support each claim: receipts, financial statements, pay stubs or other employment records, gig-economy driving and/or delivery records, and the like.[270] To be sure, claimants' attorneys have sought to achieve economies of scale by submitting something resembling a master complaint (with a spreadsheet of individual information linked or attached)[271] and by filing nearly identical complaints for thousands

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[268] *See* Cordoba v. DirecTV, LLC, 801 F. App'x 723, 724-25 (11th Cir. 2020) (per curiam) (noting that DirecTV allegedly violated the law when it created and shared a data file containing customers' personal information); Alison Frankel, *Latest Mass Arbitration Wrinkle: Plaintiffs' Lawyers Want Court Permission to Contact DirecTV Customers*, Reuters (July 6, 2020, 1:22 PM), https://perma.cc/JCM2-9B6B (describing efforts by plaintiffs' firms to contact clients based on the data file); *Plaintiffs Seek Release of DirecTV Customer Contact Info Sealed in Earlier Improper Texting Lawsuit*, Lieff Cabraser Heimann & Bernstein (July 7, 2020), https://perma.cc/JM5J-V7QJ (emphasizing that, without the release of contact information held by DirecTV, "those impacted by the company's wrongdoing will never know of privacy right breaches or have the opportunity to bring their contractually-mandated individual arbitration claims").

[269] *See, e.g.*, Cordoba v. DirecTV, LLC, No. 15-cv-03755, 2022 WL 575117, at *1-2, *4 (N.D. Ga. Jan. 7, 2022) (refusing to let firms use the data file described in note 268 above for client outreach); In re JPMorgan Chase & Co., 916 F.3d 494, 497-98, 501 (5th Cir. 2019) (holding that a district court may not provide notice of FLSA collective-action claims to employees bound by individual arbitration agreements); Bigger v. Facebook, Inc., 947 F.3d 1043, 1046-47 (7th Cir. 2020) (limiting the circumstances under which a court can authorize FLSA notice when arbitration agreements are present).

[270] *See* Interview with Warren Postman, *supra* note 40.

[271] *See, e.g., In re* CenturyLink Sales Pracs. & Sec. Litig., No. 17-md-02795, 2020 WL 7129889, at *8 (D. Minn. Dec. 4, 2020) ("Keller's pre-arbitration demand consisted of a generic complaint alleging overcharging and fraud and a list of 9,000 clients with their names, phone numbers, emails, and addresses."), *appeal dismissed*, No. 21-1030, 2021 WL 2792967 (8th Cir. Feb. 23, 2021); Letter from Douglas H. Meal, Partner, Orrick, Herrington & Sutcliffe LLP, to Cory L. Zajdel, Principal Att'y, Z Law, LLC 1 (June 26, 2020) (on file with author) (noting that Z Law compiled a "spreadsheet regarding the claimants" in the Chegg mass arbitration).

of demands.[272] Some defendants have argued that these "generic" filings are both invalid and abusive;[273] Postmates even sued 10,356 of its couriers on these grounds.[274] But the AAA has not deemed such demands—including 1,000 demands in the CenturyLink mass arbitration and more than 15,000 in the Postmates mass arbitration— insufficient.[275]

Claim preparation, claim filing, and other tasks involved in mass claiming typically require a substantial technology apparatus.[276] Building out such an apparatus requires millions of dollars in up-front investment and continued

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[272] Second Amended Complaint for Declaratory & Injunctive Relief ¶ 7, Postmates Inc. v. 10,356 Individuals, No. 20-cv-02783 (C.D. Cal. July 1, 2020), 2020 WL 8167433, ECF No. 61 [hereinafter *Postmates* Second Amended Complaint] ("[C]ounsel then sent Postmates a single email that contained a link to 10,356 virtually identical arbitration demands . . . .").

[273] *See, e.g.*, Complaint for Declaratory & Injunctive Relief at 2, Postmates, Inc. v. 10,356 Individuals, No. 20-cv-02783 (C.D. Cal. Mar. 25, 2020), ECF No. 1 [hereinafter *Postmates* Initial Complaint]; Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order at 4, Abernathy v. DoorDash, Inc., No. 19-cv-07545 (N.D. Cal. Nov. 22, 2019), ECF No. 35 [hereinafter *DoorDash* Opposition to Motion] (referring to Keller Lenkner's "mass arbitration scheme" as a "ransom"); *see also, e.g.*, Supplemental Declaration of Professor Nancy J. Moore ¶¶ 19-24, *In re* CenturyLink Sales Pracs. & Sec. Litig., No. 17-md-2795, 2020 WL 3513547 (D. Minn. June 29, 2020), ECF No. 637 (contending that Keller Lenkner violated its fiduciary duties and ethical responsibilities); Interview with Jonathan E. Paikin, *supra* note 42 (noting that, in arbitration, "there's really nothing you [the defendant] can do to get to the merits before you have to pay").

[274] *See Postmates* Second Amended Complaint, *supra* note 272, ¶¶ 2-14. Postmates detailed a number of potential deficiencies in the couriers' arbitration demands, including that some claimants never accepted the relevant arbitration agreement, some never did work for Postmates, and some had released their claims as part of a separate settlement. *Id.* ¶ 7.

[275] For CenturyLink, see *In re CenturyLink*, 2020 WL 7129889, at *1 (noting that, after Keller Lenkner "submitted 1,000 simultaneous arbitration demands against CenturyLink to the AAA," CenturyLink rather than the AAA attempted to halt arbitration proceedings). For Postmates, see *Postmate*s Second Amended Complaint, *supra* note 272, ¶¶ 6, 8-10 (describing how the AAA handled proceedings for 10,356 "boilerplate" arbitration demands); and Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1250-51 (N.D. Cal. 2019) ("Postmates refused to pay any fees, claiming that the [5,274] individual arbitration demands were insufficient . . . to initiate arbitration proceedings. The AAA, however, indicated that the arbitrations would move forward . . . ." (citation omitted)), *aff 'd*, 823 F. App'x 535 (9th Cir. 2020).

[276] *See, e.g.*, Interview with Cory L. Zajdel, *supra* note 40; Interview with Warren Postman, *supra* note 40; Interview with Adam T. Klein, *supra* note 41; Interview with Jonathan D. Selbin, *supra* note 41. But cf. Interview with Matthew C. Helland *supra* note 40 (indicating that existing tools for bringing FLSA collective actions can be repurposed for mass-arbitration claims); Interview with Jonathan E. Paikin, *supra* note 42 (noting that mass-arbitration attorneys can use Facebook and similar technologies to find potential claimants).

spending on maintenance and management.[277] Z Law and Keller Lenkner ultimately created their own technology systems to handle mass claiming.[278] Independent developers have also built software for handling mass claims and sold this software to firms.[279]

Some of the up-front work to prepare individual demands can be automated, at least with the technology mentioned above.[280] But much of it cannot be. Emails (at least on the intake side) and phone calls with clients are not automatable, either practically or ethically. And document review is not fully automatable given legal and ethical strictures.[281] For these tasks a firm needs attorney hours and a fully staffed client-services team[282]—both of which come at additional, significant cost.

The investments of capital, time, and other resources needed to launch a mass arbitration are distinct from those required in other forms of aggregate claiming in another critical respect: temporal placement in the dispute. The individualized information required at the outset of a mass arbitration, for example, is similar (in both type and quantum) to what is required at the

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[277] *See* sources cited *supra* note 276; *CenturyLink* Postman Declaration, *supra* note 248, ¶ 5 ("Keller has invested millions of dollars in proprietary software and infrastructure to make litigating clients' claims more efficient . . . .").

[278] Interview with Cory L. Zajdel, *supra* note 40; Interview with Warren Postman, *supra* note 40.

[279] Ray Gallo is one of the leaders in this emerging industry. *See* Gallo LLP, https://perma.cc/6JUR-C3LL (archived Aug. 8, 2022) (noting that Gallo is "supported by truly cutting-edge technology" backed by the firm's "affiliate Gallo Digital and its software engineering team"); Leverage, https://perma.cc/2TKT-68ER (archived Aug. 8, 2022) (describing how Leverage, developed by Gallo Digital, can help with "mass actions and arbitration swarms" (capitalization altered)).

[280] *See* Interview with Cory L. Zajdel, supra note 40.

[281] *Cf.*, *e.g.*, Fed. R. Civ. P. 11(b)(3) (noting that an attorney, by presenting a document in court, certifies that "the [underlying] factual contentions have [valid] evidentiary support").

[282] *See, e.g.*, Interview with Warren Postman, supra note 40 (describing Keller Lenkner's elaborate client-services apparatus, which includes more than one client-services representative per attorney and "elevation attorneys" dedicated to answering client questions); u/dant_punk, *Keller Lenker Settlement*, Reddit: r/doordash (Sept. 30, 2020, 3:27:50 PM PDT), https://perma.cc/H29F-MHV3 (containing copies of email exchanges between claimants and Keller Lenkner client-services staff); u/J_Reigns5, *Postmates Keller/KCC Settlement*, Reddit: r/postmates (Aug. 2, 2021, 1:39:57 PM PDT), https://perma.cc/5FLV-EV94 (sharing the text of email from Keller Lenkner's support team updating claimants on the status of settlement payments); *see also* Interview with Jonathan D. Selbin, *supra* note 41 (noting that a "huge" client-services apparatus is necessary for mass arbitration).

conclusion of a class action.[283] This distinction is economically consequential. For one thing, high startup costs diminish the present value of an asset. Economic models of litigation bear this out: A party that incurs asymmetric costs early in the litigation process suffers a devaluation of the underlying claim.[284] For another, when the costs of individualized production are frontloaded (as in mass arbitration) versus back-loaded (as in class actions), those costs will tend to raise the risk profile of the underlying claims. Back-loaded costs tend not to affect the risk profile of claims, at least not so substantially, because an outlay of capital is only required after attorney compensation has been secured. Those back-loaded costs, in other words, are baked into a deal that already exists. In mass arbitration, a capital outlay is typically required prior to any deal being reached.

This distinction also separates mass arbitrations from MDL proceedings, although to a lesser degree. In mass-tort MDLs, for instance, all claimants know that their complaints will be consolidated into aggregate proceedings before a single judge to streamline costs.[285] And all attorneys know that they will either be a part of the MDL leadership (and get paid in that way) or will not (and will get paid by amassing claims while waiting for a resolution in the MDL proceedings). Thus, while the MDL still has up-front costs—amassing claims and claimants, drafting and filing complaints, comporting with ethical obligations regarding attorney–client representation, and so on—those costs are incurred against the backdrop of guaranteed cost-effective procedures. In contrast, for first-mover mass arbitrations and many second-mover mass arbitrations, the up-front investments were made with no guarantee of any dispute-resolution procedure, cost-effective or otherwise.

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In short, mass arbitration is an expensive and therefore risky proposition.

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[283] *See, e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 450-51, 460-61 (2016) (discussing an award-distribution plan for class-action claimants based on the post-verdict production of hours worked along with statistical modeling to make up for Tyson's failure to keep records).

[284] Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stan. L. Rev. 1267, 1312 (2006) (describing how front-loaded costs tend to reduce a lawsuit's settlement value because "a plaintiff must . . . incur larger expenses before gaining the [bargaining] advantage of the information that is disclosed" later on in the lawsuit).

[285] *See* 28 U.S.C. § 1407.

How, then, did a viable mass-arbitration model emerge? This investigation reveals several answers, many of which lie in the structure of the massarbitration model. Part III.C below explores these structural answers in more detail. The investigation also reveals the importance of two developments in the civil justice landscape—both external to arbitration agreements and to the plaintiffs' bar—that emerged or evolved in the 2010s.

The first is the expansion of social media platforming in the late aughts and early 2010s, relevant here in two respects. One, this expansion brought to social media a broad group of users, some of whom joined "mass litigation" groups via online platforms. These groups enabled users to connect with similarly situated potential plaintiffs.[286] That the social media expansion facilitated access to justice was happenstance: The express purpose of these platforms had nothing to do with civil justice.[287] Nonetheless, the claimant groups that appeared on social media played a significant role in the massarbitration model. Many of the settlement releases studied here warned claimants that they would be ineligible for payouts if they shared any settlement information with others. Some releases even said that claimants would be ineligible for payouts if they informed other potential claimants of their legal rights. Whether these draconian provisions are actually enforceable is beside the point—they are meant to deter information sharing among would-be claimants, who are likely to remain silent given the prospect of losing their own benefits. Claimant groups on anonymized social media platforms have emerged as one of the only ways in which these individuals can meaningfully communicate.[288]

Two, as the number of social media platforms grew, increasingly niche platforms emerged. With interfaces growing more sophisticated and new options

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[286] *See, e.g.*, Elizabeth Chamblee Burch, *Litigating Groups*, 61 Ala. L. Rev. 1, 23, 32 & n.144 (2009) (describing the emergence of litigation-centered groups online and noting that Yahoo! groups were used to achieve coordination among participants in the Merck settlement).

[287] This is merely a descriptive point; it is not to diminish the democratizing effect of social media platforms on the consumers, employees, and franchisees denied access to justice by the arbitration revolution. *See, e.g.*, Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 Colum. J.L. & Soc. Probs. 451, 455 (2012) (discussing how social media can enable participation in mass litigation and bring mass-litigation proceedings closer to the people actually harmed).

[288] *See, e.g.*, u/Glkp, *Keller/Lenkner Law Firm*, Reddit: r/postmates (Dec. 23, 2020, 11:01:51 AM PST), https://perma.cc/6936-BRSF (discussing individual claims and settlement amounts in the Postmates mass arbitration, and crowdsourcing questions such as whether to provide Social Security numbers to Keller Lenkner).

coming to market, companies began to develop technology for the express purpose of bringing arbitration claimants together. The most prominent example of this technology is a startup called FairShake, which seeks to "level[] the playing field" between consumers and big companies.[289] FairShake uses an automated system to help individuals initiate arbitration proceedings in exchange for a cut of any eventual payout.[290] FairShake began by advertising to AT&T and Comcast customers and inviting them to file claims through its platform. Shortly after its targeted advertising campaign, FairShake had collected over 1,000 individual interest forms and prepared to submit those forms as arbitration demands.[291] To be clear, FairShake is a facilitator of individual claiming in arbitration. It does not appear to go any further, and it has not stepped into the (traditionally legal) role of aggregator or aggregate litigator.

The second important development in the 2010s was the arrival and subsequent explosion of third-party litigation funding in the United States. Third-party litigation funding enables a party with no relationship to a lawsuit to pay some or all of the litigant's costs in exchange for a cut of any ultimate award.[292] The viability of third-party funding was not clear at the time of Concepcion and Italian Colors, and the practice was not permitted in many states.[293] In fact, as of 2010, third-party litigation funding in the United States was little more than an idea in a law review article.[294] Today, it is a multibillion-

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[289] FairShake, https://perma.cc/CY6H-PVCD (archived May 19, 2022).

[290] *Common Questions About FairShake*, FairShake, https://perma.cc/H8BF-62FT (archived May 19, 2022).

[291] *See* Debra Cassens Weiss, *Lawyer and Startup Resort to Mass Filings to Fight Company Bans on Class Arbitration*, ABA J. (Apr. 13, 2020, 10:37 AM CDT), https://perma.cc/V222-HD5B ("Soon, FairShake had enough consumers to file 1,000 arbitration claims against companies like AT&T and Comcast.").

[292] *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1275-78 (2011).

[293] *See* J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & Bus. 911, 914 (2016) (noting that "alternative litigation finance is still in its early stages in the United States"); id. at 939 (describing champerty and maintenance, common law doctrines prohibiting the third-party encouragement and financial support of a lawsuit, as "more or less colorable defenses").

[294] *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65, 73 (2010).

dollar industry.[295]

The emergence of a multibillion-dollar litigation-funding industry is relevant to the development of mass arbitration in at least three ways. One, third-party funding may well have enabled a number of mass arbitrations, especially at the beginning.[296] Two, the availability of third-party funding— nonexistent during the arbitration revolution—made mass arbitration a more realistic possibility for firms that needed (or wished) to hedge against the model's substantial risks. Three, third-party litigation-funding arrangements are more available for individualized claiming models like mass arbitration than they are for class-action suits.[297]

C. Key Elements of the Mass-Arbitration Model

By studying the mass-arbitration model in its real-world context, this Article shows that mass arbitration is more than just a procedural offensive. Indeed, mass arbitration is a distinct form of dispute resolution with unique operational features, strategic elements, benefits, and risks. The four principal elements of the mass-arbitration model are: (1) leveraging arbitration fees and fee-shifting provisions in arbitration agreements; (2) arbitrating individual claims—or credibly threatening to do so—to impose asymmetric costs on the defendants; (3) selecting higher-threshold-value individual claims (relative to, say, class-action claims); and (4) generating aggregate settlements (within the arbitration

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[295] S*ee, e.g.*, Bill Tilley, *How Litigation Financing Became a Multi-billion Dollar Industry During the Pandemic*, LinkedIn (Feb. 11, 2021), https://perma.cc/FQ8Y-PVGJ. The existence and details of litigation-funding arrangements are often confidential and therefore unobtainable. *See generally* Glover, s*upra* note 293, at 913-14 (finding that many courts protect litigation-funding arrangements from disclosure during discovery).

[296] Interview with Cory L. Zajdel, *supra* note 40. Because litigation-funding arrangements tend to be confidential, it is not possible to determine whether a particular mass arbitration was funded. *See supra* note 295.

[297] For example, a 2018 New York City ethics opinion held that arrangements between third-party funders and lawyers violated rules prohibiting fee splitting. Ass'n of the Bar of the City of New York Comm. on Pro. Ethics, Formal Op. 2018-5 (2018). The opinion distinguished these arrangements from arrangements between funders and clients, which it noted were acceptable. *See id*. Because firms are inclined to comply with the opinion, *see* Interview with Anonymous No. 2, *supra* note 41, there are naturally fewer options for third-party funding in class-action suits: These suits proceed on a representative basis, and absent plaintiffs do not enter into financial agreements with attorneys.

process, as opposed to other settlement processes defendants might prefer) from a mass of individual claims.

1. Leveraging arbitration fees and fee-shifting provisions in arbitration agreements

A viable procedural offensive—especially one with the up-front costs of mass arbitration—needs some mechanism to recoup spending and generate a return on the initial investment. The mass-arbitration model does this, or at least did this in the beginning, by leveraging arbitration fees and fee-shifting provisions in arbitration agreements to obtain global settlements from defendants. When successful, this mechanism counters the effects of the arbitration revolution: Claims that were rendered unmarketable by classaction waivers suddenly become capable of generating settlement pressure greater than that produced by class certification.

Recall AT&T's arbitration agreement in Concepcion, which included both a class-action waiver and provisions requiring AT&T to pay or reimburse various arbitration fees (including up-front filing fees).[298] Recall too that AT&T included these "friendly" provisions to avoid unconscionability and effective-vindication rulings and to soften the perceived blow of the classaction waiver.[299] The mass-arbitration model exploits the tradeoffs made by AT&T and other corporate defendants: Plaintiffs' firms essentially called the defendants' bluff by filing demands under their "friendly" agreements and insisting that courts "'rigorously enforce' . . . [those] agreements according to their terms."[300]

The enforcement of arbitration agreements "according to their terms" would seem to be a foregone conclusion. After all, this was the precise command of the Supreme Court in Concepcion, Italian Colors, and Epic Systems. Yet claimants' attempts to do exactly that have been met with unrelenting resistance by defendants desperate to avoid the catastrophic consequences of taking the Court at its word.

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[298] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336-37 (2011). The agreements governing the mass-arbitration claims in this Article generally include similar provisions. All relevant agreements are on file with the Author.

[299] *See supra* notes 176-78 and accompanying text.

[300] Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 233 (2013) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

Across the universe of mass-arbitration demands, defendants have consistently refused, in whole or in part, to pay fees or to participate in arbitration in any way.[301] This inaction has led arbitral fora to close or refuse to proceed with claims.[302] It has also generated an odd, and deeply ironic, procedural posture in many mass arbitrations: After or alongside decisions in which courts granted defendants' motions to compel arbitration of putative class-action claims,[303] those same courts were asked to revisit the claims via new motions to compel arbitration—this time filed by the plaintiffs.[304]

Corporations' arguments that their agreements should not be enforced "according to their terms" have taken myriad forms. Uber, Chegg, and FanDuel, for example, argued—somewhat oddly—that arbitrators lacked the authority to decide whether to enforce their arbitration agreements. Uber made this argument despite having just convinced the Ninth Circuit that enforceability questions fell to the arbitrator.[305] Chegg raised the argument even though its agreement explicitly stated that an AAA arbitrator, and an AAA arbitrator alone,

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[301] *See, e.g., Abadilla* Petition for Arbitration, *supra* note 5, ¶ 3 (noting that, as of late 2018, Uber had only paid the initial filing fee in 296—and the arbitrator's retainer fee in 6—of 12,501 pending arbitration demands); *DoorDash* Opposition to Motion, *supra* note 273, at 2-3 (explaining DoorDash's decision not to pay fees as a way of repudiating Keller Lenkner's "shakedown scheme" (capitalization altered)).

[302] *See, e.g., Abadilla* Petition for Arbitration, *supra* note 5, ¶ 21 ("JAMS has . . . informed Uber that '[u]ntil the Filing Fee is received we will be unable to proceed with the administration of these matters.' " (alteration in original) (quoting a JAMS notice to Uber)).

[303] *See infra* Appendix.

[304] *See, e.g., infra* note 305.

[305] Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1206-08 (9th Cir. 2016) ("Thus, all of Plaintiffs' challenges to the enforceability of [Uber's newest] arbitration agreement . . . should have been adjudicated in the first instance by an arbitrator and not in court."). After the Ninth Circuit functionally granted Uber's motion to compel arbitration, Uber drivers filed 12,501 individual demands with JAMS pursuant to the terms of Uber's arbitration agreement. *Abadilla* Petition for Arbitration, *supra* note 5, ¶¶ 2-3. When Uber refused to pay the JAMS-assessed fees in all but six cases, the claimants filed their own motion to compel arbitration. *Id.* ¶¶ 3-4, 13. In its opposition to the claimants' motion, Uber asked the district court to submit the fee dispute to JAMS for collective resolution. Memorandum of Law in Opposition to Petitioners' Motion to Compel Arbitration at 14, Abadilla v. Uber Techs., Inc., No. 18-cv-07343 (N.D. Cal. Jan. 14, 2019), ECF No. 53. But Uber had earlier argued that every dispute should be resolved in individual arbitration, and its new position favored judicial intervention over the individual arbitrator's authority. *See* Petitioners' Reply to Respondent Uber Technologies, Inc.'s Opposition to Petitioners' Motion to Compel Arbitration at 1-2, Abadilla v. Uber Techs., Inc., No. 18-cv-07343 (N.D. Cal. Jan. 24, 2019), ECF No. 66 (criticizing Uber's "newfound preference for judicial relief ").

would determine whether the agreement was enforceable.[306] And FanDuel made the argument a mere six weeks after persuading a federal judge that its clause required an arbitrator to resolve all threshold issues.[307] No judge has yet to bless this particular argument.

Postmates, on the other hand, argued that its agreements should not be enforced because the mass filing of related individual demands violates the FAA. Its basic argument was this: The manner in which the claims were pressed—all at once, possibly with deficiencies in individual cases—amounted to "de facto class arbitration" in violation of the parties' agreed-upon class waiver.[308] Accordingly, allowing the claims to proceed would prevent the underlying arbitration agreements from being enforced "according to their terms." This argument also has yet to succeed.[309] It is premature at this juncture, however, to speculate as to whether courts—and ultimately the Supreme Court—will find

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[306] Although Chegg argued that its user agreement delegated enforceability questions to an arbitrator when it moved to compel arbitration in the District of Maryland, it purported to unilaterally terminate its agreements (stating that mass-arbitration claimants had asserted "frivolous or improper demands") after the AAA ordered it to pay arbitration fees. If accepted, this position would give Chegg—rather than the arbitrator—the authority to determine whether claims are proper and therefore enforceable. Alison Frankel, *Chegg Tries a New Way to Avert Mass Arbitration: Cancel Users' Contracts*, Reuters (July 2, 2020, 12:52 PM), https://perma.cc/V7WH-69ES; see Memorandum in Support of Defendant's Motion to Compel Arbitration & Dismiss or, Alternatively, Stay at 16, Lyles v. Chegg, Inc., No. 19-cv-03235, 2020 WL 1985043 (D. Md. Apr. 27, 2020), 2019 WL 8013607, ECF No. 21-1; Letter from Cory L. Zajdel, Principal Att'y, Z Law, LLC, to Cathe Stewart, Assistant Vice President, Am. Arb. Ass'n 1-3 (July 1, 2020), https://perma.cc/9V6S-RFVQ.

[307] *See In re* Daily Fantasy Sports Litig., No. 16-md-02677, 2019 WL 6337762, at *1, *10, *13 (D. Mass. Nov. 27, 2019) (agreeing with FanDuel and holding that certain classes of plaintiffs had "entered into valid agreements to arbitrate their claims, including threshold questions of arbitrability"). After that decision, and after FanDuel users filed 1,000 arbitration demands, the AAA assessed $300,000 in initial filing fees against FanDuel and FanDuel refused to pay. Verified Petition ¶¶ 2, 18, FanDuel Inc. v. Badii, No. 650211/2020 (N.Y. Sup. Ct. Jan. 9, 2020) ("FanDuel has not currently paid that [$300,000] initial filing fee . . . ."). Instead, FanDuel asked a New York trial court to decide whether the arbitral demands were time-barred—the very type of threshold enforceability question it had just persuaded the District of Massachusetts must be decided by an arbitrator. See id. ¶¶ 19-26.

[308] *Postmates* Initial Complaint, *supra* note 273, at 2.

[309] Postmates Inc. v. 10,356 Individuals, No. 20-cv-02783, 2020 WL 1908302, at *7 (C.D. Cal. Apr. 15, 2020) ("[Postmates'] arguments focus . . . on arguably abusive tactics by [the drivers'] counsel to seek a settlement, but do not point to anything about . . . [the] claims themselves that make them 'class actions.' "); *see also* Daniel Wiessner, *Arbitration Bid by 10,000 Postmates Drivers Not a "De Facto Class Action"—Judge*, Reuters (Apr. 16, 2020, 4:06 PM), https://perma.cc/99Z8-WCF3.

that mass arbitration violates the FAA by treading too close to class arbitration. So premature, in fact, that even some defense attorneys have not given the matter much thought.[310] But in order for this argument to prevail, the Supreme Court will need to further expand its (already expansive) interpretation of the FAA.[311]

Defendants have also sought to moot mass-arbitration claims, and by extension the relevant arbitration agreements. In 2016 the Supreme Court decided *Campbell-Ewald Co. v. Gomez*, a putative class action in which the defendant tried to moot the class claims by offering to settle with the named plaintiff.[312] In a 6–3 decision, the Court held that "an unaccepted settlement offer . . . does not moot a plaintiff's case."[313] Despite this holding, Fitbit tried a similar strategy in anticipation of mass arbitration. The company argued that its arbitration agreement—an agreement it had just relied on to achieve the dismissal of a consumer class action[314]—no longer applied after it made a satisfactory settlement offer to the named plaintiff of the putative class.[315] In response to this argument, the judge threatened to hold Fitbit and its attorneys in contempt.[316]

Not to be outdone on this score, Chegg argued that arbitral claimants breached the duty of good faith by filing demands, thereby terminating their contracts—and thus Chegg's fee requirements.[317] This argument, which conflates a breach of good faith in the overall contract with a breach of the arbitration agreement,

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[310] *See, e.g.*, Interview with Anonymous No. 4, supra note 42.

[311] *See supra* Parts I.A-.B.

[312] 577 U.S. 153, 157-60 (2016).

[313] *Id.* at 165-66; *id.* at 169 (Thomas, J., concurring in the judgment) ("The Court correctly concludes that an offer of complete relief on a claim does not render that claim moot.").

[314] McLellan v. Fitbit, Inc., No. 16-cv-00036, 2017 WL 4551484, at *1, *5 (N.D. Cal. Oct. 11, 2017).

[315] *See* Transcript of Proceedings at 7-11, McLellan v. Fitbit, Inc., No. 16-cv-00036, 2018 WL 3549042 (N.D. Cal. July 24, 2018), ECF No. 143 [hereinafter Fitbit Transcript].

[316] *See id.* at 12-13; *see also McLellan*, 2018 WL 3549042, at *6-7 (assessing attorney's fees and costs against "Fitbit and its lawyers . . . for their bad-faith litigation tactics").

[317] *See* Memorandum of Law in Support of Defendant Chegg, Inc.'s Motion for Clarification or Modification of the Court's April 27, 2020 Order at 20-24, Lyles v. Chegg, Inc., No. 19-cv-03235 (D. Md. Aug. 4, 2020), ECF No. 26-1 (arguing that the claimants' bad-faith acts—colluding "to bring frivolous arbitration demands against Chegg" in order to impose large fees—relieved Chegg "of all obligations under" its agreements).

likely runs counter to Supreme Court jurisprudence dating back to 1967.[318] Chegg, however, continues to raise it.[319]

Finally, all defendants have argued that the enforcement of their arbitration agreements according to their terms would be fundamentally unfair—to them.[320] DoorDash described Keller Lenkner's attempts to enforce the agreements Doordash wrote as a "shakedown scheme."[321] Postmates also referred to Keller Lenkner's filing of arbitration demands as a "shakedown," a position it supported by claiming that some of the demands were invalid or defective.[322] And Fitbit stated that enforcing its agreements and requiring it to pay arbitration fees would offend common sense: After all, "a claim that is $162—an individual claim—is not one that any rational litigant would litigate" given the AAA's $750 up-front filing fee.[323] Fitbit's argument is not new. A near-identical point on the economic irrationality of individual arbitration appeared in *Italian Colors*—in a brief written by the plaintiff merchants.[324]

Whatever their precise form, at bottom these arguments are all about enforceability. Whether it is for the arbitrator, through the relevant arbitral process, to decide if a demand has merit is a question of whether a given arbitration agreement—an agreement that assigns that very issue to the arbitrator—should be enforced. And whether it is for the arbitrator, through the relevant arbitral process, to decide if the costs of arbitration are so high relative

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[318] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967) (finding that an arbitration clause is severable from the rest of a contract, meaning that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate," not issues related to contract formation as a whole).

[319] *See, e.g.*, Respondent Chegg, Inc.'s Memorandum of Points & Authorities in Support of Motion to Stay the Proceedings at 5-6, 9-10, Theisen v. Chegg, Inc., No. 20CV371775 (Cal. Super. Ct. Dec. 2, 2020).

[320] *See, e.g., DoorDash* Opposition to Motion, *supra* note 273, at 22-23.

[321] Id. at 2 (capitalization altered).

[322] Respondent Postmates Inc.'s Opposition to Petitioners' Motion to Compel Arbitration at 1, Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019) (No. 19-cv-03042), 2019 WL 11093949, ECF No. 112 ("This is a shakedown."); *Postmates* Initial Complaint, *supra* note 273, at 2. In lawsuits against the AAA, *see infra* notes 338-55 and accompanying text, Family Dollar and Uber made similar allegations regarding the validity of some of the filed demands.

[323] *Fitbit* Transcript, *supra* note 315, at 10, 15.

[324] Brief for Respondents at 54, Am. Express Co. v. It. Colors Rest., 570 U.S. 228 (2013) (No. 12-133), 2013 WL 267025.

to claim value as to violate due process[325] or common sense is also a question of enforcement.[326]

However ironic (or sympathetic) the argument that defendants' own arbitration agreements cannot be enforced "according to their terms," that argument is entirely rational given the dramatic financial consequences of enforcement for a defendant. The fees assessed in a mass arbitration are astounding. In the Uber mass arbitration, for instance, initial filing and the retention of an arbitrator cost Uber over $1,500 per claim.[327] In both the DoorDash (employment) and Postmates mass arbitrations, initial fees were $1,900 per demand.[328] As of January 2019, Uber faced over $18 million in arbitration fees alone.[329] In October 2019, after DoorDash drivers paid over $1.2 million in arbitration fees, Doordash refused to pay the $12 million it owed to the AAA. The AAA accordingly closed over 6,000 demands.[330] As of April 2019, Postmates owed—and refused to pay—$10 million in fees.[331] The Northern District of California declined to relieve Postmates of those fees,[332] and Postmates' potential debt

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[325] This could either be due process generally or the due process protocols of the specific arbitral forum. *See generally, e.g.*, Am. Arb. Ass'n, Consumer Due Process Protocol: Statement of Principles (1998), https://perma.cc/R6JP-AZYV; Am. Arb. Ass'n, Employment Due Process Protocol (1995), https://perma.cc/3Q3M-RDEL.

[326] Judge John Kane of the District of Colorado recognized that these arguments go to enforceability in the Chipotle mass arbitration. When Chipotle requested to stay the individual arbitration proceedings that followed its successful motion to dismiss and compel arbitration, Judge Kane wrote: "Chipotle challenged whether the Arbitration Plaintiffs were proper members of the collective, and . . . I agreed and dismissed them [pursuant to Chipotle's arbitration agreement]. I refused to interfere with the arbitration proceedings of individuals who were dismissed from this litigation . . . ." Turner v. Chipotle Mex. Grill, Inc., No. 14-cv-02612, 2018 WL 11314702, at *2 (D. Colo. Nov. 20, 2018) (footnote omitted).

[327] *See Abadilla* Petition for Arbitration, *supra* note 5, ¶¶ 18, 21.

[328] Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1250 (N.D. Cal. 2019) ("[T]he AAA informed Postmates that it had until May 31, 2019, to pay its share of the filing fees . . . which was $1,900 per claimant . . . ."), *aff 'd*, 823 F. App'x 535 (9th Cir. 2020); Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020) (noting that the applicable AAA rules required DoorDash to pay $1,900 per filing and claimants $300 per filing).

[329] Frankel, *supra* note 12.

[330] *Abernathy*, 438 F. Supp. 3d at 1064.

[331] *See* Adams v. Postmates, Inc., No. 19-cv-03042, 2020 WL 1066980, at *1 (N.D. Cal. Mar. 5, 2020).

[332] *Id.* at *6.

grew as more demands were filed.[333] Postmates continued its refusal to pay and instead tried to settle its mass-arbitration claims by way of a class action.[334] By December 2020, Intuit had paid $13 million to the AAA but still faced $23 million in additional fees.[335]

Even small-scale mass arbitrations can generate significant up-front fees. In a confidential mass arbitration waged by Nichols Kaster on behalf of 150 employees with FLSA wage-and-hour claims, for instance, the defendant's filing costs alone could have been over $850,000.[336] Accordingly, it does not take many claims for mass arbitration's fee-leveraging mechanism to begin generating settlement pressure. If the Chipotle mass arbitration is any indication, it might only take about 150 cases to generate significant pressure for all claims.[337]

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[333] Alison Frankel, *Beset by Arbitration Demands, Postmates Resorts to Class Action to Settle Couriers' Claims*, Reuters (Nov. 19, 2019, 3:04 PM), https://perma.cc/Q4SM-2PEC (reporting that Keller Lenkner told Postmates it was "signing more [claimants] every day" and that Postmates' arbitration fees "would exceed $20 million"); *see also* Declaration of Dhananjay S. Manthripragada in Support of Postmates' Opposition to Cross-Petitioners' Motion to Compel Arbitration ¶ 45, Postmates Inc. v. 10,356 Individuals, No. 20-cv-02783, 2021 WL 540155 (C.D. Cal. Jan. 19, 2021), ECF No. 57 (noting that the AAA assessed over $4 million in filing fees against Postmates for a different set of arbitration demands).

[334] Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, Reuters (Dec. 2, 2019, 2:19 PM), https://perma.cc/26UZ-75ME ("Postmates came up with a tactic to short-circuit the mass arbitration campaign: Its counsel . . . negotiated an $11.5 million class action settlement in California state court that purports to resolve the claims of all of its California couriers."); see also Frankel, supra note 333.

[335] Alison Frankel, *Judge Breyer Rejects $40 Million Intuit Class Action Settlement amid Arbitration Onslaught*, Reuters (Dec. 22, 2020, 2:09 PM), https://perma.cc/363Y-U8ME.

[336] Matthew C. Helland, *Costs of Defense in Mass Individual Wage-and-Hour Arbitrations: A Case Study*, 3 PLI Current 213, 213, 218-19 (2019) ("The plaintiffs had filed 106 arbitration demands at the time of mediation, meaning the defendant had paid (or owed) over $626,000 to JAMS just in initial filing costs. If mediation had failed and the remaining plaintiffs had all filed their claims, the defendant would have owed JAMS another $226,200 in initial filing fees."); *see also id*. at 219 (noting that fully arbitrating the FLSA claims could have cost the defendant upwards of $3 million).

[337] Following the dismissal of nearly 3,000 Chipotle employees from an FLSA collective action on the grounds that those employees were required to arbitrate their claims, around 150 employees filed individual arbitration demands. Turner v. Chipotle Mex. Grill, Inc., No. 14-cv-02612, 2018 WL 11314701, at *1 (D. Colo. Aug. 3, 2018); Dave Jamieson, *Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HuffPost (updated Dec. 21, 2018), https://perma.cc/Z9QJ-XWV7. Faced with these demands, Chipotle "squeal[ed] for mercy," Michael Hiltzik, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits over Wage Theft*, L.A. Times (Jan. 4, 2019, 7:00 AM PT), https://perma.cc/N488-3FRB, and asked the district court to suspend arbitration proceedings lest Chipotle suffer "irreparable harm," Turner v. Chipotle Mex. Grill, Inc., No. 14-cv-02612, 2018 WL 11314702, at *1, *3 (D. Colo. Nov. 20, 2018). Judge Kane rejected Chipotle's arguments. Id. at *3.

