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JUDICIAL REVIEW OF ARBITRATION
AWARDS AFTER CABLE CONNECTIONS:
TOWARD A DUE PROCESS MODEL

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JUDICIAL REVIEW OF ARBITRATION AWARDS AFTER CABLE
CONNECTIONS: TOWARD A DUE PROCESS MODEL

I.

Introduction. Both Federal law¹ and California law² authorize the courts to refuse to enforce an arbitration award by vacatur, or vacating the award. Vacatur is, in effect, judicial review of an arbitration award. While similar to an appeal of a trial court decision, vacatur effectively ends the matter by granting a court judgment to the party which lost the arbitration, on an "up or down" basis. The vacatur provisions of the FAA and CAA provide that an award shall be enforced unless the grounds for a vacatur (or even more limited grounds for amendment) are present. The statutory scheme rarely combines reversal (i.e. vacatur) with a "remanding" of the matter for rehearing by the arbitrator or correction of material legal or procedural errors, as is often the case in appellate review of a trial court decision³. Such an "all or nothing" approach to vacatur unnecessarily limits a

¹ The Federal Arbitration Act ("FAA" herein) is codified at 9 USC § 1 et seq.; 9 USC § 10 governs vacatur.

² The California Arbitration Act ("CAA" herein) is codified at Cal. Code Civ. Pro. § 1280 et seq.; Cal. Code Civ. Pro. § 1286.2 governs vacatur; The New York Arbitration Act is codified at NY CPLR § 7501 et seq.; NY CPLR § 7511 governs vacatur.

³ See, e.g. Jordan v. Calif. Dept. of Motor Vehicles, 100 Cal.App 4th 431, 453-54, 123 Cal.Rptr. 2d 122, 139-40 (3d Dist. 2002) (vacatur is only remedy unless an award can be corrected without affecting the results of the decision). Unlike the FAA, NY CPLR § 7511(d) and Cal. Code of Civil Procedure § 1287 permits a court to order a rehearing before new arbitrators (or the same arbitrators with the consent of both parties). This is tantamount to allowing the parties to request a new arbitration, but subject to whatever rulings the court may make, as was the case in Jordan. An apparent exception to the general rule is contained in by the new leading case of Cable Connections, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 52 Cal.Rptr. 3d 229, 190 P.3d 586 (2008) in which the California Supreme Court remanded a decision to the arbitration panel to apply the correct legal standard as to whether class wide arbitration was available under an arbitration agreement that was silent on the matter. The issue of whether a particular issue is subject to arbitration under an arbitration agreement may therefore (at least in California) be an exception to the general rule cited in the text. See also note 12 below on the general rule that the issue of whether a party has agreed to any arbitration and whether the arbitration clause governs the dispute sub judice are questions of law for the courts. However, the Federal courts in practice tend to find that the parties

court's power to correct serious procedural and legal errors that occurred during the arbitration process. Further, it re-enforces an already strong reluctance on the part of courts to interfere with arbitration awards, even those the court finds seriously flawed by legal and procedural errors.

The FAA and the CAA establish through vacatur only a limited form of judicial review of arbitration awards, both as to the procedure of the arbitration and to the substantive decisions made in those awards. In our view, prior at least to the important new decision by the California Supreme Court in Cable Connections, Inc. v. DIRECTV, Inc.,⁴ judicial review in practice has in fact been *even more* deferential than the statutory language requires. Published opinions⁵ are rife with expressions of this deference and reflect the policy that substantial and detailed judicial review is to be avoided in order to both encourage private "dispute resolution" of contractual disputes (i.e. the policies underpinning enforcement of contracts generally) and to conserve judicial resources for the immense burden of criminal, immigration and tort cases already weaving their way through the Federal and state systems. This application of public policy is in our view inconsistent both with existing authority to the courts under the FAA

"intended clearly and unmistakably" to have the arbitrability of a particular issue decided by the arbitrator based on the view that "federal courts read arbitration clauses as broadly as possible and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" See e.g. In re Currency Conversion Fee Antitrust Litigation, 265 F.Supp.2d 385, 400, 404-07 (S.D.N.Y. 2003), following and quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed 2d 765 (1983), as well as many other cases. Moses Cone holds that a Federal court may order a controversy to arbitration even when there is a separate state proceeding, despite the so-called Colorado Rivers doctrine, further evidence of the Federal courts' desire to apply arbitration clauses broadly.

⁴ 44 Cal. 4th 1334, 82 Cal.Rptr. 229, 190 P.3d 586 (2008).

⁵ See e.g. Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362, 372, 36 Cal. Rptr. 2d 581, 587, 885 P. 2d 994 (1994) ("the deference due an arbitrator's decision on the merits of the controversy requires a court to refrain from substituting its judgment for the arbitrator's in determining the contractual scope of [his] power."); Stolt-Nielsen SA v. AnimalFeeds International Corp., 548 F.3d 85, 90 (2d Cir., 2008) ("It is well established that courts must grant an arbitration panel's decision great deference..."); Comedy Club, Inc. v. Improv West Assoc. 553 F.3d 1277, 1288 (9th Cir. 2009) ("Review of an arbitration award is 'both limited and highly deferential...").

and the CAA to vacate arbitration awards and with other public policies affected by contractual control of remedies for breach of contract, both of which we discuss below. It is also inconsistent, as Cable Connections teaches, with the policy of encouraging public confidence in the arbitration process.

In reviewing arbitration awards, appellate courts have generally considered only policies of freedom of contract and conservation of judicial resources, and not the stronger principles of due process and equal application of established law as required by the Federal and state constitutions. In the leading Barnes⁶ case, the Ninth Circuit even went so far as to hold, in effect, that by agreeing to an arbitration clause, a party waived any claims based on their right to due process of law under either the United States Constitution or the California Constitution. Other courts have also reached a similar result by finding that there is no "state action" in arbitration awards made pursuant to private contracts⁷, allowing them

⁶Barnes v. Logan, 122 F.3d 820, 824 (9th Cir. 1997) cert. denied, 523 U.S. 259, 118 S.Ct. 1385, 140 L.Ed.2d 645 (1998). See also Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064-65 (9th Cir. 1991). But see Int'l Brotherhood of Elec. Workers v. CSX Transportation, Inc., 446 F.3d 714, 717 (7th Cir. 2006) (due process is basis in Seventh Circuit for review of Railway Labor Act arbitrations). Anomalously, Federal courts are required to review foreign arbitration awards to ensure that "fundamental due process" is accorded the losing party under the New York Convention, 9 U.S.C. §201 et seq. See Generica Limited v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 129-30 (7th Cir. 1997) and Slaney v. The Int'l Amateur Athletic Federation, 244 F.3d 580, 592 (7th Cir. 2001) cert. denied 534 U.S. 828, 122 S.Ct. 69 151 L.Ed 2d 35 (2002). See note 10 below on Federal court dicta regarding the requirement of a "fundamentally fair hearing" in review of arbitration awards.

⁷ Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (collecting authorities); Rifkind & Sterling, Inc. v. Rifkind, 28 Cal. App. 4th 1282, 1291, 33 Cal.Rptr. 2d 829, 833 (2 Dist. 1994). Sometimes the courts also invoke "freedom of contract", stating that more expansive judicial review would "frustrate the intent of the parties" Stolt-Nielsen SA v. Animal Feeds International Corp., 548 F.3d 85, 92(2d Cir. 2008). But as discussed below, there is little basis for imputing an "intent" to the losing party in an arbitration to waive its due process and other fundamental rights by acceptance of a general arbitration clause. On the conflict between the cases cited above and Supreme Court cases finding "state action" for use by private parties of state judgment creditor proceedings which do not guarantee due process, see note 67 below. We find it difficult to compare mere enforcement of private contracts in state judicial proceedings which do promote due process of law (clearly not "state action") with enforcement of arbitration awards (which do not provide due process) without review, under specific statutory provisions (i.e. state action) like the FAA or CAA, a fact pattern clearly analogous to the Wyatt/Lugar cases discussed at note 67 below. This reasoning was accepted in one Federal District Court Case Commonwealth Assoc. v.

to enforce the award though it violated due process principles. The extreme results of the extent to which this deference to freedom of contract has been applied is illustrated by the decision of a case discussed below in an arbitration in the motion picture business: a party is bound to an award which had no jurisdiction over it in a summary proceeding in Superior Court with no review of the underlying factual or legal basis for the award, based on "alter ego" findings made by the arbitrator on an ex parte basis based solely on hearing testimony when the factual basis for such "findings" is contradicted by all percipient witnesses.⁸ Such a result could not have occurred as the result of a separate judicial judgment based on basic due process principles⁹, and is all too consistent with other rulings in that particular arbitration system.

Courts often state that a party should not be able to achieve by arbitration what it could not achieve in a court of law.¹⁰ Such statements, while rarely

Letsos, 40 F.Supp.2d 170, 177 n.37 (S.D.N.Y. 1999) which stated in dicta that "state action" arises from coercive state enforcement of an arbitration award.