Avoiding the enforcement of arbitration agreements "according to their terms" is so consequential that both Family Dollar and Uber have sued the AAA for carrying out their arbitration provisions.[338] Filing suit against an arbitral forum that you yourself selected is a bold and significant move. As such, these suits warrant brief examination here.

In Family Dollar's complaint against the AAA, it contended that its arbitration agreements could not be enforced in the context of a wage-theft mass arbitration because "[m]ass arbitration . . . with little regard of the claims' validity is not a proper use of the arbitration system where the arbitration filing fees may far exceed the merits of the claim."[339] Through this contention Family Dollar made two arguments. First, it asserted that the claimants' arbitration filings were "invalid." This invalidity was largely procedural: Family Dollar did not dispute the substantive merits of the claimants' wagetheft allegations.[340] Instead, Family Dollar's "validity" argument was that some of the individual filings were defective—they were filed in the wrong arbitral forum, were untimely filed, were not tendered to Family Dollar first, did not include precise damages amounts, and so on.[341] Indeed, as Family Dollar pointed out, some of the demands were in fact withdrawn as invalid.[342] (The others were unilaterally withdrawn pursuant to a settlement agreement.)[343] Because of these withdrawals, Family Dollar argued, it should not be responsible for a single penny of the more than $2.5 million in filing fees assessed by the AAA.[344]

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[338] *Family Dollar* Complaint, *supra* note 263; Declaratory Judgment Complaint, Uber Techs., Inc. v. Am. Arb. Ass'n, No. 655549/2021 (N.Y. Sup. Ct. Sept. 20, 2021) [hereinafter Uber Complaint].

[339] *Family Dollar* Complaint, *supra* note 263, ¶ 1 (emphasis added).

[340] Although Family Dollar claimed that it "never employed many of the claimants and had no arbitration agreement with them," this does not go to the substance of the wage-theft claims. *See* Family Dollar, Inc.'s Brief in Support of Motion to Dismiss American Arbitration Association, Inc.'s Counterlaim [sic] at 3-4, Fam. Dollar, Inc. v. Am. Arb. Ass'n, No. 20-cv-00248 (E.D. Va. Aug. 21, 2020), ECF No. 10 [hereinafter *Family Dollar* Motion to Dismiss].

[341] *See Family Dollar* Complaint, *supra* note 263, ¶¶ 1, 10-12. Among other things, Family Dollar asserted that (1) many of the agreements enforced by the AAA actually required claimants to arbitrate before JAMS; (2) some parties to the enforced agreements had already released their claims through prior settlements or bankruptcies; and (3) some claimants had not agreed to arbitrate with Family Dollar. *Id.*

[342] *Id.* ¶ 2.

[343] *Id.*

[344] *Id.* ¶¶ 1-2; *see also Family Dollar* Motion to Dismiss, *supra* note 340, at 1-2 ("Family Dollar does not owe [the] AAA anything."). The $2.5 million represents a fee of $2,200 for 1,166 of the roughly 2,000 total claimants. *Family Dollar* Complaint, supra note 263, ¶¶ 1, 15-16.

Second, Family Dollar argued that mass arbitration itself was improper because the filing fees could "far exceed the merits of the claim[s]."[345] At a surface level, this is a new argument in that it comes close to a broadside on mass arbitration in general. Family Dollar's assertion that filing arbitration demands "with little regard of the claims' validity is not a proper use of arbitration"[346] strongly suggests that mass arbitration is a practice divorced from the merits. Fundamentally, though, Family Dollar's argument—that its filing fees improperly exceeded the value of the underlying demands—is the same argument that was raised by the plaintiffs in Italian Colors.[347] The Eastern District of Virginia never had the chance to rule on Family Dollar's arguments; Family Dollar and the AAA reached a settlement agreement in December 2020.[348]

In September 2021, Uber moved for a preliminary injunction against the AAA in New York state court[349]—and lost.[350] In both its complaint and its motion, Uber argued that the AAA's assessment of $10 million in initial fees (and possibly $91 million in total fees) constituted a "ransom" coordinated by "politically-motivated lawyers" who were filing "baseless claims."[351] After a two-day hearing, New York State Supreme Court Justice Robert Reed ruled that while there may be "a more reasonable path" to handling 31,000 claims than individual arbitration, Uber's arbitration agreement did not provide for such a path, and it was not for the court to rewrite Uber's contract.[352] Justice Reed

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[345] *Family Dollar* Complaint, *supra* note 263, ¶ 1.

[346] *Id.*

[347] *See supra* note 324 and accompanying text.

[348] Settlement Conference Order ¶ 1, Fam. Dollar, Inc. v. Am. Arb. Ass'n, No. 20-cv-00248 (E.D. Va. Oct. 27, 2020) (scheduling a settlement conference for December 2, 2020); Rule 41(a)(1)(A)(ii) Stipulation of Dismissal at 1, Fam. Dollar, Inc. v. Am. Arb. Ass'n, No. 20-cv-00248 (E.D. Va. Dec. 4, 2020).

[349] Plaintiffs' Memorandum of Law in Support of Their Motion for a Preliminary Injunction at 1, Uber Techs., Inc. v. Am. Arb. Ass'n, No. 655549/2021, 2021 WL 4789153 (N.Y. Sup. Ct. Oct. 14, 2021) [hereinafter *Uber* Motion].

[350] *Uber Techs.*, 2021 WL 4789153, at *2-3, *aff 'd*, 167 N.Y.S.3d 66 (App. Div. 2022).

[351] *Uber* Complaint, *supra* note 338, ¶¶ 1, 5; *see Uber* Motion, *supra* note 349, at 1-2. Uber alleged that the fees were part of an effort by politically conservative D.C. firm Consovoy McCarthy to "punish Uber for supporting the Black community in the wake of George Floyd's murder." *Uber* Complaint, *supra* note 338, ¶¶ 1, 3, 46. The firm "sought out and acquired clients—tens of thousands of them—and filed boilerplate, single-sentence arbitration demands against Uber, asserting a type of 'reverse discrimination' claim." *Id.* ¶ 3.

[352] Transcript of Proceedings Before the Honorable Robert R. Reed at 136-39, *Uber Techs.*, 2021 WL 4789153 (No. 655549/2021).

seemed persuaded by AAA counsel Theodore Hecht, who "lampooned Uber's claim that it was a victim faced with a ransom."[353] If anything, Hecht noted, Uber was "hostage to [its] own agreement."[354]

In the above suits, both Uber and Family Dollar leaned heavily into the following argument: The assessment of fees pursuant to a valid arbitration agreement is improper because the claims at issue are meritless. However, whether claims have merit and what process can decide whether claims have merit are separate issues. In their contracts with consumers and employees, Family Dollar and Uber designed the process for litigating claims, including the process by which the merits of claims would be evaluated.[355] The Family Dollar and Uber complaints took issue with the processes for determining validity and merit—the very processes Uber and Family Dollar specified. Effectively, then, the complainants were arguing against themselves.

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In sum, the make-or-break event of a mass arbitration, at least in current form, is the enforcement (or credibly threatened enforcement) of arbitration agreements "according to their terms." This event triggers the fee-leveraging mechanism of mass arbitration, which can spell financial catastrophe for a potential defendant.[356] While many of the claims studied here appear quite colorable,[357] the fee-leveraging mechanism of the mass-arbitration model could

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[353] Frank G. Runyeon, *Uber Has Itself to Blame for $91M Arbitration Bill, Judge Says*, Law360 (Oct. 13, 2021, 7:54 PM EDT), https://perma.cc/9NPK-7WHV (to locate, select "View the live page").

[354] *Id.* (quoting Hecht).

[355] *See, e.g.*, Andrew Strickler, *Uber Wrote the Script It Now Attacks in Arbitration Suit*, Law360 (Oct. 4, 2021, 1:00 PM EDT), https://perma.cc/9TSR-94WL (to locate, select "View the live page").

[356] Even when the underlying claims have merit, the fee-leveraging mechanism tends to extract a settlement premium deriving from the threat of cost imposition. *See* Glover, *supra* note 132, at 1729 ("Economic models of litigation, as well as recent empirical studies, strongly support the conclusion that litigation costs can significantly affect settlement outcomes.").

[357] *See, e.g.*, Cotter v. Lyft, Inc., 176 F. Supp. 3d 930, 931-32 (N.D. Cal. 2016) (rejecting a proposed $12.25 million settlement of Lyft drivers' misclassification claims because counsel had underestimated the settlement value); Nandita Bose, *U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, Reuters (Apr. 29, 2021, 8:50 AM PDT), https://perma.cc/JQ97-4Z3Y (noting that Secretary of Labor Marty Walsh believes "[a] lot of gig workers . . . should be classified as 'employees' who deserve work benefits," a position that bolsters misclassification claims like Cotter's).

impose settlement pressure for more dubious claims—that is to say, it could impose illegitimate, in terrorem settlement pressure.[358] The same has been said of the class-certification event,[359] which is perhaps the closest analogue to the agreement-enforcement event in mass arbitration.[360] But in terrorem or otherwise, the settlement pressure created by class certification is no match for the pressure that defendants created through their arbitration agreements. Against this monster of the defendants' own making, the class action may begin to look like a safe harbor.[361]

2. Arbitrating claims individually, or credibly threatening to do so

The second distinctive feature of the mass-arbitration model is that its claims proceed individually rather than being merged into something like a single class action or MDL consolidation. In other words, mass arbitration eschews the strategy of class proceedings: the formal aggregation of claims to make claiming cost-effective for plaintiffs. Mass arbitration instead proceeds on the premise that plaintiffs can aggregate individual proceedings in a way that makes the claims economically viable—perhaps even more viable than class or otherwise consolidated proceedings.

Here, Intuit is illustrative. Claimants in the Intuit mass arbitration had more valuable claims than similarly situated claimants in class proceedings, in part because the mass-arbitration claimants could command a "premium to reflect Intuit's potential arbitration costs."[362] This premium would not have existed

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[358] Some of the attorneys I interviewed for this study indicated that firms have begun to demand settlements without filing a class complaint or any arbitral demands, and on the basis of fairly dubious claims. *See, e.g.*, Interview with Anonymous No. 4, *supra* note 42.

[359] *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

[360] *See, e.g.*, Nagareda, *supra* note 22, at 99 (describing the certification of a putative class as the make-or-break event that has the power to impose a great deal of settlement pressure on a defendant); *see also In re Rhone-Poulenc Rorer*, 51 F.3d at 1298 (making the same point).

[361] Intuit, for example, attempted to negotiate a class settlement in order to "resolve" the claims of individuals it had previously compelled to arbitrate. Presumably, Intuit preferred a single class action to the settlement pressure imposed by the fees and costs of many individual arbitrations. *See Intuit* Motion to Intervene, *supra* note 244, at 1-3, 12-13; *see also, e.g.*, Randazzo, *supra* note 35.

[362] *Intuit* Motion to Intervene, *supra* note 244, at 7 (quoting Declaration of Stephen McG. Bundy in Support of Intuit's Opposition to Defendants' Motion for a Preliminary Injunction ¶ 3.f, Intuit Inc. v. 9,933 Individuals, No. 20STCV22761, 2020 WL 7866018 (Cal. Super. Ct. Nov. 20, 2020)); *see* Glover, *supra* note 132, at 1729.

without attorneys willing and able to arbitrate (or credibly threaten to arbitrate) a meaningful number of individual cases.

More than any other, this feature of mass arbitration will likely strike readers as counterintuitive. Conventional wisdom holds that the expense of individual proceedings can make claims economically irrational to pursue. Indeed, this wisdom not only bears out empirically but also lies at the core of the arbitration revolution and the class-action counterrevolution.[363] Mass arbitration challenges the conventional wisdom in two key ways. First, it challenges the long-standing premise that disaggregation disables claiming. Second, it challenges the corollary of that premise: that those with negativevalue or low-value claims will fare better, as a matter of economics, in an aggregated case than they will in a disaggregated one.[364]

Mass arbitration was able to challenge conventional wisdom regarding aggregation (typically a claim facilitator) and disaggregation (typically a claim disabler) for three interrelated reasons. First, as a general matter, litigating many related claims on an individual basis is more expensive than litigating many related claims in a single class action or a set of consolidated cases.[365] Second, litigating many related claims on an individual basis in arbitration is more expensive than litigating many related claims on an individual basis in court, especially given that arbitral organizations impose fee after fee at just about every stage of the proceedings.[366] While defendants have insisted for

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[363] *See sup*ra Part I.C.

[364] Judges and commentators have long maintained that economy and efficiency are key benefits of joinder and aggregation. *See, e.g.*, Sherman, *supra* note 28, at 236; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 671 (1989) (analyzing an asbestos suit and finding that "[t]he cost to the judicial system for the class action approach in both time and money was substantially less than what an equivalent number of individual trials would have generated, even taking into account the supplemental judicial resources devoted to appeals, pre-trial matters, and settlement negotiations").

[365] For recent commentary on the transaction-cost–leveraging feature of mass arbitration, see Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, Bloomberg L. (Oct. 28, 2021, 10:01 AM), https://perma.cc/QDZ5-DLB9 (quoting Cohen Milstein partner Joseph Sellers, who commented that while it is tempting for companies "to use [arbitration] agreements to avoid class claims," those companies "may be forced to incur large amounts of transaction costs to handle multiple claims that are very similar").

[366] *Compare* Am. Arb. Ass'n, *supra* note 241, at 1-3, *and Arbitration Schedule of Fees and Costs, supra note 241, with District Court Miscellaneous Fee Schedule*, U.S. CTS., https://perma.cc/7QQ7-G2B4 (archived May 19, 2022).

decades that arbitration is "cost-effective,"[367] cost-effective is not the same as inexpensive. And arbitration is very, very expensive.[368] Third, and perhaps most importantly, mass-arbitration attorneys have found ways to impose arbitration's expenses on defendants asymmetrically, thus driving up the settlement value of individual claims.[369] Simply put, mass arbitration shows that when it comes to in terrorem effects (the bogeyman of the class-action counterrevolution), the leverage of a large number of individual arbitrations can sometimes exceed the leverage created by aggregate proceedings.

This study uncovered a number of ways in which mass-arbitration attorneys can asymmetrically impose the costs of arbitration on corporate defendants. First, by filing individual arbitration demands as opposed to a single class-wide complaint (as required by some arbitration agreements), mass-arbitration attorneys can harness fee-shifting provisions not just once, but hundreds or thousands of times. This can quickly drive a defendant's arbitration costs into the tens or hundreds of millions of dollars.[370]

Second, as much as defendants may wish to remove the fee-shifting

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[367] For example, defendants argued that because arbitration reduced their spending on class-action defense, they could pass along their savings to consumers in the form of lower prices. *See, e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 89. The argument changed in and after *Concepcion*: Arbitration was now easier and less expensive for individuals than judicial proceedings, particularly where defendants were contractually required to pay arbitration fees. *See, e.g.*, *Concepcion* Chamber of Commerce Brief, *supra* note 78, at 1, 3-4, 12; Brief of Amicus Curiae New England Legal Foundation in Support of Petitioner at 10-11, 15-16, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3232489.

[368] In one instance, three arbitrations for wage theft against a Florida construction company generated over $100,000 in costs to the employer. Hernandez v. Acosta Tractors Inc., 898 F.3d 1301, 1303 (11th Cir. 2018); *see also, e.g.*, Helland, *supra* note 336, at 217 ("The defendant would certainly spend more than $49,000 in JAMS fees and defense fees on each individual hearing."); Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. Times (updated Sept. 28, 2021), https://perma.cc/ 99U6-MQZ8 ("Just to hire the arbitrator and to get the process started for a single claim cost Amazon about $2,900.").

[369] *See generally* Glover, *supra* note 132, at 1729-32, 1729 nn.58-60, 1730 n.63 (tracing how the credible threat of litigation-cost imposition can either (1) drive settlement values down if deployed asymmetrically by defendants; or (2) drive settlement values up if deployed asymmetrically by plaintiffs). This point is critical, as arbitration costs are not borne by the defendants alone. *See, e.g.*, Am. Arb. Ass'n, *supra* note 241, at 1.

[370] *See infra* Appendix.

provisions from their arbitration agreements,[371] it is not clear to what extent an adhesion contract requiring arbitration can shift costs to claimants. California, for instance, restricts how far contracts of adhesion can go in forcing a claimant to pay arbitration fees.[372] Accordingly, although the issue will undoubtedly be litigated in the future, mass-arbitration attorneys can challenge defendants' efforts to avoid cost asymmetries through revised contracts.

Third, mass-arbitration attorneys can rely on structural differences to impose asymmetric costs on defendants.[373] Corporate defendants tend to be represented by large national or multinational firms—often more than one in a single case—that earn profits by billing their clients by the hour. And do they ever: These firms often assign many high-billing partners and associates to each matter.[374] Mass-arbitration claimants, on the other hand, are generally represented by firms that seek to profit via a contingency percentage of any recovery.[375] While this arrangement carries more risk for counsel, claimants themselves face far fewer litigation costs. In other words, hour by hour and pound for pound, corporate defendants generally pay more for their lawyers than mass-arbitration claimants do. Because defendants face high litigation costs while claimants do

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[371] Many defendants have already begun to do so. *See infra* Part IV.C.1 (noting that revised agreements without fee-shifting provisions are already emerging and characterizing these agreements as one of the biggest challenges to the sustainability of the massarbitration model).

[372] *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687-89 (Cal. 2000) (holding that, "when an employer imposes mandatory arbitration as a condition of employment," claimants cannot be required to pay fees unique to arbitration and in excess of litigation costs). Some courts view *Concepcion's* broad preemption holding to undermine the *Armendariz* rule. *See, e.g.*, James v. Conceptus, Inc., 851 F. Supp. 2d 1020, 1033 (S.D. Tex. 2012) ("The general *Armendariz* rule is in serious doubt following *Concepcion*. . . . To the extent *Armendariz* precludes arbitration in any employment dispute if the employee is required to bear any type of expense not present in litigation, it appears preempted . . . ." (emphasis omitted)); Mercado v. Drs. Med. Ctr. of Modesto, Inc., No. F064478, 2013 WL 3892990, at *6-7 (Cal. Ct. App. July 26, 2013) (noting that *Concepcion* and *Italian Colors* "cast doubt on the continued validity of . . . *Armendariz*"). The law on *Armendariz*, however, is not settled. *See, e.g.*, Fred W. Alvarez, *Enforcement of California-Based Employment Arbitration Agreements, in* ALI-CLE Course Materials: Advanced Employment Law and Litigation (2013), Westlaw SU033 ALI-CLE 1279 (cautioning employers to "comply with *Armendariz* until the law is more settled"). The Supreme Court has not confronted the *Armendariz* rule directly. The Court quoted *Armendariz* for the basic definition of unconscionability in *Concepcion*, but it did not otherwise mention the case. *See* 563 U.S. at 340.

[373] *See* Interview with Warren Postman, *supr*a note 40.

[374] *See* Interview with Anonymous No. 2, *supra* note 41.

[375] *See* Interview with Warren Postman, *supra* note 40.

not, defendants may be more inclined to settle and avoid the paying for the litigation itself.[376]

Fourth, entrepreneurial attorneys pursuing the mass-arbitration model can specifically select for remedial schemes with fee-shifting provisions and statutory damages.[377] Bringing claims under these schemes can introduce feeleveraging mechanisms beyond those described above, driving up settlement pressure, settlement values, and individual payouts.

3. Selecting higher-threshold-value claims

The threshold value required for a claim to be marketable in the massarbitration model is typically higher than the threshold value required for a class-action or MDL claim. This is true for two reasons. First, the initial investment required to collect, process, and file claims for a mass arbitration exceeds that required for a class action or MDL consolidation. Second, the economies of scale achieved by the class-action device and MDL are not present to the same degree in mass arbitration.[378] These differences are a significant source of leverage in the mass-arbitration model.[379] The price of that leverage, however, is that mass-arbitration claims must often be worth more to make economic sense.

Firms often use an individual-recovery threshold to determine whether mass-arbitration claims are marketable. Although the precise threshold varies by firm (given risk tolerance) and remedial scheme (given differences in fee shifting and penalties), it generally starts in the high hundreds for some firms and rises to a few thousand dollars for others.[380] Anything below the highhundred mark would almost certainly not be economically viable in mass arbitration, even if the firm carefully crafted a flat-fee structure.[381]

The range above may actually be conservative. Most mass-arbitration claims arise under remedial schemes that include some combination of statutory

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[376] *See* Glover, *supra* note 132, at 1729-32.

[377] *See infra* Appendix.

[378] *See supra* Part III.B.2.

[379] *See supra* Part III.C.2.

[380] S*ee, e.g.*, Interview with Warren Postman, *supra* note 40; Interview with Jonathan D. Selbin, *supra* note 41. Note that these figures take current fee-leveraging mechanisms into account.

[381] Even a 40% flat fee on $60 claims would not be profitable under the mass-arbitration model.

damages, treble damages, and fee shifting.[382] And the claims most suitable for mass arbitration typically require minimal discovery or rely on uniform proof, thereby enabling claimants to spread evidentiary costs.[383] Without these generous remedial schemes and limitations on discovery and proof, firms' thresholds could be driven even higher.

The fact that mass-arbitration claims require a higher threshold value to be deemed marketable is apparent in the potential Fitbit mass arbitration. Fitbit is an example of what this Article terms a mass-arbitration claimmarketability failure. The case began as a putative class action for consumer fraud, arising out of allegations that Fitbit's inaccurate heart-rate monitoring was misleading and posed serious health and safety risks to consumers.[384] These allegations were supported by independent studies, including a study done by the Cleveland Clinic.[385] The district court granted Fitbit's motion to compel arbitration,[386] and the named plaintiff, Kate McLellan, decided to arbitrate her claim. Lieff Cabraser, counsel for the Fitbit plaintiff class, subsequently determined that the other claims (which ranged in value from $20 to $80) were not marketable in a mass arbitration.[387] This was so even though the claims had been marketable in the original class action. While the details of McLellan's arbitration proceedings are confidential, both the fact of the arbitration and the studies mentioned above suggest that the claims had merit. Accordingly, it is likely accurate to say that Fitbit's arbitration clause, and Fitbit's arbitration clause alone, eliminated the remaining consumer claims.[388]

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[382] *See infra* Appendix.

[383] *See, e.g.*, Frankel, *supra* note 268 (noting that, in the potential mass arbitration against DirecTV, the underlying legal question for all claimants is simply whether DirecTV improperly disclosed a data file).

[384] *See* McLellan v. Fitbit, Inc., No. 16-cv-00036, 2017 WL 4551484, at *1 (N.D. Cal. Oct. 11, 2017).

[385] *See* Robert Wang, Gordon Blackburn, Milind Desai, Dermot Phelan, Lauren Gillinov, Penny Houghtaling & Marc Gillinov, Research Letter, *Accuracy of Wrist-Worn Heart Rate Monitors*, 2 JAMA Cardiology 104, 104 (2017).

[386] *McLellan*, 2017 WL 4551484, *5.

[387] Interview with Jonathan D. Selbin, *supra* note 41.

[388] *See id.* This findings in this Subpart align with David Horton and Andrea Cann Chandrasekher's conclusion that "very few individuals bother to arbitrate minor grievances" post-*Concepcion*. See Horton & Chandrasekher, *supra* note 210, at 116-19. In this regard our studies reinforce one another: Arbitration—mass or otherwise—does not tend to capture low-value claims.

4. Generating aggregate settlements from individual claims

If settlements in litigation are a black box,[389] settlements in arbitration are a black hole.[390] Under nondisclosure agreements (NDAs) in many settlement contracts, claimants may be deemed ineligible for payouts if they share any information about their claim or the settlement.[391] Moreover, for some mass arbitrations there are no records of the settlement—or even of the claims. These "secret" or "shadow" mass arbitrations are off the books, either for an extended period of time or entirely. This typically occurs for one of two reasons: Either (1) claims are filed in fora that do not keep public records; or (2) claims are settled prior to the filing of any demands.

Secrecy notwithstanding, this study revealed a number of details about settlements in mass arbitration. To date, there is no formalized procedural structure for mass-arbitration settlements. For all the time defendants spent designing their arbitration contracts, they spent little time designing or designating post-dispute settlement structures. That makes sense, of course: The one-off arbitral demands anticipated by defendants hardly called for a complex settlement regime. More to the point, given that the goal of the arbitration revolution was to eliminate claim resolution, spending time on claim-resolution structures would have seemed irrational.

Yet even without formal structures for settlement, global settlements in mass arbitrations are happening.[392] In some mass arbitrations, the parties attempt to settle after a number of demands are filed or arbitrated on an individual basis.[393] To the extent that demands are arbitrated, they function like bellwether trials

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[389] *See* Glover, *supra* note 132, at 1745-50; see also, e.g., Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 Cornell L. Rev. 957, 974-77 (2010).

[390] *See* Estlund, *supra* note 38, at 682.

[391] Interview with Warren Postman, *supra* note 40; *see, e.g.*, u/steezefabreeze, *Hey All!: I've Received an Email from Keller Lenkner*, Reddit: r/postmates (June 8, 2021, 5:19:14 PM PDT), https://perma.cc/V4FL-JJHH; *see also* Interview with Nancy Erika Smith, *supra* note 41 (discussing how NDAs can force information "out of the light of day").

[392] *See, e.g.*, Erin Mulvaney, *DoorDash Got Its Arbitration Wish, Costing Millions Upfront*, Bloomberg L. (updated Feb. 12, 2020, 12:47 PM), https://perma.cc/BN5Y-LK7V (noting that "mass arbitration leads to settlements" (capitalization altered)).

[393] *See, e.g.*, Arena v. Intuit Inc., No. 19-cv-02546, 2021 WL 834253, at *1 (N.D. Cal. Mar. 5, 2021); *see also* Interview with Warren Postman, *supra* note 40 (comparing the massarbitration process to a mass-tort process with test cases and global settlements).

in mass-tort MDLs: The individual results help create a global deal aimed at resolving the remaining claims.[394] Other mass arbitrations involve few (if any) filings or individual proceedings prior to settlement; still others do not get past the threat of mass filings before settlement talks ensue. Regardless of how many demands are actually filed or arbitrated, massarbitration defendants generally agree to global settlements given claimant fee leveraging and the expense and risk of claims. This is true even if fees have already been paid.

Investigation reveals three additional trends. First, even global deals in mass arbitration must be effectuated on an individual basis. As a de facto matter, the aggregate-settlement consent requirement of Model Rule of Professional Conduct 1.8 operates in the background of the mass-arbitration settlement process.[395] Second, global settlements in mass arbitration often hinge on the participation of a prespecified supermajority of claimants.[396] Finally, while the claimants' firm is ultimately in charge of securing releases and distributing payouts, firms (at least for distribution) have tended to contract with settlement administrators.[397]

The settlement amounts in mass arbitration have so far tended to be substantial, both relative to class-action settlements for similar claims and on their own terms. Indeed, some settlements have provided claimants with awards approximating their actual damages. But while generous settlements are the norm, there are exceptions. In the Family Dollar mass arbitration, for instance, the highest settlement amount reported to date is $4,000.[398] This is

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[394] *See* Interview with Warren Postman, *supra* note 40.

[395] Model Rules of Pro. Conduct r. 1.8(g) (AM. Bar Ass'n 1983) (stating that an attorney "who represents two or more clients shall not participate in making an aggregate settlement" unless each client provides informed consent); see Declaration of Richard Zitrin in Support of Respondent DoorDash, Inc.'s Opposition to Petitioners' Motion for a Temporary Restraining Order ¶¶ 1, 11-14, Abernathy v. DoorDash, Inc., No. 19-cv-07545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1 ("My own plaintiffs' firm clients, desirous of representing clients in mass action cases, were hamstrung by the hoops they would have to jump through to do so ethically [as a result of Model Rule 1.8]."); Interview with Warren Postman, *supra* note 40 (noting that Model Rule 1.8 operates unofficially in mass arbitration).

[396] Interview with Warren Postman, *supra* note 40.

[397] *See, e.g.*, u/Majestic-Key2066, *Keller Lenkner Settlement*, Reddit: r/postmates (July 21, 2021, 11:49:49 AM PDT), https://perma.cc/5B94-SWCZ (referencing KCC as the settlement administrator hired by Keller Lenkner).

[398] *See* Allana Akhtar, *Family Dollar Workers Said They Put in 80-Hour Weeks and Slept on Cardboard to Keep Stores Open*, Bus. Insider (Dec. 20, 2021, 1:13 PM), https://perma.cc/ K4FV-CVRE.

less than what some employees believe they are owed for "years of poor working conditions," including having to sleep on cardboard boxes during double and triple (unpaid) overtime shifts and having to contend with snakes and lizards in breakrooms.[399] It is worth noting, however, that Family Dollar is an unusually intransigent litigant in many respects—including with regard to settlement.[400]

By January 2021, just over three years after launching its practice, Keller Lenkner had secured more than $200 million in settlements for claimants.[401] (This number is rather astonishing given that mass arbitration only began in earnest in 2018; one advantage that mass arbitration has over settlements and trials in court is speed.)[402] In the Intuit mass arbitration, claimants obtained settlement offers for 100% of their out-of-pocket damages for each year they had a claim.[403] The only public disclosure of mass-arbitration settlement specifics—contained in a 2019 free writing prospectus Uber filed with the Securities and Exchange Commission (SEC)—reveals that Uber had reserved $132 million for anticipated settlements with 60,000 of its drivers who had filed individual arbitration demands.[404] Uber estimated that its ultimate liability to

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[399] *Id.*; Jack Newsham & Peter Coutu, *Family Dollar Forced Employees to Sign Arbitration Agreements. Here's What Happened When They Tried to Sue the Company over Unpaid Wages.*, Bus. Insider (Dec. 21, 2021, 6:53 AM), https://perma.cc/F2LF-9QM2 (to locate, select "View the live page").

[400] One claimant who spoke with journalists thought that her $400 settlement was low, but she also reported that Family Dollar initially balked at her claim. Newsham & Coutu, *supra* note 399. The claimant, Carrie Boles Lear, stated that she wished she had fought harder in arbitration, but "Family Dollar took the position that she wasn't entitled to anything." *Id.* An attorney who represented Family Dollar managers in a 2001 class-action suit noted that Family Dollar was "one of the most arrogant companies I've ever dealt with in my 32 years of practicing law." *Id.* (quoting Alabama plaintiffs' attorney Mark Petro).

[401] Press Release, Keller Lenkner LLC, Keller Lenkner LLC Celebrates Third Anniversary (Jan. 12, 2021), https://perma.cc/SQ5K-SL8F.

[402] For example, in 2018, 37,000 female managers reached a $45 million settlement with Family Dollar over gender-discrimination claims. Scott v. Fam. Dollar Stores, Inc., No. 08-cv-00540, 2018 WL 1321048, at *1-2, *5 (W.D.N.C. Mar. 14, 2018); Katherine Peralta, *Family Dollar Agrees to Pay $45 Million to Settle Long-Running Gender Bias Lawsuit*, Raleigh News & Observer (updated Mar. 29, 2018, 9:57 AM), https://perma.cc/PG4A-UUZM (to locate, select "View the live page") (reporting that the settlement purported to resolve the claims of 37,000 plaintiffs). That settlement was the product of ten years of class-wide litigation, *Scott*, 2018 WL 1321048, at *1, and the underlying lawsuit dated back to 2002, Peralta, *supra*. Claimants in the Family Dollar mass arbitration, in contrast, got checks in under two years. *See* Newsham & Coutu, *supra* note 399.

[403] *See Intuit* Motion to Intervene, *supra* note 244, at 6.

[404] Uber Techs., Inc., Free Writing Prospectus (May 9, 2019), https://perma.cc/L9M6- DZAP.

these drivers would fall somewhere between $146 million and $170 million.[405] And although FairShake is (largely) a different model of mass arbitration,[406] it reports similarly high settlement figures: Consumers who settled with "major corporations" like AT&T and Comcast using FairShake's platform received an average of $700.[407] Finally, reviewing (confidential) individual settlement data reinforces the findings in this Subpart and Part III.C.3 above: The average value of mass-arbitration claim marketability starts in the high hundreds, and a number mass-arbitration payouts track claimants' actual damages.[408] That being said, mass arbitration is simply too new of a practice (involving too few defendants, too few claim types, and too few firms) and settlement data too difficult to obtain to draw anything more than tentative conclusions about mass-arbitration settlement amounts.

Given generally high settlement values, it is perhaps not surprising that defendants have erected a number of hurdles to the distribution of massarbitration settlements. Although the precise details must again be kept confidential, some generalized examples are illustrative. For one, defendants often include provisions in arbitration agreements and settlement releases warning claimants that they will forfeit their payouts if they share any information about the settlement.[409] For another, defendants have sought to impose various artificial conditions on settlement payouts. In one case, a defendant mailed claimants a nondescript postcard containing a unique "settlement ID" and then insisted that claimants present this ID in order to resolve their claims. If a claimant could not locate her ID—even if she could provide other proof of settlement

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[405] *Id*. DoorDash did not disclose specific numbers in its 2021 SEC registration statement, but it nonetheless warned that mass-arbitration settlements posed a financial risk to the company. *See* DoorDash, Inc., Registration Statement (Form S-1), at 54 (Nov. 13, 2020), https://perma.cc/3XSU-D4S3 ("It is possible that a resolution of one or more such [arbitration] proceedings could result in substantial . . . settlement costs . . . that could adversely affect our business, financial condition, and results of operations.").

[406] *See supra* notes 289-91 and accompanying text.

[407] Alison DeNisco Rayome, *Overcharged by a Tech Company? New Service Could Help Get Your Money Back*, CNET (Mar. 3, 2020, 7:00 AM PT), https://perma.cc/H5KT-WV3J ("The FairShake platform uses AI to resolve customer claims with major corporations within two months, with a typical settlement of $700."); *see also* Weiss, *supra* note 291 (discussing FairShake settlements in the context of Comcast and AT&T); Corkery & Silver-Greenberg, *supra* note 34 (same).

[408] Individual settlement data is on file with the Author.

[409] *See supra* note 391 and accompanying text.

eligibility—her claim would be forfeited.[410] Similarly, some defendants have tried to require wet signatures for all settlement documents; others have insisted that those wet signatures be tendered in person. Still others have demanded that all signatures be wet and sometimes even notarized.[411]

Finally, many defendants have tried to avoid mass-arbitration settlement altogether. In November 2019, Postmates (unsuccessfully) attempted to settle its wage-theft litigation for $11.5 million in California court; the settlement purported to resolve all claims by Postmates' California couriers, many of whom were already in arbitration.[412] In February 2020, DoorDash offered to resolve all wage-theft claims brought by its drivers through a $39.5 million state-court class-action settlement.[413] Northern District of California Judge William Alsup declined to stay federal proceedings pending the settlement's approval, stating that he would not bless DoorDash's "hypocrisy" regarding arbitration.[414] And in November 2020, Intuit agreed to a $40 million class settlement that purported to settle all claims against it, including those that were in arbitration.[415] Northern District of California Judge Charles Breyer refused to approve the settlement.[416]

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[410] *See* Interview with Travis Lenkner & Warren Postman, *supra* note 40; Interview with Cory L. Zajdel, *supr*a note 40.

[411] *See* Interview with Travis Lenkner & Warren Postman, supra note 40; Interview with Cory L. Zajdel, *supra* note 40. *But cf.* Interview with Jonathan E. Paikin, *supra* note 42 (indicating that some of these formalities may be necessary to vet the underlying claims).

[412] *See* Frankel, *supra* note 334. In August 2021, San Francisco County Superior Court Judge Suzanne Bolanos granted preliminary approval to a revised settlement that increased the deal to $32 million and included new opt-out procedures for couriers. Order Granting Preliminary Approval of Class Action Settlement at 2, Postmates Classification Cases, No. CJC-20-005068 (Cal. Super. Ct. Aug. 12, 2021); *see* Plaintiffs' Supplemental Briefing in Support of Motion for Preliminary Approval of Revised Class Action Settlement at 3-5, Rimler v. Postmates, Inc., No. CGC-18-567868 (Cal. Super. Ct. Dec. 14, 2020) (laying out the revised settlement terms).

[413] "DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate." Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020); Alison Frankel, *"This Hypocrisy Will Not Be Blessed": Judge Orders DoorDash to Arbitrate 5,000 Couriers' Claims,* Reuters (Feb. 11, 2020, 4:10 PM), https://perma.cc/7LRR-B2L9 (reporting that "[i]nstead of paying the requisite AAA fees" of $12 million, DoorDash tried to use a pending state-court class action—"a case in which [it had] once attempted to compel arbitration"—to settle its couriers' claims for $39.5 million).

[414] *Abernathy*, 438 F. Supp. 3d at 1067-68 ("This hypocrisy will not be blessed, at least by this order.").

[415] *See* Arena v. Intuit Inc., No. 19-cv-02546, 2021 WL 834253, at *1-3 (N.D. Cal. Mar. 5, 2021).

[416] *Id.* at *1.

Intuit, Judge Breyer noted, was being "hoisted by [its] own petard."[417]

IV. CONTEMPORANEOUS AND FUTURE DEVELOPMENTS

Part III showed that mass arbitration is a distinct business model and a distinct form of aggregate dispute resolution. A mass-arbitration model, if you can keep it.[418]

This Part examines three significant ways in which the mass-arbitration model must adapt. First, mass arbitration will require smaller firms to scale up, rapidly and exponentially, both to comply with the ethical obligations of individual representation and to cope with the increasing demands of mass individual claiming. Second, mass arbitration will likely require scaled-up arbitral fora to handle growing claim volume. Third, mass arbitration must cope with and adapt to revised arbitration agreements—and where necessary, challenge the legality of those revised contracts.

A. Scaled-Up Mass-Arbitration Firms

A viable aggregate dispute resolution practice must be able to retain its clients. Ouster of counsel based on firm rivalries has long been a feature of aggregate dispute resolution given the vast sums of money at stake;[419] mass arbitration is

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[417] Transcript of Proceedings at 10, *Intuit*, 2021 WL 834253 (No. 19-cv-02546), ECF No. 206 ("I did think when I looked at this, and saw that, really, that this was a way to avoid or otherwise circumscribe arbitration, that it seemed to be that Intuit was . . . hoisted by [its] own petard.").

[418] With regards (and apologies) to Benjamin Franklin. As delegates left Independence Hall in 1787 following the Constitutional Convention, Franklin was asked: "Doctor, what have we got? A republic or a monarchy?" "A republic," Franklin supposedly replied, "if you can keep it." *See* Gillian Brockell, *"A Republic, if You Can Keep It": Did Ben Franklin Really Say Impeachment Day's Favorite Quote?*, Wash. Post (Dec. 18, 2019, 6:36 PM EST), https://perma.cc/RK86-WMQJ.

[419] For example, the adequacy objection that helped destroy the settlement class in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 607-08, 625-28 (1997), was brought by Fred Baron, a plaintiffs' attorney whose asbestos-heavy portfolio would have been eliminated by the Amchem settlement. *See* Linda S. Mullenix, *Standing and Other Dispositive Motions After Amchem and Ortiz: The Problem of "Logically Antecedent" Inquiries,* 2004 Mich. St. L. Rev. 703, 713 (observing that the *Amchem* objectors were represented by Baron's firm); David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy 1981-1994,* 86 Fordham L. Rev. 1785, 1823-24 (2018) (noting that asbestos class actions "jeopardized fee-generating relationships individual tort lawyers had with their clients," and describing Baron as "[i]mplacably and bitterly opposed to an asbestos class action"—so much so that he "spent $4.5 million fighting major asbestos class settlements").

not meaningfully different in this regard. This dynamic was at play, for instance, during Intuit's attempt to settle mass-arbitration claims out from under mass-arbitration counsel by way of a class that purported to include the arbitration claimants.[420] Indeed, the Intuit story is just as much about Intuit trying to cripple a mass arbitration as it is about rival plaintiffs' firms trying to collect hefty fees for themselves by engineering a reverseauction class settlement.[421]

It is defense-initiated attempts to oust counsel, however, that have so far dominated the mass-arbitration landscape. A number of defendants have tried to disqualify mass-arbitration firms—especially Keller Lenkner—from representing clients in mass-arbitration proceedings. Importantly, defendants have sought to disqualify these firms based on key features of the massarbitration model.

For example, some defendants have argued that Keller Lenkner's representation of many individual claimants violates ethical constraints on group representation, particularly given the firm's small size.[422] Keller Lenkner has responded to this concern by disclosing its relationships with other law firms, including Quinn Emanuel and Troxel Law.[423] And while courts have recognized the concern in a few mass-arbitration rulings, it generally has not been sufficient to warrant disqualification.[424] Nonetheless, Keller Lenkner has reacted to the defendants' arguments by scaling up—and scaling up fast. The firm now has more than 100 employees, a full clientservices department, and an advanced technology apparatus.[425] And at least according to its attorneys, the firm is

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[420] *See supra* notes 415-17 and accompanying text.

[421] The notion of a reverse-auction class settlement is well understood and well traced in the scholarly literature and in class-action jurisprudence. A reverse-auction class settlement is one that is results when a defendant harnesses the competition among plaintiffs' firms for control of the class litigation (and, by extension, associated attorney's fees), with the lowest bidder among the firms "winning" the right to settle with the defendant. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1354 (1995) (explaining the reverse-auction phenomenon); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282-83, 289 (7th Cir. 2002) (reversing the district court's approval of a class settlement in part because the settlement could have been the product of a reverse auction).

[422] *See, e.g.*, *Intuit* Opposition to Motion, *supra* note 246, at 1-2, 6-7.

[423] *See CenturyLink* Postman Declaration, *supra* note 248, ¶ 7.

[424] *See, e.g.*, In re CenturyLink Sales Pracs. & Sec. Litig., No. 17-md-02795, 2020 WL 3513547, at *7-8, *10-11 (D. Minn. June 29, 2020); *see also, e.g.*, Arena v. Intuit Inc., No. 19-cv-02546, 2021 WL 834253, at *4, *7-11 (N.D. Cal. Mar. 5, 2021) (noting that Keller Lenkner may not be "looking out for its clients' best interests" but rejecting a proposed settlement on other grounds).

[425] *See CenturyLink* Postman Declaration, *supra* note 248, ¶ 5; Interview with Warren Postman, *supra* note 40.

willing and able to litigate as many arbitration demands as possible, as quickly as possible.[426] Although defense attorneys still believe Keller Lenkner lacks the staffing necessary to pursue thousands of individual demands,[427] it is clear that mass arbitration will require large, well-resourced firms going forward.

It may also require many different firms. In addition to size-related concerns, defendants have tried to leverage procedural posture—recall that mass arbitrations often follow the stay (or dismissal) of a class or collective action[428]—to disqualify counsel. Chipotle, for instance, said that law firms representing plaintiffs dismissed from a wage-and-hour collective action should not be allowed to represent those plaintiffs in arbitration.[429] By encouraging claimants to (initially) pursue their claims in court, Chipotle argued, the firms had compromised their clients' interests.[430] The District of Colorado rejected this argument.[431] But had Chipotle succeeded, new firms would have needed to step in and fill the gap.

Disqualification motions are not just a tactic in mass arbitration; they are common across the aggregate dispute resolution landscape.[432] Accordingly, defendants will almost certainly file these motions against mass-arbitration firms in the future. Firms can fend off disqualification, at least in part, by scaling up. And in the meantime, having many mass-arbitration firms will allow claims to continue even if disqualification motions succeed.

B. Scaled-Up Arbitral Fora

The sustainability of the mass-arbitration model also depends on arbitral fora that can expeditiously handle a large volume of claims. The ability to arbitrate claims individually (or credibly threaten to do so) is not just a function of a

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[426] *See, e.g.*, Interview with Warren Postman, *supra* note 40.

[427] *See* Interview with Anonymous No. 4, *supra* note 42.

[428] *See supra* notes 258-59 and accompanying text.

[429] Chipotle Mexican Grill, Inc.'s Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement at 21-23, Turner v. Chipotle Mex. Grill, Inc., No. 14-cv-02612, 2018 WL 11314701 (D. Colo. Aug. 3, 2018), ECF No. 172.

[430] *See id*. at 22-23.

[431] *Turner*, 2018 WL 11314701, at *7.

[432] *See, e.g.*, Diva Limousine, Ltd. v. Uber Techs., Inc., No. 18-cv-05546, 2019 WL 144589, at *1-2 (N.D. Cal. Jan. 9, 2019).

firm's economic wherewithal; it is also a function of the designated forum's demand-processing capabilities. In more concrete terms, arbitration fees are assessed as the proceeding progresses: There are unique costs associated with filing, arbitrator retention, preliminary review, and so on. If a defendant knows that arbitration proceedings will not realistically move forward, a plaintiffs' firm—even one with the means to bring thousands of claims—will not be able to leverage fees.[433]

Arbitral fora, then, must also scale up. The speed at which these fora operate is not suitable for mass arbitration today. In the Postmates mass arbitration, for example, assigning arbitrators to fifty individual cases took over three months.[434] As Postmates put it, the "AAA is [just not] equipped to handle that many arbitrations at the same time."[435]

An individual mass-claiming model could never function in the taxpayerfunded, resource-strapped court system. The AAA or JAMS, however, could easily handle $50 million worth of claims across a large set of individual proceedings.[436] Scaling up these fora, then, is largely a matter of logistics.[437] But the fora must also have an incentive to grow, and that incentive likely depends on whether mass arbitrations will stay in front of AAA and JAMS arbitrators. This is significant, as both the AAA and JAMS have reason to suspect mass arbitrations could go elsewhere.

Because mass arbitration depends on the ability to actually litigate (or threaten to litigate) claims, defendants might move arbitration proceedings from heavily capitalized, large fora like the AAA and JAMS to small outfits incapable of processing more than a few claims a year. Changes along these lines would not only deter the AAA and JAMS from scaling up; they would also hamstring mass arbitration's settlement power in cases sent to smaller fora.

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[433] *See supra* Parts III.C.1-.2.

[434] *Postmates* Initial Complaint, *supra* note 273, ¶ 49 ("Although Postmates paid filing fees for fifty arbitrations in December 2019, as of March 25, 2020, only 21 arbitrators had been confirmed and only two arbitrators had conducted individual hearings.").

[435] First Amended Complaint for Declaratory & Injunctive Relief ¶ 43, Postmates Inc. v. 10,356 Individuals, No. 20-cv-02783 (C.D. Cal. Apr. 2, 2020), ECF No. 7.

[436] Because these private fora obtain funding through fees, they do not rely on taxpayer dollars and are not subject to statutory resource limitations. *See, e.g.*, *supra* text accompanying note 351 (noting that a set of arbitration proceedings before the AAA could cost Uber more than $90 million).

[437] Indeed, both the AAA and JAMS have gotten better at handling mass arbitrations in recent years. *See* Interview with Matthew C. Helland, *supra* note 40.

Corporate strategy here would most likely look similar to AT&T's strategy in Concepcion: point to the presumably "friendly" rules of the new forum in hopes that the court will not notice (or care) that the forum is literally incapable of processing claims.[438] To date, corporations have not taken this approach. Yet as the next Subpart explains, corporations have attempted to achieve similar results by specifying defendant-friendly fora in their revised agreements.

C. Revised Agreements

With their "friendly" arbitration agreements, corporate defendants may well have been hoisted by their own petards.[439] But defendants still have the power: They drafted the agreements, which means they can change them.[440] Live by the sword, die by the sword.

Indeed, perhaps the most significant challenge to the future of mass arbitration is revised arbitration agreements. This Subpart focuses on three types of revisions with which the mass-arbitration model must cope: (1) the elimination of fee-shifting provisions; (2) the insertion of "batching" provisions; and (3) the insertion of provisions that move mass-arbitration claims to defendant-friendly arbitral fora.

1. Eliminating fee provisions

One judge has referred to mass arbitration's leveraging of fee-shifting provisions as "poetic justice."[441] Some take the view, however, that the price tag of this particular justice—whatever its poetic force—might be a bit excessive. Across the arbitration-services industry, organizations have scrambled to adapt their protocols to mass arbitration. The AAA recently adopted a sliding-scale fee

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[438] *See supra* notes 178-79 and accompanying text; *see also* Miller, *supra* note 103, at 800 (noting that arbitration agreements like the one in *Concepcion* "typically offered a wide variety of goodies to customers").

[439] *See supra* note 417 and accompanying text.

[440] *See* Glover, *supra note* 75, at 3059; Fitzpatrick, *supra* note 152, at 176-79.

[441] Transcript of Proceedings at 27, Abernathy v. Doordash, Inc., No. 19-cv-07545 (N.D. Cal. Nov. 27, 2019), ECF No. 67; *see also, e.g.*, Michael E. McCarthy, Jeff E. Scott & Robert J. Herrington, S*temming the Tide of Mass Arbitration*, Greenberg Traurig (June 7, 2021), https://perma.cc/F3SK-LU9M.

schedule that reduces up-front filing fees as more related claims are filed.[442] And new arbitration outlets are engaged in fierce competition with one another (not to mention the AAA) to cash in on what they see as a mass-arbitration business opportunity. Some small arbitration services—for instance, New Era ADR and FedArb—openly court businesses with promises of cost savings by way of virtual platforms (New Era)[443] or protocols designed to ease the burdens of mass arbitration (FedArb).[444] In October 2021, National Arbitration and Mediation issued a "customized fee structure to address issues that have arisen as a result of mass filings of arbitration demands in the Employment and Consumer arenas."[445]

Whatever arbitral fora do with their fee schedules, many fee-shifting provisions in arbitration contracts are not long for this world. In May 2021, Gibson Dunn recommended that defendants rethink provisions committing them to paying arbitration fees.[446] Gibson Dunn further suggested that companies add new fee-shifting provisions—this time shifting fees to the plaintiffs—for claims deemed by an arbitrator to be frivolous.[447] Scores of companies have already changed their arbitration agreements to avoid undesirable fee shifting.[448] And

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[442] *See* Am. Arb. Ass'n, *supra* note 244, at 1-3.

[443] *See* Press Release, New Era ADR, Tech Startup New Era ADR Aims to Disrupt Traditional Litigation and Dispute Resolution with New Business Platform (Apr. 20, 2021), https://perma.cc/GMC5-MCLB; *see also Digital Arbitration*, New Era ADR, https://perma.cc/YA8K-W4ZL (archived Aug. 23, 2022) ("[W]e made the entire [arbitration] process fully digital and fully virtual so you can tell your story to an experienced arbitrator from anywhere in the world.").

[444] FedArb promises a structure that "backends the administrative costs, . . . adjudicate[s] the claims on a fixed cost basis[,] and . . . [uses] an MDL type procedure to deal with common issues." Alison Frankel, Another Arbitration Service—FedArb—Establishes New Mass Arbitration Protocol 1 (2020), https://perma.cc/7CHS-YJK5 (quoting an email statement from FedArb CEO Ken Hagen).

[445] Press Release, Nat'l Arb. & Mediation, NAM Introduces a Customized Fee Structure for Mass Arbitration Filings in the Employment and Consumer ADR Arenas (Oct. 20, 2021), https://perma.cc/HR8L-VJUL.

[446] *See* Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, Gibson Dunn (May 24, 2021), https://perma.cc/WH45-7NLZ.

[447] *Id.*

some companies have gone even further, battling to get their revised agreements applied retroactively.[449]

Mass-arbitration attorneys no doubt anticipated the removal of at least some fee-shifting provisions. Fee leveraging at the current scale was always going to be a one-time opportunity—essentially a chance to short sell on a market error. As companies remove fee-shifting provisions and claimant leverage begins to decrease, the mass-arbitration model will almost certainly become less attractive to firms and third-party funders. Are the agreements above, then, the death knell for mass arbitration?

Likely not. For one, individual arbitration is expensive even without fee shifting. Defendants incur substantial arbitration costs beyond filing fees; multiplied by 1,000 or 10,000, these costs are still sufficient to generate significant settlement pressure.[450] For another, established mass-arbitration firms will not always need to front the filing fees for tens of thousands of demands. In mass arbitration's infancy, the fronting of fees was no doubt necessary for firms to show that their threats were not empty. In 2018, a defendant corporation may well have laughed at a new firm's threat to file 12,500 demands and to advance 12,500 filing fees. Today, less so. For yet another, current law imposes limits on the arbitration fees defendants can force claimants to pay.[451] Accordingly, companies trying to contract around their fee obligations will likely find their agreements struck

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[448] *See* Interview with Cory L. Zajdel, *supra* note 40. *Compare, e.g.*, *Terms of Use* ¶ 17, Ticketmaster, https://perma.cc/5MMJ-Y7V8 (archived May 19, 2022) [hereinafter Ticketmaster 2022 Terms] ("If you commence an arbitration in accordance with the Terms, you will be required to pay New Era ADR's $300 filing fee."), *with Terms of Use*, Ticketmaster (archived Oct. 1, 2013) ("We will reimburse [JAMS] fees for claims totaling less than $10,000 . . . ."), *reprinted* in Exhibit 51 to Declaration of Kimberly Tobias in Support of Defendants' Amended Motion to Compel Arbitration, Oberstein v. Live Nation Ent., Inc., No. 20-cv-03888, 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021), ECF No. 85-51.

[449] *See* Interview with Cory L. Zajdel, *supra* note 40.

[450] *See, e.g.*, Helland, *supra* note 336, at 217, 222; Am. Arb. Ass'n, *supra* note 241, at 2-3: *Arbitration Schedule of Fees and Costs*, supra note 241; s*ee also, e.g.*, Interview with Anonymous No. 4, *supra* note 42 (noting that mass arbitration relies on the general leveraging of arbitration fees); Interview with Travis Lenkner & Warren Postman, *supra* note 40 (observing that, beyond just up-front fees, defendants have created an expensive dispute-resolution process filled with transaction costs).

[451] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687-89 (Cal. 2000); *see also supra* note 372 and accompanying text. It is possible that the Supreme Court will modify or reject the *Armendariz* rule; the rule's validity has been central to recent certiorari petitions. *See, e.g.*, Petition for a Writ of Certiorari at 1-3, Winston & Strawn LLP v. Ramos, 140 S. Ct. 108 (2019) (No. 18-1437), 2019 WL 2140500.

down on unconscionability or effective-vindication grounds.[452]

Further, not all corporate defendants will remove fee-shifting provisions from their arbitration agreements. Corporations with fewer resources, less legal sophistication, or less flexibility (or some combination of the three) will likely be less able to adapt. Companies that cannot quickly revise their agreements—agreements essentially copied and pasted from AT&T (or a similar corporate entity) pursuant to general legal advice[453]—will almost certainly be mass-arbitration defendants soon enough. The future of mass arbitration will likely involve fewer claims against the biggest and most sophisticated national corporations and more claims against less nimble regional and local outfits. For these outfits, after all, the full range of feeleveraging mechanisms will remain available.

Of course, changes to fee schedules and the removal of fee-shifting provisions will still be consequential. These shifts will force claimants and firms to rely more on mass arbitration's other features, including the imposition of asymmetric costs through individual arbitration proceedings. But even these other features are not safe: As the next Subpart explains, defendants are also targeting asymmetric cost imposition.

2. Inserting "batching" provisions

To reduce the settlement pressure imposed by the asymmetric costs of individual arbitration proceedings,[454] defendants have inserted "batching" provisions into their agreements.[455] In addition, arbitration outfits have adopted mass-

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[452] Indeed, courts have already struck down agreements that improperly shift costs to arbitration claimants. *See, e.g.*, *Armendariz*, 6 P.3d at 687-89; Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 368-73 (N.C. 2008) (holding an arbitration agreement unconscionable in part because of its "loser pays" provision); Delta Funding Corp. v. Harris, 912 A.2d 104, 111-13 (N.J. 2006) (finding a provision allowing an arbitrator "unfettered discretion to allocate the entire cost of arbitration to a consumer" unconscionable under New Jersey law); Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 175-76, 175 n.62 (Wis. 2006) (citing *Armendariz* and invalidating an arbitration provision that required short-term, high-interest loan recipients to pay a filing fee of $125); *see also* Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1035 (Ariz. 2021) (noting that the "financial costs of arbitration [can] prohibit a plaintiff from vindicating her rights," particularly when the plaintiff cannot pay and the arbitration agreement contains no hardship provision); S. 707, 2019 Leg. (Cal. 2019) (affirming the *Armendariz* decision and imposing penalties on companies that do not pay their arbitration fees).

[453] *See, e.g.*, Miller, *supra* note 103, at 820 n. 123.

[454] *See supra* Part III.C.2.

[455] *See* Holecek, *supra* note 446.

arbitration protocols that include batching.[456] While precise details vary across agreements and fora, the basic idea is that after a certain number of legally and factually related demands are filed, those demands are "batched" into a group for resolution in one proceeding.[457] The "batch" then gets assigned to an arbitrator or panel of arbitrators, and it triggers a single filing fee.[458] Notably, some batching provisions exist alongside contractual class-action waivers.[459]

Batching provisions may diminish the attractiveness of the massarbitration model by reducing its ability to use individual claiming to the plaintiff's advantage. Indeed, FedArb markets its batching protocol—under which a panel of arbitrators conducts a single proceeding to resolve, in a binding fashion, common pretrial issues—along these lines: "[T]here will be little need for individual arbitrations, thereby expediting payment and greatly reducing costs—including the elimination of millions in arbitration fees."[460]

Batching could accordingly put pressure on other parts of the massarbitration model, particularly the claim-value threshold.[461] Batching ensures that only easy-to-prove, near–slam-dunk cases will be economically attractive for firms to pursue.[462] As a result, claims of racial discrimination and sexual harassment—which are typically of nominal value and present challenges regarding proof—could be left out of the mass-arbitration equation.[463]

Despite the increase in batching provisions and protocols, it is not clear that batching will be desirable in the long run. Batching is not guaranteed to create

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[456] *See infra* notes 460, 464-66, 471 and accompanying text.

[457] This resolution could be a general determination regarding common issues, or it could be a set of decisions on the merits for a small group of test cases.

[458] Holecek, *supra* note 446.

[459] *See, e.g.*, *Terms of Use: Dispute Resolution* ¶¶ III, VII, GRUBHUB, https://perma.cc/8RXHXL7M (archived May 19, 2022) (containing both a class-action waiver and a batching provision, and stating that the batching provision "shall in no way be interpreted as authorizing class arbitration of any kind"); *Terms of Service* (U.S.) ¶ 19(c), (g), DRIZLY, https://perma.cc/6JWB-7YQ4 (archived May 19, 2022) (same).

[460] Kennen D. Hagen, *Mass Arbitrations*, TODAY'S GEN. COUNS., Sept. 2021, at 12, 13. Hagen is the CEO and president of FedArb. *Id.*

[461] *See supra* Part III.C.3.

[462] Because batching makes fee leveraging more challenging, the claims that are filed are more likely to move forward. The merits of those claims will therefore be more important, and firms will be more selective in which claims they take on.

[463] *See* Glover, *supra* note 132, at 1772 & n.221 (noting that "employment discrimination cases often concern low-value claims held by low-wage earners"); *infra* notes 524-25 and accompanying text.

efficiency or reduce costs, and batching provisions could ultimately disadvantage both claimants and defendants in mass-arbitration proceedings.

By way of example, consider the CPR's batching protocol. When more than thirty employment demands of a "nearly identical nature" come before the CPR, the CPR randomly selects ten demands to proceed as test cases.[464] After the test cases have concluded, both sides enter into a mediation process.[465] If mediation does not produce a global resolution, the remaining demands move forward either in arbitration or in court.[466] The threat of individual proceedings on the back end of mediation may incentivize both parties to reach a global settlement based on the test cases—at least to the extent those cases generated uniform results.[467] This would be an efficient outcome.

But this potentially desirable outcome is not required, and it does not appear particularly inevitable given that the test cases are not binding or precedential. Nonbinding bellwethers are not well poised to guard against strategic holdout, where a party threatens inefficiency or delay to change the price of settlement.[468] Even if the first ten claimants lost, for example, the eleventh claimant could threaten to reject the defendant's offer and proceed with arbitration to drive up the settlement price.[469] And even if those ten claimants won, the defendant could still threaten to sabotage mediation and opt out of arbitration to drive the settlement price down.[470] These results benefit neither party.

Even binding test cases may not solve the problem—at least not under existing protocols. Unlike the CPR, New Era ADR provides for three bellwether trials, the results of which are precedential in cases involving common issues of

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[464] Int'l Inst. for Conflict Prevention & Resol., What Is the Employment-Related Mass Claims Protocol? 2-3 (2019), https://perma.cc/9ZDN-DVLN.

[465] *Id.* at 5-6.

[466] *Id.* at 1, 6-7.

[467] *Cf., e.g.*, Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 Brook. L. Rev. 961, 979-80 (1993) (noting that the Bendectin mass-tort litigation "dwindled away" after a bellwether jury ruled against the plaintiffs on causation).

[468] *See, e.g.*, Alain Frécon, *Delaying Tactics in Arbitration*, Disp. Resol. J., Nov. 2004/Jan. 2005, at 40, 46 ("Sometimes, a party seeks to delay arbitration . . . in the hope that the other side will be forced to abandon the proceedings or agree to a settlement.").

[469] *See* Int'l Inst. for Conflict Prevention & Resol., *supra* note 464, at 7.

[470] *See id.* at 6-7.

law and fact.[471] Three binding bellwethers could usher in a global settlement without the challenges described above. But two additional things must be true for this to occur, and neither seems particularly likely under the New Era protocol. First, the findings and outcomes of the three bellwethers must be in accord with one another. Each side selects one of the bellwethers,[472] however, meaning that the results could easily differ. Second, the selected bellwethers must actually represent the mass of claims.[473] With only three bellwethers (two of which are selected by the parties), this seems improbable at best.

More fundamentally, to the extent batching protocols shift the massarbitration model into a class-action or MDL model, it is not clear that this shift would be preferable for either defendants or claimants. All else equal, if defendants are stuck with an arbitration that looks like a class action or an MDL consolidation, they would probably prefer to be in court. Indeed, court proceedings are less expensive, provide for substantial judicial review, and generally present

[471] *Rules and Procedures* ¶¶ 2(x)-(y), 6(b)(iii), New Era ADR, https://perma.cc/FF5P-XNRA (last updated Mar. 2, 2022).

[472] *Id.* ¶ 6(b)(iii)(3)(b) ("Claimant(s), collectively on the one hand, and Respondent(s), collectively on the other hand, will each select one 'Bellwether Case' from all the cases that were filed.").

[473] That is, they must not offend long-standing notions of due process. *See, e.g., In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1017, 1020-21 (5th Cir. 1997) (rejecting the trial court's plan to use bellwether cases for settlement purposes, finding that the cases "lack[ed] the requisite level of representativeness so that the results could permit a court to draw sufficiently reliable inferences about the whole"). While the *Chevron* court was "sympathetic to the efforts of the [trial] court to control its docket and to move this case along," its "sympathies . . . [did] not outweigh . . . due process concerns." *Id.* at 1021.

defendants with favorable doctrine.[474] And for plaintiffs' attorneys, batching transforms the lucrative mass-arbitration model into a more expensive version of a class action or an MDL.

3. Provisions that change the arbitral forum

In response to mass arbitration, some defendants have sought to change the arbitral forum—either by designating a new forum or designing new procedures for the forum, or both. Defendants have already begun using contractual revisions to move arbitration proceedings from neutral fora like the AAA or JAMS to more defendant-friendly outfits. In 2019, for instance, DoorDash found itself "dissatisfied with the AAA's due process protocol requirements and [its] requirements for . . . filing fees" in light of massarbitration demands.[475] In response, Gibson Dunn reached out to the CPR to request protocols "created for DoorDash, at DoorDash's request, and with the input of DoorDash and its lawyers."[476] The CPR agreed to create these protocols,[477] at which point

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[474] *See, e.g.*, Charles Silver & Maria Glover, *Zombie Class Actions*, SCOTUSblog (Sept. 8, 2011, 10:16 AM), https://perma.cc/J6Y6-KZG9. The favorable-doctrine point might help explain Amazon's recent retreat to the class action. See *supra* note 35 and accompanying text. Facing a host of novel strict-liability claims arising under state law, *see, e.g.*, Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 605 (Ct. App. 2020) ("Under established principles of strict liability, Amazon should be held liable if a product sold through its website turns out to be defective."); Loomis v. Amazon.com LLC, 277 Cal. Rptr. 3d 769, 779 (Ct. App. 2021) ("[W]e are persuaded that Amazon's own business practices make it a direct link in the vertical chain of distribution under California's strict liability doctrine."), Amazon issued new contracts requiring all claims against the company to be brought in its home state of Washington, Robert, *supra* note 35. Washington does not have case law resembling *Bolger or Loomis*; accordingly, Amazon could have removed its arbitration provision (in part) to obtain favorable precedent in the state. *See Will Amazon Be Liable for Defective Products in Washington?*, Russell & Hill, PLLC: Blog (Aug. 17, 2020), https://perma.cc/3FZYCPB4 ("Right now, there is no consensus [in Washington] as to whether . . . Amazon should be considered only a neutral middle-man distributor of products or if they should be held legally liable for injuries . . . ."); Todd Bishop, *Landmark Product Liability Ruling Puts Amazon's Third-Party Marketplace in a New Legal Pinch*, GeekWire (updated Aug. 14, 2020, 2:30 PM), https://perma.cc/6DYK-55TZ (noting Amazon's hostility to the *Bolger* decision). Amazon would not have been able to obtain similar precedent through private arbitration.

[475] [Unredacted] Declaration of Aaron Zigler in Support of Petitioners' Reply in Support of Amended Motion to Compel Arbitration ¶¶ 11-12, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. 19-cv-07545), ECF No. 180-3 (quoting a CPR email describing a conversation with Gibson Dunn attorney Michael Holecek).

[476] *Id.* ¶¶ 8-14.

DoorDash sent its drivers revised agreements designating the CPR as its arbitral forum.[478] Emails reveal that the CPR saw DoorDash's request as a lucrative business opportunity, especially given Gibson Dunn's "large book" of clients.[479] Claimants challenged the new agreement, but Northern District of California Judge Edward Chen was not persuaded there had been any "catering or favoritism" or that the protocols were "so biased that [they] negate[d] the agreement to arbitrate."[480] For its part, the CPR said that it did not draft its new protocols to "woo employers."[481]

Other defendants are following DoorDash's lead. Ticketmaster, for example, changed its arbitral forum to New Era ADR shortly before a court granted its motion to compel arbitration on antitrust claims.[482] This timing does not seem coincidental: New Era bills itself as cheaper for businesses than other arbitral fora.[483] The new Ticketmaster agreement also provides that consumers must

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[477] *Id*. ¶ 9; *see* Declaration of Joshua Lipshutz in Support of Respondent DoorDash, Inc.'s Opposition to Petitioners' Amended Motion to Compel Arbitration at 414, *Abernathy*, 438 F. Supp. 3d 1062 (No. 19-cv-07545), ECF No. 157-5.

[478] Motion for a Temporary Restraining Order at 7, Abernathy v. DoorDash, Inc., No. 19- cv-07545 (N.D. Cal. Nov. 17, 2019), ECF No. 10 (noting that DoorDash "began imposing a new arbitration agreement . . . provid[ing] for arbitration governed by" CPR rules a mere three days after the CPR issued its new protocols); *see, e.g.*, Press Release, Int'l Inst. for Conflict Prevention & Resol., CPR Launches New Mass Claims Protocol and Procedure (Nov. 6, 2019), https://perma.cc/2DSS-B5BV.

[479] Alison Frankel, *The Problem with Outsourcing Justice to Mass Arbitration Services*, Reuters (Feb. 27, 2020, 5:21 PM) (quoting an email from CPR vice president Helena Erickson), https://perma.cc/E94Q-QXGL.

[480] McGrath v. DoorDash, Inc., No. 19-cv-05279, 2020 WL 6526129, at *9-11 (N.D. Cal. Nov. 5, 2020) (noting, however, that "Gibson Dunn's involvement in the development of the [protocols] may raise some concern").

[481] Frankel, *supra* note 479 (quoting a CPR statement). More recently, the CPR created an "employment-related mass claims task force" comprised of attorneys from various plaintiffs' and defense firms "in an effort to continue to improve its procedures." *See Employment-Related Mass Claims Task Force*, Int'l Inst. for Conflict Prevention & Resol. (capitalization altered), https://perma.cc/7C93-26MZ (archived May 19, 2022). In 2021 DoorDash changed its arbitral forum once again, this time selecting ADR Services. *See Terms and Conditions—United States: DoorDash Consumers* ¶ 12(c), DoorDash, https://perma.cc/2NQZ-Z4FK (archived May 19, 2022) (to locate, select "View the live page"); *Terms of Service—United States: DoorDash Merchants* ¶ 13.2, DoorDash, https://perma.cc/4RUC-G57T (archived May 19, 2022) (to locate, select "View the live page"). For more on ADR Services, see *About ADR Services, Inc.*, ADR Servs., Inc., https://perma.cc/76CS-AZWJ (archived May 19, 2022).

[482] Complaint, *supra* note 238, ¶¶ 1-2, 6; Oberstein v. Live Nation Ent., Inc., No. 20-cv- 03888, 2021 WL 4772885, at *1 (C.D. Cal. Sept. 20, 2021), *appeal filed*, No. 21-56200 (9th Cir. Oct. 29, 2021); *see also supra* note 448.

[483] *See, e.g.*, Press Release, New Era ADR, *supra* note 443.

pay attorney's fees, not to mention the $300 New Era filing fee.[484]

In the short term, these sorts of revisions are unlikely to meet with much resistance. Arbitral fora are businesses, after all, and corporations can decide which organizations get their business. Market pressure may lead smaller outfits to develop defendant-friendly protocols,[485] but defendants are free to forum shop so long as everything seems "fair and impartial."[486]

Long term, though, there may be limits to how far defendants can go in revising their agreements to select new and friendly fora. Revisions that provide for unfair procedures or specify a forum with unfair procedures (or both)[487] may collide with state unconscionability and effective-vindication limitations. Indeed, these sorts of revisions would look like the arbitration provisions defendants tried in the days before "friendly" agreements and *Concepcion*.[488] Contracts that specify wholly defendant-created arbitration procedures are not contracts for alternative dispute resolution permitted by the FAA; they are contracts designed to ensure defendant-friendly outcomes and eliminate claims.

But drawing the line is challenging. Defendants are smart, and they are unlikely to embrace blatantly unfair provisions or fora. This is true not just because unfair revisions could meet with resistance in the courts, but also because subtler and more effective revisions are possible. Consider a revision providing for an arbitral forum that is functionally incapable of processing more than a few claims each year. Perhaps this revision would fail (say, for contractual impossibility[489]). But it is ostensibly neutral, and there is always the risk that courts will be unwilling to peek behind the curtain.

That said, some revisions push dispute resolution beyond the traditional bounds of arbitration more clearly than others. The Supreme Court, for

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[484] Ticketmaster 2022 Terms, *supra* note 448, ¶ 17.

[485] *See, e.g.*, *supra* notes 475-79 and accompanying text.

[486] *See* McGrath v. DoorDash, Inc., No. 19-cv-05279, 2020 WL 6526129, at *9-11 (N.D. Cal. Nov. 5, 2020). Of course, "fair and impartial" does not mean "as neutral or claimant friendly as established outfits like JAMS and the AAA."

[487] *Cf.* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 Va. L. Rev. 129, 132-35 (2015) (describing the dangers of corporate "settlement mills," which "private parties may exclusively design, operate, and . . . oversee").

[488] *See supra* notes 176-77 and accompanying text.

[489] *See* 9 U.S.C. § 2 (noting that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

example, has defined arbitration to involve bilateral proceedings;[490] revisions related to fees would likely be acceptable under this definition, but revisions involving batching could be suspect. Although the Court has not fully examined the FAA's outer limits,[491] it has made clear that the Act has boundaries[492] and that its terms have independent meaning.[493]

For decades, private parties' authority to select arbitration has been premised on the idea that the FAA "places arbitration agreements on equal footing with all other contracts."[494] But it is difficult to put arbitration agreements on equal footing if "arbitration" is meaningless. Could a process that indefinitely drags out the resolution of claims be fairly described as "arbitration"? What about a process that only adjudicates bellwether claims, five at a time, until the claimants agree to a global deal? The selection of a forum that, as a functional matter, can only hear one or two claims yearly? Mass arbitration's future hinges in no small part on these fundamental questions of statutory interpretation.

The same is true of mass arbitration's potential to upend the class-action counterrevolution. From a defendant's perspective, a class action may well be preferable to a mass arbitration—but nothing would be more preferable than a private dispute-resolution system of the defendant's own design. If courts allow "adjudication by defendant" or permit dispute resolution that looks nothing like traditional arbitration, then mass arbitration will have made consumers and employees better off in the short term, but worse off in the long term.

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[490] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347-48 (2011); Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 238-39 (2013); *see also supra* notes 81-89 and accompanying text.

[491] *See, e.g.*, Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014) (finding unconscionable an arbitration agreement that, inter alia, gave the defendant "near-unfettered" control over arbitrator selection and required claimants to pay a filing fee of $2,600), *cert. granted*, 136 S. Ct. 27 (2015), *and cert. dismissed*, 136 S. Ct. 1539 (2016).

[492] *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 578-81, 585-88 (2008) (holding that a contract for de novo review of arbitral decisions was foreclosed by the FAA, which provides the terms for judicial review of arbitration).

[493] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 536, 538-41, 543-44 (2019) (holding that the term "employment" in the FAA has a historical meaning separate from and unalterable by private contracts).

[494] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

V. CASE-STUDY FINDINGS AND LIMITATIONS

A. Mass-Arbitration Taxonomy

The previous Parts uncovered and distilled the principal features of the mass-arbitration model and revealed what the future of the model may look like. This Subpart synthesizes the Article's findings and develops the first working taxonomy of the mass-arbitration model. It also situates mass arbitration—as a distinct model of aggregate dispute resolution—within the broader landscape of complex procedure.

Table 1 below taxonomizes what I term "Mass Arbitration 1.0," which is the mass-arbitration model as it originated (and still exists for thousands of claims). It also taxonomizes what I term "Mass Arbitration 2.0 (Projected)," which draws from the findings in this study to predict the future of mass arbitration. Table 1 presents these two models alongside the two most established forms of aggregate dispute resolution: class action and MDL consolidation.