⁸ See note 29 below

⁹ See Katzir's Floor and Home Design, Inc. v. M-MLS.COM, 394 F.3d 1142 (9th Cir. 2004) (applying California law); Miller & Snyder v. R & T Properties, Inc., 63 Cal.App. 4th 1303, 73 Cal. Rptr. 2d 770 (2d Dist. 1998) and notes 62-65 below.

¹⁰ E.g. Lindenstadt v. Staff Builders, Inc., 55 Cal.App. 4th 886, 892, 65 Cal.Rptr. 2d 484, 490 (2d Dist. 1997) quoting Loving & Evans v. Blick, 33 Cal.2d 603, 607, 204 P.2d 23 (1949). The Federal courts also state in what appears to be dicta in certain cases that the arbitration hearing must be "fundamentally fair" without stating the legal basis either in the FAA or other applicable law for this requirement, but this statement does not apparently result in any specific review to ensure compliance with precise due process concerns and in one case the Ninth Circuit found a hearing was "fundamentally fair" based it appears on only written submissions. Sovak v. Chugai Pharmaceutical Co., 280 F.3d 1266, 1271 (9th Cir. 2002) cert. denied 537 U.S. 825, 123 S.Ct. 114, 154 L.Ed.2d 37 (2003). See for example of this "fundamentally fair" dicta, Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1012 (10th Cir. 1994) and cases cited; Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001) following Denver Western Rio Grande Railroad Co. v. Union Pacific Railroad Co., 119 F.3d 847, 849 (10th Cir. 1997); Fine v. Bear, Sterns & Co., 765 F.Supp. 824, 829 (S.D.N.Y. 1991) following Bell Aerospace Co. v. Local 516 United Auto Workers, 500 F.2d 921, 923 (2d. Cir. 1974). Certain state courts may take this requirement to have a more precise "due process" meaning. Cf. Nosonowitz v. Nosonowitz, 284 A.D. 2d 586, 726 N.Y.S. 2d 486, 488 (3d Dept. 2001) (must give notice to husband of arbitration against wife by wife's attorney for attorney fees); McMahan & Co. v. Dunn Newfund I, Ltd, 230 A.D. 1, 656 N.Y.S.2d 620, 621 (1st Dept. 1997) (list "minimum requirements of fairness"); Miller v. Miller, 264 Mich. App. 497, 691 N.W. 2d 788, 790 (Ct. of App. 2004) rev'd 474 Mich. 27, 707 N.W. 2d 341 (2005) (domestic relations arbitration require certain

reflective of actual vacatur results, in fact state the primary judicial principles and public policy that should be balanced against the policies of freedom of contract and conservation of judicial resources: fairness of procedure and rational and equal application of established principles of law (particularly limitations on remedies) to similarly situated persons are more fundamental or “strong” principles and should not be overridden by weaker "efficiency" policies of freedom of contract and preservation of judicial resources. However, these "efficiency" policies have in practice unduly limited judicial review of arbitration awards. Efficiency policies should not reign supreme. Courts should also recognize countervailing policies of fairness and the rule of law and should not enforce any arbitration award which grants remedies not available under statutory or judicial law or which denies basic due process rights. Indeed, we argue these countervailing policies are not only more important values or principles in our system of justice, but also because, as Cable Connections teaches, failure to judicially enforce these policies undercuts confidence in (and ultimately utilization of) arbitration as an efficient alternative dispute resolution system.

There should be no judicial distinction between a trial court actually rendering a flawed reversible decision on fundamental legal principles on its own accord and the court achieving the same result by enforcing an arbitration award containing the same fundamental flaws and reversible errors. Many years ago, one of the authors co-wrote two Notes for the Yale Law Journal on the related issues of whether private university students retained due process rights in expulsion proceedings despite the lack of "state action" and whether a state may avoid its obligation to integrate public schools by permitting delegation to private "segregation academies" of the role formerly performed by public schools¹¹. The

due process elements but satisfied with "shuttle" hearings in two rooms).

¹¹ Note, Common Law Rights For Private University Students: Beyond The State Action Principle, 84 Yale L.J. 120 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1546 (1973). Traditionally, common law recognized a "property"

courts have in fact showed little sympathy to any effort to avoid fundamental constitutional rights by delegation of public duties to private parties with a resultant denial of due process of law. The court's approach to arbitration awards should be no different.

The suggestion in Barnes that parties take the risk of loss of due process and other fundamental rights when they freely agree to arbitration in a contract was perhaps an acceptable answer when arbitration clauses were limited to contracts between sophisticated businesses on fairly equal footing with one another. However, it is not an appropriate response to this problem today and in light of the Cable Connections decision. Pace Barnes, since arbitration clauses have become so prevalent in today's world, most parties do not understand that they are waiving their right to fundamental fairness, nor do they understand that they are agreeing to remedies not authorized by law or violation of fundamental rights. Arbitration clauses generally do not include express waivers of such issues nor any explanation that such rights may be waived, and in the author's experience simply provide that disputes relating to the contract in issue are subject to arbitration in a particular arbitration system. In other legal circumstances, no waiver of such fundamental rights would be implied absent express language.¹² In fact, the entire purpose of certain arbitration clauses is to

interest of a member in membership of a private association and imputed rules of basic fairness or "due process" in reviewing expulsion from private associations as part of the "contract" of the association. We argue that these considerations apply with even greater force in judicial review of arbitration awards made pursuant to arbitration proceedings controlled by private associations, such as the arbitration proceedings of the International Film and Television Alliance discussed below.

¹²On the usual requirement of an explicit "knowing" and "willing" waiver of fundamental civil rights which is "not lightly to be inferred", such as the right to a jury trial in a civil matter, see e.g. Dunmore v. United States, 358 F.3d 1107, 1116 (9th Cir. 2004); Garguilo v. Delsole, 769 F.2d 77, 79 (2d Cir. 1985). We see no basis for the conclusion of one commentator that parties to an arbitration "knowingly take the risks of errors of law or fact" because the "practical experience and worldly reasoning [by 'experts'] will be accepted as correct by other experts...", see Sweeney, Judicial Review of Arbitral Proceedings, 5 Fordham Intl. J. 253, 254 (1982), which does not represent the "real world" as we have experienced it. The FAA and CAA differ on the issue of whether a party reserves the right to a jury trial on the issue of whether it has agreed to

affect a waiver of jury trial and other procedural protection normally offered to litigants by the judicial system.

The reasoning of Barnes is undercut even further by the United States Supreme Court decision in Hall Street Associates refusing to enforce contractual language added to arbitration clauses requiring a more extensive judicial review of any arbitration award as a condition to agreement to arbitration, presumably including a contractual clause requiring the arbitrator to abide by judicial principles of due process of law.¹³ Hall Street Associates in effect holds that the parties are prohibited by the FAA from contracting to protect their due process rights or other statutory rights, which thus may be ignored by arbitrators. This rule is not followed in California under the reasoning of Cable Connections Inc. v. DIRECTV, Inc.,¹⁴ which we consider below. We argue courts must squarely confront any denial of due process or other rights arising in arbitration as caused or authorized by the arbitration process itself, enforcement of the results of which is clearly a creature of the state.

The deep seated judicial reluctance to enforce contractual “choice of remedy” or penalty clauses and other similar waivers of procedural rights in fact reflects our proposed balance of judicial principles and the rule of law against a pure reliance of freedom of contract and conservation of judicial resources in private dispute resolution. From the beginning of the common law, courts have refused to enforce “penalty clauses” in contracts despite policies of freedom of

arbitration of a particular issue, an issue normally not subject to any deference to the decision of the arbitrator under the rule of First Options of Chicago v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1985) and Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S.Ct 588, 154 L.Ed 2d 49) (2002). See on this issue Rosenthal v. Great Western Financial Securities Corp., 14 Cal. 4th 394, 405-07, 58 Cal.Rptr. 2d 875, 881, 926 P.2d 1061 (1996) (Cal. Code of Civil Procedure §1281.2 vs. 9 USC §4)

¹³ See the split decision in Hall Street Associates, L.L.C. v. Mattel, Inc., ___ U.S. ___, ___, 128 S.Ct., 1396, 1404-1405, 170 L.Ed.2d 254 (2008), affirming the Ninth Circuit position set forth in Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 997 (9th Cir., 2003) (*en banc*).

¹⁴ 44 Cal. 4th 1334, 82 Cal.Rptr. 3d 229, 190 P.2d 586 (2008).

contract and conservation of judicial resources. It is difficult to conceive of an arbitrary arbitration award -- i.e. one made in violation of due process or which accords a remedy not authorized by law as opposed to a fair and legal proceeding -- as anything but a contractual penalty.