	Mass Arbitration 1.0	Mass Arbitration 2.0 (Projected)	Class Action	MDL Consolidation
Procedural Posture	Dismissal of antecedent class action; motion to compel arbitration	Antecedent class actions possible (DirecTV, Ticketmaster); direct filings	Class complaint filed	JPML transfer to MDL judge
Creation of the "Mass"	Attorneys retain all individuals as clients	Attorneys retain all individuals as clients	Class definition in class complaint	Consolidation for pretrial proceedings (28 U.S.C. § 1407)
Review of the "Mass"	Sufficiency of demands determined by arbitrator	Filing threat alone in some cases; in others, sufficiency of demands determined by (potentially) new arbitrators in new contracts	Class certification analysis under Rule 23(a), (b), (c)(4)	Motions to dismiss; motions for summary judgment; settlement eligibility criteria
Claim-Value Threshold	Minimum: High hundreds to > $2,000	Likely minimum: ~$1,000 to ~$3,000	Minimum: Low ($20 for Fitbit) or individually unmarketable	Low range or individually marketable
Claim Filing	Individual demand and high filing fee	Individual demand and group arbitration fee; fee schedules	Single class complaint and low (or waived) filing fee	Individual complaints to start; master complaint in MDL
Claim Management	Significant: Ethical rules regarding individual representation (intake/outflow)	Significant: Ethical rules regarding individual representation (intake/outflow)	Minimal: Absent class members do not need to (or do not) participate	Minimal: Cases stayed pending consolidated pretrial proceedings

Table 1 Aggregate Dispute Resolution Taxonomy

	Mass Arbitration 1.0	Mass Arbitration 2.0 (Projected)	Class Action	MDL Consolidation
Claim Litigation	Individual proceedings	Individual proceedings; possible batches with test-case sets	Common question of law and fact determined on class-wide basis	Consolidated pretrial proceedings; handful of bellwether trials
Settlement Leverage (Global)	Claimant mass; statutory remedial schemes; leveraging of significant up-front fees and arbitration fees; transaction-cost imposition (or threat thereof)	Claimant mass; statutory remedial schemes; "slam-dunk" claims; leveraging of nonwaivable arbitration fees and costs	Claimant mass; certification of class; publicity (maybe)	Consolidated mass; managerial judging; publicity (maybe)
Settlement Structure (Global)	Similar to mass-tort grids	Potential for lowball settlements and reverse auctions with defendants' potential class-action optionality	Settlement grids	Settlement grids or mass-tort grids
Settlement Distribution (Global)	Individual; contractually imposed procedural hurdles; administration by counsel and counsel-hired settlement administrator	Individual; contractually imposed procedural hurdles; administration by counsel and counsel-hired settlement administrator	Class-wide notice (cost shared); court-appointed (typically) settlement administrator	Settlement notice (cost shared); court-appointed (typically) settlement administrator
Settlement Review (Global)	Little to no judicial review; Model Rule 1.8	Little to no judicial review; Model Rule 1.8	Rule 23(e); judge as class fiduciary; appeal	Quasi–class-action authority; judge as fiduciary; applicable ethical rules
Forum Rules	Arbitral forum's rules, except as amended by contract or allowed under the FAA	Forum rules developed with (potentially significant) defendant input or by defendant's design in contract	Federal Rules of Civil Procedure or state equivalent	Federal Rules of Civil Procedure
Firm Profile	Well capitalized (or sacrificial); entrepreneurial; risk seeking	Well established, big firms; more repeat players	Class counsel dominated by repeat players	Plaintiffs' steering committee dominated by repeat players

B. Study Limitations

This Subpart briefly discusses the limitations of the Article's study. Two limitations in particular are worth noting. First, mass arbitration is a rapidly evolving phenomenon. Although this study captures the mass-arbitration model at a critical moment in time, it is still only a single moment; future developments will require future investigation. Second, the private nature of arbitration means that the study does not cover the full universe of arbitration demands. Some information is, and will remain, unobtainable.[495]

These limitations shed light on several important points. Three bear emphasis here. One, because some mass arbitrations do not appear in any arbitral records, the precise size and scope of mass arbitration is a somewhat open question. The arbitration market is comprised of both institutional and ad hoc fora, and moves to ad hoc organizations will undoubtedly increase in the coming years.[496] Together, the ad hoc market and the rise in direct-toarbitration filings (as opposed to filings that follow a class or collective action) mean that some mass arbitrations will proceed entirely in secret—if they do not do so already.

Two, with the exception of confirmed arbitration decisions,[497] it is an open question whether (and how far) a given arbitral demand proceeded.[498] Relatedly, it is an open question for a given demand what (if anything) was litigated and what (if anything) was decided.

Three, because arbitrator decisions on fees are confidential, it is not entirely clear to what extent claimants, defendants, or both were granted fee waivers. Many of the claimants in this investigation were eligible for fee waivers—particularly for economic hardship—but information regarding which claimants obtained those waivers is not available. Therefore, it is impossible to pin down with precision the exact fee burdens in a given mass arbitration.

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[495] *See, e.g.*, Estlund, *supra* note 38, at 684-86; Resnik, supra note 256, at 799.

[496] *See supra* Part IV.C.3.

[497] *See, e.g.*, Simpson v. Peloton Interactive, Inc., No. 20-cv-07630, 2021 U.S. Dist. LEXIS 125416, at *1-3, *6-8 (S.D.N.Y. July 2, 2021).

[498] I have, however, been able to uncover general data on this "known unknown." In the gig-economy mass arbitrations, proceedings have occurred to some degree in over 100 cases per defendant (close to 1,000 cases total). In the Amazon mass arbitration, hundreds of demands have proceeded in some manner in the arbitral forum.

The above limitations and the points that they raise would be (and are) present in any study of arbitration.[499] Indeed, these shortcomings and issues stem from features, not bugs, of the arbitration model. Arbitral proceedings and decisions are confidential. Settlements are confidential, and defendants threaten to deny payouts to individuals who discuss them. Defendants have even attempted to make legal rights confidential by threatening to deny payouts to individuals who mention those rights to others. Many individuals do not understand the nature of their legal rights. Many defendants use arbitration to keep it that way.

C. Study Takeaways

The discussion above reveals that mass arbitration is a new and distinct model of dispute resolution. But it is more than that: It is also the first (and only) meaningful response to the arbitration revolution and the class-action counterrevolution. In its current form, however, mass arbitration's half-life may be short. Defendants—especially sophisticated, nimble, well-resourced ones—are already adapting in ways that suggest Mass Arbitration 1.0 is not long for this world. Importantly, though, defendants are not adapting by abandoning arbitration. Instead, it seems like defendants are leaning into a renewed campaign to "take back the revolution."[500] If webinars, continuing legal education (CLE) programs, conferences, podcasts, and the like are any indication, all parties are seeking to adjust to the new landscape—of which mass arbitration will certainly be a part.[501]

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[499] For another arbitration case study discussing similar limitations, see Horton & Chandrasekher, *supra* note 33, at 476-78.

[500] *See, e.g.*, *supra* note 164 and accompanying text (describing efforts by the Chamber of Commerce to oppose the FAIR Act); *supra* notes 475-84 and accompanying text (noting that DoorDash and Ticketmaster were able to change arbitral fora to their advantage).

[501] *See, e.g.*, *Mitigating Mass Arbitration: Revising Arbitration Clauses and Rethinking Defense Strategies*, Strafford, https://perma.cc/FF64-33EN (archived May 19, 2022); *CLE Speaker Series: Arbitration 360—What Companies Need to Know About International, Domestic and Consumer Mass Arbitration*, Cooley, https://perma.cc/93K6-JEG2 (archived Aug. 18, 2022); *The New Mass Arbitration: Just Deserts or Just Another Abuse?*, Federalist Soc'y, https://perma.cc/CUP7-HKCN (archived Aug. 26, 2022) (featuring the Author, Brian Fitzpatrick, and Daniel Fisher); *Miami Law Class Action & Complex Litigation Forum*, Univ. Mia. Sch. L., https://perma.cc/3UYM-NPJ7 (archived May 19, 2022) (featuring a panel on arbitration comprised of the Author, Judge Roy Altman, Rachel Furst, Lawrence Silverman, and Tal Lifshitz); Consumer Fin. Monitor, *A Deep Dive into Mass Arbitration: Part II*, Ballard Spahr (Feb. 24, 2022), https://perma.cc/ 47PL-6YBG (featuring the Author and Alan Kaplinsky); *Program Details: What Does the Future Hold for Mass Arbitration?*, W. LegalEdcenter, https://perma.cc/4JJZ-49HR (archived May 19, 2021) (featuring a lecture by the Author hosted by Celesq AttorneysEd Center).

That said, it is possible that mass arbitration will eventually be its own undoing. Whether this is for ill or for good depends on the form that the undoing takes. On the one hand, mass arbitration could help create an even bleaker civil justice landscape for large swaths of the American public. This is possible if the defense coalition manages to (1) prevent the passage of broad reform bills like the FAIR Act (rather likely as things stand now[502]); and (2) convince courts, especially the Supreme Court, to bless new, draconian arbitration agreements (less likely, but not inconceivable[503]).

On the other hand, mass arbitration could catalyze much-needed reform. Mass arbitration has challenged both the arbitration revolution and the classaction counterrevolution, and in doing so it has helped to make civil justice work again—especially for the most disadvantaged members of our society. Indeed, the movement has already started a counter-counterrevolution: Corporate giants like Amazon have fled arbitration,[504] and others will likely follow if mass arbitration persists. And unlike the arbitration revolution, which barely registered outside of academic circles,[505] mass arbitration has captured significant national attention.[506] Accordingly, public pressure for reform has never been greater. If mass arbitration continues on its current path, its greatest trick may not just be to upend the defense coalition's push toward arbitration, but to reverse it.

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[502] *See, e.g.*, LaSusa, *supra* note 166.

[503] *See supra* Part IV.C.3.

[504] *See supra* notes 34-35 and accompanying text.

[505] In October 2015, the *New York Times* published an article entitled "Arbitration Everywhere, Stacking the Deck of Justice." *See* Jessica Silver-Greenberg & Robert Gebeloff, A*rbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), https://perma.cc/BS9P-7XWL. By that time, the Supreme Court had already decided *Stolt-Nielsen, Concepcion*, and *Italian Colors*. Myriam Gilles and Jean Sternlight's pathbreaking articles, which sounded the alarm about mandatory arbitration agreements, had been in print for around a decade. *See generally* Gilles, *supra* note 47 (describing how class-action waivers in arbitration agreements pose a threat to the availability of mass relief); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631 (2005) (discussing the proliferation of mandatory arbitration agreements and arguing that mandatory arbitration is unjust). Even if the public had wanted to do something about the arbitration revolution at that point—and that is assuming a single article in the *New York Times* would have been sufficient to inform and galvanize them—it was too late.

[506] *See, e.g.*, Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, Consumer Reps. (Aug. 13, 2021), https://perma.cc/ SMT3-KQQB (featuring this Article's study); Alison Frankel, *Postmates Brings Mass Arbitration to SCOTUS, Sort Of*, Reuters (Aug. 2, 2021, 5:02 PM EDT), https://perma.cc/ LNX6-W5UH (same); Armstrong & Tobin, supra note 267; Corkery & Silver- Greenberg, *supra* note 34; Randazzo, *supra* note 35.

VI. APPLICATIONS, EXPANSIONS, AND IMPLICATIONS

Mass arbitration is a transformational phenomenon in civil justice. Following the arbitration revolution and the class-action counterrevolution, defendants had two clear options: either litigate a class action in court (quite undesirable) or use arbitration agreements with class-action waivers to virtually eliminate claims (the obvious choice). With the advent of mass arbitration, however, the calculus changed: Defendants could now either litigate a class action in court (quite undesirable) or drown in a sea of arbitration demands (more undesirable still). Faced with this second set of choices, it is no wonder that corporate defendants are seeking refuge in the class-action device. After more than forty years, defendants are on the defensive.

Even if Mass Arbitration 1.0 is fleeting—indeed, even if mass arbitration writ large is somehow fleeting[507]—mass arbitration has already taught us a number of lessons about aggregate dispute resolution and civil justice. This Part explores three. It first examines the civil justice issues laid bare by mass arbitration, particularly those issues concerning access to justice and the resolution of claims on the merits. Next, this Part situates mass arbitration within the larger universe of aggregate dispute resolution. Far from being tethered to the world of arbitration, the mass-arbitration model is relevant across the universe of individual adjudication. This includes areas of dispute resolution that defendants cannot unilaterally change. The Part concludes by discussing, in the context of mass arbitration, a central critique of our civil justice system: that its fundamental commitments have been abandoned through outsourcing to moneyed corporate interests.

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[507] As of this writing, mass arbitration, while still rare, appears to be growing—and of growing concern to defendants. *See, e.g.*, *supra* note 501 (listing numerous CLE offerings, podcasts, and conferences devoted to the rise of mass arbitration in civil justice); *supra* note 250 (discussing Labaton Sucharow's targeted outreach to potential mass-arbitration clients); Margaret M. Clark, *Mass Arbitration Strains Employers*, SHRM: HR Mag. (Nov. 22, 2021), https://perma.cc/UYR6-HQZF; Charles Balmain, Matthew Devine, Sonja Hoffmann & Sheldon Philp, *Class and Group Actions Laws and Regulations: Developments and Trends in Collective Actions* 2022, ICLG.com (Aug. 11, 2021), https://perma.cc/H4KV-5R65 (describing mass arbitration as a new development with which defendants must cope); Alison Frankel, *Lieff Cabraser's Gambit: Contacting Potential 9,100 Clients Despite Protective Order*, Reuters (Jan. 13, 2022, 2:03 PM PST), https://perma.cc/8XS3-4YZ8 (discussing Lieff Cabraser's continued outreach efforts in the potential DirecTV mass arbitration).

A. Claim Facilitation and Merits-Based Claim Resolution

Mass arbitration reveals profound shortcomings in the aggregate dispute resolution landscape. To be sure, it is laudable that many mass-arbitration claimants have recovered close to their actual damages. And the fact that claimants were able to achieve these outcomes through private procedural innovation speaks to the value of adversarialism in civil justice.[508] Yet these results are also lamentable, at least to the extent they stem from in terrorem settlement pressure imposed by mass-arbitration fee leveraging.

If we care about poetic justice in aggregate dispute resolution, mass arbitration fits the bill. If we care about settlement outcomes driven by the merits of claims, mass arbitration is also acceptable (although somewhat by happenstance). But if we care about a functional infrastructure designed to vindicate meritorious but low-value claims, mass arbitration shows that no such infrastructure exists—at least not judicially.

Mass arbitration is, in large part, a response to the Supreme Court's destruction of that infrastructure.[509] The mass-arbitration model operates on its ability to impose significant in terrorem settlement pressure; without the class action or other means of aggregate dispute resolution, this pressure is necessary to access any sort of justice. So far, many mass-arbitration claims have proved meritorious and been successful. Absent mass arbitration, these claims may not have received awards anywhere close to actual damages—or may not have been heard in the first place. In other words, mass arbitration may well impose in terrorem settlement pressure. But that is because corporations left mass-arbitration claimants, many of whom are frontline workers, with no alternative but to upend the contractual provisions that eliminated their claims.

That individuals with meritorious but low-value claims have so little access to justice (to say nothing about access to systems capable of ensuring adequate recovery) is as unfortunate as it is unsurprising. The civil justice system has

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[508] *See generally* Robert A. Kagan, Adversarial Legalism: The American Way of Law (2d ed. 2019) (discussing the virtues of adversarial legalism and describing how it can empower citizens to challenge unlawful conduct).

[509] *See supra* Part I; *see also, e.g.*, Glover, *supra* note 15, at 1160-75 (detailing various efforts to curtail mechanisms of private enforcement); Burbank & Farhang, supra note 15, at 62-64 ("We anticipate that the Court will continue as the institutional leader in the project to retrench private enforcement in the near future . . . .").

been under concerted attack for over forty years. Corporate interests have waged a methodical and relentless campaign to characterize small claims as frivolous and eliminate them. Many of the claims in mass arbitration, though, are not frivolous. They are claims by some of the most vulnerable members of our society, brought against the corporations that exploited them secure in the knowledge that there was no real way to fight back. Enterprising lawyers identified a glitch in the matrix, and mass arbitration was born.

Properly understood and properly contextualized, mass arbitration does not create civil justice problems so much as it exposes them.

B. Informal Aggregate Dispute Resolution

Mass arbitration is both a new mode of dispute resolution and a new method of individualized aggregate claiming. Although the mass-arbitration model owes its origins to the world of arbitration created by the arbitration revolution, it is hardly constrained by that world. As such, this Subpart examines mass arbitration in other contexts.

Commentators have long offered accounts of lawyers, organizers, and corporations privately aggregating claims to achieve economies of scale. Samuel Issacharoff and John Fabian Witt, for instance, have noted that translators historically acted as intermediaries for groups of workers with claims against their employers.[510] Nora Freeman Engstrom has shown that some personal-injury firms ("settlement mills") collect and file automobile claims in high volume.[511] And on the defense side, Dana Remus and Adam Zimmerman have detailed how corporations informally aggregate claims in their own high-volume settlement operations.[512]

Each of the above investigations reveals a model of aggregate dispute resolution distinct from the formal mechanisms for mass claiming (like the class action or the MDL consolidation). Each also reveals that the traditional "poles" of litigation—individual on the one hand, formally aggregated on the other—are

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[510] Issacharoff & Witt, *supra* note 175, at 1631 (listing "translators in immigrant factory communities" as a "historical example[] of aggregation").

[511] Nora Freeman Engstrom, *Sunlight and Settlement Mills, 86* N.Y.U. L. Rev. 805, 816-23 (2011).

[512] Remus & Zimmerman, *supra* note 487, at 136-37.

somewhat mythical.[513] The world of mass litigation is more of a spectrum, with various models designed to aggregate claims using a mix of public and private tools. Mass arbitration is simply a new addition to that spectrum.

Mass arbitration is at once individualized (it centers around one-on-one arbitration) and collective (it relies on venture capital, technology, firm expertise, and mass claiming to enable and resolve disputes). As such, mass arbitration can be situated alongside the informal modes of aggregation described above. Although detailed comparisons among these modes are necessarily the subject of other work,[514] a few important distinctions are worth noting here. Unlike the informal aggregation process described by Issacharoff and Witt, mass arbitration involves the formal representation of claimants by firms. And while mass arbitration involves individual claims against a single defendant for a common course of conduct, Engstrom's "settlement mills" principally deal with individual claims arising out of different events and against different drivers—even if insurers are present as repeat players.

Situating mass arbitration on the spectrum of informal aggregation illuminates the model's importance in the civil justice landscape. One could imagine a similar model in small-claims court, with claimants' attorneys formally out of view but functionally performing the same role as massarbitration attorneys. One could also imagine a similar model for common disputes before administrative agencies.[515] It is also conceivable that key elements of the mass-arbitration model could be used for claims that cannot be certified in a class or consolidated for pretrial proceedings under 28 U.S.C. § 1407.[516] And a mass-arbitration–type model (albeit a flipped one) is already emerging outside of arbitration: Corporate plaintiffs are filing thousands of small-dollar claims against unrepresented individuals in state courts.[517]

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[513] Accord, e.g., Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Compar. & Int'l L. 179, 181-82, 189-91 (2001).

[514] *See* J. Maria Glover, Informal Aggregation (unpublished manuscript) (on file with author).

[515] *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1658-63 (2017) (noting that very few agencies formally aggregate claims).

[516] See, e.g., J. Maria Glover, *Mass Litigation Governance in the Post–Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. Tort L. 3, 9 (2012); Zachary D. Clopton & D. Theodore Rave, MDL *in the States*, 115 Nw. U. L. Rev. 1649, 1702-03, 1713 (2021).

[517] *See* Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704, 1707-09 (2022).

To be sure, mass arbitration's effects on the aggregate dispute resolution landscape are still unclear.[518] It is unlikely, though, that the pre–arbitration revolution or the post–*Italian Colors* status quos will be restored. Instead, the mass-arbitration model (or some structural analogue) will likely remain a distinct option for aggregate dispute resolution going forward. In this new status quo, defendants will not be able to eliminate low-value claims arising from aggregate harm.[519] They will instead have to resolve at least a subset of those claims through informal aggregate models—models that will look a lot like mass arbitration.

C. Mass Arbitration and the Civil Justice System

Mass arbitration is not just a distinct form of dispute resolution; it is a potentially preferable form of dispute resolution for both consumers and employees. This is true for at least three reasons. One, mass-arbitration settlement payouts have tended to be higher than settlement payouts in parallel class actions.[520] Two, mass arbitration is often more efficient. Well-capitalized arbitral fora have greater resources with which to effectively resolve claims than their judicial counterparts; what is a Roach Motel in an MDL consolidation[521] could be a relatively short stay in a mass arbitration. Three, mass arbitration provides more opportunities for participation and attorney interaction.[522] (Nothing approaching the level of participation in one-on-one litigation, of course, but certainly greater than the level of participation typical in a class action.)

But even if mass arbitration were always preferable, it would not (and could not) be a panacea for the class-action counterrevolution. In its current form, there are some claims that mass arbitration simply cannot reach. For one, a

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[518] This lack of clarity stems in large part from mass arbitration's uncertain future. *See supra* Part IV.

[519] *See generally* D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 Ga. L. Rev. 475 (2016) (describing how class-action waivers, whether ex ante or ex post, can leave claimants with no chance to vindicate their substantive rights).

[520] *See supra* Part III.C.4.

[521] *See In re* TJX Cos. Retail Sec. Breach Litig., 584 F. Supp. 2d 395, 405 n.16 (D. Mass. 2008) (borrowing Issacharoff 's comparison of an MDL to a Roach Motel: Cases "check in— but they don't check out" (quoting a Roach Motel ad)).

[522] *See generally, e.g.*, Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. Rev. 1011 (2010) (discussing the importance of participation in the broader context of procedural rights).

number of meritorious claims will still cost more to litigate than their individual values. The threshold value for claim marketability is higher in a mass arbitration than it is in a class action,[523] and that value will tend to increase as mass arbitration adapts to the defense bar's counteroffensives. For another, to the extent that mass arbitration can facilitate claims, it facilitates those that benefit from aggregation as an economic matter. Claims that stem from discrimination, sexual harassment, sexual assault, and other civil rights violations depend on aggregation to obtain company-wide data or class-wide proof. As I explore in other work,[524] mass arbitration generally cannot help these claims.[525]

Further, that the mass-arbitration model is potentially preferable for consumers and employees does not mean that mass arbitration is preferable from a regulatory standpoint. Although mass arbitration can help patch the holes of a regulatory apparatus damaged by decades of procedural warfare, mass arbitrations are still smaller than class actions. This size difference (as measured by the total number of claimants) is likely a feature of the massarbitration model: Mass arbitration's ability to grow is constrained by the expense of arbitral proceedings, the necessity of up-front production, the challenge of filing individual demands, and a host of ethical constraints regarding representation. As such, mass arbitrations may not hold the same promise as class actions for achieving deterrence and changing defendant behavior.[526] And at least to the extent mass arbitration continues to occur in arbitration, the private, secretive nature of arbitral proceedings means less public precedent, less publicity, less public outcry, and less pressure on defendants to abandon harmful practices.

In sum, mass arbitration cannot restore all the claims eliminated by the

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[523] *See supr*a Part III.C.3.

[524] *See* J. Maria Glover, Disaggregated Proof, Dismantled Rights (unpublished manuscript) (on file with author).

[525] This is true because, as a general matter, the whole of the evidence gathered across individual cases is not greater than the sum of its parts. Consider employmentdiscrimination cases, which typically require proof of a pattern or practice of discrimination. *See, e.g.*, Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1105-06 (10th Cir. 2001) (distinguishing aggregate "pattern-or-practice" cases from cases "involving one or more claims of individualized discrimination"). The data generated in each case is distorted because there is no company-wide view, and limitations on obtaining company-wide data (such as cost) could mean that no such data is available to any claimant. It is hard to prove a pattern or practice using only a single perspective.

[526] *See* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, in The Class Action Effect 181, 194-95 (Catherine Piché ed., 2018) ("[T]he theory of general deterrence is sound. We still have every reason to think that lawsuits—including class action lawsuits—deter corporate misconduct.").

arbitration revolution and the class-action counterrevolution. But it can restore some of those claims, and it can do so to the claimants' advantage. A happy ending, at least in part? Not quite. Corporate defendants are in the claim-elimination business, and to the extent that mass arbitration interferes with claim elimination, defendants will take their procedural war machine elsewhere. Amazon may be a harbinger of what is to come.[527]

Some might say that mass arbitration is merely the latest and most consequential offensive in an otherwise moribund theater of procedural warfare. And they are right, to a degree. But mass arbitration is much more than that. It is also a phenomenon that sheds a harsh light on the sad state of American civil justice. Our current system has become, at Congress and the Supreme Court's behest, the product of (and the battlefield for) a mutually destructive private procedural arms race. It is a system that is increasingly indifferent to systemic injustices faced by minorities, women, the working poor, and other marginalized groups—injustices created and perpetuated by that arms race. A system that destroyed its infrastructure for vindicating meritorious claims, only to criticize the in terrorem settlement pressure that necessarily arose in the vacuum. A system that refuses to distinguish between low-value claims that matter to real people and claims that matter only to attorneys, thereby abrogating its responsibility to hear the former and push out the latter. A system that shirks its constitutional countermajoritarian commitments[528] and outsources the allocation of justice to the moneyed corporate majority.

What can be done? Discussions of procedural reform often incorporate both

[527] *See supra* note 35 and accompanying text.

[528] *See, e.g.*, Martin H. Redish & Matthew Heins, *Premodern Constitutionalism*, 57 Wm. & Mary L. Rev. 1825, 1834-35 (2016).

public and private procedural ordering,[529] but that combination offers little purchase here. For more than forty years, public procedural ordering produced nothing that could meaningfully counterbalance the arbitration revolution or the class-action counterrevolution. Instead, it was the private response to those movements that harnessed the economic potential in defendants' arbitration agreements. That response stopped the arbitration revolution in its tracks, and it seems to be our best hope going forward—at least until the wind changes.

But civil justice—and almost coterminously, social justice—that is so deeply dependent on shifts in the political and economic winds is likely to be little justice at all.

CONCLUSION

This Article is the first to study mass arbitration, which has upended the defense bar's forty-year campaign to eliminate claims through forced arbitration and class-action waivers. Whatever mass arbitration's future, that is quite a lot for a day's work. But mass arbitration is more than a response to the arbitration revolution and the class-action counterrevolution. Mass arbitration has vital implications for broad questions about aggregate dispute resolution, the regulatory apparatus for low-value claims in the United States, and for civil justice—its conceptions, its ideals, and its failures. And our own.

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[529] *See, e.g.*, Dodge, *supra* note 45, at 724-31; Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1073-78 (1984) (criticizing both public and private efforts to encourage settlement); Resnik, *supra* note 75, at 2806-17; Remus & Zimmerman, *supra* note 487, at 134-35 ("Corporate settlement mills thus raise the question of how far policymakers should be permitted to go to privatize our public . . . process of adjudication."); Engstrom, *supra* note 511, at 829-33. Some commentators have argued that public procedural ordering is at least more democratically legitimate. *See, e.g.*, Glover, *supra* note 75, at 3076-83; Richard A. Nagareda, *The Litigation–Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1077 (2011) ("The central argument against class waivers is they purport to do something that public legislation may do but that private contracts may not . . . ."); *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 172-75 (2006); Nagareda, *supra* note 132, at 1902; David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 646 (2020); David L. Noll & Luke Norris, Federal Rules of Private Enforcement 1 (unpublished manuscript) (on file with author) (deriving its title from Glover, *supra* note 132). One can debate whether and to what extent public procedural ordering better aligns with democratic values. But even if public procedural ordering offers greater democratic legitimacy than private procedural ordering, it is unclear what functional good that legitimacy has done for the scores of claimants whose rights were erased by the defense coalition.

APPENDIX

Table 2 summarizes the mass arbitrations included in this Article's study. The study took place from January 2019 to December 2021; the data below is from that time period unless otherwise noted. For purposes of Table 2, I estimated up-front fee obligations based on the best available data (estimate disclosures in public filings, agreement terms, fee schedules for arbitral fora, and so on).[530]

Table 2
Mass Arbitrations
Table 2 begins on the following page.

[530] It is worth noting that arbitrators have some discretion to adjust fee assessments.

Mass Arbitration	Principal Claims	Underlying Law	Lead Plaintiffs' Counsel	Defense Counsel	Demands Filed, Inventory	Damages Available	Up-front Fees: Defendants	Up-front Fees: Plaintiffs	Arbitral Forum	Prior Class Action?
Amazon	Privacy action based on Amazon Alexa devices secretly recording minors	California Invasion of Privacy Act	Keller Lenkner	Fenwick & West	~75,000 filed	Statutory damages of $100 to $750 per violation	~$127 million	$15 million	AAA	No
CenturyLink	Consumer action based on fraudulent CenturyLink billing practices	Various consumer-fraud statutes	Keller Lenkner	Cooley	~1,000 filed, ~20,000 inventory	All legal and equitable remedies allowed by law	~$1.5 million to ~$30 million	~$200,000 to ~$4 million	AAA	Yes
Chegg	Breach of consumer data	California Civil Code section 1798.80 et seq.	Z Law	Orrick	~15,000 filed	Actual, compensatory, and punitive damages, attorney's fees	~$7.5 million (used to be $56 million)	~$3,021,400	AAA	Yes
Chipotle	Wage-theft action based on unpaid overtime	Fair Labor Standards Act, Colorado labor law	Kent Williams, Williams Law Group	Messner Reeves	~150 filed, ~3,000 inventory	Restitution (back pay), liquidated damages, pre-judgement interest, attorney's fees	~$260,000 to ~$5 million	~$60,000 to ~$1.125 million	JAMS	Yes

Mass Arbitration	Principal Claims	Underlying Law	Lead Plaintiffs' Counsel	Defense Counsel	Demands Filed, Inventory	Damages Available	Up-front Fees: Defendants	Up-front Fees: Plaintiffs	Arbitral Forum	Prior Class Action?
Dollar Tree (Family Dollar)	Wage theft	Fair Labor Standards Act, state wage-and-hour laws	Keller Lenkner	Hunton Andrews Kurth	~2,000 filed	General damages, pre- and post-judgement interest, attorney's fees, injunctive relief	~$2.5 million	Not enough data to provide an estimate	AAA (though Family Dollar asserted that some demands were for JAMS)	No
DoorDash (consumer)	Consumer-fraud action based on skimming tips	New York General Business Law sections 349 to 350, state consumer-protection statutes	Z Law	Gibson Dunn	Unknown	Actual, compensatory, punitive, and statutory damages, pre-judgement interest, attorney's fees	Unknown	$250 per claim	Unknown	No
DoorDash (employment)	Wage-and-hour action based on classification of employees as independent contractors	Fair Labor Standards Act, California labor law	Keller Lenkner	Gibson Dunn	~6,000 filed	General damages, pre- and post-judgement interest, attorney's fees, injunctive relief	~$12 million	~$1.5 million	AAA, CPR	Yes
DraftKings, FanDuel	Consumer-fraud action, fraudulent advertising	New York General Business Law sections 349 to 350	Keller Lenkner	ZwillGen	~1,000 filed, ~17,000 inventory	Actual and punitive damages, injunctive relief, attorney's fees	~$300,000 to ~$5 million	~$200,000 to ~$3 million	AAA	Yes

Mass Arbitration	Principal Claims	Underlying Law	Lead Plaintiffs' Counsel	Defense Counsel	Demands Filed, Inventory	Damages Available	Up-front Fees: Defendants	Up-front Fees: Plaintiffs	Arbitral Forum	Prior Class Action?
Intuit (TurboTax)	Consumer-fraud action based on advertising that steered consumers to paid tax services	California, New York, and Pennsylvania consumer-protection laws	Keller Lenkner	Wilmer Cutler Pickering Hale and Dorr	~16,000 filed	Nominal, actual, compensatory, consequential, punitive, and statutory damages, pre- and post-judgement interest, attorney's fees	Up to ~$36 million	~$8 million	AAA	Yes
Lyft	Wage-and-hour action based on classification of employees as independent contractors	Fair Labor Standards Act, California labor law	Keller Lenkner	Keker, Van Nest & Peters	~3,500 filed	Declaratory judgement, equitable relief, restitution (back pay), statutory, general, and punitive damages, attorney's fees	~$9 million	~$1 million	AAA	Yes
Peloton	False advertising	New York and Michigan consumer-protection laws (Michigan plaintiffs dropped out July 2021)	DiCello Levitt, Keller Lenkner	Hueston Hennigan, Beys Liston & Mobargha	~2,700 filed	Actual and statutory damages, restitution, injunctive relief, attorney's fees, pre- and post-judgement interest	~$2.1 million	Unknown	JAMS	No, but class action followed demands

Mass Arbitration	Principal Claims	Underlying Law	Lead Plaintiffs' Counsel	Defense Counsel	Demands Filed, Inventory	Damages Available	Up-front Fees: Defendants	Up-front Fees: Plaintiffs	Arbitral Forum	Prior Class Action?
Postmates	Wage-and-hour action based on classification of employees as independent contractors	Fair Labor Standards Act, California labor law	Keller Lenkner	Gibson Dunn	~15,000 filed	General damages, pre- and post-judgement interest, attorney's fees, injunctive relief	Up to ~$20 million	~$100,000	AAA	Yes
Uber (race) (data updated April 2022)	Challenge to Uber's waiver of certain delivery fees in 2020	42 U.S.C. § 1981 et seq., Unruh Civil Rights Act	Consovoy McCarthy	Kaplan Hecker & Fink	~31,000 filed	Compensatory, punitive, and statutory damages (of $4,000 per violation)	~$91 million	Unknown	AAA	No
Uber (employment)	Wage-and-hour action based on classification of employees as independent contractors	Fair Labor Standards Act, California and other state labor laws	Larson	Gibson Dunn	~12,500 filed, ~60,000 inventory	Equitable relief, restitution (back pay), statutory, general, and punitive damages, attorney's fees	~$18 million to ~$90 million	~$5 million to ~$24 million	JAMS	Yes

Mass Arbitration	Principal Claims	Underlying Law	Lead Plaintiffs' Counsel	Defense Counsel	Demands Filed, Inventory	Damages Available	Up-front Fees: Defendants	Up-front Fees: Plaintiffs	Arbitral Forum	Prior Class Action?
Prior Small-Scale Mass Arbitrations										
Prospect Mortgage	Wage theft	Fair Labor Standards Act, state wage-and-hour laws	Nichols Kaster	Seyfarth Shaw	~180 (Aguilera) and ~50 (Aldrich) filed	General damages, pre- and post-judgement interest, attorney's fees, injunctive relief	$396,000	Unknown	AAA or JAMS, depending on agreement	Yes
Undisclosed	Wage theft, overtime, employee classification	Fair Labor Standards Act, California labor law	Nichols Kaster	Unknown	150 filed	Unknown	~$870,000	Unknown	JAMS	Yes
Potential Mass Arbitrations										
Arise (pending release of class list)	Wage theft	Fair Labor Standards Act	Lichten & Liss-Riordan	Tucker Ellis	~70,000 inventory	Liquidated damages (unpaid compensation), attorney's fees	Unknown	Unknown	N/A	N/A
DirecTV (pending release of class list)	Improper disclosure of consumer information	Telephone Consumer Protection Act, Satellite Television Extension and Localism Act	Lieff Cabraser	Mayer Brown	At least ~9,100 inventory	Statutory damages of $500 per violation, trebled if knowing violation	Unknown	Unknown	AAA	Yes

Mass Arbitration	Principal Claims	Underlying Law	Lead Plaintiffs' Counsel	Defense Counsel	Demands Filed, Inventory	Damages Available	Up-front Fees: Defendants	Up-front Fees: Plaintiffs	Arbitral Forum	Prior Class Action?
Ticketmaster, Live Nation (pending release of class list)	Consumer antitrust claims	Sherman Act	Quinn Emanuel, Keller Lenkner	Latham & Watkins	Unknown	Treble and punitive damages, pre- and post-judgement interest, injunctive relief, attorney's fees	Unknown	Unknown	N/A	Yes
Claim-Marketability Failures										
Fitbit	Consumer-fraud action based on incorrect user heart-rate calculations	California Consumer Legal Remedies Act	Lieff Cabraser	Morrison & Foerster	N/A	Disgorgement, restitution for cost of purchase, compensatory, punitive, and statutory damages, injunctive relief, notification as to defect, attorney's fees	N/A	N/A	AAA	Yes

"Keep to the Code": A Global Code of Conduct for Third-Party Funders

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ABSTRACT

Global commercial third-party funding has given rise to wide-ranging regulatory approaches worldwide. Consequently, funders can engage in cross-border regulatory arbitrage by exploiting regulatory gaps within and among nations. This Article argues that the global community of nations should articulate a universal approach to the behavioral expectations of third-party funders operating transnationally, independent of local laws regarding the technical business of funding. It asserts that the key to fostering the ethical development of the third-party funding industry is to develop a globally applicable but locally enforced code of conduct or professional responsibility for the industry. Moreover, a successful regime for funder professional responsibilities should be genuinely transnational, transsubstantive, and forum neutral. The ideal framework should also be clear but not rigid, and comprehensive but customizable. Individual governments, transnational regulatory efforts, and funders creating internal governance codes can then adopt the principles in this framework to achieve global harmonization.

This Article takes three crucial steps toward harmonizing the professional responsibility tenets for the third-party funding industry through a transnational, transsubstantive, and forum-neutral Model Code of Conduct for Third-Party Funders. First, this Article provides a brief overview of several existing approaches to regulating and enforcing third-party funding ethics and professional responsibility globally. Second, this Article distills from these existing approaches universal principles as the starting point for drafting a global Model Code of Conduct for Third-Party Funders in the future. Third, this Article discusses several implementation and enforcement options for such a code, including drawing an analogy to the successful and celebrated New York Convention, which is globally applicable but locally enforced. Finally, this Article concludes by proposing avenues for further inquiry to bring this idea to fruition.

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Me? I'm dishonest, and a dishonest man you can always trust to be dishonest. Honestly. It's the honest ones you want to watch out for, because you can never predict when they're going to do something incredibly stupid.
—Captain Jack Sparrow[1]

INTRODUCTION

There are real pirates in dispute settlement, and they are not always who you think. Unscrupulous investors are running amok in our litigation and arbitration systems globally, and there are enough egregious examples from the United States alone to raise the alarm. For example, federal judges have bought and sold the stock of litigants in the cases they were hearing in violation of the Federal Judicial Code of Conduct.[2] In addition, a winning corporation paid a losing individual claimant to pursue and intentionally lose an appeal to create a precedent against thousands of potential similar litigants.[3] In New York

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[1] Pirates of the Caribbean: The Curse of the Black Pearl (Walt Disney Pictures & Jerry Bruckheimer Films 2003). A video clip of this quotation is available on the internet. *See* RAV-AN maharaj, *Jack Sparrow Says " I am Dishonest,"* YouTube (June 27, 2019), https://youtu.be/pNksCAN9IcA.

[2] *See* Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Federal Judges or Their Brokers Traded Stocks of Litigants During Cases*, Wall St. J. (Oct. 15, 2021, 9:59 AM), https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192 (reporting that 131 federal judges heard cases between 2010 and 2018 that involved companies in which they or their family members owned stock); Code of Conduct for U.S. Judges Canon 3(C)(1) (Jud. Conf. of the U.S. 2019) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge knows that the judge, . . . or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding . . . ."); id. at Canon 3(C)(2) ("A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.").

[3] Dave Simpson, *Bayer Paid Roundup Plaintiff To Appeal Its Own Win, Attys Say*, Law360 (Apr. 22, 2021, 11:30 PM), https://www.law360.com/articles/1378149/bayer-paid-roundup-plaintiff-to-appeal-its-own-win-attys-say.

City, several attorneys, surgeons, and a third-party funder[4] participated in a $31 million fraud scheme involving fake slip-and-fall cases.[5] The scheme exploited poor, homeless, and destitute individuals by giving them meager financial incentives to undergo unnecessary surgeries to "prove" their fraudulent slip-and-fall accidents, then serve as plaintiffs in the cases.[6] In another fraudulent scheme, a surgeon teamed up with a third-party funder of medical claims who misled women into having unnecessary surgeries to remove transvaginal mesh so that the funder could obtain a higher return on investments in those patients' medical device litigation settlements.[7] These incidents came to light in 2021, but there are older examples of problematic third-party funding schemes as well.[8]

Third-party funders have (some say unfairly) been called gamblers, loan sharks, and mercantile adventurers, among other things, so a reference to a pirate movie seems apt.[9] But the plot of the film quoted above emphasizes (in classic Disney fashion) that even pirates, who are famously lawless by definition, have a set of core principles by which they manage themselves: they "keep to

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[4] Some scholars use the term "third-party litigation funding" or "litigation funding" to refer to this same phenomenon. This Article intentionally uses the term "third-party funding"—without the word "litigation"—because this Article addresses funding of both litigation and arbitration, domestically and internationally.

[5] *See* Press Release, U.S. Att'y's Off., S. Dist. of New York, New York Litigation Funder and Fifth Member of $31 Million Dollar Trip-and-Fall Fraud Scheme Arrested and Charged in Manhattan Federal Court (Oct. 20, 2021), https://www.justice.gov/usao-sdny/pr/new-york-litigation-funder-and-fifth-member-31-million-dollar-trip-and-fall-fraud [https://perma.cc /Y3JM-ZTRU]; Alison Frankel, *N. Y. Feds Allege Litigation Funder Horror Story*, Reuters (Oct. 21, 2021, 5:48 PM), https://www.reuters.com/legal/transactional/ny-feds-allege-litigation-funder-horror-story-2021-10-21/.

[6] *See* Frankel, *supra* note 5.

[7] Diana Novak Jones, *Doctor, Surgical Funder Admit to Roles in Transvaginal Mesh Fraud*, Reuters (Sept. 17, 2021, 6:47 PM), https://www.reuters.com/legal/government /doctor-surgical-funder-admit-roles-transvaginal-mesh-fraud-2021-09-17/.

[8] *See, e.g.*, Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc., 162 F. Supp. 2d 448, 450-52 (W.D.N.C. 2001) (indicating that third-party funder problematically designed agreement so plaintiff would only benefit if settlement exceeded $1.2 million, causing her to reject offers that did not reach that amount).

[9] *See* RSM Prod. Corp. v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal to Disqualify Arbitrator, ¶ 42 (Oct. 23, 2014) (Nottingham, Arb.) ("The description of third-party funders as 'mercantile adventurers' and the association with 'gambling' and the 'gambler's Nirvana: Heads I win and Tails I do not lose' are, in Claimant's view, radical in tone and negative and prejudge the question whether a funded claimant will comply with a costs award." (emphasis removed)); Catherine A. Rogers, Ethics in International Arbitration 178 (2014).

the code."[10] As investors in the disputes and businesses of others, third-party funders should also have a set of core principles to govern themselves within and across borders: a code of conduct.

Reputable and conscientious third-party funders with integrity are certainly not pirates. Still, the threat of that disparaging moniker should incentivize funders to obey some guiding principles or code, even if "the code is more what you'd call guidelines than actual rules."[11] In addition, a code of conduct aimed at behavior that looks like third-party funding, broadly defined, could deter "pirates" like those in the horrendous examples mentioned above from engaging in cunning corruption. The code could accomplish this by targeting suspicious, funding-like behavior rather than only official members of the third-party funding industry. Assuming that a code of conduct for third-party funding is desirable, the next question is how to make it viable.

Exploring existing regulatory approaches to third-party funding in other countries is instructive. The past decade of global commercial[12] third-party funding regulation has spurred a "laboratory of nations."[13] The broad spectrum of approaches to regulating third-party funding has demonstrated that it would be undesirable for most nations around the globe to adopt the same legal regime for the procedural and transactional aspects of third-party funding because the approaches are so disparate, ranging from absolute prohibition to judicial and

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[10] *See* Pirates of the Caribbean: The Curse of the Black Pearl, *supra* note 1 (quoting Captain Jack Sparrow). Relevant video clips of this quotation from the movie are interspersed in a derivative work found on the internet. *See* Pirate's Life, *Keep to the Code!*, YouTube (Aug. 31, 2016), https://youtu.be/_fF0owIfNik?t=35.

[11] Pirates of the Caribbean: The Curse of the Black Pearl, *supra* note 1 (quoting Captain Barbossa). For a video clip of this quotation, see Epic Parts of Epic Movies, *The Code Is More Like Guidelines*, YouTube (July 9, 2018), https://www.youtube.com/watch?v=k9ojK 9Q_ARE.

[12] Although the examples above reflect consumer-focused third-party funding arrangements, there is also significant danger in the commercial third-party funding space, which is a separate industry. This Article focuses on commercial, not consumer, third-party funding, although some regulatory efforts referenced in Part II of this Article are aimed at both types. *Cf.* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388, 394 n.22 (2016) [hereinafter Sahani, *Judging*] (distinguishing between consumer and commercial third-party funding but noting that same procedure and evidence rules apply to both types).

[13] This phrase borrows from the classic "laboratory of states" description of how federalism works in the United States. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

legislative silence to regulatory permission.[14]

Meanwhile, the funding industry continues to morph and expand without regard to national borders. For example, funders are becoming multinational corporations by merging with other funders,[15] raising billions of dollars from investors,[16] and simultaneously operating in multiple nations and states.[17] Given the cross-border flow of investor capital, funders may take advantage of the wide-ranging regulatory environments by engaging in regulatory arbitrage—perhaps a form of "piracy"—by exploiting the regulatory gaps within and among nations.[18] This behavior could threaten the integrity of both domestic and international dispute settlement systems. Therefore, as the third-party funding industry is growing exponentially and becoming more widely accepted, the global community of nations should articulate a universal approach to defining

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[14] *See* Lisa Bench Nieuwveld & Victoria Shannon Sahani, Third-Party Funding in International Arbitration 267-68 (2d ed. 2017) (summarizing nations' approaches to third-party funding).

[15] *See*, e.g., Dan Packel, *After Merger, IMF Bentham Rebrands as Omni Bridgeway*, Law.com (Feb. 14, 2020, 1:09 PM), https://www.law.com/americanlawyer/2020/02/14/after-merger-imf-bentham-rebrands-as-omni-bridgeway/ (describing merger of Australian and Dutch funders into rebranded entity with $1.5 billion in capital).

[16] *See, e.g.*, *Burford Capital Raises More than $1 Billion in Three Months with New $350 Million Post-Settlement Investment Fund*, Accesswire (June 13, 2022, 6:30 AM), https://www.accesswire.com/704810/Burford-Capital-Raises-More-than-1-Billion-in-Three-Months-with-New-350-Million-Post-Settlement-Investment-Fund [https://perma.cc/3383-BGKD]; Roy Strom, *Big Law Warms Up to Litigation Finance as Deals Pot Hits $2.8B*, Bloomberg L. (Mar. 23, 2022, 5:59 AM), https://news.bloomberglaw.com/business-and-practice/big-law-warms-up-to-litigation-finance-as-deals-pot-hits-2-8b; Roy Strom, *LexShares Raises $100 Million for Litigation Funding 'Certainty,'* Bloomberg L. (Jan. 25, 2022, 8:30 AM), https://news.bloomberglaw.com/business-and-practice/lexshares-raises-100-million-for-litigation-funding-certainty.

[17] *See, e.g.*, Sara Merken, *Litigation Funders Are Setting Up Shop in the Nation's Capital*, Reuters (Apr. 21, 2022, 5:18 PM), https://www.reuters.com/legal/legalindustry/litigation-funders-are-setting-up-shop-nations-capital-2022-04-21/ (reporting that several third-party funders are opening satellite offices in Washington, D.C., to service local law firms); Int'l Legal Fin. Ass'n, https://www.ilfa.com [https://perma.cc/2FTB-PMDT] (last visited Dec. 7, 2022) (calling itself "Global Voice of Commercial Legal Finance," declaring purpose to "represent the global commercial legal finance community," and noting it "is incorporated in Washington, DC, and will have chapter representation around the world").

[18] For an explanation of regulatory arbitrage, see Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 Cornell Int'l L.J. 63, 70 (2014) ("[T]he arbitrageur seeks to profit from a discrepancy in the price of the investment in two different markets by buying or producing the product in the market of lowest regulatory cost.").

the behavioral expectations of third-party funders.[19] A Model Code of Conduct for Third-Party Funders ("Code") would meet this need.

This Article proposes harmonizing the professional responsibility tenets for the third-party funding industry through a transnational, transsubstantive, and forum-neutral Code. Part I provides a brief background on the modern third-party funding industry and explains why the current regulatory framework is insufficient to ensure that funders behave in a professionally responsible manner. Part II briefly describes several existing approaches to regulating and enforcing third-party funding ethics and professional responsibility that the "laboratory of nations" is presently testing. It concludes that this regulatory "trial and error" advances the global legal system. Thus, instead of replacing the existing patchwork, Part II proposes an overarching, unifying layer of behavioral standards to smooth out the bumps as funding sails across "the Seven Seas."[20] Crucially, in this proposal, nations and states that have outlawed funding would be able to maintain their prohibitions.

Part II explores several existing codes of conduct for funders and concludes there is broad agreement worldwide on the basic principles of funder ethics, despite the disparate regulatory choices around the world. Part III distills from these existing approaches universal principles of professional responsibility for third-party funders as the starting point for drafting a global Model Code of Conduct. Part III also discusses several implementation and enforcement options for the Code, including drawing an analogy to the successful and celebrated New York Convention, which is globally applicable but locally enforced. Finally, Part III concludes by proposing avenues for further inquiry to bring this idea to fruition.

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[19] This argument is bolstered by the fact that G-20 nations have pledged to adopt a global minimum corporate tax rate with enforcement "teeth" to curb cross-border tax evasion. *See Clint Rainey, G20 Leaders Have Agreed on a Global Minimum Corporate Tax: Here's How It Would Work*, Fast Co. (Nov. 1, 2021), https://www.fastcompany.com/90692067/g20-global-minimum-tax-rate-explained [https://perma.cc/MA76-DFRY]. If the global powers can agree in principle on a minimum standard for something as complex as corporate taxation, then agreeing on minimum standards for third-party funding regulation should be comparatively easy.

[20] The pirate analogy is a gift that keeps on giving! For a precise definition of "the Seven Seas," see *What Are the Seven Seas?*, Nat'l Oceanic & Atmospheric Admin.: Nat'l Ocean Serv., https://oceanservice.noaa.gov/facts/sevenseas.html [https://perma.cc/7WBF-7AZT] (last updated Mar. 10, 2022).

I. BACKGROUND

A. An Overview of Modern Third-Party Funding

What is third-party funding? In a sentence, third-party funding exists because financial investors have discovered that a monetizable legal claim is an asset with independent value, regardless of external economic, political, regulatory, or public health forces.[21] Classic third-party funding involves an outside entity—called a "third-party funder"—providing dispute-related financing to a party or a law firm.[22] This traditional funding relationship involves the funder contracting to receive a percentage of the proceeds from the case if the plaintiff or claimant wins in exchange for providing nonrecourse funds to pursue the case.[23] The nonrecourse nature of the investment means that, unlike a loan, a funded plaintiff does not have to repay the funder if it loses the case or does not recover any money.[24] However, if the funded party is the defendant or respondent, the funder contracts to receive a predetermined payment from the client, similar to an insurance premium.[25] The agreement may also include an extra payment to the funder if the defendant wins the case.[26] Third-party funding is a controversial

[21] *See infra* notes 48, 50-51 and accompanying text (discussing third-party funding's detachment from external economic conditions); cf. Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DePaul L. Rev. 611, 628 (2020) [hereinafter Sahani, *Rethinking*] ("Damages claims are understandably attractive to dispute financiers, because there will be a pot of money to share if the party wins. Non-financial claims and 'no liability claims' (defenses) are less attractive, or may be completely unattractive, because such claims do not automatically create a pot of money to share, even though such claims may be worthy on the merits.").

[22] Nieuwveld & Sahani, *supra* note 14, at 1-8 (describing players in third-party funding, types of funding relationships, and effect of funder type on attorney-client relationship).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

and evolving phenomenon that has attracted the attention of the news media and state and federal legislators.[27]

The financier—called a "third-party funder"—finances the party's legal representation in return for a profit.[28] Third-party funders are banks, hedge funds, insurance companies, parent corporations, high-net-worth individuals, nonprofit entities, and crowdfunded sources.[29] Most third-party funders are privately held entities, but a few are publicly traded companies.[30] Third-party funders provide a wide array of products, including consumer dispute

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[27] *See* Joshua Hunt, *What Litigation Finance Is Really About*, New Yorker (Sept. 1, 2016), http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about (detailing support and criticism for third-party funding model); Mathew Ingram, *The Gawker vs. Hulk Hogan Case Just Got a Lot More Important*, Fortune (May 25, 2016, 2:19 PM), https://fortune.com/2016/05/25/gawker-hogan-thiel/ (reporting that billionaire Peter Thiel financed professional wrestler's lawsuit against media company); Roger Parloff, *Key Funder of Ecuadorians' Suit Against Chevron Quits*, Fortune (Feb. 16, 2015, 1:05 PM), https://fortune.com/2015/02/16/key-funder-ecuadorians-suit-vs-chevron-quits/ (reporting that third-party funder of Ecuadorian plaintiffs pledged to give no more money and turned over entire stake in judgment to defendant, Chevron, to settle another lawsuit that Chevron brought against him).

[28] *See* Nieuwveld & Sahani, *supra* note 14, at 1-7.

[29] *Id*.

[30] *See* Sarah O'Brien, Litigation Financing May Tempt Investors with High Returns. What To Know Before Buying in, CNBC (June 25, 2020, 11:35 AM), https://www.cnbc.com/2020/06/25/litigation-financing-tempts-with-high-returns-tips-before-buying-in.html [https://perma.cc/29NG-L79J]. Publicly traded funders include Omni Bridgeway, an Australian company, and Burford, a company based in the United States but traded on the London Stock Exchange. See About Us, Omni Bridgeway [hereinafter Omni Bridgeway], https://omnibridgeway.com/about/overview [https://perma.cc/6HGH-NYQF] (last visited Dec. 7, 2022); About Burford, Burford, https://www.burfordcapital.com/about-burford/ [https://perma.cc/HLG2-X9HE] (last visited Dec. 7, 2022); see also News Release, Chuck Grassley, U.S. Sen., Grassley, Cornyn Seek Details on Obscure Third Party Litigation Financing Agreements (Aug. 27, 2015) [hereinafter News Release], https://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements [https://perma.cc/CW6S-JQEB].

funding,[31] commercial dispute funding,[32] class action funding,[33] lending to law firms,[34] defense-side funding,[35] litigation crowdfunding,[36] brokerage services

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[31] Examples of consumer dispute funders include all the members of the American Legal Finance Association ("ALFA"). *See ALFA Member Companies*, Am. Legal Fin. Ass'n, https://americanlegalfin.com/alfa-membership/alfa-member-companies/ [https://perma.cc /Z5PH-7MUW] (last visited Dec. 7, 2022).

[32] Examples of commercial dispute funders include all the "Funder Members" of the Association of Litigation Funders ("ALF") in the United Kingdom. *See Membership Directory*, Ass'n of Litig. Funders, http://associationoflitigationfunders.com /membership /membership-directory/ [https://perma.cc/8EDF-K2RQ] (last visited Dec. 7, 2022). The listed "Associate Members" are brokers and law firms that regularly refer cases to funders, as well as one "Academic Member" who is Head of the School of Law at the University of West London. *See id*.

[33] The key example is from Australia, which has opt-in class actions. IMF Bentham (now known as Omni Bridgeway) is the oldest funder in Australia and regularly funds class actions there. *See* Omni Bridgeway, *supra* note 30. Class action funding is practically nonexistent in the United States, except in the form of lawyer-lending to plaintiff-side law firms. *See* Nieuwveld & Sahani, *supra* note 14, at 132-33. Class action funding is more prevalent in a few countries in Europe—such as the Netherlands—and Australia. *See id*. at 79-82, 85-86, 193-94.

[34] Law firm lenders that may take a security interest in the potential proceeds of the firm's portfolio include Amicus Capital Services, Momentum Funding, LawCash, and Advanced Legal Capital. *See* Amicus Cap. Grp., LLC, https://amicuscapitalgroup.com [https://perma.cc /2KWM-NZW2] (last visited Dec. 7, 2022); Momentum Funding, https://www.momentum funding.com [https://perma.cc/2HZS-9ATY] (last visited Dec. 7, 2022); LawCash, https://lawcash.com [https://perma.cc/5PJ6-BZQR] (last visited Dec. 7, 2022); Advanced Legal Cap., https://www.advancedlegalcapital.com [https://perma.cc/27HV-XT8F] (last visited Dec. 7, 2022). Traditional banks also may offer loans to law firms secured by accounts receivable or tangible property owned by the firm.

[35] An example of a defense-focused funder in the United States was Gerchen Keller Capital LLC (now Burford), which announced a defense-side and risk management focus when it launched. *See* Andrew Strickler, *Litigation Finance Co. Launches with Defense-Side Focus*, Law360 (Apr. 8, 2013, 12:05 AM), http://www.law360.com/articles/429993/litigation-finance-co-launches-with-defense-side-focus. Burford acquired Gerchen Keller Capital in 2016. *See* Press Release, Burford, Burford Capital Adds Scale and Significant Private Capital Management Business Through Acquisition of Gerchen Keller Capital (Dec. 14, 2016), https://www.burfordcapital.com/media-room/media-room-container/burford-capital-adds-scale-and-significant-private-capital-management-business-through-acquisition-of-gerchen-keller-capital/ [https://perma.cc/3CQT-MV7E]. Defense-side funding is rarer in the United States and is more prevalent in the United Kingdom and European Union in the form of after-the-event or before-the-event insurance. *See* Nieuwveld & Sahani, *supra* note 14, passim (discussing use of such insurance in various jurisdictions around world, including United Kingdom and Germany).

[36] Examples of litigation crowd-funders include Invest4Justice and LexShares. *See Invest4Justice*, Crunchbase, https://www.crunchbase.com/organization/invest4justice (last visited Dec. 7, 2022); LexShares, https://www.lexshares.com [https://perma.cc/EMR9-WB63] (last visited Dec. 7, 2022).

between funders and potential clients,[37] and, in the case of "funders of funders," investment in litigation funders.[38]

Third-party funding is widespread globally in litigation, arbitration, and sometimes mediation if there is a multistage dispute settlement clause.[39] This phenomenon is a multibillion-dollar industry both domestically and internationally.[40] In addition, depending on the structure of the funding arrangement, the funder may lawfully control or influence aspects of the legal representation or may completely take over the case and step into the shoes of

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[37] Examples of funding brokers include Fulbrook Capital Management, Mighty, and ClaimTrading Ltd. *See Fulbrook Capital Management*, Crunchbase, https://www.crunch base.com/organization/fulbrook-capital-management (last visited Dec. 7, 2022); Mighty, https://www.mighty.com [https://perma.cc/GX5Z-NK9J] (last visited Dec. 7, 2022); ClaimTrading, https://www.claimtrading.com/index/page?id=home [https://perma.cc /4J8A-MRL3] (last visited Dec. 7, 2022).

[38] Fortress Investment Group LLC invests in litigation funding companies but does not directly finance litigation disputes itself. *See* Fortress, https://www.fortress.com [https://perma.cc/E3U5-94N5] (last visited Dec. 7, 2022). To describe entities like Fortress, the author coined the term "funder of funders," which is a play on the common financial term "fund of funds." Cf. Zoe Van Schyndel, *A Fund of Funds: High Society for the Little Guy*, Investopedia (Aug. 25, 2021), http://www.investopedia.com/articles/mutualfund/08/fund-of-funds.asp [https://perma.cc/YBL3-B3NP] ("A fund of funds (FOF) is an investment product made up of various mutual funds . . . .").

[39] *See* Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 Case W. Rsrv. J. Int'l L. 159, 162, 180-81 (2011); Elayne E. Greenberg, *Hey, Big Spender: Ethical Guidelines for Dispute Resolution Professionals when Parties Are Backed by Third-Party Funders*, 51 Ariz. St. L.J. 131, 133 (2019) (describing general ethical issues in third-party mediation funding).

[40] *See*, *e.g.*, Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, Wall St. J. (Jan. 12, 2014, 7:48 PM), http://online.wsj.com/news/articles/SB10001424052702303819704579316621131535960 (noting several funders have hundreds of millions of dollars in assets under management); Jennifer Smith, *Investors Put Up Millions of Dollars To Fund Lawsuits*, Wall St. J. (Apr. 7, 2013, 7:46 PM), http://online.wsj.com/news/articles/SB10001424127887323820345784080879415581 6934 ("Gerchen Keller Capital LLC, a Chicago-based team that includes former lawyers . . . . has raised more than $100 million and says there is plenty of room for newcomers given the size of the U.S. litigation market, which they put at more than $200 billion, measuring the money spent by plaintiffs and defendants on litigation."); Vanessa O'Connell, *Funds Spring Up To Invest in High-Stakes Litigation*, Wall St. J. (Oct. 3, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052970204226204576598842318233996 ("The new breed of profit-seeker sees a huge, untapped market for betting on high-stakes commercial claims. After all, companies will spend about $15.5 billion this year on U.S. commercial litigation and an additional $2.6 billion on intellectual-property litigation . . . .").

the original party.[41] The United States alone is home to dozens of funders of consumer disputes, such as personal injury and other tort claims, and complex commercial disputes.[42] In light of its increasing prevalence, third-party funding has sparked a fascinating debate regarding its place both in the American legal

[41] *See* Nieuwveld & Sahani, *supra* note 14, at 6 (explaining that some third-party funding arrangements are structured as assignment in which third-party funder becomes claimant in case and original party is no longer involved). For an in-depth treatment of assignment and insurance policies in the third-party funding context, see generally Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DePaul L. Rev. 453 (2011); Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. Pa. L. Rev. 1297 (2002); Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 Chi.-Kent L. Rev. 11 (2014); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. Legal Stud. 329 (1987).

[42] Regarding consumer disputes, there are over thirty members of the ALFA and several other non-ALFA third-party funding companies that fund consumer disputes. *See ALFA Member Companies, supra* note 31. Regarding commercial third-party funders, most of the members of the International Legal Finance Association ("ILFA") are U.S.-based funders. *See Membership Directory,* Int'l Legal Fin. Ass'n, https://www.ilfa.com/membership-directory [https://perma.cc/78H9-UX6K] (last visited Dec. 7, 2022). For a list of global commercial funders affiliated with ALF in the United Kingdom, see *supra* note 32.

system and in the context of international dispute resolution.[43] Moreover, third-party funding has many applications. First, funders can help resource-challenged individuals bring claims that they would not otherwise be able to, increasing access to justice for indigent or disadvantaged persons.[44]

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[43] *See, e.g.*, Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DePaul L. Rev. 527, 527 (2014) [hereinafter Hylton, *Regulatory Framework*] (analyzing "economics of third-party funding relationships"); Keith N. Hylton, *The Economics of Third-Party Financed Litigation*, 8 J.L. Econ. & Pol'y 701, 704 (2012) [hereinafter Hylton, *Economics*] (identifying "likely sources of welfare gains and losses in a third-party litigation funding system"); Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. Pa. L. Rev. 503, 504, 508, 513-23, 526-27 (2006) (arguing "best method of [litigation finance] regulation" is shortening time for disposition of claims); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 Fordham J. Corp. & Fin. L. 55, 56-57, 68, 74-75 (2004) [hereinafter Martin, *Wild West of Finance*] (defending regulated litigation financing industry with disclosure rules as protective of plaintiffs who lack resources to bring meritorious claims); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 Vill. L. Rev. 83, 83-95 (2008) [hereinafter Martin, *Subprime Industry*] (proposing that regulation of litigation financing industry should focus on data collection, transparency, and competition); Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 72 n.36, 139 (2011) (arguing need for "careful policy-based research to draw boundaries and rules for a market in lawsuits"); Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 Rev. Litig. 707, 735 (2007) (advocating for greater access to information about litigation finance industry, more competition, and regulation of interest rates and lending practices); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1325-36 (2011) (proposing conceptual framework for litigation funding regulation); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571, 608-09 (2010) ("Third-party litigation lending is consistent with our values as a society."); Max Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48, 74-75 (1935) (arguing for regulation of contingency fees in a way similar to today's arguments for regulating third-party funding); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367, 377-439 (2009) (proposing defense-side funding in United States modeled on after-the-event insurance in Europe); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework To Legitimize Third Party Litigation Finance*, 58 Consumer Fin. L.Q. Rep. 347, 349-61 (2004) (proposing statute to regulate third-party funding for individual consumers).

[44] For example, the author served as an expert witness in a case in which a third-party funder financed an individual claimant in an investor-state arbitration against a government. Investor-state arbitrations are very expensive, and partly due to the expense, individuals are rarely claimants in investor-state arbitration. Similarly, Keith Hylton extensively analyzed the economic and social welfare benefits and costs of third-party funding, including the economics of waiver, subrogation, and sales and settlement agreements. *See* Hylton, *Regulatory Framework*, *supra* note 43, at 528; Hylton, *Economics*, *supra* note 43, at 702. Furthermore, David Abrams and Daniel Chen conducted an empirical study on third party funding's effect on claimants' ability to proceed in Australian courts. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. Pa. J. Bus. L. 1075, 1076 n.3, 1077 nn.6-7 (2013) (reporting results of their study on public third-party funding data available in Australia).

Second, third-party funding enables many insolvent or small companies to pursue valid claims that they could not otherwise afford to pursue and are too risky for contingency fee attorneys to accept.[45] Third, large companies that are constantly sued, like insurance companies and manufacturers of dangerous products, are looking to smooth out the litigation line item on their balance sheets.[46] Funders can offer these repeat-player[47] defendants a fixed payment system for managing their litigation costs. Fourth, the worldwide market turmoil during the global financial crisis began in 2008 and never quite seemed to reach its denouement due to the current economic side effects of the global pandemic and Russia's invasion of Ukraine in early 2022. This prolonged economic uncertainty has prompted many investors to seek investments not dependent upon the financial markets, supply chains, stock prices, or company valuations.[48] Fifth, funders have begun taking equity stakes in law firms and clients in recent years and providing transaction structures that look more like

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[45] *See* Steinitz, *supr*a note 43, at 1275-76, 1283-84; Martin, *Wild West of Finance*, *supr*a note 43, at 67 n.93; Martin, *Subprime Industry*, *supra* note 43, at 85; James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. Econ. & Org. 349, 365-66 (1993); Ralph Lindeman, Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits 1-8 (2010), [https://perma.cc/JT3G-5QFW].

[46] *See, e.g.*, Kevin LaCroix, *What's Happening Now? Litigation Funding, Apparently*, D&O Diary (Apr. 9, 2013), http://www.dandodiary.com/2013/04/articles/securities-litigation/whats-happening-now-litigation-funding-apparently/ [https://perma.cc/4U37-M9F6] ("Litigation funding proponents contend that the funding arrangements helps [sic] to level the playing field by allowing litigants to pursue lawsuits against better financed opponents, or simply allowing litigants to keep litigation costs off their balance sheet."); David Lat, *Litigation Finance: The Next Hot Trend?*, Above the L. (Apr. 8, 2013, 1:59 PM), http://abovethelaw.com/2013/04/litigation-finance-the-next-hot-trend/ [https://perma.cc/A7UQ-DH56] (explaining third-party funding allows large companies to pursue claims without having lump sum litigation costs reduce earnings per share).

[47] In 1974, Marc Galanter famously modeled the world of dispute resolution by dividing parties into "one-shotters" and "repeat players" and describing the advantages that repeat players have in the legal system over one-shotters. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 97-103 (1974). Third-party funding clearly increases the advantages of repeat-players even further.

[48] *See* Steinitz, *supra* note 43, at 1283-84 (discussing effects of global recession on rising demand for litigation funding).

ownership or partnership than an arms-length, passive investment.[49] Finally, each litigation or arbitration matter is independent of other disputes and detached from market conditions regarding the value of the underlying harm or liability.[50] This independence shields the third-party funder's investment and potential profit from the general uncertainty in the global financial markets.[51]

The proliferation of third-party funders and funding arrangements strikes a sharp contrast to the comparatively minimal and noncomprehensive regulation of the industry at present.[52] The existing regulations governing the third-party funding industry worldwide are complex, disjointed, and divergent.[53] Creating a model code of conduct for funders would, at the very least, help inform consumers of the appropriate behavior for a reputable third-party funder. It would also educate noncompliant funders regarding how to bring their business practices into compliance, retain well-informed clients, and avoid sanctions.

A four-part series of articles studying this growing industry laid the

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[49] *Cf.* Maya Steinitz & Victoria Sahani, *You No Longer Have To Be a Lawyer To Practice Law in Arizona. That's Good and Bad*, AZCENTRAL. (Feb. 6, 2021, 1:44 PM), https://www.azcentral.com/story/opinion/op-ed/2021/02/06/arizona-no-longer-restricts-law-lawyers-here-pro-con/4339871001/ (discussing jurisdictions that allow investors to own, invest in, and control law firms by creating alternative business structures ("ABS") that are allowed to practice law in those jurisdictions); Maya Steinitz & Victoria Sahani, *New Ariz. Law Practice Rules May Jump-Start National Reform*, LAW360 (Jan. 28, 2021, 4:19 PM) [hereinafter Steinitz & Sahani, *New Ariz. Law Practice Rules*], https://www.law360.com/articles/1349687/new-ariz-law-practice-rules-may-jump-start-national-reform (discussing jurisdictions that allow nonlawyers to own, invest in, and control law firms by creating "alternative business structures" that are allowed to practice law in those jurisdictions); Victoria Shannon Sahani & Maya Steinitz, N*avigating the Sea Change in Law Firm Finance and Ownership in the U.S.*, WOLTERS KLUWER: KLUWER ARB. BLOG (Nov. 18, 2021) [hereinafter Sahani & Steinitz, *Navigating*], http://arbitrationblog.kluwerarbitration.com/2021/11/18/navigating-the-sea-change-in-law-firm-finance-and-ownership-in-the-u-s/ [https://perma.cc/U4YY-6ABS] (addressing discussions among regulators regarding nonlawyer ownership of law firms in Arizona, California, Utah, Illinois, Florida, and New York).

[50] *See* NIEUWVELD & SAHANI, *supra* note 14, at 10-12.

[51] *Id.*

[52] This Article does not address the often debated question of whether third-party funding should exist at all. Instead, the author takes the view that, because the industry is growing rather than shrinking, the focus should be on creating sensible regulations for the industry rather than trying to dismantle it. See id. at 157-74 (presenting fifty-two-jurisdiction survey of existing state laws as of early 2017); Richard A. Blunk, *Have the States Properly Addressed the Evils of Consumer Litigation Finance?*, MODEL LITIG. FIN. CONT. (Jan. 20, 2014), http://litigationfinancecontract.com/have-the-states-properly-addressed-the-evils-of-consumer-litigation-finance/ [https://perma.cc/P6XP-WYBY] (describing third-party funding statutes in Maine, Ohio, Nebraska, and Oklahoma).

[53] *See* NIEUWVELD & SAHANI, *supra* note 14, *passim* (discussing law of third-party funding in countries spanning six continents).

groundwork for this Article. The first article in the series explained the origins of third-party funding to educate academics, practitioners, and legislators, giving context to this then-emergent industry.[54] The second article analyzed the rules of the main methods of adjudication in which funders invest—litigation and arbitration—and suggested appropriate modifications to and reinterpretations of those rules.[55] The third article correctly predicted that new transaction structures and financial products would radically transform the relationships among the third-party funder, the party to the lawsuit, and the party's law firm.[56] Finally, the fourth article described what real, impactful access to justice looks like in an era of third-party funding, arguing that prioritizing nonfinancial characteristics of a case may be the proper foundation of "access to justice" involving third-party funding.[57]

This Article presents the next evolution of designing an appropriate regulatory framework for third-party funding. It revisits the thesis of the first article in the series, which proposed regulating third-party funding procedurally, transactionally, and ethically.[58] Part II of this Article examines the current regulatory efforts in those three areas. It concludes that harmonizing the regulations regarding the procedural and transactional aspects of funding across the entire world is neither achievable nor even desirable; however, ethical rules are ripe for harmonization.[59]

To that end, this Article proposes a model code of conduct. The Code should contain an expansive definition of third-party funding to dissuade corrupt potential financiers from misusing the dispute settlement system. This expansive

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[54] *See generally* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861 (2015) [hereinafter Shannon, *Harmonizing*] (proposing harmonizing regulatory framework for third-party funding, including key procedural, transactional, and ethical regulations).

[55] *See* Sahani, *Judging*, *supra* note 12, at 390, 410-41 (proposing revision and reinterpretation Federal Rules of Civil Procedure, rules of international arbitration procedure, and rules regarding evidentiary privileges to address third-party funding).

[56] *See generally* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 Tul. L. Rev. 405 (2017) [hereinafter Sahani, *Reshaping*] (predicting that third-party funders might become internal partners of United States law firms or corporate parties, rather than remaining external investors, and analyzing benefits and drawbacks of these new structures).

[57] *See* Sahani, *Rethinking*, *supra* note 21, at 626-28 (proposing that third-party funders should finance "unfunded winners," including nonfinancial claims, and pro bono cases).

[58] *See* Shannon, Harmonizing, supra note 54, at 883-907.

[59] *See infra* Section II.H.

definition would encompass financiers regardless of whether they are explicitly members of the third-party funding industry or not. With the Code and proper enforcement, regulators can be more prepared to combat appalling situations like those described in the Introduction of this Article.[60]

B. The Problem: A Lack of Funder Ethics or Professional Responsibility Rules

Third-party funding has evolved into an industry that impacts how parties handle disputes, changing the dynamic between wealthy and nonwealthy litigants and reshaping the legal services industry through partnerships and joint ventures with law firms and corporate parties.[61] In response, laws in many jurisdictions now constrain or shape the third-party funding industry in technical ways, such as through interest rate caps, disclosure rules, licensure requirements, capitalization requirements, and fee schedules.[62] However, these laws do not address how funders should behave when interacting with dispute settlement systems. Instead, third-party funders are essentially left to their own devices worldwide concerning professional responsibility or ethics rules. This lacuna is astonishing because third-party funders operate in a client services industry primarily dominated by heavily regulated professional services firms, such as law firms, accounting firms, consulting firms, and traditional financing entities in the financial services sector. These professional services firms are subject to either licensing or ethics rules or both. Yet, there are no broadly enforceable ethics rules for third-party funders in any jurisdiction, and most jurisdictions

[60] *See supra* notes 2-3, 5-8 and accompanying text (discussing third-party funders' involvement in judicial misconduct, collusive litigation, fraud, and exploitation of vulnerable populations).

[61] *See supra* note 49 and accompanying text; see also Sahani, *Reshaping*, *supra* note 56, at 408-10.

[62] For examples of technical regulations for third-party funders, *see infra* Part II . *See also* Nieuwveld & Sahani, *supra* note 14, passim (discussing law of third-party funding in over fifty countries on six continents).

do not require licenses for funders.[63] As the funding industry continues to grow without some external source of professional responsibility or ethics regulation, a form of regulatory arbitrage will likely emerge in which funders will try to see how well they can evade indirect regulations by moving their operations from jurisdiction to jurisdiction.[64]

Instead of direct ethics or professional responsibility regulations, passive regulations exist for funders, whereby funders are governed indirectly by multiple constituencies. For example, all the global dispute settlement system stakeholders partially govern third-party funders, including legislatures, courts, arbitral institutions, judges, arbitrators, attorneys, funded clients, investors, and funders themselves through self-governance. At the same time, no one is explicitly responsible for holding funders accountable for their ethical misconduct.