Former Dean Wellington of the Yale Law School argued¹⁵ that this common law principle, though seemingly at odds with the general principle of enforcing private consensual agreements made for consideration, was based on a belief and policy that contracting parties had unreasonably optimistic expectations that no breach triggering a penalty would occur¹⁶, a conclusion the

¹⁵ While this argument was mainly voiced in his Introduction to Contracts course, the power of his logic is more apparent in his seminal article, Wellington, Common Law Rules and Constitutional Double Standards: Some Notes On Adjudication, 83 Yale. L.J. 221 (1973) and in particular pages 220-35 which distinguishes between "strong" duties based on "principles," i.e. moral right and wrong, and "weak" duties based on "policies" such as, in the case of contracts, "economic efficiency." In particular, Professor Wellington discusses the courts' responsibility to avoid "surprise" to a party in the "fashioning of remedy," as a function of whether the duty in issue is "strong" or "weak." It would be in our view inappropriate for the courts to "surprise" a party by finding it had "waived" fundamental rights, i.e. the "principles" of due process of law which are a "strong" duty, in service of the policies of economic efficiency enforcement of private contracts. Id. at 233-35.

¹⁶ Compare the rules for determining whether a punitive damage award is so "grossly excessive" to be a violation of due process rights, which may be enforced against arbitration awards as discussed in notes 39-41 below. BMW of North America, Inc. v. Gore, 517 U.S. 559, 583, 116 S.Ct. 1589, 1598, 134 L.Ed 2d 809 (1996) (comparison of award to actual harm suffered and any applicable civil or criminal penalties). The older cases traditionally phrased the illegality of contractual "penalties" for non-performance as based on "relief from forfeiture" or "equity abhors a forfeiture," relying on equity principles to prohibit both punitive monetary sums payable on breach, but also any other type of contractual remedy which might also be a forfeiture. E.g. Elbert v. Mercantile Trust Co. of Cal., 213 Cal. 496, 499, 2 P.2d 776, 777 (1931). These phrases (as well as Justice Stevens' reasoning in Gore) appear to be based on the underlying assumptions described by Professor Wellington. The cases, and in California the applicable statutes, distinguished between "penalties" and acceptable so-called "liquidated damage" clauses, which purported to provide appropriate recompense under judicial definitions of contract damages only for the lost expectancy interest when "damages for breach are impracticable or difficult to ascertain at the time the contract is made" (Cal. Civil Code Section 1671(b)), and not to "compel performance" i.e. not to compensate for an expectancy loss which is non-speculative and proven as is required by the courts. The leading case in California was Garrett v. Coast and Southern Fed'l Savings & Loan Ass'n, 9 Cal.3d 731, 739, 108 Cal.Rptr. 845, 850, 511 P.2d 1197 (1973) ("A penalty is punitive and... operates to compel performance of an act... and usually becomes effective only in the event of default... upon which a forfeiture is compelled without regard to the actual damage sustained...") California law has since been updated in 1977 and is reflected in the amended California Civil Code § 1671 et

authors believe is particularly applicable to parties' expectations regarding arbitration of their disputes. These expectations of the results of a contractually selected remedial process, as opposed to expectations as to the value received in the exchange, were not entitled to judicial enforcement, particularly when the result "expected" is just a better outcome for that party than might be given in court. Similarly, penalty clauses are not the sort of consideration that courts protect in enforcing private bargains, and failure to enforce such clauses will in fact have no deleterious affect on the reasonable expectations of parties entering contracts: each will continue to expect to receive the consideration bargained for through substantial performance. Private business will not collapse if the courts do not enforce contractual penalty clauses, as hundreds of years of common law experience can attest. The same logic applies to judicial enforcement of arbitration awards that, for all intents and purposes, are penalty clauses if a party is deemed or inferred by arbitration agreements to waive fundamental due process protections and other basic rules of law.¹⁷

seq, which follow the same general principles described above but shift the burden of proof in certain cases. See note 17 below.

¹⁷ Traditionally, the common law did not take into account "contracts of adhesion" or imbalance in bargaining power in reviewing "penalty" clauses. However, in the revision of California law, Cal. Civil Code § 1671 et seq., the Law Revision Commission recommended a general approval of "liquidated damage" clauses and in effect shifted the burden to the party seeking to invalidate such a provision, to prove that the provision "was unreasonable under the circumstances at the time the contract as made," "unreasonableness" meaning that the provision was not "a reasonable attempt to anticipate the losses to be suffered," as opposed to a penalty to coerce performance. See Cal. Civil Code § 1671(b); Californians for Population Stabilization v. Hewlett-Packard Co., 58 Cal.App. 4th 273, 288-89, 67 Cal.Rptr.2d 621, 629-30 (6th Dist. 1997), which found that "reduction in litigation" was the reason for the change in law. But the Law Revision Commission specifically warned that "limitations of existing law should be retained and additional protection provided in cases where the parties have substantially unequal bargaining power." 13 Cal. Law. Rev. Comm'n Reports 1741 (1977), and the new law therefore retains the prior law for consumer-based and similar transactions. Cal. Civil Code. § 1671(c)(1), (d). However, even without the specific protection, of Section 1671 (c) and (d), the courts have remained under the new law vigilant to look through purported "alternative performance" or "conditional waiver" language to find coercive penalties, which should not be enforced against the parties. E.g. Harbor Island Holdings v. Kim, 107 Cal.App. 4th 790, 795-99, 132 Cal. Rptr.2d 406, 408-11 (4th Dist. 2003) following the leading case of Ridgley v. Topa Thrift & Loan Assn', 17 Cal. 4th 970, 982, 73 Cal.Rptr.2d 378, 385, 953 P.2d 884 (1998) which

This article begins with a brief history of arbitration in the Federal and California law. We then discuss the particular issues with arbitration proceedings in the motion picture industry particularly under the regulations of the International Film and Television Alliance. We then discuss the current statutory provisions of the FAA and CAA regarding vacatur, and explain how such provisions are currently applied by the courts. We then propose a reconsideration and expansion of the current interpretations of the FAA and the CAA based on the countervailing judicial principles identified above, particularly in light of the reasoning of Cable Connections, as well as legislative clarification of both statutory schemes to support these principles.

This article argues there should be no judicial enforcement of awards that delegate to arbitrators the power to grant remedies that are not authorized at law or violate fundamental due process rights absent specific and fully informed waiver at the time of the arbitration, based on existing CAA statutory provisions and Cable Connections, a doctrine which balances the judicial principles and public policies explained above. We suggest the United States Supreme Court should take the opportunity to reject the vague and confusing "manifest disregard of the law" standard for vacatur in Federal courts in favor of a clear standard of which public policies an arbitrator must follow at the risk of vacatur. It is undeniable that existing law does not permit as full of a review of arbitration awards as would exist in an appeal of a trial court decision. Such a standard is neither necessary nor desirable. However, limited intervention by the courts is preferable and critical to the avoidance of serious injustice. Such new standards of review under the CAA are strongly supported by the recent Cable Connections

"exposed the double talk of a 'conditional waiver' of certain... charges" as effective penalties. See also the unreported California case of Greentree Financial Group, Inc. v Execute Sports, Inc. 2008 WL 195 2376 (4th Dist. 2008) (stipulated judgment was a penalty because the amounts agreed bear "no reasonable relationship to the range of actual damages. . .")

decision by the California Supreme Court which permits just such extensive review if specifically provided for in the applicable arbitration clause.

II

JUDICIAL REVIEW OF ARBITRATION AWARDS

UNDER CURRENT LAW

A. Brief History of Arbitration

The FAA was enacted in 1925 and the predecessor of the CAA was enacted in 1927.¹⁸ Both are based on earlier statutes in New York and New Jersey. The creation of the FAA and CAA were meant to accomplish two primary goals: to put an end to the judicial hostility towards arbitration, and to “allow parties to avoid the costliness and delays of litigation.”¹⁹ The legislative reports show that Congress viewed arbitration agreements as voluntary agreements that should be treated like other contracts.²⁰ At this time, arbitration clauses were primarily limited to contracts between businesses, which are generally presumed to be sophisticated in their dealings.²¹

¹⁸ The FAA is derived from the Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886. The CAA is derived from Stats. 1951, ch. 1708, §4, as amended in 1961. See 3 Cal. Law Rev. Comm'n G-28 et seq. (1961). See also Rosenthal v. Great Western Financial Securities Corp., 14 Cal. 4th 394, 406, 58 Cal. Rptr. 2d 875, 881, 926 P.2d 1061 (1996) and Feldman, Arbitration Law in California, 1957 So. Cal. Law Rev. 375 for discussion of California law prior to adoption of the CAA.

¹⁹ Scherk v. Alberto Culver Co., 417 U.S. 506, 510-511, 94 S.Ct. 2449, 2453, 41 L.Ed. 2d 270 (1974) (Stewart, J.). See also the leading California case of Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9-11, 10 Cal.Rptr. 2d 183, 186-87, 832 P.2d 899 (1992) which discusses these policies.

²⁰ “The report of the House Committee stated in part: 'Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.’” Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942), citing 68 Cong., 1st Sess., House of Rep. Report No. 96. On judicial review of arbitration generally under the FAA and CAA, see Cable Connections, Cal. 4th at 1358-63, 52 Cal.Rptr. 3d at 248-53, 190 P.2d at 595-606. This issue is also discussed at length in Moncharsh, 3 Cal. 4th at 9-11, 10 Cal. Rptr. 2d at 186-87. As discussed below and in light of Cable Connections, which discusses the contractual basis of arbitration at length, this policy of freedom of contract has effects that both discourage judicial review and recognize judicial review.

²¹ Public Citizen, “Arbitration Q&A”; Retrieved from <http://www.citizen.org/congress/civjus/arbitration/articles.cfm>

Soon the shift towards arbitration became clear. By 1944, 73% of collective bargaining agreements in major industries contained arbitration clauses.²² By 1960, the courts were actively encouraging arbitration, allowing arbitration agreements to cover more than stated issues, refusing to confine arbitrators to the language of the contract, and resolving disputes in favor of arbitrability.²³ In fact, by 1984, the FAA had even been found to preempt state law in certain cases absent a specific choice of state law in the applicable agreement (and even that choice of law principle is apparently itself selectively enforced in the Federal courts).²⁴

²² Massey, Jr., Robert V., "History of Arbitration and Grievance Arbitration in the United States;" West Virginia University Extension Service, Institute for Labor Studies and Research.

²³ See generally The Steelworkers Trilogy: United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); and note 3 above.

²⁴ See Southland Corp. v. Keating, 465 U.S. 1, 16, 104 S.Ct. 852, 861, 79 L.Ed 2d 1 (1984). The preemptive effect of the FAA on the CAA (and the concomitant question of which law applies in vacatur proceedings) has generated a fair degree of confusion. The Supreme Court has specifically held that the FAA does not overrule the CAA when the contract in issue chooses California law in which event California law is applied, including on the issue of arbitrability vel non. See Volt Information Sciences, Inc. v. Board of Trustees, Stanford Univ., 489 U.S. 468, 474-77, 109 S.Ct. 1248, 1253-55, 103 L.Ed. 2d 488 (1989). In a related decision, the California Supreme Court has held the FAA did not preempt the CAA's provisions with respect to state court (as opposed to Federal court) proceedings. See Cable Connections, Inc. v. DIRECTV Inc., 44 Cal. 4th 1334, 1353-1354, 52 Cal. Rptr. 3d 229, 599, 190 P.2d 586, 595-98 (2008), following Cronus Investments, Inc. v. Concierge Services, 35 Cal. 4th 376, 389-90, 25 Cal.Rptr. 3d 540, 550, 107 P.2d 217 (2005) in turn based on footnote 10 in Keating, an issue left "open" in footnote 6 in Volt. This issue is complicated by the apparent fact that Federal courts may apparently apply (and in the author's experience do apply) the FAA to arbitration disputes based on this preemption theory even if only diversity jurisdiction is obtained and whether or not the applicable contract has a choice of law clause, based on an apparent theory that the choice of law clause applies only to "substantive" not "procedural" issues. Cf. Sovak v. Chugai Pharmaceutical Co., 280 F.3d 1266, 1270 (9th Cir.) amended 289 F.3d 615 (9th Cir. 2002) cert. denied 537 U.S. 825, 123 S.Ct. 114, 154 L.Ed 2d 37 (2003). In light of the dramatic conflict between the position of the United States Supreme Court (Hall Street) and the California Supreme Court (Cable Connections) on the enforceability of contractual clauses requiring judicial review, this issue has now enormous practical consequences to practitioners. The FAA does not on its own provide a basis for Federal jurisdiction. See 9 USC § 4 and discussion in the recent Supreme Court decision in Vaden v. Discover Bank, 556 U.S. __, __, __ 129 S.Ct. 1262, __, __ L.Ed.2d __ (2009) which again declares Southland's "national policy favoring arbitration" and that FAA is a "body of federal substantive law" which is

Since these expansions, arbitration has continued to grow exponentially. It is no longer limited to business to business transactions, but instead has permeated throughout all kinds of agreements in all kinds of industries. Many employment agreements now contain arbitration clauses. Sales agreements,²⁵ service agreements,²⁶ and even financial agreements²⁷ all contain an arbitration clause. In today's world, it is difficult to find anyone at all, albeit some unknowingly, who has not signed an agreement containing an arbitration clause. The experience of the authors is that arbitration clauses tend to be used selectively by businesses when those businesses believe arbitration awards will be more beneficial in actual results than the judicial process, that is, producing outcomes more favorable to that business than obtainable in courts. Our experience is that this objective exceeds the objectives of a faster, cheaper and more efficient dispute resolution process (the policies supposedly promoted by arbitration), a point little noticed and seldom mentioned in judicial discussions of arbitration clauses, particularly when civil actions (at least in Los Angeles County) now proceed to trial quite expeditiously.

B. Arbitration In The Motion Picture Industry

To illustrate the issues raised in practice with arbitration proceedings, we will review arbitration in one important California industry -- motion pictures. Independent motion picture and television producers and distributors from the United States and most important international markets formed an alliance in the

"equally binding in state and federal court," but nevertheless resolved a conflict in the Circuits by requiring that the courts "look through" the arbitration agreement to determine if the underlying claim for which arbitration is sought "arises under federal law," without reliance on the allegations of any counterclaim, in order to find Federal jurisdiction of an arbitration dispute.

²⁵ Ford, Toyota, Honda, Nissan, and Chevrolet, among others, provide for arbitration of disputes in their sales contracts.

²⁶ Verizon, Time Warner Cable, DirecTV, Comcast, AT&T, Sprint, T-Mobile, and many others include arbitration clauses in their service agreements.

²⁷ Bank of America utilizes arbitration clauses in all of their agreements, including credit cards, college loans, leases, and mortgages. Chase, American Express, Citibank, ETrade and many others do the same.

early 1980's, originally called the American Film Market or "AFM," and now called the International Film and Television Alliance or "IFTA." IFTA has over 100 member companies and operates the American Film Market in Los Angeles each year (now in November) at which more than 500 companies attend, the most important film market for motion pictures not produced by the six "major studios" (i.e. Warner Brothers, Disney, Fox, Paramount, Sony, and Universal) and their associated labels.

IFTA also established in the mid-1980's an arbitration panel of approximately twenty local lawyers who claim experience in independent film and television finance, production and distribution. In five years ending in 2007, the IFTA conducted over 500 arbitrations with awards in excess of \$50,000,000 (to say nothing of the cases in which nothing was awarded)²⁸. This system is now central to independent motion picture finance and distribution and IFTA arbitration clauses are often included in financing and distribution agreements in the international motion picture business.

IFTA arbitration clauses are particularly important to banks and other financial institutions advancing loans secured by third party distribution agreements as well as completion bond companies. As a result, most "letters of direction" executed by third party distributors agreeing to pay proceeds of license agreements for their territory to a lender include IFTA arbitration clauses. Banks and financiers are generally pleased with the results of this system. Notably the major studios refuse to accept arbitration clauses in production, financing and

²⁸ All information cited in this section is from the personal experience of the author except this data which was provided by Jean Prewitt (Executive Director of IFTA) in a telephone conversation with the author. In addition, the four principal unions in the motion picture business (Writers Guild, Directors Guild, Screen Actors Guild and the IATSE for production personnel) require arbitration of most disputes between producers (including the major studios) and their members under a system similar to IFTA. Much of the discussion in the text is applicable to this arbitration process as well. Based on conversations with union representatives, we estimate that more than 300 arbitrations have occurred under these arbitration provisions in the last five years.

distribution of their motion pictures even when acquired from independent productions (and as a result do not as a rule accept IFTA arbitration clauses).

However, many independent producers and distributors have had very frustrating if not wholly arbitrary results in IFTA arbitration. In one case, a licensor of rights sued an independent film distributor (whom we refer to as the distributor) because the distributor's predecessor had not paid to the licensor a rights fee for a second video sequel to a well know film owned by the licensor (which we refer to as the original picture), produced and distributed by the distributor. A UK-French co-production was established to produce a first sequel to the original picture in 1996, and the distribution rights to this picture were licensed to an unrelated party (the first licensee). The first licensee had funded the \$12 million production budget of the first sequel under a distribution agreement giving it all distribution rights for the life of the copyright. The UK co-producer of the first sequel was owned (as was then required by the UK-French bilateral co-production treaty) by a European resident who was one of the producers of the picture. The UK co-producer had acquired the sequel rights under an agreement which included an IFTA arbitration clause. The rights agreement allowed the UK co-producer to make further sequels for payment of future rights fees to be negotiated and included an agreement (as is customary) that all rights were irrevocably granted to the UK co-producer (and not subject to revocation for any reason) so long as the UK co-producer had paid the purchase price and started principal photography on the first sequel.