For example, national governments regulate third-party funding through statutes, existing regulations,[65] financial or securities enforcement proceedings,[66]

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[63] *See* Nieuwveld & Sahani, *supra* note 14, at 72 (noting ethical issues in third-party funding "remain unsettled"). Section II.E discusses Hong Kong's statutory funder code of conduct, but that code of conduct can only serve as evidence in litigation against a funder or in an international arbitration cost proceeding in a case involving a third-party funder. *See* Arbitration Ordinance, (2022) BLIS Cap. 609, div.4 § 98S (H.K.), https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1498192254668_002 [https://perma.cc /V4LP-348V]. It contains no direct means of enforcement to correct a funder's undesirable behavior. Therefore, it does not solve the problem highlighted in this Article.

[64] *See supra* note 18 and accompanying text.

[65] *See* Victoria Shannon, T*hird-Party Litigation Funding and the Dodd-Frank Act*, 16 Tenn. J. Bus. L. 15, 16-18 (2014) [hereinafter Shannon, *Dodd-Frank Act*] (discussing national legislative and regulatory oversight of third-party litigation funding in United States, United Kingdom, and Australia).

[66] *See* Seth Sandronsky, *Litigation Funding Is 'Shadow' Industry that Needs Oversight, Expert Says; Prometheus in SEC Crosshairs*, N. Cal. Rec. (June 2, 2016), https://norcalrecord.com/stories/510743381-litigation-funding-is-shadow-industry-that-needs-oversight-expert-says-prometheus-in-sec-crosshairs [https://perma.cc/4MK3-UN2X] (reporting Securities and Exchange Commission's charges against third-party litigation funder Prometheus Law).

and direct governmental inquiries into the industry.[67] Individual provinces or states govern funders through statutes addressing litigation funding directly or categorizing it as a loan;[68] corporate registration requirements (e.g., licensure, capitalization, and disclosures);[69] case law;[70] and bar ethics opinions.[71] Courts and arbitral institutions implement disclosure rules to discover funder participation with few, if any, rules regarding what judges and arbitrators should do about it.[72] Judges and arbitrators govern funders indirectly through their inherent power to issue reasoned opinions construing applicable laws, impose monetary sanctions on funded parties, allocate costs, and join funders as parties if they are too involved in the dispute resolution process.[73] Attorneys govern funders by making funders aware of their constraints under the Rules of Professional Conduct and threatening to withdraw or not comply if funders interfere in the attorney-client relationship or otherwise try to control the attorney's actions.[74] Funded clients partially govern funders through contract negotiations and co-owning special-purpose vehicles with funders.[75] Investors and shareholders in

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[67] *See, e.g.*, News Release, *supra* note 30 (discussing information requests that U.S. Senators Grassley and Cornyn sent to three of largest litigation funding companies operating in United States that are publicly traded on non-U.S. exchanges); *Consultation Paper: Third Party Funding for Arbitration*, Law Reform Comm'n of H.K., http://www.hkreform.gov.hk /en/publications/tpf.htm [https://perma.cc/3C48-63ZU] (last visited Dec. 7, 2022) (seeking public comment on how to clarify Hong Kong's laws to allow third-party funding in international and domestic arbitration); *Public Consultation To Seek Feedback on the Third-Party Funding Framework*, Sing. Ministry of L. (Apr. 3, 2018), https://www.mlaw.gov.sg /news/public-consultation-third-party-funding/ [https://perma.cc/R63V-LPUP] (seeking public comment on draft of then new third-party funding law in Singapore). In addition, the author is aware that the U.S. Government Accountability Office is currently researching third-party funding at the request of the U.S. Senate and is preparing a report on the industry that will likely be publicly released in 2023.

[68] *See infra* Section II.E (discussing third-party funding statutes in Hong Kong, Singapore, and United States).

[69] *See infra* Section II.D.

[70] *See infra* Section II.A.

[71] *See infra* Section II.C.

[72] *See infra* note 96, Sections II.A, II.F for examples of court rules and arbitration institution rules requiring disclosure of third-party funding.

[73] *See* Sahani, *Judging*, *supra* note 12, *passim*.

[74] *See* Sahani, *Reshaping*, *supra* note 56, at 420, 426-28, 449-50. *See generally* Am. Bar Ass'n Comm'n on Ethics 20/20, Informational Report to the House of Delegates (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212 _ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf [https://perma.cc/LYF4-ZDCL].

[75] *See* Sahani, *Reshaping*, *supra* note 56, at 416, 434 n.156, 435-39.

public and private funders provide the capital and incentives for the funder's profit-making motives and behavior. Finally, funder industry associations allow funders to self-govern through internal codes of conduct and sanctions for violations of the code, the harshest of which might be expulsion from the association, which—to the author's knowledge—has never been imposed.[76] This indirect, loose ethics regime results in no one having any accountability for providing guidance, oversight, or enforcement regarding funder professional responsibilities.

The preceding regulatory influences on funders are not cohesive, do not coordinate, and may even conflict. This patchwork also demonstrates that no single entity in most local jurisdictions is tasked explicitly with keeping funders accountable or overseeing the industry. Thus, most jurisdictions have no consistent source of accountability for the third-party funding industry. Essentially, no one bears the ultimate responsibility for enforcing funder ethics. Moreover, if the funder is disciplined or disqualified from operating in one jurisdiction, it can move to a different jurisdiction and continue to operate, which incentivizes regulatory arbitrage and undermines the integrity of the global dispute settlement system. Therefore, this Article argues that the key to fostering ethical development of the third-party funding industry is to develop a globally applicable but locally enforced model code of conduct or professional responsibility for the third-party funding industry.

The next step toward developing the Code is examining existing global approaches to regulating and enforcing third-party funding ethics and professional responsibility. A complete examination of all potential principles and approaches adopted worldwide is beyond the scope of this Article and is more aptly treated in a book.[77] Nevertheless, novel regulatory practices continue to arise worldwide with increasing frequency as new regulators discover the third-party funding industry. Therefore, any attempt to describe all existing approaches would be out-of-date by the time the ink is dry. Instead, Part II provides a snapshot overview of the range of approaches within a few major categories and highlights a few representative examples.

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[76] *See infra* note 139 (discussing range of sanctions under ALF Code of Conduct, including expulsion from ALF).

[77] *See* Nieuwveld & Sahani, *supra* note 14, *passim*.

II. KEY SOURCES OF PROFESSIONAL RESPONSIBILITY PRINCIPLES FOR THIRD-PARTY FUNDERS

Nations, states, funder professional associations, attorney bar associations, and funders themselves have promulgated many possible sources of professional responsibility principles for funders around the world. Most jurisdictions have adopted, formally or informally, at least one of these approaches, and several have adopted multiple approaches. This Article is too brief to analyze them all thoroughly. A robust qualitative and quantitative study of all the existing approaches to a code of conduct for third-party funders would yield a more comprehensive set of principles. Instead, this Part presents examples from different categories of existing direct and indirect approaches to regulating funder ethics and explains why each approach is insufficient to regulate global third-party funders.

A. Court Oversight

Court oversight is the oldest means of regulating the third-party funding industry and the legal profession.[78] Courts have served as the gateway through which third-party funding has entered into public consciousness in most jurisdictions. National courts across the globe, as well as state and federal courts in the United States, have often been the first authorities in a particular jurisdiction to interpret the existing laws and apply them to the emerging third-party funding industry.

For example, the High Court of Australia initially authorized litigation funding in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd.*[79] In contrast, the Supreme Court of Ireland has expressly outlawed third-party funding, although

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[78] *See* Rancman v. Interim Settlement Funding Corp., 99 Ohio St. 3d 121, 2003-Ohio-2721, 789 N.E.2d 217, at ¶¶ 10-14 (representing, arguably, first time any court addressed third-party funding in United States, well before industry exploded in size and scope and before any state statutes addressed third-party funding); MODEL RULES OF PRO. CONDUCT pmbl. ¶ 10 (AM. BAR ASS'N 2020) ("[U]ltimate authority over the legal profession is vested largely in the courts.").

[79] (2006) 229 CLR 386, 425 (Austl.) ("[T]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled.").

the legislature may soon override the prohibition.[80] In the middle is the Colorado Supreme Court, which determined that third-party funding is a loan subject to the usury statute in that state.[81] While not expressly outlawing funding, this ruling made the industry commercially nonviable in Colorado due to the usury statute's interest rate cap of 12%.[82] Moreover, Ohio provides an example of a legislature overruling a court. The Ohio State Supreme Court prohibited the litigation funding industry in *Rancman v. Interim Settlement Funding*;[83] afterward, the Ohio legislature passed a statute allowing and regulating third-party funding.[84]

Courts have also issued rules and guidelines regarding disclosure and privileges. Wisconsin, West Virginia, and the U.S. District Court for the Northern District of California have all adopted rules requiring the disclosure of funding in cases filed there.[85] The U.S. District Court for the Northern District of

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[80] *See* Persona Digit. Telephony Ltd. v. Minister for Pub. Enter. [2017] IESC 27 (Ir.) (ruling that third-party funding is champertous and illegal); s*ee also Irish Supreme Court Maintains Third-Party Funding Ban*, Glob. Arb. Rev. (May 24, 2017), http://globalarbitrationreview.com/article/1142016/irish-supreme-court-maintains-third-party-funding-ban. *But see* Catherine Sanz, *McEntee To Bring Forward Proposals To Legalise Third-Party Legal Funding*, Bus. Post (Sept. 17, 2022), https://www.businesspost.ie/politics/mcentee-to-bring-forward-proposals-to-legalise-third-party-legal-funding/ [https://perma.cc/U7XM-S775] (reporting Ireland Minister for Justice's proposal to legalize third-party funding in international arbitration only, not domestic litigation in Ireland).

[81] *See* Oasis Legal Fin. Grp., LLC v. Coffman, 2015 CO 63, ¶ 4, 361 P.3d 400, 401-02.

[82] *See id.* at ¶ 34, 361 P.3d at 406.

[83] 99 Ohio St. 3d 121, 2003-Ohio-2721, 789 N.E.2d 217, at ¶ 19 (holding third-party funding "void as champerty and maintenance").

[84] Ohio Rev. Code Ann. § 1349.55 (West 2022); *see also* Mark Bello, *Lawsuit Funding—New Legislation in Ohio*, Ohio Trial, Summer 2009, at 28, 28-30, http://www.lawsuit financial.com/files/ohio.pdf [https://perma.cc/E8VQ-BLM6] (explaining that, in response to the Supreme Court of Ohio striking down litigation funding agreement in *Rancman*, Ohio State Legislature passed House Bill 248 to both permit and regulate litigation funding industry).

[85] *See* Wis. Stat. Ann. § 804.01(2)(bg) (West 2022) (requiring parties, as of July 1, 2018, to disclose funding agreements that provide "right to receive compensation that is contingent on and sourced from any proceeds of the civil action"); W. Va. Code Ann. § 46A-6N-1 (West 2022) (establishing requirement identical to Wisconsin's); N.D. Cal. Civil L.R. 3-15(a) (requiring parties to disclose any persons or entities who have "financial interest of any kind in the subject matter in controversy or in a party to the proceeding"); James Anderson, *Is Increased Transparency into Litigation Financing on the Horizon?*, Nat'l L. Rev. (Jan. 15, 2020), https://www.natlawreview.com/article/increased-transparency-litigation-financing-horizon [https://perma.cc/DD6Q-4BTP] (discussing both Wisconsin's and West Virginia's laws); *Wisconsin Adopts Proportionality and Mandatory Disclosure of Third-Party Litigation Financing*, Bowman & Brooke LLP (Apr. 26, 2018), https://www.bowmanandbrooke.com /insights/wisconsin-proportionality-and-mandatory-disclosure [https://perma.cc/L9SN-CVHN].

Illinois concluded in *Miller UK LTD. v. Caterpillar, Inc.*[86] that work product protection extended to documents disclosed to the funder due to a preexisting confidentiality agreement between the client and the funder; however, the court determined that the attorney-client privilege had been waived according to the facts of *Miller* because the court did not view the funder as falling within the "common interest" waiver exception.[87] Federal district court opinions are not binding on other jurisdictions, so this decision is merely persuasive authority regarding the effect of a funder's confidentiality agreement on evidentiary privileges.

In contrast, in *Essar Oilfield Services Ltd. v. Norscot Rig Management PVT Ltd.*,[88] the United Kingdom's English Commercial Court allowed a funded party to recover its third-party funding costs from the opposing side by enforcing a partial international arbitration award on costs on the theory that the opposing side had forced the funded party to seek third-party funding to pay for its arbitration costs.[89] This decision appears to be the first of its kind in the United Kingdom. Although this decision does not directly address third-party funders' professional responsibilities, it enhanced the industry's legitimacy in the United Kingdom and in international arbitration.

As the contrasts between the cases discussed above illustrate, court oversight would likely not be effective as the sole means to regulate third-party funders' professional responsibilities worldwide. Most litigation funders have a multijurisdictional practice,[90] and conflicts between court systems' standards, rules, and procedures abound. Conflicting ethics rules can confuse attorneys and would likely create confusion for funders—or additional regulatory arbitrage

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[86] 17 F. Supp. 3d 711 (N.D. Ill. 2014).

[87] *Id.* at 732-36.

[88] [2016] EWHC (Comm) 2361, [2016] WLR (D) 576 (Eng.).

[89] *See id.; English Court Approves Recovery of Third-Party Funding Costs*, Glob. Arb. Rev. (Sept. 20, 2016), https://globalarbitrationreview.com/third-party-funding/english-court-approves-recovery-of-third-party-funding-costs.

[90] *See supra* note 17 and accompanying text.

opportunities.[91] In addition, courts can only issue rulings when cases come before them, so regulations arising from judicial opinions would be reactive rather than proactive. Reactivity is not an ideal posture from which to regulate professional responsibilities.[92]

On the other hand, judges and arbitrators already have both the authority and the procedural tools to handle and decide issues regarding discovery, disclosure, privileges, conflicts of interest, cost allocation, and sanctions that may be affected by funder involvement.[93] Thus, no additional changes to procedural rules are required, although many are likely forthcoming. For example, the Federal Civil Rules Advisory Committee is considering changing the Federal Rules of Civil Procedure to address third-party funding but has not announced any forthcoming revisions.[94] In contrast, the international arbitration community has been abuzz recently with revisions to international

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[91] *Cf.* Model Rules of Pro. Conduct r. 8.5 cmt. 2 (Am. Bar Ass'n 2021) ("A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations."); *id.* r. 8.5 cmt. 3 (explaining lawyer's particular conduct is governed by single jurisdiction's rules of professional conduct because "minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession"). Accordingly, [Rule 8.5(b)] takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.").

[92] *See, e.g.*, Jeff Black & Ranier Buergin, *Buck To Stop with Bankers as G-7 Seeks Conduct Code for Lenders*, Bloomberg (May 31, 2015, 7:01 PM), http://www.bloomberg.com /news/articles/2015-05-31/buck-to-stop-with-bankers-as-g-7-seeks-conduct-code-for-lenders (noting governments' preference in banking industry for "better conduct from the outset" over reactionary penalties).

[93] *See* Sahani, *Judging*, *supra* note 12, at 407-08 (overviewing Federal Rules of Civil Procedure that allow judges to account for third-party funding).

[94] In November 2018, the author participated in a conference cohosted by the Federal Civil Rules Advisory Committee (the "Committee") and George Washington University Law School to gather information regarding whether to revise the Federal Rules of Civil Procedure to directly address third-party funding. *See Third-Party Litigation Finance Conference*, George Wash. Univ. L. Sch., https://www.law.gwu.edu/third-party-litigation-finance-conference [https://perma.cc/5SQR-XEUC] (last visited Dec. 7, 2022). Recently, defense-side lobbying interests have proposed revisions to Federal Rule of Civil Procedure 16 to address third-party funding, but the Committee has not yet addressed those proposals. *See* Laws. for Civ. Just. & U.S. Chamber of Com. Inst. for Legal Reform, Rules Suggestion to the Advisory Committee on Civil Rules 2 (2022), https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf [https://perma.cc/U89D-7U5L].

arbitration rules to address third-party funding.[95] As a result, at least eight major international arbitral institutions have adopted or are considering adopting disclosure and cost provisions that apply to third-party funding.[96] In addition, as discussed further below, the United Nations Commission on International Trade Law ("UNCITRAL") will address third-party funding in its suggested revisions to investor-state dispute settlement procedures under bilateral and multilateral investment treaties.[97]

B. Funder Self-Governance

Three funder self-regulatory organizations have promulgated voluntary codes of conduct or best practices: the United Kingdom's Association of Litigation Funders ("ALF") Code of Conduct,[98] the American Legal Finance Association ("ALFA") Code of Conduct,[99] and the International Legal Finance Association

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[95] *See infra* notes 236, 242 and accompanying text (noting enactment of third-party funding rules following Global Task Force on Third-Party Funding report).

[96] International arbitral institutions addressing third-party funding directly in their arbitration rules include the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, the China International Economic and Trade Arbitration Commission, the Hong Kong International Arbitration Centre, the International Court of Arbitration of the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes ("ICSID") (proposed), the Singapore International Arbitration Centre, the Australian Centre for International Commercial Arbitration, and the American Arbitration Association's International Centre for Dispute Resolution, among others. *See* Jonathan Barnett, Lucas Macedo & Jacob Henze, *Third-Party Funding Finds Its Place in the New ICC Rules*, Wolters Kluwer: Kluwer Arb. Blog (Jan. 5, 2021), http://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/ [https://perma.cc/MV3K-XAQX]; Austl. Ctr. for Int'l Com. Arb., ACICA Rules 44-45 (2021), https://acica.org.au/wp-content/uploads/2021/03/ ACICA_Rules_2021-WFF2.pdf; Int'l Ctr. for Disp. Resol., International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) 25 (2021), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar [https://perma.cc/9Z59-4S4X].

[97] *See infra* note 270.

[98] Ass'n of Litig. Funders, Code of Conduct for Litigation Funders (2018) [hereinafter ALF Code of Conduct], http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf [https://perma.cc/7GHW-6ENQ]; *see also Code of Conduct*, Ass'n of Litig. Funders [hereinafter A*LF Code of Conduct Summary*], http://associationoflitigationfunders.com/code-of-conduct/ [https://perma.cc/ST3L-NNC7] (last visited Dec. 7, 2022) (summarizing code of conduct).

[99] *The ALFA Code of Conduct*, Am. Legal Fin. Ass'n, https://americanlegalfin.com/alfa-code-of-conduct/ [https://perma.cc/4XGD-QUJ4] (last visited Dec. 7, 2022).

("ILFA") list of industry best practices.[100] Individual funders have also developed their own internal corporate codes of conduct regarding funding.[101]

1. The Association of Litigation Funders

The national government in the United Kingdom has delegated regulation of the funding industry to a private organization, the ALF.[102] The Ministry of Justice, through its Civil Justice Council ("CJC"), has legitimized ALF and charged it with updating and administering a code of conduct for third-party funders.[103] This code "sets out standards of practice and behaviour to be observed by Funders" who are members of ALF.[104] Lord Justice Jackson provided input on the drafting of the original code.[105] Noncompliance with the ALF code leads to sanctions under the authority granted to ALF by the CJC and implemented through the complaints procedure for third-party funders.[106] Given ALF's

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[100] *Best Practice*, Int'l Legal Fin. Ass'n, https://www.ilfa.com/#best-practice [https://perma.cc/DF33-UE37] (last visited Dec. 7, 2022).

[101] *See infra* note 141 and accompanying text (describing former Bentham IMF's internal code of conduct).

[102] *How We Work*, Ass'n of Litig. Funders, https://associationoflitigationfunders.com /about-us/how-we-work/ [https://perma.cc/TC87-LNEZ] (last visited Dec. 7, 2022) (detailing ALF's creation and its approval by Civil Justice Council ("CJC")).

[103] The United Kingdom's Ministry of Justice acts through the CJC, "an Advisory Public Body which was established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the Civil Justice System." Jud. Off., Triennial Review: Civil Justice Council and Family Justice Council 1 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/444682/triennial-review-cjc-fjc-2015-print.pdf [https://perma.cc/ZN7S-9CVH]. The CJC authorized funders to self-regulate and held "stakeholder events" in 2008 to draft a "Code of Conduct for Third-Party Funding." *See Third Party Funding*, Cts. & Tribunals Judiciary, https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/ previous-work/costs-funding-and-third-party-funding/third-party-funding-2/ [https://perma.cc/7S3C-LHZQ] (last updated Nov. 2011).

[104] ALF Code of Conduct, *supra* note 98, para. 1.

[105] *See ALF Code of Conduct Summary*, *supra* note 98 ("The Code sets out the standards by which all full funder members of the ALF must abide, and meets each of the key concerns set out by Lord Justice Jackson in his Civil Litigation Costs Review.").

[106] *Third Party Funding*, *supra* note 103 (defining CJC working party's objective as to "produce final version of [a voluntary code of conduct for third-party funders] for approval by Ministers [of Justice] which Third Party Funders will be expected to abide by"). *See also generally* Ass'n of Litig. Funders of Eng. & Wales, A Procedure To Govern Complaints Made Against Funder Members by Funded Litigants (2017) [hereinafter Procedure To Govern Complaints], https://associationoflitigationfunders.com/wp-content /uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf [https://perma.cc/P6VC-WQLJ].

governmentally sanctioned regulatory function, "[c]laimants and their lawyers are therefore urged to work only with those funders who are approved members of the ALF."[107] ALF only regulates commercial funding, not consumer funding, and only has jurisdiction over its voluntary members, not other funders who may operate in the United Kingdom or elsewhere.[108]

ALF's Code of Conduct includes the U.K. government's input, and ALF's administration of the code remains under light-touch government oversight. ALF's code provides professional conduct guidance in several areas, including producing "clear and not misleading" advertising;[109] preserving the confidentiality of the client's information;[110] ensuring that the funded party has obtained "independent [legal] advice" regarding the funding agreement;[111] avoiding controlling the party's attorney[112] or causing the party's attorney to breach professional duties;[113] maintaining capital adequacy, submitting to financial audits, and disclosing such financial information to ALF;[114] including in the funding agreement provisions for paying adverse costs, security for costs, or insurance;[115] specifying in the funding agreement whether the funder can provide input (if any) in the party's settlement decision;[116] complying with termination and withdrawal requirements if funders wish to end the funding arrangement before the case has ended on the merits;[117] specifying the

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[107] *About Us*, Ass'n of Litig. Funders, https://associationoflitigationfunders.com/about-us/ [https://perma.cc/923Y-8263] (last visited Dec. 7, 2022).

[108] *See* Ass'n of Litig. Funders, Introducing Litigation Funding 1, http://associationoflitigationfunders.com/wp-content/uploads/2014/03/ALF-info-for-solicitors.pdf [https://perma.cc/P565-GMLX] (last visited Dec. 7, 2022) ("Litigation funding is typically only available to commercial cases of a high value, and it is not yet suitable for consumer cases, personal injury cases, or claims that do not carry a sufficiently high level of damages.").

[109] *See* ALF Code of Conduct, *supra* note 98, para. 6.

[110] *See id*. para. 7.

[111] *See id*. para. 9.1.

[112] *See id*. para. 9.3.

[113] *See id*. para. 9.2.

[114] *See id*. paras. 9.4-9.5 (requiring litigation funders to maintain £5 million of capital, undergo annual audits, and "accept a continuous disclosure obligation").

[115] *See id*. para. 10.

[116] *See id*. para. 11.1.

[117] *See id*. paras. 11.2-13.2.

nonrecourse nature of the funding;[118] extending liability to parent corporation funders for violations of the code by their subsidiaries or associated entities;[119] and requiring ALF to maintain dispute resolution or complaints procedures to handle disputes between the funder and the funded party.[120]

2. American Legal Finance Association

Similarly, the ALFA in the United States has a voluntary code and institutional legitimacy from a government. There is no federal regulation of third-party funding in the United States and no federal legitimacy for legal funding guidelines or professional associations.[121] Instead, legitimacy and guidance must come from state governments, if at all. ALFA's members made an agreement with the New York State Attorney General in 2005 that outlined a code of conduct for litigation funding transactions in New York state and legitimized ALFA.[122] The first provision of ALFA's Code of Conduct states that "[e]ach member agrees to comply with the Agreement negotiated by ALFA with the New York Attorney General dated February 17, 2005 for all New York State transactions."[123] According to that agreement, ALFA was "formed, according to its By-Laws or Certificate of Incorporation, for the purpose of, inter alia, promoting high ethical standards of professionalism for the legal finance industry."[124] As with ALF in the United Kingdom, ALFA's public-private partnership with New York gives the weight of governmental authority to the third-party funding industry's self-regulation efforts, thereby enhancing the effectiveness of that self-regulation.

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[118] *See id*. para. 2.6 (prohibiting litigation funders from "seek[ing] any payment from the Funded Party in excess of the . . . proceeds of the dispute" where funded party does not materially breach funding agreement).

[119] *See id*. para. 14.

[120] *See id*. paras. 13.2, 15.

[121] *See* Nieuwveld & Sahani, *supra* note 14, at 142 n.52.

[122] *See The ALFA Code of Conduct*, *supra* note 99, para. 1. *See generally* State of N.Y. Off. of the Att'y Gen., Assurance of Discontinuance Pursuant to Executive Law § 63(15) (2005) [hereinafter Agreement Between ALFA and New York], http://docplayer.net/713096-State-of-new-york-office-of-the-attorney-general.html [https://perma.cc/2AAG-6NJ2]. As third-party funding is regulated only at the state level in the United States, the influence of ALFA at the national level is merely as persuasive authority, similar to the American Bar Association's ("ABA") persuasive authority over lawyer regulation by state bars or state supreme courts.

[123] T*he ALFA Code of Conduct*, *supra* note 99, para. 1.

[124] Agreement Between ALFA and New York, *supr*a note 122, para. 3.

Unlike ALF, ALFA includes only consumer-focused third-party funders, which means that they finance cases brought primarily by individual human claimants.[125] Thus, the ALFA code applies only to consumer litigation funding by its members.[126] Like ALF, ALFA can only regulate its own voluntary members, not other funders who may operate in the United States or elsewhere.

ALFA's Code of Conduct is less specific than ALF's, and it expressly excludes commercial litigation funding.[127] Still, its provisions are instructive for assembling general principles of professional responsibility for all types of third-party funders. For example, the ALFA Code of Conduct promotes industry self-governance and created a first-of-its-kind tracking system for funded cases.[128] It also requires members to obtain a written acknowledgment from the plaintiff's attorney before funding the plaintiff's case, to inform ALFA of any pending or threatened litigation that may impact the industry, and to negotiate balances with any party that receives a substantially lower settlement.[129] The code prohibits acquiring an ownership interest in the client's litigation, interfering or participating in the client's litigation, attempting to influence the client's litigation, advancing money above the client's need, distributing false or misleading information or advertisements, paying any commission or referral fees to an attorney or law firm referring clients to the funder, and funding a case previously funded by another ALFA member without buying out that other member's interest in the case first.[130] In addition, the ALFA Code of Conduct includes a multistep dispute resolution process that includes mediation through a Grievance Committee and binding arbitration under the American Arbitration Association, Commercial Division.[131]

Uniquely, the ALFA Code of Conduct includes a provision that each member shall input newly funded cases within one business day into an Investment Management System ("IMS"),[132] which is a "comprehensive database . . .

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[125] *See About ALFA*, Am. Legal Fin. Ass'n, https://americanlegalfin.com/about-alfa [https://perma.cc/88RM-UVFM] (last visited Dec. 7, 2022).

[126] *See The ALFA Code of Conduct, supra* note 99, para. 13.

[127] *See id.*

[128] *See id.* para. 10.

[129] *See id.* paras. 2, 11-12.

[130] *See id.* paras. 4-9.

[131] *Id.* para. 14.

[132] *Id.* para. 10.

of consumer legal funding advances made by ALFA members . . . . to avoid potential problem cases and to ensure that cases are not over-funded."[133] To this Author's knowledge, ALFA's IMS is the world's first administrative system dedicated to ensuring that a funded party is not receiving financing from more than one third-party funder simultaneously or that a third-party funder is not funding more than one side of a case.

3. International Legal Finance Associatio

In contrast to ALF and ALFA, global legal funding industry giants cofounded ILFA in 2020 without seeking government acceptance. Based in Washington, D.C., ILFA's members have a global footprint and focus on the international commercial legal funding market, particularly international arbitration.[134] ILFA's recent creation demonstrates the maturation of the industry and funders' preference for self-regulation.

ILFA has posted a list of best practices on its website without specifically enumerated requirements or a publicly disclosed code of conduct.[135] ILFA's best practices are organized around guiding principles such as clarity, transparency, and forthrightness in communicating "terms, expectations and contractual arrangements" to the "users" of funding; "[r]especting duties to the courts" and "the proper administration of justice"; not interfering with "lawyers' duties to the courts and to their clients"; "[a]void[ing] conflicts of interest"; "[p]reserv[ing] confidentiality and legal privilege"; and maintaining "capital adequacy."[136] However, ILFA's best practices do not mention any enforcement mechanisms or sanctions.[137] This may mean either that ILFA does not have sanctions for member misconduct or that its sanctions are not publicly disclosed.

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If funders are allowed to self-govern, then as the examples above indicate,

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[133] *About ALFA, supra* note 125.

[134] *See* Int'l Legal Fin. Ass'n, *supra* note 17.

[135] *See Best Practice*, *supra* note 100.

[136] *Id.*

[137] *See id.*

some tenets of professional conduct should be agreed upon to protect the legal system from attacks on its integrity. Otherwise, regulators cannot be sure that the codes of self-governance are effective and enforceable, rather than simply giving the appearance of ethics and trustworthiness. In an extreme, worst-case scenario, one can imagine that funder self-governance could turn self-destructive if funders seek to eliminate their competitors or detractors purportedly in the name of self-governance like the characters in the book *The Lord of the Flies.*[138]

However, the biggest issue with funder self-regulation is that no information is available about the frequency, extent, or circumstances of funder sanctions by self-regulatory organizations. Thus, one assumption could be that funders are rarely or never sanctioned by their self-regulatory associations. ALF provides the best existing example of funder self-governance (with a faint shadow of government oversight). Still, to the author's knowledge, ALF has rarely engaged in any discipline or sanction of funders who are members, so its efficacy is still theoretical. Does this mean that no funder has ever committed a breach of ALF's Code of Conduct? Perhaps, but there is no way to know for sure; ALF does not publicly disclose the use of its complaints procedure or the results unless a public sanction is imposed.[139] It is more likely that the member funders are reticent to discipline their peers harshly and publicly, given the finality and embarrassment accompanying such punishment.

In comparison, students administering honor codes at universities exhibit similar behavior whenever expulsion from school is the only punishment imposed; students may vote to expel a peer more often than funders do, but

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[138] *See generally* William Golding, The Lord of the Flies (Lois Lowry ed., Penguin Books 2016) (1954).

[139] See Procedure To Govern Complaints, supra note 106, para. 35 ("Unless otherwise provided for by this procedure or the Board, the fact of and all matters concerning any Complaint shall be kept strictly confidential by the parties."); id. para. 25 (listing all possible sanctions, including fines, private and public warnings, publication of the decision against the funder, suspension of membership in ALF, expulsion from ALF, and "payment of all or any of the costs of determining the Complaint [i.e., the funded party plaintiff]"). To the author's knowledge, ALF has never publicly disclosed the applications of any of these sanctions.

such decisions are still rare.[140] ALF's system of funder self-regulation will not prove its efficacy and integrity until an instance of serious funder misconduct has tested it. Under the existing regime for funder self-governance, such a circumstance may never be publicly disclosed. In Part III, this Article proposes global information-sharing of funder sanctions to bridge this information gap and prevent regulatory arbitrage.

4. A Former Funder's Code of Best Practices

In addition to funder associations, third-party funders often publicly post their internal codes of conduct or best practices on their websites. One of the most detailed of those codes was the Code of Best Practices by Bentham IMF, a former U.S.-based funder that recently merged with another funder and adopted the name Omni Bridgeway.[141] Bentham IMF engaged exclusively in commercial litigation funding and therefore did not belong to ALFA, whose members are consumer litigation funders only.[142] Even though Bentham IMF no longer

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[140] *See, e.g.*, Anna G. Bobrow, *Restoring Honor: Ending Racial Disparities in University Honor Systems*, 106 Va. L. Rev. Online 47, 51 (2020) ("Since the first recorded trial in 1851, expulsion from UVA has been the only punishment available if the jury finds the student guilty."); Jill Seiler, *K-State Sees Increase in Honor Code Violations*, Kan. St. Collegian (Jan. 27, 2017), https://www.kstatecollegian.com/2017/01/27/k-state-sees-increase-in-honor-code-violations/ [https://perma.cc/BV78-MZS4] ("Very rarely did honor code violations result in suspension or expulsion, and only one or two students found themselves in that situation . . . .").

[141] *See generally* Bentham IMF, Code of Best Practices (2014) [hereinafter Bentham IMF, Code of Best Practices] (on file with author). Bentham IMF's original Code of Best Practices is no longer available on the internet because Bentham IMF (U.S.), IMF Bentham (Australia), and several other subsidiaries and affiliates recently merged into Omni Bridgeway. *See IMF Bentham and Bentham IMF To Become Omni Bridgeway*, Omni Bridgeway: Blog (Feb. 26, 2020), https://omnibridgeway.com/insights/blog/blog-posts/global/2020/02/25/imf-bentham-and-bentham-imf-to-become-omni-bridgeway [https://perma.cc/H69J-W5DY]. However, a press release summarizing the Code of Best Practices and a video of Bentham IMF's former leaders discussing the 2017 version of the Code are still available online. *See* Press Release, Omni Bridgeway, Litigation Funder Bentham IMF Adopts Code of Best Practices for US (Jan. 13, 2014), https://omnibridgeway.com/insights/press-releases/all-press-releases/press-release/2014/01/13/litigation-funder-bentham-imf-adopts-code-of-best-practices-for-us [https://perma.cc/GB37-4ZKF]; Bentham IMF, *Bentham IMF's Code of Best Practices*, Vimeo (June 7, 2017, 3:37 PM) [hereinafter Bentham IMF, Vimeo], https://vimeo.com/220694106. This Article cites a funder's code that no longer exists to avoid the appearance of bias toward or against any existing funders regarding whether their codes are included or excluded from this Article. A comprehensive examination of all available internal funders' codes of conduct is beyond the scope of this Article but is ripe for future inquiry.

[142] *See generally* Bentham IMF, Code of Best Practices, *supra* note 141; *see also supra note* 125 and accompanying text.

exists as an independent entity, its Code of Best Practices is still instructive and contains many of the same provisions described in the other examples above.

Bentham IMF's code is unique, however, in several ways. First, it sets out four guiding principles: fairness, transparency, accountability, and responsibility.[143] Conversely, the ALF, ALFA, and ILFA examples in this Section do not expressly articulate the overarching principles that their codes seek to uphold. Second, Bentham IMF's code includes best practices for each of the funder's relationships: the funder-public relationship, the funder-attorney relationship, the funder-client relationship, and the funder-financial relationship (termed "financial strength").[144] Separating the funder's duties in these various relationships underscores the interconnectedness and interdisciplinary nature of the third-party funding industry and recognizes that the funder's duties in each of those contexts differ in crucial ways.

Third, Bentham IMF's best practices for the funder-public relationship included educating the public about funding and devoting resources to pro bono projects, a provision that the author has not seen in any other code of conduct.[145] Considering that attorney professional responsibility obligations include taking on pro bono work, this provision indicates that Bentham IMF saw itself as a professional organization with obligations to the profession and society. Fourth, the best practices for the funder-attorney relationship include prohibiting investments by attorneys or law firms representing a funded party in the funder itself.[146] This provision complements the restriction on self-dealing in the Model Rules of Professional Conduct for attorneys.[147] This restriction is crucial given the growing availability of crowdfunding and other opportunities for individual attorneys to invest in the practices of other attorneys.[148]

Despite the very forward-looking provisions of the Bentham IMF Code of

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[143] *See* Bentham IMF, Code of Best Practices, *supra* note 141, at 2.

[144] *Id*. at 3-4.

[145] *Id*. at 3.

[146] *Id*.

[147] *See* Model Rules of Pro. Conduct r. 1.8 (Am. Bar Ass'n 2021) (restricting financial relationships between attorneys and clients).

[148] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-499.pdf [https://perma.cc/T8LQ-4TJR] (stating that lawyer may passively invest, but not actively practice, in licensed ABS even if lawyer is admitted to practice in jurisdiction that does not allow ABS form).

Best Practices, this was still a voluntary code of conduct administered internally by a single funder. Moreover, like ILFA's list of best practices, this code of conduct contained no enforcement mechanisms, and it is unclear how Bentham IMF enforced this code of conduct internally. Thus, this code was aspirational rather than operational, as underscored by a promotional video that Bentham IMF released about its code.[149] Nevertheless, Bentham IMF's Code of Best Practices was a commendable, concerted effort by a third-party funder to espouse professional responsibility norms sua sponte, without government pressure. Moreover, by prominently publishing the code of conduct on its website, Bentham IMF likely influenced, at least indirectly, the behavior of its competitors and the expectations of potential clients. Today, several more funders have codes of conduct that could be explored in greater detail in a robust qualitative and quantitative study of all the approaches worldwide to regulating third-party funder ethics and professional responsibility.

C. Attorney Regulation

Unlike lawyers, funders do not have a "close relationship between the profession and the processes of government and law enforcement."[150] Still, the activity of funders profoundly affects the relationship between lawyers, clients, and the legal system. As a result, many jurisdictions regulate third-party funding indirectly by regulating how attorneys approach the third-party funding relationship. Regulating through attorneys is indirect because the regulation only affects the funder to the extent that the funder interacts with the attorney. Funders who only interact with the funded party and never encounter the attorney often do so to avoid triggering an attorney's professional ethics conundrum.