Shortly after completion of the first sequel, a Canadian partner of the first licensee in a separate motion picture venture decided it was a good idea to produce a series of low budget video or TV sequels based on the original picture and approached an executive at the distributor to finance and distribute these low budget sequels. This Canadian venture partner took control of the UK co-

producer and negotiated an agreement with the distributor under which the UK co-producer transferred the sequel rights to the distributor for payment of \$100,000 per sequel plus the distributor's assumption of any obligation to pay any sums due to the licensor for any subsequent sequels under the original rights agreement. The distributor made the second sequel, paid \$100,000 to the UK co-producer, which the first licensee endorsed under its power of attorney to the Canadian venture partner. The distributor did not pay any sums to the licensor.

In an otherwise unobjectionable decision, the arbitrator decided to hold the first licensee as the author of the entire dispute, even though the first licensee was not present, the arbitrator had no jurisdiction over it or its affiliates (as the arbitrator admitted) and the UK co-producer (now owned by the venture partner) had defaulted. The arbitrator also did not require the parties to call as witnesses, and heard no testimony from, any of the principals, relying instead on the hearsay testimony of a then (at the time of the incident) junior executive of the distributor who claimed to remember hearing that the first licensee had orally promised the distributor that the \$100,000 paid to the UK co-producer would instead be paid to the licensor in full satisfaction of its rights under the original rights agreement with the UK co-producer, even though no writing existed anywhere to support this hearsay. This hearsay testimony would have been (and has been) directly contradicted by the testimony of the percipient witnesses. As a result, the arbitrator found the first licensee's "wrongful conduct" allegedly caused the whole dispute and should pay everyone's legal fees.²⁹

²⁹ Of course, the distributor for years had the cancelled check for \$100,000 payable to the UK co-producer endorsed to the venture partner, showing it was paid to the venture partner, not to the licensor. Arbitration Award of June 30, 2004 made in Jonesfilm v. Lions Gate Films, et al., IFTA Arbitration No. 03-08 included in the record on appeal to the Ninth Circuit. Hoffman v. Goldin, et al, No. 06-5607 filed on July 28, 2006 ("Goldin Appeal") which was an appeal of the dismissal of civil rights claims of denial of due process of law filed in the Federal District Court for the Central District of California, No. CV 06-2272 (dismissal by Order dated July 20, 2006). The Goldin Appeal was denied by the Ninth Circuit on March 24, 2008 in an unpublished opinion based on res judicata allegedly rising by reason of the denial of an appeal in state court

One would like to believe that any experienced film lawyer would reject this questionable explanation of the distributor's failure to pay the license fee to the licensor: is it believable that the first licensee would orally waive for no consideration the venture partner's or UK co-producer's rights to the \$100,000 payment on a picture in which it had no interest, use that payment to satisfy the distributor's obligations under the rights agreement to make the rights payment to the licensor and agree with the distributor for no consideration (and with no writing from the licensor) that the licensor would accept this sum as the to-be-negotiated sum due to the licensor for the second sequel? Apparently the arbitrator accepted this claim without ever referring to the rights agreement which provided that the distributor was obligated to pay both the \$100,000 and all sums due to the licensor and others in the chain of title. But most importantly the arbitrator came to this conclusion even though he had no jurisdiction over the first licensee and had not heard from the only first person or "percipient" witnesses to the events, who would have (and now have) directly contradicted the arbitrator's alleged factual findings.³⁰

from the Original Order of March 18, 2005 of the Los Angeles Superior Court adding the first licensee on a summary basis as a judgment debtor with no evidentiary hearing. Unpublished Second District Court of Appeal Order dated May 4, 2006 in Hoffman v. Jonesfilm, No. B183198. The facts described above are set forth with citations to the record in Appellant's Opening Brief in the Goldin Appeal, pp. 1-26, filed July 18, 2006.

³⁰ The arbitrator then went on to find one individual (over whom he had no jurisdiction and who did not appear at this hearing) was the "alter ego" of a company which the individual did not own based on a power of attorney he found did not exist during the relevant periods, all with no evidentiary showing. The arbitrator also found that the distributor should not be responsible for the licensor's legal fees because three letters had been written to the distributor's counsel warning that the second sequel was being made (production and distribution of a motion picture in any event not being amenable to secrecy since the owners expect to earn money from public sale of the picture), even though these letters were written by the first licensee. Not content with his "finding" of the first licensee's "wrongful conduct," the arbitrator also felt he needed to make a "finding" with no adversary hearing about the first licensee's motivation for this "wrongful conduct": according to the arbitrator, the first licensee made this oral "representation" to the distributor to "cover up" the fact that the first licensee had not obtained the licensor's "consent" to the production of the second sequel. However, only one page before in his arbitration award he had (correctly) found that under the terms of the original agreement, neither the distributor nor the UK co-producer needed the licensor's consent for the second sequel so long as it paid the \$100,000 to the UK co-

This arbitrary result is consistent with other IFTA arbitration experiences³¹. In one arbitration, the arbitrator found jurisdiction over three companies which had never signed an arbitration agreement without required compliance with California law (which requires a court action to establish jurisdiction over non-parties) and ruled against them after the statute of limitations had run and after the matter had previously gone to judgment (clearly barring a new judgment under res judicata principles). This arbitrator also awarded attorney fees to the losing party under a theory that a contractual indemnity clause is in effect an attorney's fee clause even in an action on the contract between the contracting parties, also in direct violation of California law.³² In yet another case, the arbitrator found a French distributor could avoid payment of an advance because the picture was delivered late... due to the fact

producer, as its production lawyers had told the distributor at the time the second sequel was made. So the first licensee's "wrongful conduct" was to "cover up" a lack of consent that the arbitrator had one page earlier found was not required with respect to a picture in which the first licensee had no financial interest, all without hearing the percipient witnesses tell what really happened. The California courts approved the arbitrator's findings and entered judgment against the producer personally for legal fees with no civil action filed, no hearing, no discovery, no cross-examination of witnesses or other incidents of civil procedure, even though none of the agreements provided for award of attorney fees.

³¹ The following cases are from the personal experiences of one author and his associates. The incidents are results of confidential arbitrations that lack citations.

³² On the requirement for a petition to enforce arbitration, see Calif. Code of Civil Procedure §1281.2 interpreted in City of Hope v. Bryan Cave LLP, 102 Cal. App. 4th 1356, 1361-70, 126 Cal. Rptr. 2d 282, 292-93 (2d Dist. 2000). The CAA law, apparently unlike the FAA, does not permit arbitral jurisdiction over a non-signatory based on an "equitable estoppel" or "receipt of benefits" theories. See, e.g. Benasra v. Marciano, 91 Cal. App. 4th 987, 990, 112 Cal. Rptr. 2d 358, 360 (2d Dist. 2001). Compare under Federal law the expansive bases for finding arbitral jurisdiction over non-signatories in Comer v. Micor, Inc., 436 F.3d 1018, 1102-04 (9th Cir. 2006) and Smith/Enron Cogeneration Ltd. Partnership Inc. v. Smith Cogeneration Int'l. Inc., 198 F.3d 88, 97 (2d Cir. 1999). On the refusal to permit indemnity clauses to be used as "backdoor" attorney fee clauses, see Southern Pacific Thrift & Loan Ass'n v. Savings Ass'n Mortgage Co., 70 Cal App. 4th 634, 643-44, 82 Cal. Rptr.2d 874, 880 (2d Dist. 1999). Cal. Civil Code §1717, an important policy in the state, prohibits awards of attorney fees to the losing party pursuant to a contractual attorney fee clause, and Cal. Code of Civil Procedure § 1021 codifies the "American rule" denying attorney fee awards absent a specific contract or statutory provision.

that the distributor had objected with no apparent justification to delivery when tendered in the contracted time period.

Further, a producer's efforts to collect a letter of credit from a Korean client were denied because the arbitrator found that underlying industry practice always required Korean censorship approval before payment on Korean contracts, ignoring the producer's contract with that Korean distributor and the producer's testimony of eight years of prior practice. Finally, a sales agent was found personally liable to repay an investment despite a specific claim in the underlying agreement prohibiting any personal liability related to the subject matter of the applicable agreements. We have anecdotal evidence of other completely opposite IFTA arbitration rulings in similar arbitrations.

Our experience is that industry lawyers who have the time to conduct IFTA arbitrations as arbitrators are not the lawyers who have either the professional success or real industry experience to separate fact from fiction in an adversary proceeding. We also find these lawyers are often deficient in knowledge of California law and civil procedure, and they ignore both at will. IFTA arbitrators necessarily develop a bias or prejudice toward one of the parties to the proceeding by reason of the wide network of industry relations in which each work and live, even if there is no specific disqualifying conflict of interest. Also it is not surprising that financiers have generally none of the foregoing complaints. In our experience the composition of the arbitration panel in a particular arbitration system is central to that system's effectiveness and fairness.

In light of Cable Connections, IFTA could include in its rules of arbitration a requirement that all arbitration awards under its system must comply with California (or other appropriate) law and accord basic due process of law to litigants. This inclusion in the rules will insure judicial review in California courts of these fundamental (non-evidentiary) questions. But IFTA (nor any

other arbitration system) need not solely rely on judicial review. IFTA could also establish a panel of retired judges as its own appeal panel to review errors of law, clearly erroneous factual determinations and violations of fundamental fairness or rudimentary civil procedure, i.e. review errors within the arbitral process. We particularly believe that the lack of any review is what leads to the abuse of arbitral discretion. Most experienced litigation attorneys recognize the importance of judicial review of trial court decision in limiting arbitrary decisions. The same is of course true in arbitration, particularly when the arbitrators believe there will be limited or no judicial review of their decisions.

The confidentiality provisions of IFTA prohibit disclosure of opinions rendered in IFTA arbitration and hence serve to cover up bad decisions and conflicts of interest. How can a party discover conflicts or other relationships between the arbitrator and a party or its affiliates and allies without full disclosure of all arbitral awards and arbitration records? Full publication of all awards will also be a deterrent to unchecked and absurd arbitral discretion as Cable Connections suggests³³. Most arbitration systems in our experience do not have any transparency process or public review of decisions which is an essential element of due process of law in judicial proceedings and necessary to establish defined rules of conduct applicable to all similarly situated persons. As a result, arbitral awards can be extremely arbitrary when compared against all decisions made in that arbitral system, even if not apparently arbitrary to a court reviewing one particular decision.

Even after a party objects to arbitration, it may be forced not only to arbitration but to pay a portion of substantial costs of arbitration.³⁴ We argue the

³³ Cable Connections, 44 Cal. 4th at 1363, 52 Cal.Rptr. 3d at 253, 190 P.3d at 606 (2008) quoted in note 61 below.

³⁴ See note 36 below on the judicial review of "unconscionable" arbitration fees and costs. Normally, contractual clauses which purport to award attorney fees are "strictly construed." See Kolai v. Gray, 109 Cal.App. 4th 768, 777, 135 Cal.Rptr. 449, 456 (4th Dist. 1997) and Layman v. Combs, 994 F.2d 1344, 1351 (9th Cir. 1992) cert. denied 510

party seeking arbitration should pay all the arbitrator's fees since otherwise payment of arbitral fees is an illegal shifting of attorney fees without a contractual clause in direct violation of California law, a result also tolerated in many arbitration systems. Arbitrator fees can be included in any final award as part of legal fees and subject to appropriate review, as opposed to requiring payment up front on penalty of default. IFTA, as well as most other arbitration systems, makes no provision for providing counsel to parties who cannot afford the very high costs of arbitration, and counsel should be provided at the cost of the losing party in this instance.

We believe no IFTA arbitration should proceed under any theory against a party which has not executed an arbitration agreement absent a court ruling after filing of a proper petition for arbitration as required by California law. Otherwise, a party which never signed an agreement is forced to arbitrate on penalty of default (and may be deemed to have waived its objections to jurisdiction if it does) and pay the arbitral fees to an arbitration which it never agreed. IFTA arbitrators have an irreducible financial incentive to find arbitral jurisdiction and almost no knowledge of the law regarding arbitral jurisdiction over non-parties, as we think is common in arbitration³⁵.

U.S. 914, 114 S.Ct. 303, 126 L.Ed 2d 251 (1993). But this rule is not followed in reviewing arbitration clauses which often award in effect attorney fees directly or indirectly by implication from the agreement to arbitration. Compare however the discussion in Cole v. Burns Int'l Security Services, 105 F.3d 1965, 1483-86 (D.C. Cir. 1997) (interprets labor arbitration agreement as imposing all fees on the employer when contract is silent).

³⁵ These points apply equally to labor arbitration in the motion picture industry, although the jurisdiction issues and the issues for review are much clearer and the arbitrations are much less formal, resulting in much less in legal fees than in the IFTA system. Enforcement of labor arbitration awards are generally the subject of Federal jurisdiction unlike IFTA awards, and hence California law issues do not apply in that context. The author's experience is that arbitrators in labor arbitration in the motion picture industry (while not particularly aware of California court procedure) tend to be more knowledgeable and reasonable on the more limited issues of interpretation of collective bargaining or other talent agreements before them, and the authors have not in many such arbitrations experienced the procedural unfairness or irrational decisions experienced in IFTA arbitrations, particularly regarding jurisdiction over non-signatories (which has not been used in the author's experience in labor arbitration).

C. Potential Basis For Vacatur Under Current Law

1. Public Policy. Under Federal law, a court may deny confirmation and enforcement of arbitration awards which violate a "public policy" which is "well defined and dominant by reference to the laws and legal precedents and not from general considerations of supposed public interest."³⁶ This non-statutory ground³⁷ for vacatur of an arbitration award is also available under California law.³⁸ On this issue, Federal and California law appear to be identical. Many

³⁶ United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43, 108 S.Ct. 364, 373, 98 L.Ed. 2d 296 (1987), quoting W.R. Grace & Co. v. Local 759, United Public Workers of America, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed. 2d 298 (1983). Compare Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma (USA) Inc., ___ F.3d ___ (9th Cir. March 1, 2009) which applied Washington State law in finding that high arbitration costs (\$220,000 in fees!) did not render the arbitration clause "unconscionable," distinguishing several state cases which held such high fees were unconscionable. See discussion in Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 90, 121 S.Ct. 513, 518, 148 L.Ed. 2d 373 (2000) and discussion in In Re Currency Conversion Fee Arbitral Litigation, 265 F.Supp. 2d at 411-14 and cases cited. But see In re Arbitration Between Teleserve Sys. Inc. & MCI Telecommunications Corp., 230 A.D.2d 585, 659 N.Y.S. 659, 664 (4th Dept. 1997) (\$204,000 in fees unconscionable under Federal and state law and against public policy). The non-statutory basis for judicial review based on "public policy" is similar to the review of the enforceability of choice of law or jurisdiction clauses based on public policy and the existence of a "rational relationship" to the jurisdiction chosen. These principles also involve judicial refusal to enforce contractual control of judicial or remedial functions. See e.g. Brack v. Omni Loan Co., 164 Cal.App.4th 1312, 1325, 80 Cal. Rptr. 3d 275, 284 (4th Dist. 2008) (California public policy requires application of California law despite choice of law clause). On the judicial tests for enforcement of choice of law or jurisdiction clauses generally, see Smith, Valentino & Smith v. Superior Court, 17 Cal. 3d 491, 494-95, 131 Cal.Rptr. 374, 376-78, 551 P.2d 1206 (1976) and The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17, 92 S.Ct. 1907, 1917, 32 L.Ed. 2d 513 (1972). Conceptually analogous doctrines of "federal abstention" to state court proceedings or of "comity" to foreign proceedings require the courts review the fairness of the state or foreign law and tribunal to ensure that the federal claim may be fairly presented. E.g. Davis v. Wechsler, 263 U.S. 22, 24-25, 44 S.Ct.13, 14, 68 L.Ed. 143 (1923) (Holmes, J.); Bird v. Glacier Elec. Corp., 255 F.3d 1136, 1140-44, 1149-52 (9th Cir. 2001) (recognition of tribal judgment by the Blackfeet Tribal Court of Appeals is allowable only if the tribal court did not violate due process of law, an issue reviewed de novo as an issue of law; appeal to racial prejudice violated due process rights).

³⁷ (i.e. not listed in 9 USC § 10(a)). But compare Comedy Club, Inc. v. Improv West Assoc. 553 F.3d 1277 (9th Cir. 2009) which vacated an award in part for violation of Cal. Business & Professions Code § 16 600 based on 9USC §10(a)(4) which permits vacatur "where the arbitrators exceeded their power," as a "manifest disregard of the law," a separate ground for vacatur discussed below. The Second and Sixth Circuit appear to also combine the two tests. See Electronic Data Systems Corp. v. Donelson, 473 F.3d 684, 688 (6th Cir. 2007) and D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110-11 (2d Cir. 2006).

³⁸ Moncharsh v. Heely & Blasé, 3 Cal. 4th 1, 32-33, 10 Cal.Rptr. 2d 183, 202-03, 832

public policies may be violated by awards. These include: res judicata and the statutes of limitations,³⁹ as well as state rules regarding choice of law clauses, the illegality of non-compete covenants and "fundamental fairness" in an arbitration hearing.⁴⁰ Application of each of these fundamental rules of law are for the courts and should not be avoided by arbitration awards later enforced by courts.