There are several examples of indirect regulation of the third-party funding industry through lawyers' professional responsibility requirements in a particular jurisdiction. One of the most comprehensive examples comes from the United States. A decade ago, the American Bar Association ("ABA") Commission on Ethics 20/20 submitted an Informational Report to the ABA House of Delegates

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[149] *See* Bentham IMF, Vimeo, *supra* note 141.

[150] Model Rules of Pro. Conduct pmbl. Para. 10 (Am. Bar Ass'n 2020).

on "alternative litigation finance."[151] In its report, the Commission interpreted the existing ABA Model Rules of Professional Conduct to explain how lawyers should conduct themselves when dealing with a case involving a third-party funder. The Commission identified "several core professional obligations" about which attorneys must be "mindful" when litigation funding is used in a case, including "exercis[ing] independent professional judgment," "not be[ing] influenced by financial or other considerations," preventing "conflicts of interest," complying with restrictions on "third-party payments of fees," "prevent[ing] disclosure of information" protected by confidentiality or by an evidentiary privilege, and "becom[ing] fully informed about" litigation funding or "associat[ing] with experienced counsel."[152]

These professional obligations also indirectly regulate the conduct of third-party funders because the report advises lawyers to withdraw if they are unable to carry out their professional obligations in the face of pressure or undue influence by the third-party funder.[153] The lawyer's withdrawal will cause the funder to incur additional costs in the litigation and may delay or otherwise affect the case's merits. In this way, the lawyer's professional responsibility obligations incentivize cost-conscious funders to avoid any interference in the attorney-client relationship that may hinder a lawyer's performance of her professional duties. Therefore, the ABA's interpretation of the lawyer's obligations vis-à-vis third-party funding functions as an indirect "regulation" of the behavior of third-party funders. This indirect "regulation" does not directly apply professional responsibilities to third-party funders. Instead, it creates the potential for funders to incur additional financial and time costs when the attorney withdraws. This incentivizes cost-conscious funders to take a hands-off approach to the client's legal representation and not interfere in the attorney-client relationship. Such incentives are necessary aspects of any code of professional conduct for third-party funders. Nevertheless, as illustrated in the Introduction of this Article, unscrupulous lawyers (and doctors) will contravene their rules of professional conduct for a profit. Thus, this indirect "regulation" of funders through lawyers

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[151] *See generally* Am. Bar Ass'n Comm'n on Ethics 20/20, Informational Report to the House of Delegates (2012), http://www.americanbar.org/content/dam/aba/ administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf [https://perma.cc/89BD-ZE6D].

[152] *Id*. at 4.

[153] *Id*. at 29.

is inadequate to prevent funders from abusing the dispute settlement system.

Adding to this problem is that funders can make agreements with clients that attorneys cannot. For example, an attorney cannot make a contract with a client providing that the attorney must approve the terms of the client's settlement agreement,[154] but a funder can put such a provision in its contract with a client.[155] Similarly, an attorney cannot make a contract with a client that restricts the client's right to choose its legal counsel or fire the attorney.[156] In contrast, a funder can make a contract with a client that the funder must approve any changes in the client's legal representation and has the right to fire and replace the attorney over the client's objections.[157] These problems are not addressed by regulating funders indirectly through attorney professional responsibility rules.

Furthermore, funders make many expensive and impactful judgment calls regarding their service despite the lack of guidance for funders on challenging ethical quandaries. Lawyers are not even trusted to make such decisions without a framework for professional conduct, such as the ABA's Model Rules of Professional Conduct and an enforcement mechanism. Are funders somehow more moral or responsible than lawyers? Certainly not.

On the contrary, funders are more like attorneys than they may admit because third-party funding entities are direct byproducts of the legal services industry. For example, nonpracticing attorney principals have founded or currently manage the most significant funding industry players.[158] Many funders hire (or poach) lawyers directly from top law firms to benefit from

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[154] *See* Model Rules of Pro. Conduct r. 1.2(a) (Am. Bar Ass'n 2021) ("A lawyer shall abide by a client's decision whether to settle a matter.").

[155] *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 96-403 (1996) (describing insurance contract that grants insurer right to settle claim without insured's consent).

[156] *See, e.g.*, Model Rules of Pro. Conduct r. 1.16(a)(3) (requiring attorney to withdraw upon discharge by client); *id.* cmt. 4 (clarifying client's "right to discharge a lawyer at any time, with or without cause").

[157] *Cf.* ABA Comm. on Ethics & Pro. Resp., Formal Op. 96-403 (noting insured may forfeit rights under insurance policy by challenging insurer's "right to control the defense and settle the claim").

[158] *See* Sahani, *Judging*, *supra* note 12, at 399 n.47 (listing examples of third-party funders with lawyers as leaders or principals).

the formal training that those lawyers have received.[159] Funders hire attorneys to analyze and evaluate cases to decide which ones the funder should fund.[160] Funders also facilitate the financial aspects of the attorney-client relationship (which includes communication) and enter into comprehensive confidentiality and nondisclosure agreements as a best practice.[161] Funders also often have prominent litigators or arbitrators on their advisory boards to help them decide which cases to finance or reject.[162] In this way, the formal training of legal practice is part of the DNA of the leadership of most funders. Thus, funders are already operating with the attorney's rules of professional conduct in mind. As long as an attorney holds at least one active bar license, that attorney is subject to rules of professional conduct, even when that attorney is an owner or employee of a funder and does not represent clients.[163]

Moreover, the well-established, leading funders respect lawyer professional responsibility principles. For example, funders often argue that they provide an "access justice" service. Regardless of whether that is true, funders should help alleviate the gap between those who need legal help and those who can afford it for the good of society.[164] Similarly, attorney bars strongly encourage their

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[159] *See, e.g.*, Andrew Mizner, V*annin Capital Launches in New York*, ICLG.com (Aug. 16, 2017), https://iclg.com/cdr/third-party-funding/7524-vannin-capital-launches-in-new-york [https://perma.cc/4JKY-9PER] ("Third-party funder Vannin Capital made a statement of intent towards the United States at the start of this month, opening a second office in the country with the hire of three New York lawyers as investment directors.").

[160] For example, in a recent *60 Minute*s episode, Christopher Bogart, the Chief Executive Officer of Burford, one of the largest third-party funders in the world, took the *60 Minutes* host on a tour of Burford's offices hosting dozens of cubicles of lawyers working on evaluating potential cases for investment. *See* Lesley Stahl, *Litigation Funding: A Multibillion-Dollar Industry for Investments in Lawsuits with Little Oversight*, CBS News: 60 Minutes (Dec. 18, 2022, 7:36 PM), https://www.cbsnews.com/news/litigation-funding-60-minutes-2022-12-18/ [https://perma.cc/YVU2-R62D].

[161] With respect to the latter point, the shroud around the inner workings of third-party funders makes it difficult for academics to obtain much needed data and information for research.

[162] *See, e.g.*, Leo Szolnoki, *Beechey To Advise Third Party Funder*, Glob. Arb. Rev. (Nov. 5, 2013), https://globalarbitrationreview.com/third-party-funding/beechey-advise-third-party-funder (reporting that former Chairman of International Court of Arbitration, who had previously spent thirty years litigating at international law firm Clifford Chance, joined investment advisory panel of London-based Woodsford Litigation Funding).

[163] *See, e.g.*, Model Rules of Pro. Conduct pmbl. para. 3 (Am. Bar Ass'n 2020) (noting applicability of rules beyond practice of law).

[164] *See* Sahani, *Rethinking*, *supra* note 21, at 626-28.

members to engage in pro bono and reduced-fee representation.[165] Second, like contingent fee attorneys, funders specialize in assessing the cost of providing legal services and constructing financing arrangements to pay for those services. In this way, funders bridge the gap between the licensed legal services profession and the licensed financial services profession. Third, funders create professional associations that promulgate codes of conduct or best practices, such as ALF, ALFA, and ILFA.[166] Fourth, as already discussed, the nature of the third-party funder's work may directly affect the professional responsibilities of lawyers. Thus, the interconnectedness among lawyers and funders necessitates applying principles of professionalism to funders.

Finally, funders are offering a type of unbundled legal service—dispute financing, a field mainly occupied by attorneys until now.[167] Part I explained that traditional third-party funding is essentially a nonattorney contingent or conditional fee. However, because funders are not lawyers, their behavior does not fall under the attorney rules of conduct regarding contingent or conditional fees. Therefore, funders often charge significantly higher rates of return and impose more onerous restrictions on funded parties than the rules and statutes would allow for attorneys.[168]

This picture will become even more complex as funders start owning law firms.[169] Jurisdictions are loosening the restrictions on nonlawyers—including third-party funders—owning equity in law firms and are applying attorney Rules of Professional Conduct to these investors.[170] For example, the United Kingdom has allowed nonlawyers limited ownership of law firms since 2013

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[165] *See, e.g.*, Model Rules of Pro. Conduct r. 6.1 (Am. Bar Ass'n 2021) (encouraging lawyers to provide at least fifty hours of pro bono services annually).

[166] *See supra* Section II.B.

[167] Another traditional funding alternative available to clients is a traditional recourse loan, but the terms are often much less desirable, and payments are often required long before the client would recover any money from winning its case. *See* Nieuwveld & Sahani, *supr*a note 14, at 6.

[168] *See* Shannon, *Harmonizing*, *supra* note 54, at 866 (explaining that funders charge higher rates of return to offset higher risk).

[169] *See, e.g.*, *Alternative Business Structures*, Ariz. Jud. Branch, https://www.az courts.gov/Licensing-Regulation/Alternative-Business-Structure [https://perma.cc/PTY3-BVWG] (last visited Dec. 7, 2022).

[170] *See* Sahani, *Reshaping*, *supra* note 56, at 408-09; s*ee also supra* note 49 and accompanying text (discussing Arizona legalizing nonlawyer ownership of law firms through ABS entities).

through alternative business structure ("ABS") entities that practice law.[171] Australia has long allowed nonlawyer ownership of law firms and funder-law firm partnerships, and in 2007, Australian firm Slater and Gordon became the first publicly traded law firm in the world.[172]

In January 2021, Arizona became the first state to allow nonlawyer ownership of law firms through ABS entities.[173] Arizona requires ABS entities to obtain a law license, abide by the attorney rules of professional conduct in Arizona as they apply to law firms, and comply with sanctions for violations.[174] Arizona fundamentally changed its version of Rule 5.4 of the Rules of Professional Conduct to allow for nonlawyer ownership of law firms.[175] California,[176] Utah,[177]

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[171] *See* Legal Services Act 2007, c. 29, § 5 (Eng.); *'Tesco Law' Allows Legal Services in Supermarkets*, BBC News (Mar. 28, 2012), https://www.bbc.com/news/uk-17538006 [https://perma.cc/DS8L-MAK3] (reporting United Kingdom's adoption of provisions allowing nonlawyer ownership of law firms through ABS entities, potentially including supermarkets like Tesco).

[172] *See* Jason Krause, *Selling Law on an Open Market*, 93 ABA J. 34, 34 (2007); Peter Lattman, *Underwritten Down Under: A Firm's IPO Opens Debate*, Wall St. J. (May 23, 2007, 12:01 AM), https://www.wsj.com/articles/SB117988897781011777.

[173] *See supra* note 49 and accompanying text. Though not a state, Washington, D.C., has allowed nonlawyer ownership for many years, but the ownership percentage and the activities of the resulting entity are restricted. *See* Sahani, *Reshaping*, *supra* note 56, at 434-36 (noting original owner must not sell 100% of claim to third-party funder and that funder-attorney partnerships must be "very carefully structured" to comply with Rule 5.4 of the D.C. Rules of Professional Conduct). Thus, historically, D.C. has not been an attractive jurisdiction for third-party funders to invest in law firms. *See* Sahani & Steinitz, *Navigating*, *supra* note 49 (highlighting lack of large-scale nonlawyer ownership of D.C. law firms). In 2020, the D.C. Bar's Global Leader Practice Committee sought public comments on whether to relax its rules and thereby further encourage nonlawyer ownership of law firms. *See D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct* 5.4, D.C. Bar (Jan. 23, 2020) [hereinafter D.C. Bar], https://www.dcbar.org/news-events/news/d-c-bar-global-legal-practice-committee-seeks-publ [https://perma.cc/7C3A-Z2TV].

[174] *See* Steinitz & Sahani, *New Ariz. Law Practice Rules*, *supra* note 49.

[175] *See* Sahani, *Reshaping*, *supra* note 56, at 435.

[176] *See* Lauren Berg, *Calif. Bar OKs Exploring 'Sandbox' To Boost Legal Access*, Law360 (May 14, 2020, 7:36 PM), https://www.law360.com/articles/1273812/calif-bar-oks-exploring-sandbox-to-boost-legal-access (discussing California State Bar's vote to launch experimental "sandbox" to relax rules prohibiting nonlawyer ownership of firms to provide greater access to legal services).

[177] *See* Bob Ambrogi, *Utah Supreme Court Votes To Approve Pilot Allowing Non-Traditional Legal Services*, LawSites (Aug. 29, 2019), https://www.lawsitesblog.com /2019/08/utah-supreme-court-votes-to-approve-pilot-allowing-non-traditional-legal-services.html [https://perma.cc/Q3K8-LQQ9] (reporting Utah Supreme Court's unanimous vote to launch pilot program allowing nonlawyer investment and ownership of legal service entities).

Florida,[178] Illinois,[179] New York,[180] and the District of Columbia[181] are all in various stages of examining whether to make similar changes to their rules to allow nonlawyer ownership of law firms. In addition, the ABA issued an ethics opinion in September 2021 stating that lawyers licensed to practice in jurisdictions that do not allow ABS entities may nevertheless invest passively in them in jurisdictions in which they are allowed.[182]

If funder ownership of law firms becomes widespread in the same vein as the Arizona model, lawyers and funders would be subject to the same professional conduct rules, and the regulatory arbitrage loophole would be closed, at least concerning attorney ethics. Still, it is not clear that most funders and law firms would choose to partner in that way, especially since the current structures for dispute finance transactions arguably better preserve lawyer autonomy from the financiers. In any event, the current framework for regulating funders through attorney regulation is insufficient to enforce funder ethics rules because it relies solely on how ethical the individual attorneys or law firms interacting with funders are. As described in the Introduction of this Article, attorneys can be

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[178] *See* Justin Wise, CORRECTED: *Florida Special Committee Recommends Regulatory 'Sandbox,'* Law360 (June 29, 2021, 4:45 PM), https://www.law360.com/articles/1398652 (summarizing Florida's "law practice innovation laboratory program," which would permit nonlawyers to have noncontrolling equity interest in law firms).

[179] *See* Aebra Coe, *Where 5 States Stand on Nonlawyer Practice of Law Regs*, Law360 (Feb. 5, 2021, 4:33 PM), https://www.law360.com/articles/1352126/where-5-states-stand-on-nonlawyer-practice-of-law-regs (discussing regulatory deliberations in Arizona, California, Illinois, New Mexico, and Utah).

[180] *See Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees*, N.Y.C. Bar (July 30, 2018), https://www.nycbar.org/member-and-career-services /committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees [https://perma.cc/XJC6-S3DQ] (reaffirming Rule 5.4 prohibition on fee sharing with nonlawyers); N.Y.C. Bar Ass'n Working Grp. on Litig. Funding, Report to the President 2 (2020), http://documents.nycbar.org /files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf [https://perma.cc/6N9Q-RA37] (expressing modestly contrary view that "lawyers and the clients they serve would benefit if lawyers have less restricted access to funding").

[181] Until Arizona changed its Rule 5.4 in 2021, D.C. had the least restrictive Rule 5.4 in the nation, allowing limited nonlawyer ownership of law firms. *See* Sahani, R*eshaping*, *supra* note 56, at 457-70 (discussing history of Rule 5.4 and D.C.'s outlier status). Washington, D.C., is considering loosening its restrictions even further on nonlawyer ownership and multidisciplinary practices. *See* D.C. Bar, *supra* note 173.

[182] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-499.pdf [https://perma.cc/T8LQ-4TJR].

just as unscrupulous as funders[183] and therefore constitute an unreliable source of regulatory accountability at best.

D. Financial Services Industry Regulation

Commercial third-party funding resembles venture capital, a derivative, or a hedging investment strategy.[184] Thus, some jurisdictions already apply financial or securities industry regulations to third-party funders.[185] For example, Australia recently introduced a requirement that funders obtain an Australian Financial Services License ("AFSL").[186] The Australian Securities and Investments Commission ("ASIC") oversees the "light touch" regulation of third-party funding in Australia and issues AFSLs to third-party funders who operate in Australia.[187] In addition to requiring an AFSL, Australia has a "light touch" regime of regulation for litigation funding that includes a combination of statutes, court oversight, court case management protocols, and regulatory guidance from the ASIC.[188] This regime requires litigation funders operating in Australia to maintain practices for "addressing potential, actual or perceived

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[183] *See supra* notes 2-6 and accompanying text (discussing fraudulent litigation schemes).

[184] *See*, *e.g.*, Maya Steinitz, *Incorporating Legal Claims*, 90 Notre Dame L. Rev. 1155, 1160 (2015) (discussing funding as venture capital); Shannon, *Dodd-Frank Act*, *supra* note 65, at 20 (discussing funding as derivative or hedging strategy); *Int'l Litig Partners Pte Ltd v Chameleon Mining NL*, (2011) 50 NSWCA (Austl.) (debating whether litigation funding in case was derivative); Swaab, *Australia: Has the Long-Anticipated Regulation of Litigation Funding Finally Arrived?*, Mondaq (June 21, 2011), https://www.mondaq.com /australia/corporate-governance/135958/has-the-long-anticipated-regulation-of-litigation-funding-finally-arrived [https://perma.cc/4Q9X-Z6QM] (discussing decision in *Int'l Litig Partners Pte Ltd* regarding whether funding is a derivative).

[185] Examples of funders regulated by the securities regulatory bodies in the United States, the United Kingdom, and Australia are Calunius Capital, Omni Bridgeway, and Burford. *See* Roy Strom, *Litigation Finance Giants Form Trade Group To Counter Regulation*, Bloomberg L. (Sept. 8, 2020, 1:01 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/litigation-finance-giants-form-trade-group-to-counter-regulation?context=article-related.

[186] *See Litigation Funding Schemes*, Australian Sec. & Invs. Comm'n, https://asic.gov.au/regulatory-resources/managed-investment-schemes/litigation-funding-schemes/ (last updated Apr. 19, 2022) ("Operators of litigation funding schemes will generally need to hold an AFS licence and each litigation funding scheme will need to be registered as a managed investment scheme.").

[187] *See id. See generally* Australian Sec. and Invs. Comm'n, Regulatory Guide 248: Litigation Schemes and Proof of Debt Schemes (2013) [hereinafter Regulatory Guide 248], https://download.asic.gov.au/media/1247153/rg248.pdf [https://perma.cc/L8FY-Z383].

[188] *See* Regulatory Guide 248, *supra* note 187, at 11 tbl.1.

conflicts of interest."[189]

The Financial Conduct Authority ("FCA") regulates funders' asset management activities in the United Kingdom.[190] Among the states that allow and regulate third-party funding via statute, Indiana has designated its Department of Financial Institutions to oversee licensing of funders and discipline funders under its litigation funding statute.[191] Moreover, existing national regulations that protect investors already directly or indirectly regulate some third-party funders. For example, publicly traded funders, such as Omni Bridgeway and Burford, are regulated by the stock exchanges in the countries where they are listed and traded.[192] In addition, publicly traded corporations that are clients of litigation funders must disclose funding if it is a material transaction.[193] Such disclosure is a form of indirect regulation because funders cannot "hide" their business dealings with publicly traded corporations. Furthermore, third-party funders organized as hedge funds or financial firms must comply with the securities and exchange regulatory bodies in all the jurisdictions where they operate, such as the Securities and Exchange Commission ("SEC") in the United States, the ASIC in Australia, and the FCA in the United Kingdom.

In the same vein, third-party funders might be investment brokers under the Jumpstart Our Business Startups ("JOBS") Act, which requires that all crowdfunding occurs through platforms registered with a self-regulatory

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[189] *See id*. para. 248.18, at 9.

[190] *See Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016: Proposal To Lower the Age of Contractual Capacity from 21 Years to 18 Years, and the Civil Law (Amendment)* Bill, Ministry of L. Sing. (June 30, 2016), https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-the-draft-civil-law--amendment--bill-2016/ [https://perma.cc/UY4L-3GKS] ("In England, funders are regulated by the Financial Conduct Authority in connection with their asset management activities.").

[191] *See* Ind. Code Ann. §§ 24-12-1-1 to -1-10 (West 2022) (regulating litigation funding in Indiana under auspices of state's Department of Financial Institutions).

[192] *See supra* note 30 and accompanying text.

[193] *See* Nieuwveld & Sahani, *supra* note 14, at 31.

organization and regulated by the SEC.[194] For example, at least one funder, LexShares, operates under the JOBS Act and focuses on crowdfunding litigation by targeting accredited investors—individuals with a certain minimum dollar amount in assets—to contribute a portion of the investment needed to pursue a case.[195] In exchange, an individual investor receives a "share" of the case corresponding to a portion of any eventual return.[196]

Furthermore, in the future, funders might be securities dealers if they gain the ability to "securitize litigation costs and sell derivative interests in lawsuits to spread the risk of a frivolous lawsuit among numerous investors."[197] Thus, funders with specific characteristics may already be part of the financial services industry. For example, the SEC has already brought an enforcement action against one funder for defrauding investors.[198] Thus, the SEC may be the appropriate government agency to act as an enforcement body for commercial

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[194] *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.) (amending Securities Exchange Act of 1934, 15 U.S.C. §§ 77-78, 7213, 7262); *Registration of Funding Portals: A Small Entity Compliance Guide*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/divisions/marketreg /tmcompliance/fpregistrationguide.htm [https://perma.cc/CUX4-296R] (last updated Jan. 18, 2017). For more information, see generally Darian M. Ibrahim, *Equity Crowdfunding: A Market for Lemons?*, 100 Minn. L. Rev. 561 (2015) (discussing implications of allowing retail investors to invest directly in startups, which could include litigation finance companies); Press Release, White House, President Obama to Sign Jumpstart Our Business Startups (JOBS) Act (Apr. 5, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04 /05/president-obama-sign-jumpstart-our-business-startups-jobs-act [https://perma.cc/L8VZ-9SB8].

[195] *See Frequently Asked Questions*, LexShares, https://www.lexshares.com/pages/faqs [https://perma.cc/9QPE-RUEC] (last visited Dec. 7, 2022) (requiring investors to be accredited and offering interests "pursuant to Regulation D Rule 506(c)" under JOBS Act).

[196] *See id*.

[197] Lawrence S. Schaner & Thomas G. Appleman, *The Rise of 3rd-Party Litigation Funding*, Law360 (Jan. 21, 2011, 2:07 PM), https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding.

[198] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Litigation Marketing Company With Bilking Retirees (Apr. 15, 2016), https://www.sec.gov/news/pressrelease /2016-72.html [https://perma.cc/Q26K-UB6S] (alleging Los Angeles-based litigation marketing company defrauded retirees and other investors); Seth Sandronsky, *Litigation Funding Is 'Shadow' Industry That Needs Oversight, Expert Says; Prometheus in SEC Crosshairs*, N. Cal. Rec. (June 2, 2016), https://norcalrecord.com/stories/510743381-consumer-fraud-litigation-funding-is-shadow-industry-that-needs-oversight-expert-says-prometheus-in-sec-crosshairs [https://perma.cc/84E5-PKAP].

third-party funding enterprises operating in the United States.[199] Nevertheless, the U.S. federal government's hands-off approach has enabled it to observe how the "laboratory of the states" regulates the industry.[200]

Still, even if all financial industry regulations apply to third-party funders, no code of professional conduct exists for bankers.[201] Scholars are looking into this question,[202] and the G-7 countries have asked regulators to develop a code of conduct for the banking industry.[203] Moreover, litigation funders organized as hedge funds that reach a certain threshold of assets under management may contribute to the systemic risk of the domestic and global financial system and, therefore, the SEC should take notice.[204] The Dodd-Frank Act may also provide appropriate avenues for regulation by the SEC or the Consumer Financial Protection Bureau ("CFPB"), depending on a funder's corporate form, operating structure, and targeted segments of the third-party funding market.[205]

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[199] With respect to consumer third-party funding, the Consumer Financial Protection Bureau ("CFPB") may be the appropriate enforcement body considering its focus on eradicating predatory lending and enforcing the Truth in Lending Act. *See Truth in Lending Act (TILA) Examination Procedures*, Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/compliance/supervision-examinations/truth-in-lending-act-tila-examination-procedures/ [https://perma.cc/KE5P-X45U] (last updated Oct. 22, 2021).

[200] Federal legislation has been proposed but not passed. For a discussion of previous U.S. federal interest in regulating litigation funding, s*ee* Nieuwveld & Sahani, *supra* note 14, at 157 n.110. *See also supra* note 13 (articulating "laboratory" of states ethos of federalism in United States).

[201] *See, e.g.*, Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. Corp. L. 559, 560-62 (2017).

[202] *See, e.g.*, id. at 560 (describing how lack of code negatively impacts banking industry's reputation); David Zaring, *International Ethical Banking*, Conglomerate (June 5, 2015), http://www.theconglomerate.org/2015/06/international-ethical-banking.html [https://perma.cc/F5W8-3VW9] (summarizing international leaders' sentiment that universal banker code of ethics is needed).

[203] *See, e.g.*, Black & Buergin, *supra* note 92 (reporting that G7 finance ministers charged Financial Stability Board with drafting global code of conduct).

[204] *See generally* Cary Martin Shelby, *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*, 58 B.C. L. Rev. 639 (2017) (discussing how systemically important financial institution designation system subjects industry to loopholes and risks).

[205] *See* Shannon, *Dodd-Frank Act, supra* note 65, at 21-22 (using High Court of Australia case to illustrate how United States could bring litigation contracts under purview of CFPB by categorizing them as financial products); Richard Painter, T*he Model Contract and the Securities Laws, Part 1*, Model Litig. Fin. Cont. (July 15, 2013), http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-1/ [https://perma.cc/WQ8M-QWFM] ("Litigation Proceed Rights, if used to help individual litigants cover litigation costs and other expenses, could be deemed a consumer finance product subject to disclosure and other requirements under federal law, as amended by the Dodd-Frank Act of 2010, and relevant state law.").

For now, however, financial industry regulations would not be a solution to the issue of enforcing the professional responsibilities of third-party funders.

E. Statutory Regime with Government Enforcement

The most common way legislators and the public become aware of funding is through lawsuits that receive media attention. With more media coverage of third-party funding recently,[206] statutes specifically regulating third-party funding are becoming more prevalent. For example, Hong Kong and Singapore are two jurisdictions where third-party funding had previously been illegal, but their governments recently legalized and put limits on the industry.[207] In January 2018, as prescribed in their recent legislation legalizing the industry, Hong Kong adopted a "Code of Practice for Third Party Funding of Arbitration."[208] Hong Kong's Code of Practice does not contain a self-enforcing mechanism; instead, the code is admissible evidence of an ethics violation affecting the underlying

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[206] *See, e.g., supra* notes 2-7 and accompanying text.

[207] *See* Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6, (2017) O.H.K., § 2(3), https://www.elegislation.gov.hk /egazettedownload?EGAZETTE_PDF_ID=13048 [https://perma.cc/3TSR-ZNPJ] (legalizing third-party funding of arbitration subject to incorporated list of rules); Civil Law (Amendment) Act 2017, Gov't Gazette Acts Supplement (Sing.), https://sso.agc.gov.sg/Acts-supp/2-2017/ [https://perma.cc/62U9-EYY8] (declaring that third-party funding is not against public policy and is permissible subject to regulation); *see also* Press Release, Dep't of Just., Gov't of H.K. Special Admin. Region, Third Party Funding of Arbitration: Amendments Proposed for Arbitration Ordinance and Mediation Ordinance (Dec. 28, 2016), https://www.doj.gov.hk/en/community_engagement/press/20161228_pr2.html [https://perma.cc/7U92-V7UH]; *Key Bills Passed in Singapore, as Hong Kong Moves Towards Funding*, Glob. Arb. Rev. (Jan. 11, 2017), https://globalarbitrationreview.com /article/1079959/key-bills-passed-in-singapore-as-hong-kong-moves-towards-funding; *The Singapore Bills: A Detailed Look*, Glob. Arb. Rev. (Jan. 11, 2017), http://globalarbitrationreview.com/article/1079960/the-singapore-bills-a-detailed-look.

[208] *See* Teresa Y.W. Cheng, H.K. Sec'y of Just., Gazette Notice No. 9048, Arbitration Ordinance (Chapter 609): (Notice Under Section 98P) (Dec. 7, 2018), https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf [https://perma.cc /M6MK-BBT2]; Press Release, Gov't of the H.K. Special Admin. Region, Code of Practice for Third Party Funding of Arbitration Issued (Dec. 7, 2018), https://www.info.gov.hk /gia/general/201812/07/P2018120700601.htm [https://perma.cc/B4BB-C29B]; *see also* Arbitration Ordinance, (2022) BLIS Cap. 609, div. 4 § 98P (H.K.), https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1498192254668_002 [https://perma.cc/V4LP-348V].

merits case.[209] Still, Hong Kong's Code of Practice is the first code in the world issued and administered by a government directly.[210]

Hong Kong's Code of Practice is comprehensive and articulates important norms regarding the expectations of the third-party funding industry, such as a third-party funder taking responsibility for violations by its "subsidiaries and associated entities";[211] producing "clear and not misleading" promotional materials;[212] ensuring that the funded party is aware of their "right to seek independent legal advice on the funding agreement";[213] "explain[ing] clearly in the funding agreement all the key features and terms";[214] maintaining capital adequacy;[215] "maintain[ing] . . . effective procedures for managing any conflict of interest that may arise";[216] "observ[ing] the confidentiality and privilege" of the funded client's information;[217] not seeking to influence or control a party, its legal counsel or any arbitral body or institution;[218] assisting the funded party in complying with disclosure requirements;[219] specifying the funder's liability for costs;[220] stating clearly the termination provisions in the funding agreement;[221] not terminating the funding agreement arbitrarily;[222] remaining liable for obligations incurred prior to termination;[223] providing for the funded party to terminate the funding agreement if the funder "commit[s] a material breach

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[209] *See* Arbitration Ordinance, div. 4 § 98S(1) ("A failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings."); div. 4 § 98S(2)(a) ("[T]he code of practice is admissible in evidence in proceedings before any court of arbitral tribunal . . . .").

[210] In contrast, the U.K. government had input on ALF's code but did not issue it directly and does not administer it. *See supra* Section II.B.3.

[211] *See* CHENG, *supra* note 208, para. 2.1.

[212] *Id.* para. 2.2.

[213] *Id*. para. 2.3(1).

[214] *Id*. para. 2.3(3).

[215] *Id*. para. 2.5 (requiring that funder be able to pay all debts for minimum of thirty-six months).

[216] *Id*. para. 2.6(1).

[217] *Id*. para. 2.8.

[218] *Id*. para. 2.9.

[219] *Id*. para. 2.10 (requiring funder to remind funded party of its disclosure obligations).

[220] *Id*. para. 2.12 (requiring agreement to outline responsibilities for adverse cost payment, premium payment, security costs, and other financial liabilities).

[221] *Id*. para. 2.13.

[222] *Id*. para. 2.14.

[223] *Id*. para. 2.15.

of the Code or the funding agreement;"[224] "provid[ing] a neutral, independent and effective dispute resolution mechanism" for handling disputes between the funded party and the funder;[225] maintaining an effective complaints procedure;[226] and reporting complaints by funded parties, violations of the code, or violations of Hong Kong's third-party funding law to the "advisory body," a governmental entity charged with overseeing the code's administration.[227]

In the United States, several states have passed statutes to regulate consumer third-party funding. Most of these do not apply to commercial third-party funding due to the parameters of the statutes.[228] For example, some statutes apply to claims only up to a dollar amount that is lower than the claim size for a typical commercial claim.[229] Still, some of the parameters included in these statutes can be instructive in regulating the ethics of global commercial third-party funding ethics.

For example, several statutes require that the third-party funders obtain a license from the state.[230] With wide variations, at least a few states include notable provisions relating to the proper execution of the agreement, such as requiring disclosures in writing to the potential client, providing information about alternative funding sources besides litigation funding, preventing collusion between the client's attorney and the funder, restricting the funder's rate of return, prohibiting false or misleading advertising, and requiring registration or licensing of the funder with an agency of the state.[231] In addition, recognizing the critical importance of maintaining evidentiary privileges, some jurisdictions, such as Indiana, Vermont, Nebraska, and Nevada, have explicitly provided an exception to waiver of the attorney-client privilege and work product doctrine

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[224] *Id*. para. 2.16.

[225] *Id*. para. 2.17.

[226] *Id*. para. 2.18 (prescribing steps to receive, investigate, review, and remedy any complaints).

[227] *Id*. para. 2.19.

[228] *See* Nieuwveld & Sahani, *supra* note 14, at 157-74 (presenting fifty-two-jurisdiction survey of existing laws in United States as of 2017).

[229] *See, e.g.*, Nev. Rev. Stat. Ann. § 604C.100 (West 2022) (limiting regulations to funding transactions that do not exceed $500,000).

[230] Those states include Indiana, Maine, Nebraska, Nevada, Oklahoma, Tennessee, Vermont, and West Virginia. *See* Pro. Staff of the Comm. on Banking and Ins., Fla. Senate, Bill Analysis and Fiscal Impact Statement on SB 1750, at 5 n.20 (2021), https://www.flsenate.gov/Session/Bill/2021/1750/Analyses/2021s01750.pre.bi.PDF [https://perma.cc/F234-VC8J].

[231] *See generally* Blunk, *supra* note 52.

for documents and information disclosed to the third-party funder.[232] Privilege protection is essential because client confidentiality is a hallmark of third-party funding, just as it is a hallmark of other licensed professions, such as attorneys, doctors, and accountants.[233] Wisconsin and West Virginia are the first two states to require third-party funding to be disclosed in all cases heard in the courts of those states.[234] Finally, Indiana has set up a robust governance and enforcement regime by statute under the umbrella of trade and financial institution regulation.[235] These examples underscore that licensure, provisions in funding agreements, evidentiary privileges, disclosure, and enforcement are aspects of third-party funding that a model code of conduct should address.

F. Nongovernmental and Multinational Approaches

The *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* provides a transnational, nongovernmental, multistakeholder example of best practice guidelines for third-party funders.[236] The International Council for Commercial Arbitration and Queen Mary University of London School of Law collaborated on the task force that issued this 2018 report containing policy suggestions for international arbitration institutions and nations to address third-party funding.[237] The task force

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[232] *See* Ind. Code Ann. § 24-12-8-1 (West 2022) (providing exception to waiver of attorney-client privilege and work product doctrine for communications between parties and funders in Indiana); Neb. Rev. Stat. Ann. § 25-3306 (West 2022) (same); Nev. Rev. Stat. Ann. § 604C.240 (West 2022) (same); Vt. Stat. Ann. tit. 8, § 2255 (West 2022) (same).

[233] *See, e.g.*, Fed. R. Evid. 502 (addressing attorney-client privilege and work product protection in U.S. federal court).

[234] *See supra* note 85 and accompanying text.

[235] *See* Ind. Code Ann. §§ 24-12-1-0.5 to -10-1 (providing comprehensive regulation of third-party funding in civil proceedings, including mandatory licensing for funders, prohibitions on attorney referral fees, explicit rights of consumer litigants, and commission fee limits).

[236] William "Rusty" Park, Stavros Brekoulakis, and Catherine Rogers cochaired the ICCA-Queen Mary Task Force on Third-Party Funding, which was organized as a collaboration between the International Council for Commercial Arbitration and Queen Mary University of London School of Law between 2013 and 2018. The author served as a member of the Task Force. *See generally* Int'l Council for Com. Arb., No. 4, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018) [hereinafter ICCA Report], https://cdn.arbitration-icca.org/s3fs-public/document /media_document/Third-Party-Funding-Report%20.pdf [https://perma.cc/9YRD-V2YD].

[237] *See generally id.*

members included "arbitrators, attorneys from both in-house and law firms, representatives from arbitral institutions, states, academics, and a range of third-party funders and brokers."[238] The report addressed the regulation of third-party funders in international arbitration in the areas of fundamentals of the funding transaction structure, definitions, disclosure and conflicts of interest, privilege and "professional secrecy," costs, security for costs, best practices, and special considerations for investment arbitration.[239] It also emphasizes that the primary reason to require disclosure of the identity of a third-party funder in an arbitration matter is to allow an arbitrator to check for potential conflicts of interest.[240] The report contains a sample list of best practices and, uniquely, a due diligence checklist for funders to employ when considering whether to fund a case.[241]

Following the task force report, many international arbitration institutions adopted rules addressing third-party funding.[242] Those rules focus mainly on disclosure to check for arbitrator conflicts of interest, allocation of costs, and orders for security for costs in investor-state arbitration.[243] In addition, nongovernmental investor-state arbitration tribunals have articulated fundamental principles for third-party regulation funding.[244] Investor-state arbitration awards are nonprecedential decisions, but their persuasive authority is powerful enough to influence conversations on international policy more broadly.[245] As a result, rules to regulate third-party funding in investor-state dispute settlements are beginning to emerge.

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[238] *See id*. at ix.

[239] *See generally id*.