P.2d 899 (1992); City of Palo Alto v. Local 715, Service Employees Int'l, 77 Cal.App. 4th 327, 340, 91 Cal.Rptr. 2d 500, 508 (6th Dist. 1999) (Courts will refuse to enforce an award which is "incompatible with a statutory right" or contravenes "an explicit legislative expression of public policy"). This same rule applies generally in other states. E.g. Binghamton City School Dist. v. Peacock, 33 A.D. 3d 1074, 1076-77, 823 N.Y.S. 2d 231, 233-34 (2d Dept. 2006); County of Nassau v. Sheriff's Officers Ass'n, 294 A.D. 3d 31, 743 N.Y.S. 2d 503, 506-7 (2d Dept. 2002) and cases cited. Compare the various decisions of the California courts refusing to enforce arbitration agreements that are "unconscionable" in prohibiting "class-certification" in arbitration (an issue also discussed in Cable Connections) because arbitration in effect is a "de facto waiver" of statutory rights," i.e. "exculpatory in practical terms." See Franco v. Athens Disposal Co., 2009 WL 695452 (2d Dist. 2009) following Gentry v. Superior Court, 42 Cal. 4th 443, 457-58, 64 Cal.Rptr. 3d 773, 782, 165 P.3d 556 (2007) and Discover Bank v. Superior Court, 36 Cal. 4th 148, 154, 30 Cal.Rptr. 2d 76, 80, 113 P.3d 1100, 1104 (2005) (unlawful "late fees" charged as a penalty on credit card payments).

³⁹ As defined in California Code of Civil Procedure §337 for California contract claims. See e.g. Landwehr v. DuPree, 72 F.3d 726, 732-33 (9th Cir. 1995) (ERISA claim); Spear v. Calif. State Automobile Assn', 2 Cal. 4th 1035 9 Cal.Rptr. 2d 381, 831 P.2d 821 (1991); All State Inc. Co. v. Gonzales; 38 Cal.App. 4th 783, 785, 45 Cal.Rptr. 2d 491, 492-93 (2d Dist. 1995) (implicitly hold statute of limitation and laches are issues of law for the courts); and Collins v. D.R. Horton, Inc., 505 F.3d 874, 880 (9th Cir. 2007) and cases cited; W.R. Grace & Co. v. Local 759, United Rubber Workers of America, 652 F.2d 1248 (5th Cir. 1981) aff'd on other grounds, 46 1 U.S. 754, 103 S.Ct. 2177, 76 L.Ed 2d 298 (1983); Jordan v. Calif. Dept of Motor Vehicles 100 Cal.App. 4th 431, 653-54, 123 Cal.Rptr. 2d 122, 137 (3d Dist. 2002) (res judicata and collateral estoppel are issues for the courts). The Collins case gives arbitrators discretion in the application of non-mutual offensive collateral estoppel for Federal purposes, but this ruling would appear to not be permissible under California law based on Vandenberg discussed at note 63 below.

⁴⁰ See Barnes 122 F.3d at 823-24 (choice of law) and Comedy Club 553 F.3d at 1290 (covenants not to compete). On covenants not to compete, see to an opposite effect Sprinzen v. Nomberg, 46 N.Y. 2d 623, 630, 415 N.Y.S. 2d 974, 977, 389 N. E. 2d 456 (1979) (listing other public policies as the basis for vacatur, including usury, punitive damages, antitrust, education policies and insurance regulations). We believe the foregoing should also apply to state policies regarding recovery of attorney fees. See Cal. Code of Civil Procedure §1021 and Cal. Civil Code §1717. Compare Demarco v. Chaney, 31 Cal.App. 4th 1809, 3 Cal.Rptr. 2d 558 (2d Dist. 1995) (arbitrator must award attorney fees to prevailing party if required by the agreement.) Vacatur is common in family law arbitrations which purport to alter state policy on child support or custody, e.g. Hirsch v. Hirsch, 4 A.D. 3d 451, 774 N.Y.S.2d 48 (2d Dept. 2008) (overruling Jewish law arbitration which also voided an award of attorney fees in violation of state law), and labor law arbitrations which purport to alter applicable labor laws, e.g. Cohoes City School District v. Cohoes Teachers Ass'n. 40 N.Y.2d 774, 390 N.Y.S. 2d 53, 358 N.E.2d 878 (1976) (no arbitration of collective bargaining over

The Ninth Circuit accepted the Grace rule⁴¹ in Arizona Electric Power Cooperative, Inc. v. Berkeley,⁴² adding that "the policy [allegedly violated in the award] is one that specifically militates against the relief ordered . . ." ⁴³ As stated, this non-statutory ground of vacatur focuses on whether enforcement of the proposed award, i.e. the grant of a judicial remedy, violates the clear public policy on the procedures limiting enforcement of decisions, and not on the merits of the arbitration award.⁴⁴ The California authorities appear to propose a broader test based on the dicta in Moncharsh,⁴⁵ the leading case in California on vacatur principles. But the implementation of this rule is principally to refuse judicial enforcement when that enforcement violates the "statutory right" or "explicit legislative expression of public policy."⁴⁶

2. Manifest Disregard of the Law. The Federal courts may also decline to confirm or enforce an award which "manifests a complete disregard of the law,"⁴⁷

tenure decision). Cf. Binghamton City School Dist. v. Peacock, 33 A.D. 3d 1074, 823 N.Y.S. 2d 231, (3d Dept. 2006) (public policy protects students from "inappropriate contact" by teacher and voids arbitration decision). We assume that any dicta regarding a requirement of "fundamentally fair hearings" in arbitration would be enforced (if at all) through this "public policy" rule, see note 10 above, or by reference to the general language of the vacatur provisions.

⁴¹ See note 36 above. However, as discussed below, the Second, Sixth and Ninth Circuits seem to combine these grounds for vacatur with the "manifest disregard" basis for vacatur discussed below, creating no small manner of ambiguity as to how the Federal courts apply this "public policy" basis for vacatur. Compare Sawtelle v. Waddell & Reid, Inc., 304 A.D. 2d 103, 75 N.Y.S. 2d 264 (1st Dept. 2003) (punitive damage award in arbitration set aside as "irrational" and a "manifest disregard of the law" and not as a violation of public policy under Federal law).

⁴² 59 F.3d 988, 992 (9th Cir. 1995). See also Exxon Shipping Co. v. Exxon Seaman's Union, 11 F.3d 1189 (3d Cir. 1993).

⁴³ (emphasis added), citing for this proposition Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1212-13 (9th Cir.) (en banc) cert. denied 495 U.S. 946, 110 S.Ct. 2205, 109 L.Ed.2d 531 (1990)

⁴⁴ In accord is a leading Second Circuit case in this area, Diapulse Corp. of America v. Carba Ltd, 626 F.2d 1108, 1110 (2d Cir. 1980).

⁴⁵ 3 Cal. 4th at 32-33, 10 Cal.Rptr. 2d at 202-03,

⁴⁶ E.g. Jordan's list of decisions which "exceed the powers of the arbitrator," 100 Cal.App. 4th at 443, 23 Cal.Rptr. 2d. at 131, and the discussion in Jones v. Humanscale Corp., 130 Cal.App. 4th 401, 408-09, 29 Cal.Rptr. 3d 881, 888-89 (4th Dist. 2005).

⁴⁷ Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F. 3d 1987, 1997 (9th Cir. 2003) (en banc) which bases this power in 9 USC §10(a)(4). See Barnes v. Logan,

or is "completely irrational,"⁴⁸ as an additional ground for vacatur of an arbitration award. This is solely a Federal rule but apparently is applied by the Federal courts to all proposed arbitration awards. This Federal rule is substantially different from the statutory basis for vacatur in CAA: the arbitrator "exceeded his powers" when he acts "in a manner not authorized by the contract or by law," including "issue an award that violates a statutory right" or "selects a remedy not authorized by law," or "arbitrarily remakes the contract."⁴⁹

The Supreme Court first enunciated a "manifest disregard" non-statutory ground for vacatur of an arbitration award in a dictum in Wilko v. Swan.⁵⁰ All

122 F.3d 820, 831 (9th Cir. 1997) cert. denied 523 U.S. 259, 118 S.Ct. 1385 140 L.Ed. 2d 645 (1998). The "manifest disregard" concept derives from the common law rules for review of arbitration awards, but is imported into the FAA by the Ninth Circuit. See discussion by a professional arbitrator, Lehrmann Award Hesitation, Los Angeles Daily Journal, Federal 24 2009, at 7 (also discusses venue questions under the FAA). The courts naturally distinguish between manifest disregard of the law from manifest disregard of the evidence, Stolt-Nielsen SA v. Animal Feeds International Corp., 545 F.3d at 91, but this distinction can become attenuated in egregious cases.

⁴⁸ Coutee v. Barington Capital Group, L.P., 336 F.3d 1128, 1133-34 (9th Cir. 2003). See discussion in Comedy Club, 553 F.3d at 1290 regarding an "irrational" award which fails "to draw its essence from the agreement," quoting Hoffman v. Cargill, Inc., 236 F.3d 458, 461-62 (8th Cir. 2001).