[240] *See id*. at 81-115 (addressing disclosures to check for arbitrator conflicts of interest). The author cochaired the subcommittee that drafted Chapter 4 of the report.

[241] *See id*. at 185-97 (providing suggested list of best practices and sample due diligence checklist).

[242] *See supra* note 96.

[243] *See supra* note 96.

[244] *See generally* Victoria Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in Investment Arbitration, in* Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (Christina L. Beharry ed., 2018) (discussing reasoning of several international investment arbitration tribunals in their awards addressing third-party funding); Victoria Sahani, *Third-Party Funders, in* Cambridge Compendium of International Commercial and Investment Arbitration (Stefan Kröll, Andrea Bjorklund & Franco Ferrari eds., forthcoming Feb. 2023) [hereinafter Sahani, *Third-Party Funders*] (same).

[245] *See supra* note 244.

For example, the China International Economic and Trade Arbitration Commission's *Investment Arbitration Rules* and the Singapore International Arbitration Center's *Investment Arbitration Rules* include provisions for disclosure of third-party funding and consideration of third-party funding in the award of costs by the arbitrator.[246] Moreover, the world's leading arbitral institution for investor-state disputes, the International Centre for Settlement of Investment Disputes ("ICSID") at the World Bank, recently adopted a rule regarding third-party funding disclosure and consideration of the funding's effect on cost allocation in investment treaty arbitration.[247] Finally, at least two adopted bilateral investment treaties and one proposed multilateral treaty providing for ICSID arbitration contain provisions addressing third-party funding.[248]

Notably, the United Nations Commission on International Trade Law Working Group III on Investor-State Dispute Settlement is drafting guidance for world governments to address third-party funding in bilateral and multilateral treaties.[249] In addition, ICSID has issued the *Draft Code of Conduct for Adjudicators in International Investment Disputes* for discussion and public comments, including provisions addressing arbitrators' disclosures to detect

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[246] *See International Investment Arbitration Rules (For Trial Implementation)*, China Int'l Econ. & Trade Arb. Comm'n (Oct. 1, 2017), http://www.cietac.org.cn /index.php?m=Page&a=index&id=390&l=en [https://perma.cc/9AK9-785D] (providing Article 27, which explicitly addresses third-party funding); Sing. Int'l Arb. Ctr., SIAC Investment Rules 24-26 (2017), https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Investment-Rules-2017.pdf [https://perma.cc/G7BR-6FHF].

[247] Int'l Ctr. for Settlement of Inv. Disps., ICSID Convention, Regulations and Rules 75 (2022), https://icsid.worldbank.org/sites/default/files/documents /ICSID_Convention.pdf [https://perma.cc/3RPR-9ZD2] (requiring disclosure of third-party funding).

[248] *See* Investment Protection Agreement ch. 3, § B, subsec. 1, art. 3.28(i); subsec. 3, art. 3.37, June 30, 2019, 2019 O.J. (L 175), https://data.consilium.europa.eu/doc/document/ST-5932-2019-INIT/en/pdf [https://perma.cc/H4UQ-MJ6X] (stipulating that dispute settlement between parties in European Union and Vietnam must involve disclosures of third-party funders); Comprehensive Economic and Trade Agreement arts. 8.1, 8.26, Oct. 30, 2016, 2017 O.J. (L 11), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114 (01)&qid=1663528942186&-from=EN [https://perma.cc/NPT8-9HX8] (stipulating same in disputes between parties in European Union and Canada); Eur. Comm'n, Transatlantic Trade and Investment Partnership: Investment arts. 1, 8 (2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf [https://perma.cc/A47C-AS66] (proposing same in disputes between parties in European Union and United States).

[249] *See Third Party Funding*, U.N.: Comm'n on Int'l Trade L., Working Grp. III: ISDS Reform, https://uncitral.un.org/en/thirdpartyfunding (last visited Dec. 7, 2022) (containing Working Group's drafts and Secretariat's notes).

and resolve conflicts of interest related to third-party funding.[250] In addition, the Singapore International Arbitration Center and the International Court of Arbitration of the International Chamber of Commerce have issued guidance to arbitrators encountering third-party funding in a case.[251]

G. No Regulation

Finally, it is crucial to note that there is no regulation of third-party funding in much of the world. Most legislatures and courts are not yet aware of funding taking place within their borders, and, even if they are aware of it, they have not yet indicated whether funding is legal or whether they plan to regulate it. For example, legislatures, judges, and attorney regulators in the Middle East and most nations in Africa, Asia, and South America have been silent on third-party funding.[252] This silence does not mean that funding is not happening there; it simply means that the governmental authorities have not yet sought to regulate or outlaw it. An illustrative example is Brazil, where neither the legislature nor the courts have opined on third-party funding. However, Brazil's Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC") issued guidance—but not an arbitral rule—requiring participants in arbitrations conducted under its Arbitration Rules to disclose

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[250] *See* Int'l Ctr. for Settlement of Inv. Disps., Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Four 16 (2022), https://icsid.worldbank.org/sites/default/files/CoC_V4_ENG.pdf [https://perma.cc/LWZ9-GP4Z] (proposing obligation of potential ICSID arbitrator to disclose any relationships in past five years with "any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder").

[251] *See* Sing. Int'l Arb. Ctr., Practice Note on Arbitrator Conduct in Cases Involving External Funding 1-2 (2017), https://www.international-arbitration-attorney.com/wp-content/uploads/2018/11/Practice-Note-on-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf [https://perma.cc/5RR7-7WYP] (stressing impartiality, independence, and disclosures); Int'l Chamber of Com., Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration §§ II.D, III.A & XV (2021), https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/ [https://perma.cc/6FDC-PMTW] (discussing mandatory disclosure of third-party funders).

[252] Presenting all of the information about which countries address funding and which are silent is beyond the scope of this Article. For a detailed discussion of third-party funding regulations in more than sixty countries, *see* Nieuwveld & Sahani, *supra* note 14, *passim*.

the identity of any third-party funder involved.[253] This guidance indicates that international arbitration practitioners in Brazil are aware of and open to third-party funding, at least in international arbitration.

H. Global Regulatory Uniformity Is Unrealistic

In the years since the author proposed regulating the procedure, transaction, and ethics of third-party funding,[254] jurisdictions worldwide have implemented and experimented with such regulation in various admirable and exciting ways. This Part has illustrated the diverse approaches worldwide to regulating third-party funding. This Part has also demonstrated that harmonizing global transactional and procedural third-party funding regulations is impossible. For example, some jurisdictions require specific licenses or corporate forms, while others do not.[255] Moreover, third-party funders own law firms through ABS entities in some jurisdictions, but most jurisdictions prohibit nonlawyer ownership of law firms.[256] Finally, some jurisdictions completely prohibit third-party funding.[257] These wide-ranging approaches to third-party funding will lead to diversification and, optimistically, price competition in the global market for commercial clients and law firms shopping for dispute financing services.

On the other hand, third-party funders are also becoming more sophisticated and creative in generating profits across borders and have merged into massive multinational corporations.[258] These huge funders know how to operate in multiple jurisdictions and engage in regulatory arbitrage. For example, a funder prohibited from active involvement in funded matters in one jurisdiction can

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[253] *See AR 18/2016: Recommendations Regarding the Existence of Third-Party Funding in Arbitrations Administered by CAM-CCBC*, Ctr. for Arb. & Mediation of the Chamber of Com. Braz.-Can. (July 20, 2016), https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/ [https://perma.cc/R9MD-KBKP] (recommending parties disclose any third-party funders at earliest opportunity and arbitrators check for subsequent conflicts of interest).

[254] *See* Shannon, *Harmonizing*, *supra* note 54, at 883-89.

[255] *See supra* note 230 and accompanying text.

[256] *See* Sahani, *Reshaping*, *supra* note 56, at 410.

[257] *See, e.g.*, *supra* note 80 and accompanying text (discussing Ireland's ban on third-party funding).

[258] *See supra notes* 35, 141 (detailing recent acquisitions and mergers among funders).

join an ABS in another jurisdiction (such as Arizona, the United Kingdom, or Australia) to gain more control and diversify its risk, thereby enjoying the best of both worlds.[259]

According to the ABA, lawyers can also invest in ABSs even if their law license does not allow them to practice in an ABS.[260] This investment is also a form of third-party funding for law firms and a way to engage in diversification of income streams from practicing law. For example, if a lawyer's practice is not very lucrative, the lawyer can presumably supplement her income by investing passively in the practices of other lawyers. While these activities do not seem sinister, the potential for abuse is immense in the absence of a clear code of conduct for investors, regardless of whether they are officially termed third-party funders. And even with clear rules, the potential for abuse by investors still exists, as described in the Introduction to this Article.[261]

Another fundamental problem is definitional. The regulatory definitions will always overinclude or underinclude new or changed financial offerings. Therefore, any procedural or transactional regulations will be unavoidably incomplete in their coverage or scope.[262] In addition, the terminology and understanding of the industry will change as the industry changes. For example, this Article has described a variety of third-party funders, including classic nonrecourse funders, lenders receiving interest, equity funders owning shares in clients, equity owners in ABS entities engaged in the practice of law, and funders in joint venture vehicles with clients. This Article has also mentioned judges, individuals, and corporations engaged in financing the disputes of others in surprising and often questionable ways.[263] Other forms of funding include

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[259] *See supra* notes 169-72 (describing ABS entities in Arizona, United Kingdom, and Australia); supra note 18 and accompanying text (discussing regulatory arbitrage).

[260] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-499.pdf [https://perma.cc/T8LQ-4TJR] ("A lawyer may passively invest in a law firm that includes nonlawyer owners . . . operating in a jurisdiction that permits ABS entities, even if the lawyer is admitted to practice law in a jurisdiction that does not authorize nonlawyer ownership of law firms.").

[261] *See supra* notes 2-3, 5-8 and accompanying text.

[262] *See* ICCA Report, *supra* note 236, at 47, 50-52 (describing range of entities that term "third-party funder" might encompass); Sahani, *Judging, supra* note 12, at 412 (discussing how single regulatory definition of third-party funding would be inherently overinclusive, underinclusive, or both).

[263] *See supra* notes 2-3, 5-8 and accompanying text.

assigning claims or monetizing judgments or awards. These involve the funder stepping into the role of the client and the original client giving up any interest in the case after selling it to the funder for less than the face value of the claim or award.[264] For the preceding reasons, a code of conduct aimed at funding activity, broadly defined, could constrain would-be funders engaging in corrupt behavior according to their conduct and not whether third-party funding is their official business.

Therefore, the solution presented in the next Part of this Article is a model code of conduct rather than a model law. Most of the world has not yet wrapped its mind around what third-party funding is or whether it is appropriate.[265] Thus, any proposed global regulatory effort must be policy neutral and customizable to allow every nation the freedom to make its own decisions regarding third-party funding, at its own pace, without external pressure from other nations.

III. THE SOLUTION: A MODEL CODE OF CONDUCT FOR THIRD-PARTY FUNDERS

A. Universal Principles of Professional Responsibility for Third-Party Funders

Given the regulatory smorgasbord described in Part II, it would be unwise to attempt to convince all jurisdictions to adopt the same legal regime for licensing funders, funding transactions, or court procedures, or to ask all international arbitration institutions to adopt the same funding provisions.[266] Nevertheless, funder ethics and professional responsibilities can and should be harmonized globally, including in jurisdictions currently silent regarding third-party funding. One approach is to develop a document that includes a framework of general principles for the ethical aspects of third-party funding on which there is essentially agreement around the world—principles that states can feel free to adopt and implement. The ideal framework would be clear but not rigid, and

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[264] *See* NIEUWVELD & SAHANI, *supra* note 14, at 6 .

[265] *See supra* Section II.G. *See generally* NIEUWVELD & SAHANI, *supra* note 14.

[266] Section III.A is a distillation of the universal principles of funder codes of conduct gleaned from the sources explored in detail in Part II.

comprehensive but customizable.

This Part begins the discussion of developing that framework by defining third-party funders' professional responsibilities in Section A and exploring potential implementation strategies and challenges in Section B. The overarching challenge is that third-party funding is a global industry, so a successful regime for funder professional responsibilities would need to be genuinely transnational, transsubstantive,[267] and forum neutral.[268] This Part begins that discussion by distilling some general funder professional responsibility principles from the examples presented in Part II. Individual governments can adopt these principles domestically[269] and in transnational regulatory efforts,[270] and funders can incorporate them into internal governance codes.[271]

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[267] *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2244 (1989) ("The second principal criticism of the Federal Rules is that they indiscriminately govern all kinds and types of litigation, whereas civil procedure rules properly constructed would be shaped to the needs of specific categories of litigation. This critique contemplates separate sets of rules for civil rights cases, antitrust cases, routine automobile cases, and so on. Yet . . . the 'trans-substantive' critique seems misguided to me. It overstates the reach of the Federal Rules and underestimates the technical and political difficulties of trying to tailor procedures to specific types of controversies.").

[268] *See generally* Sahani, *Judging*, *supra* note 12 (proposing litigation and arbitration rules regarding third-party funding). When that article was published, no court rules or arbitration rules on third-party funding had yet been adopted. Now there is a proliferation of court rules and international arbitration rules addressing, at a minimum, disclosure of third-party funding and the consideration of third-party funding by the decision-maker when allocating costs at the end of the case.

[269] Most jurisdictions that regulate third-party funding do so at the national level. Federalism, however, raises domestic regulation to the purview of international law in many jurisdictions. The United States is the only jurisdiction where funding is directly regulated only at the state level, so state third-party funding regulations directly affect international third-party funders. *See supra* notes 229-32. Hong Kong has also engaged in state-level regulation of third-party funding in international arbitration explicitly (and prohibited it in domestic litigation), while mainland China does not directly regulate third-party funders. Other nations that have a federalist system, such as Australia, regulate funding at both the state/territory level and the national level. For ease of phrasing, this Article refers to governments generally at the national level, except where specific reference to state-level law is relevant. For more information about how the federalism issue involving third-party funding is addressed in the United States, see Nieuwveld & Sahani, *supra* note 14, at 129-74.

[270] *See, e.g.*, *Working Group III: Investor-State Dispute Settlement Reform*, U.N. Comm'n on Int'l Trade L., https://uncitral.un.org/en/working_groups/3/investor-state [https://perma.cc/S9GD-G4PX] (last visited Dec. 7, 2022) (promoting broad reforms to investor-state dispute settlement, including encouraging states to revise their hundreds of investment treaties to address third-party funding).

[271] *See supra* Section II.B.

Part II demonstrated that third-party funders already have professional responsibilities in many jurisdictions. Those professional responsibilities, though varied, can be divided into categories based on the funders' duties to multiple constituencies, including the funded party or the funded law firm's client, the funded party's attorney or the funded law firm, the legal system, the financial system, and the public. The funder's duties vary from relationship to relationship and jurisdiction to jurisdiction.[272] Therefore, this Part presents a general outline of universal principles concerning each relationship.

The primary challenges of the funder-party relationship are information asymmetry and unequal bargaining power between the party and the funder.[273] Thus, the professional responsibilities of the funder concerning the funder-party relationship should attempt to remedy that inequity. Funders should provide clear information that is not misleading in language that a party can understand, and advertising should not be false or misleading.[274] Funders should also advise parties to seek independent legal counsel regarding the negotiation of the funding arrangement.[275] If an individual funded party does not have the means to obtain independent legal counsel, funders should have a duty to inform and educate the funded party adequately about the benefits and risks of litigation funding before signing the funding agreement. This requirement does not supplant the attorney's duty to the funded party in the case (for example, as articulated by the ABA in the United States) to educate herself about litigation funding or associate with an attorney experienced in this area to advise the funded party appropriately.[276] Both the attorney and the funder have a duty to educate the funded party. Funders have a duty to specify clearly in the funding agreement whether and, if at all, how they may be involved in the settlement process and not to exceed that authority during the case. Funders also have a

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[272] *See, e.g., supra* note 144 and accompanying text (describing Bentham IMF's relationship-specific best practices).

[273] *See supra* Section II.B.3 (discussing lack of transparency in third-party funding industry).

[274] *See, e.g., supra* notes 109, 130, 212, 231 and accompanying text (discussing code provisions and laws prohibiting misleading advertising from ALF, ALFA, Hong Kong, and several U.S. states).

[275] *See supra* notes 111, 213 (describing Hong Kong's and ALF's provisions concerning independent legal counsel).

[276] *See* Am. Bar. Ass'n Comm'n on Ethics 20/20, *supra* note 151 (explaining lawyers' duty of competence requires them to "become fully informed about the legal risks and benefits" of third-party funding through "study or associat[ion] with experienced counsel").

duty to preserve the confidentiality of the funded party's information[277] and any evidentiary privileges that may apply to such information to the extent possible, including executing a confidentiality agreement with the funded party providing for such protection, if applicable.[278] In addition, the funder should have an appropriate procedure in place to handle disputes between it and the funded party through mediation, arbitration, or some other mechanism.[279]

The overarching concern for the funder-attorney relationship is that funders must not interfere in the attorney-client relationship or cause the attorney to breach her own professional duties under any applicable code of conduct or ethics associated with her law license(s).[280] The funder should also not exert indirect influence over the attorney by pressuring the client, withholding payment of attorney fees, or other means. Funders should neither pay commissions or referral fees to attorneys nor allow attorneys, judges, or sitting arbitrators to invest in their funding operations if such investments would lead to conflicts of interest. Funders should not engage in the unauthorized practice of law or give legal advice to their clients.

The main concerns for the funder-legal system relationship are the potential for conflicts of interest involving judges and arbitrators and the potential disruption to the legal system if a funder unexpectedly withdraws or terminates its financing of a pending case. A funder should encourage the funded party or law firm to disclose the funder's identity to the court or arbitral tribunal in compliance with the local laws in the jurisdiction in which the case is pending or the arbitration is seated.[281] If required by local law, a funder should also disclose its identity to the opposing side. The funder should not include unfair termination or withdrawal provisions in its contract with a funded litigant.[282] If the funder does withdraw, the client may need to notify the court or arbitral

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[277] *See supra* notes 110, 137, 152, 217 (describing ALF's, ILFA's, ABA's, and Hong Kong's confidentiality requirements).

[278] *See supra* notes 87, 232 (citing caselaw and state statutes concerning third-party funding's impact on evidentiary privileges).

[279] *See supra* notes 106, 131, 225 (discussing ALF's, ALFA's, and Hong Kong's dispute resolution mechanisms).

[280] *See supra* Section II.C (explaining indirect third-party funding regulation through attorney ethics rules).

[281] *See supra* notes 85, 219, 250-51, 253 (describing disclosure requirements in United States, Hong Kong, and international arbitral institutions).

[282] *See supra* notes 117, 221-23 (discussing ALF's and Hong Kong's termination provisions).

tribunal of the funder's withdrawal so that the court may stay the case to allow time for the client to make alternate funding arrangements. Funders should also develop a systematic way to track which cases have received funding to prevent funded parties from receiving a windfall of excess funding and to mitigate the potential for abuse by both funders and funded parties.[283] Funders should promptly pay security for costs or adverse cost orders when contractually agreed or ordered by a court or arbitral tribunal. Funders must not fund opposing sides of the same case under any circumstances. Funders should avoid funding opposing parties in different cases where such involvement by the funder could create conflicts of interest for involved attorneys, arbitrators, or judges.

The funder's primary duty in the funder-financial system relationship is to ensure that its funding corporation has adequate capital to handle any eventualities that may occur in cases across its portfolio.[284] A funder must not be so highly leveraged that it lacks enough cash on hand to adequately finance its portfolio of cases adequately. In addition, the funder must have sufficient capital to continue operations during the long waiting time when trying to collect on a judgment or arbitral award. The funder should obtain and maintain any licenses or registrations required to operate as a litigation funder or to solicit investors in all the jurisdictions in which it operates.[285] Finally, the funder should provide appropriate, accurate, and understandable disclosures—such as those in a prospectus—to investors and potential investors in funding while also maintaining the confidential and privileged nature of its clients' information.[286]

Concerning the funder-public relationship, funders should educate the judiciary, attorneys, litigants, and the general public about their industry.[287] Funders should also engage in funding cases on a pro bono basis, particularly civil rights cases or other cases of public importance that attorneys traditionally

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[283] *See supra* note 132 (describing ALFA's IMS database).

[284] *See supra* notes 114, 136, 215 (citing ALF's, ILFA's, and Hong Kong's capital adequacy requirements).

[285] *See supra* notes 186-87, 191, 231-32 (describing licensing requirements in Australia and United States).

[286] *See supra* note 193 and accompanying text (noting public company disclosure rules); supra notes 277-78 and accompanying text (discussing confidentiality and evidentiary privileges).

[287] *See supra* note 145 (describing Bentham IMF's funder-public relationship best practices).

have accepted on a pro bono, reduced fee, or wholly contingent fee basis.[288] Finally, funders should work to improve their image and standing in the eyes of the public.

In sum, the overarching goal of the Model Code of Conduct for Third-Party Funders would be to articulate universal norms and standards for the industry against which to measure compliance. Finally, any effective code of professional responsibility for funders should include an enforcement mechanism and designate an entity to carry out such enforcement. The enforcement entity should have the power to execute appropriate sanctions against a noncompliant funder to ensure that unprofessional or irresponsible funders either correct their behavior or are driven out of the market.[289] Given the diverse regulatory approaches across jurisdictions, local enforcement is more feasible than multilateral enforcement.

In Part II, this Article analyzed several different existing models of direct and indirect regulation of funders. Adopters of the Code would be free to choose from those models or devise new systems to promulgate, oversee, and enforce the Code in their particular jurisdiction. The Code should encourage nations to designate a public or private entity, governmental agency, or court to enforce the Code and should develop sanctions to put funders on notice of the consequences of noncompliance. Sanctions could include, for example, fines or barring the funder from funding matters with specific characteristics, such as a particular industry, type of client, or method of dispute resolution (e.g., banned in litigation but allowed in arbitration).[290] The most severe sanction would be equivalent to expulsion in the ALF Code of Conduct: banning the funder from financing all types of matters in that jurisdiction.[291]

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[288] *See Sahani*, *Rethinking*, *supra* note 21, at 631 (concluding third-party funders should finance pro bono cases by analogizing to attorney pro bono requirements); *see also supra* note 145.

[289] *See supra* text accompanying notes 138-39 (explaining limitations of self-regulatory enforcement).

[290] As an example, the law in Hong Kong allows third-party funding only in arbitration, not in domestic litigation. *See* Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, (2017) BLIS, § 2(3) (H.K.), https://www.elegislation.gov.hk/egazette-download?EGAZETTE_PDF_ID=13048 [https://perma.cc/3TSR-ZNPJ] (stating that, although provisions 98K and 98L removed prohibitions on maintenance, champerty, and barratry for arbitration funding, "[s]ections 98K and 98L do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal").

[291] *See supra* note 139 (discussing range of sanctions under ALF Code of Conduct, including expulsion from ALF).

States may also wish to declare that a funder sanctioned under this Code in one jurisdiction is not allowed to engage in new funding in another Code jurisdiction until the funder cures the offending conduct. Conversely, the funder may be required to delay withdrawal from funding clients in pending cases if withdrawal would harm those clients or their legal representation.[292] Moreover, states should publish information about the imposition of sanctions on a particular funder with the global community of enforcement bodies across Code-adopting nations to help reduce the problem of funders moving to a new jurisdiction after one jurisdiction sanctions them. An apt analogy is the problem of a suspended or disbarred attorney attempting to practice law in a different jurisdiction. Many jurisdictions publish the names of sanctioned attorneys in bar publications and on the bar's website to combat this problem. In addition, the ABA Model Rules of Professional Conduct address this problem by admonishing attorneys that practicing law in one jurisdiction while suspended or disbarred in another jurisdiction is sanctionable conduct.[293] Indeed, the Code should treat such funder sanctions similarly.

In sum, funders can be responsible for abiding by a unified, global code of professional conduct even with vastly different laws governing third-party funding transactions or procedures in the nations or states in which they operate. For example, the ABA promulgates rules of professional conduct for attorneys, but the rules governing the actual practice of law in each respective state are vastly different.[294] Regardless, the ABA Model Rules of Professional Conduct are influential in shaping the direction of the legal profession and codifying the professional responsibilities of lawyers. Similarly, suppose a nongovernmental body like the ABA could develop a code generalized to address various situations and regulatory environments in which funders might find themselves in various States or national jurisdictions. Then, like the ABA Model Rules of Professional Conduct for lawyers, nations could take that model code and adapt it to how that state prefers to regulate the third-party funding industry.

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[292] *See* Model Rules of Pro. Conduct r. 1.16 (Am. Bar Ass'n 2021) (requiring court approval before attorney's withdrawal from representation).

[293] *See id*. r. 5.5 (applying to regular attorneys in section (c) and to in-house counsel in section (d)).

[294] *See Jurisdictional Rules Comparison Charts*, Am. Bar Ass'n, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/6UDW-H948] (last visited Dec. 7, 2022) (detailing variations in rules of professional conduct across U.S. jurisdictions).

In addition, global funders operate in multiple countries worldwide and multiple states in the United States with disparate regulations. A global code would give funders operating in multiple jurisdictions an overarching, global mandate regarding their professional responsibilities—regardless of the nuances of each jurisdiction's substantive law. Having universal professional responsibility principles and guidelines would help standardize funder behavior from jurisdiction to jurisdiction while still allowing them to offer various financing products that differ widely across jurisdictions.

B. Potential Models for Implementation

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," is a tremendously successful example of international norms with global application and local enforcement in international arbitration. The New York Convention applies in more than 171 signatory nations,[295] and new signatory nations are still joining the sixty-three-year-old Convention in 2022.[296] It is globally applicable but locally enforced through domestic arbitration legislation, such as the Federal Arbitration Act[297] in the United States. Domestic courts in signatory nations apply their local procedural rules and standards to enforce arbitral clauses and awards under the New York Convention. By signing and ratifying the New York Convention, a nation agrees to enforce private arbitral agreements and private arbitral awards, absent limited availability for reservations from the Convention and limited grounds for refusal of enforcement under Article V.[298] But the secret

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[295] *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, U.N. Comm'n on Int'l Trade L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [https://perma.cc/3PSL-C8MU] (last visited Dec. 7, 2022) (listing 171 parties to Convention). The author uses the term "nation" loosely because there are some nonrecognized quasi-state entities that are parties to the Convention (e.g., Palestine).

[296] For example, Suriname is the most recent nation to join the New York Convention in October 2022. *See id.*

[297] 9 U.S.C. § 1 et. seq. For a discussion of the problems with the Federal Arbitration Act and opportunities for much-needed reform, see generally William W. Park, T*he Specificity of International Arbitration: The Case for FAA Reform*, 36 Vand. J. Transnat'l L. 1241 (2003); and William W. Park, *Amending the Federal Arbitration Act*, 13 Am. Rev. Int'l Arb. 75 (2002).

[298] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 330 U.N.T.S. 38, 40-42.

to the New York Convention's success is that it does not micromanage states implementing it. For example, the Convention does not tell states how to give effect to arbitral agreements and awards. Instead, the New York Convention delegates responsibility for the procedural and enforcement mechanisms to the traditional court rules and procedures that apply to domestic court proceedings and the enforcement of domestic court judgments.[299] Thus, the New York Convention provides a bold framework with built-in freedom and may provide an excellent implementation model for a third-party funding code of conduct to emulate.

However, although the New York Convention provides a helpful analogy, a convention is not realistic for regulating third-party funding for several reasons. First, the New York Convention took many decades to become successful, and it would be unwise to wait so long to adopt an ethics framework for third-party funding. Second, the New York Convention carries several assumptions that are not true for third-party funding. For example, the Convention addresses arbitration, which is legal in every nation, as it is one of the oldest forms of human dispute settlement. In addition, every nation has a court system with the capacity to issue decisions and enforce them, and therefore, enforce arbitration agreements and awards under the Convention. In contrast, third-party funding is not legal everywhere, and the industry needs ethical guidance now. Moreover, the definitions of arbitration agreements, arbitral awards, and arbitrators are well-established and universal worldwide. Finally, these assumptions are remarkable in their consistency across legal cultures and societies. The New York Convention would be meaningless without these assumptions, given its brevity, simplicity, and intentional lack of definitions.

In contrast, third-party funding is not legal in every nation, and the definition of funding is constantly changing. In addition, many individuals and entities are engaged in nontraditional forms of funding in which directly profiting financially from third-party funding may not be the primary motive.[300] However, what is universal is a visceral reaction in every nation that something is not right about

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[299] *See id*. art. 3 ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of the procedure of the territory where the award is relied upon . . . .").

[300] *See* Sahani et al., *supra* note 244, at 48-50 (addressing not-for-profit funding, wherein profit is not primary motivation for funding); *see also* Sahani, *Third-Party Funders, supra* note 244, at 326-29 (categorizing and overviewing not-for-profit funders).

letting the practice of third-party funding run amok in our dispute settlement systems with no oversight or accountability. Moreover, examples of funding "piracy" highlight the industry's need for ethical standards. The community of international dispute settlement practitioners and the community of nations share enough common ground regarding fairness and due process in dispute settlement to reach an overarching consensus regarding what ethics-related behavior by third-party funders would be undesirable.

Moreover, this shared ethos may be enough to support an effort to develop the Code. Nations and states could use the Code as a template. For example, the ABA Model Rules of Professional Conduct are the framework for the professional conduct rules in every state and the D.C. Bar.[301] Similarly, the UNCITRAL Model Law on International Commercial Arbitration is the basis for legislation in more than eighty-five nations and eight states.[302] In the same vein, the Code would provide a framework for local regulators to emulate, especially those unfamiliar with or unaware of the funding within their borders. Funders could also mirror the Code in their internal codes of conduct to bolster global confidence in the integrity of funder self-regulation.[303]

Instead of a convention, a model code for the professional conduct of funders is a better format for regulating the ethics of third-party funding. In addition, it would provide a valuable framework for states that have chosen to allow third-party funding without ostracizing states that have chosen to outlaw third-party funding.[304]

For example, in jurisdictions where funding is allowed, the Code could coexist with existing laws and rules regarding procedures and transactions that may already apply to funders regarding licensing, financial services, corporate,

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[301] California was the last holdout until it finally adopted rule revisions modeled on the ABA Model rules in 2018. See Michael E. McCabe, Jr., S*eeking National Uniformity, California (Finally) Adopts New Ethics Rules*, McCabe & Ali, LLP, https://ipethicslaw.com/seeking-national-uniformity-california-finally-adopts-new-ethics-rules/ [https://perma.cc/A6GW-6EUC] (last visited Dec. 7, 2022).

[302] The eight states are California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas. *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, U.N., Comm'n on Int'l Trade L., https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [https://perma.cc/U6TG-37FU] (last visited Dec. 7, 2022) (listing all adopters of UNCITRAL Model Law).

[303] *See supra* Section II.B (discussing funder self-governance).

[304] Ireland is an example of a jurisdiction that has outlawed funding, but it may soon change its position. *See supra* note 80 and accompanying text.

civil procedure, and arbitration rules. For example, the U.S. Federal Arbitration Act applies in the eight states that have adopted the UNCITRAL Model Law on International Commercial Arbitration. If there is a conflict, the Federal Arbitration Act controls.[305] Moreover, the Code would enhance the efficacy of the legal regimes for funding around the world. It would provide ethical principles to serve as an interpretive lens through which to view statutes and other forms of regulations and resolve regulatory doubts or gaps in favor of the professionally responsible course of action. Similarly, the Code would invite nations to address the ethical issues surrounding funding, not just the procedural and transactional issues, when regulating the industry.

To support jurisdictions where funding is not allowed, the Code would say nothing about the legality or desirability of third-party funding, leaving states free to determine whether funding is or is not allowed in their jurisdiction. If a state decides to allow funding, it could adopt the Code and choose an oversight, accountability, and enforcement mechanism that suits its legal system. But, like the New York Convention, the Code would not tell states how best to accomplish oversight, compliance, enforcement, or sanctions of the third-party funders operating within their jurisdictions.

As another implementation example, the development of attorney ethics regulation in the United States is instructive. The legal services industry has evolved dramatically over the centuries, and along with innovation, new avenues for potential abuse have arisen. For example, attorney contingency fees, conditional fees, and damages-based agreements were illegal for centuries until they were legalized jurisdiction by jurisdiction during the latter half of the twentieth century through the early 2000s.[306] In addition, the ABA created and revised its Model Rules of Professional Conduct for attorneys during the late twentieth century to provide crucial guideposts and acceptable paths for attorneys to follow when handling new situations and implementing new technologies. As a result, these dispute financing methods are now ubiquitous in

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[305] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that Federal Arbitration Act preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 50-51 (2015) (reaffirming preemption doctrine as expressed in *AT&T Mobility LLC*).

[306] For an overview of the history of contingency fees in the United States, see Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DePaul L. Rev. 261, 263-65 (1998).

the common law world and gaining traction in the civil law world.

Third-party funding is the newest technology for financing legal services, namely nonlawyers serving as dispute financiers.[307] As a result, funders need a similar form of professional responsibility guidance that helped shape the growth of the lawyer funding phenomenon. Notably, the G-7 countries have asked regulators to develop a global code of conduct for the global banking industry.[308] If investment bankers will soon have a global code of conduct, so should third-party funders.

The licensing, transactional, and procedural aspects of third-party funding invoke corporate law, securities law, contract law, usury laws, specific statutes addressing third-party funding capitalization requirements, statutory caps on funder rates of return, and other similar technical regulations. As Part II illustrated, licensing, transactional, and procedural regulations for funding vary widely worldwide and defy unification and harmonization. In contrast, ethics and professional conduct norms for funders are trending in the same direction.[309] Yet, ethics and professional responsibility are the most underdeveloped aspects of the global regulatory expectations of third-party funders.

Promising multilateral efforts at unifying treaty-based regulatory approaches to third-party funding are already underway in investor-state dispute settlement. As mentioned earlier in this Article, UNICTRAL Working Group III is working to capture this ethos regarding third-party funding as part of its recommendations to states revising or adopting new bilateral or multilateral investment treaties.[310] An extreme but straightforward example of this universal ethos is that every nation in the world would probably consider it unacceptable for a funder to bet on both sides of a single case—funding both the claimant and the respondent against each other—due to the glaring conflict of interest. This principle is universal enough to warrant inclusion in the Code.

Finally, the Code could be accompanied by a funding model law, like the UNCITRAL Model Law, which would provide an example for local legislators to emulate, especially if they are not as familiar with funding or are unaware of the funding occurring within their jurisdiction. Like the Code, a funding model

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[307] *See, e.g.*, *Alternative Business Structures*, *supra* note 169.

[308] *See, e.g.*, Black & Buergin, *supra* note 92.

[309] *See supra* Section II.H.

[310] *See supra* note 249 and accompanying text.

law could exist alongside existing laws that may already apply to funders in a jurisdiction, and those existing laws would take precedence over the model law.

CONCLUSION

This Article has proposed harmonizing the professional responsibility tenets for the third-party funding industry by devising a transnational, transsubstantive,[311] and forum-neutral Model Code of Conduct for Third-Party Funders. Moving toward that goal, this Article has briefly introduced samples of the various approaches that nations have adopted to regulate third-party funding ethics and professional responsibility and distilled some universal principles that can be codified into the Code. In the future, a robust qualitative and quantitative study of all the approaches worldwide to regulating third-party funder ethics and professional responsibility would yield a more comprehensive set of principles.

Those skeptical of a universal approach to principles of professional responsibility for funders proposed in this Article may argue that established funders would welcome more regulation to increase the barriers to entry and keep out new market entrants. Indeed, excluding new funders might discourage competition for terms and prices in the third-party funding market and reduce party choice. On the other hand, an unimpeachable goal is that unethical funders should be excluded from the market. The insurance industry is heavily regulated, yet no one is complaining that a dubious, start-up insurance company has been regulated out of business. Instead, litigants want to be able to rely on their third-party funders just like they rely on their insurers. A universal, transnational code of conduct with an appropriate, locally tailored enforcement regime in each jurisdiction would begin to bolster public confidence globally in the funding industry. Funders would not be able to change jurisdictions to avoid their professional responsibilities, and jurisdictions that choose to prohibit funding would not be forced to allow it.

In conclusion, the third-party funding industry should be subject to codified principles of professional responsibility that are harmonized and unified across the globe, independent of the local laws regarding the technical business of funding. The contours of the Code still need to be hashed out, and this Article

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[311] *See supra* note 267 (explaining transsubstantivity).

provides a starting point for principles to include. The hope is that this Article will spark a discussion among funders, regulators, lawyers, clients, and industry observers regarding whether the idea of creating and implementing a worldwide code of conduct is an appropriate next step in the continued evolution of the third-party funding industry.

The same effort could help create a companion funding model law to provide an example for local legislators to emulate, especially if they are not as familiar with funding or are unaware of the funding occurring within their jurisdiction. A model law could exist alongside existing laws that may already apply to funders in a jurisdiction, such as corporate law, financial services law, or usury laws. Drafting a model law is beyond the scope of this Article but is ripe for further exploration in future work.

In a future world, all cases may be funded through claim assignment, and all "parties" may be funders. This would be similar to how a single car insurance company can be a party in thousands of car accident cases to recover amounts paid out on claims, even if the original human policyholder is no longer involved in the case. The question then will be how decision-makers will decide on which version of the truth to adopt when none of the humans or companies involved in the underlying dispute are in the courtroom or arbitration hearing room. Or maybe third-party funding will be as uncontroversial as contingency fees in the future once the decision-makers are all robots.[312]

[312] *See generally* Eugene Volokh, *Chief Justice Robots*, 68 Duke L.J. 1135 (2019) (discussing possibility of artificial intelligence judges deciding cases).


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