⁴⁹ Cal. Code of Civil Procedure §1286.2(a)(4). See Jordan v. Dept. of Motor Vehicles, 100 Cal.App. 4th 431, 443, 123 Cal.Rptr. 2d 122, 131 (3d Dist. 2002) (collecting authorities on this issue); O'Flaherty v. Belgium, 115 Cal.App. 4th 1044, 1055-56, 9 Cal.Rptr. 3d 286, 295-96 (2d Dist. 2004). New York states the rule is whether the award is "irrational," "violates a strong public policy," or "clearly exceeds a specific enumerated limitation on the arbitrator's power," New York City Transit Authority v. Local 100, Transport Workers Union of America, 812 N.Y. 3d 332, 336, 812 N.Y.S.2d 413, 415, 845 N.Ed 2d 1243 (2005), and have held that an award "must have evidentiary support and cannot be arbitrary or capricious..." Napoli v. Peake Automotive, Inc., 34 A.D. 3d 674, 824 N.Y.S.2d 424, 425 (2d Dept. 2006). See also the Michigan standard quoted in Electronic Data Systems Corp. v. Donelson, 473 F.3d 684, 688 (6th Cir. 2007) (arbitration of civil rights claims permitted if arbitration procedures are "fair" and not "in contravention of controlling principles of law...").

⁵⁰ 346 U.S. 427, 436, 74, S.Ct. 192, 98 L.Ed 168 (1953) overruled later on other grounds. The Ninth Circuit accepted this ground in San Martine Companies de Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961); French v. Merrill Lynch, Pierce, Fenner & Smith, 784, F.2d 902, 905-06 (9th Cir. 1986); Todd Shipyards Corp. v. Cunard Line, Ltd. 943 F.2d 1056, 1060 (9th Cir. 1991); George Day Construction Co. v. Local 354, United Brotherhood of Carpenters, 722 F.2d 1471, 1477 (9th Cir. 1984), as well as in Barnes and Coutee before its en banc decision in Kyocera establishing 9 USC §10(a)(4) as the basis for vacatur. Coutee relies on American Postal Workers Union v. United States Postal Service, 682 F.2d 1280, 1284-86 (9th Cir. 1982) cert. denied 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed. 2d 431 (1983) which vacated an arbitration award which reinstated a labor striker in direct violation of the

the Circuits have now accepted the "manifest disregard" basis for vacatur,⁵¹ even though the Supreme Court has yet to speak definitively on this standard and its application. This "manifest disregard" test, while often promulgated, is rarely used, for vacatur, e.g. 4 out of 48 cases in the Second Circuit as discussed in detail in Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S,⁵² which analogizes this ground for vacatur to arbitral decisions that "exceeded the legal powers of the arbitrator," as was in effect held under California law in Jordan and O'Flaherty, and as suggested by Barnes and Coutee.

A leading statement of this ground for vacatur is found in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker⁵³: "A party seeking vacatur bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect ignoring it." As formulated, this ground for vacatur differs from the "public policy" basis -- an objective determination of whether judicial enforcement would violate a particular public policy -- to a species of arbitral misconduct, in

applicable law, and on G.C. & K.B. Investment, Inv. v. Wilson, 326 F.3d 1096, 1105 (9th Cir. 2003), as well as Barnes.

⁵¹ French and Coutee also formulate this test as requiring vacatur of a "completely irrational" award. On authority in other circuits, see Brabham v. A.G. Edwards & Sons, Inc., 376 F.3d 377, 381 (5th Cir. 2004); Wise v. Wachovia Securities, LLC, 405 F.3d 265 (7th Cir. 2006) cert. denied 549 US 1047, 127 S.Ct. 582, 166 L.Ed 2d 458 (2007); Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc. 442 F.3d 471 (6th Cir. 2006); Virgin Islands Nursing Assn's Bargaining Unit v. Schneider, 668 F.2d 221 (3d Cir. 19981); Dominion Video Satellite, Inc. v. Echostar Satellite LLC, 430 F.3d 1269 (10th Cir. 2005); Lessen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813 (D.C. Cir. 2007); B.L. Harbert Int'l LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006); Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004) cert. denied 544 U.S. 1000, 125 S.Ct. 1943, 161 L.Ed. 2d 872 (2005); Advent, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990); Miller v. Prudential Bache Securities Inc., 884 F.2d 128 (4th Cir. 1989) cert. denied 497 U.S. 1004, 110 S.Ct. 3240, 111 L.Ed 2d 751 (1990).

⁵² 333 F.3d 383, 389 (2d Cir. 2003) followed in D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110-11 (2d Cir. 2006). See also Comedy Club 553 F.3d at 1290.

⁵³ 808 F.2d 930, 933 (2d Cir. 1986). This formulation appears to be accepted in B.L. Harbert Int'l LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006) and Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004) cert. denied 544 U.S. 1000, 125 S.Ct. 1943, 161 L.Ed 2d 872 (2005). See also Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991); Stolt-Nielsen SA v. AnimalFeeds International Corp. 548 F.3d 85, 96 (2d Cir. 2008).

effect allowing vacatur not when the arbiter was merely wrong but when he simply refused to apply clearly controlling legal principles of which he had actual knowledge. This test is then a review of the process of the arbitration, not a substitution of the Court's judgment for that of the arbitrator. A good faith reasoned basis for not applying a legal principle is subject to judicial deference, but a refusal by the arbitrator to apply clear legal principles, "in effect ignoring" them, is not a process that should be judicially enforced. The "manifest disregard" ground for vacatur is to be rarely used, only "where some egregious impropriety on the part of the arbitrator is apparent," as was said in Duferco.⁵⁴

The "manifest disregard" ground was discussed at length in Duferco and the court determined not to apply the doctrine after a detailed review of the reasons offered by the arbitrator for not applying the applicable legal principles. The court found there was a rational basis for the arbitrator's decision or a "plausible reading" of the award, even if the court did not fully agree with that reasoning. In the cases in which "manifest refusal" was found -- as in the cases described in Duferco -- the Courts faced arbitral decisions that tended to exceed the arbitrator's power under the law, suggesting that there may be a greater "scrutiny" when the principles "manifestly disregarded" implicate public policy regarding traditional judicial and legislative limitations on remedies, a rule and reason similar to the application of the "public policy" ground for vacatur discussed above.

⁵⁴ 333 F.3d at 389. See Stolt-Nielsen SA v. Animal Feeds International Corp. 548 F.3d. at 90. In a recent unreported case involving the author, the Ninth Circuit found no "manifest disregard of the law" when the Court believed that the arbitrator ignored applicable law because those principles were not raised in a statement of defense in the arbitration, even though the arbitrator did not rely on this ground and the key violations of California law arose only after the arbitrator's decision was rendered (i.e. an award of attorney fees not permitted by California law). See Seven Arts Pictures Inc. v. Jonesfilm, No. 07-56656 (9th Cir. Feb. 12, 2009). Compare Electronic Data Systems Corp. v. Donelson, 473 F.3d 684, 692 (6th Cir. 2007) (no "manifest disregard" when no record of the hearing was available to determine if the statutory prima facie showing of racial discrimination was made).

Thus, there would appear to be two bases for vacatur under the "manifest disregard" rule: (a) the arbitrator engaged in misconduct by completely ignoring clear legal principles directly applicable to this dispute (not even purporting to give any reasoned explanation of his decision on these issues) and (b) the applicable legal principles involve the refusal by courts to grant a remedy when no remedy would be available in court, by reason, e.g. of the principles of res judicata by "merger and bar" apply, when a statute of limitations is applicable, when attorney fees may be awarded and when the proceedings lack "due process of law." These situations present no question of deferral to the arbitrator's judgment because the arbitrators have refused to even address the issues or render any judgment on them, or because the award violates public policy which limits judicial remedies available in court.

However, as described below, there are clear conflicts between the "manifest disregard" standard of vacatur and the "public policy" standard of vacatur and the courts, particularly the Ninth Circuit, tend to treat the two standards as one, adding more uncertainty to this already unclear area of law. The "public policy" standard would appear to direct attention to whether the legal errors of the arbitrator related to clear and well-established principles of law (particularly remedies) and the "manifest disregard" standard would appear to direct attention to whether the arbitrator was aware of and chose to ignore the law in issue. Neither test directly addresses what we suggest is the more important issue -- whether the legal principle violated in an arbitration award protects fundamental substantive or procedural rights and in particular the availability of a particular judicial remedy for the duty allegedly violated.

3. Arbitrators Exceeded Powers. Both the FAA and CAA⁵⁵ provide for vacatur when the arbitrator "exceeded its powers," although Federal courts interpret the language as limited to the "public policy" and "manifest disregard" standards set forth above. This rule is applied in California to cases where the arbitrator purported to arbitrate an issue as to which the parties had not agreed⁵⁶ or to adopt a remedy "not authorized by law."⁵⁷ In the new leading Cable Connections decision,⁵⁸ the California Supreme Court and the CAA parted company with the FAA and the United States Supreme Court in Hall Street Associates,⁵⁹ on the issue of whether this statutory provision authorized review by the courts of errors of law, when the parties had specifically agreed in the applicable contract that the arbitrator "shall not have the power to commit errors

⁵⁵ Cal. Code of Civil Procedure §1286.2(a)(4); 9 USC §10(a)(4). As indicated above, the Ninth Circuit in Kyocera found that this statutory basis for vacatur also supported the "manifest disregard" basis for vacatur.

⁵⁶ E.g. Rosenthal v. Great Western Financial Securities Corp., 14 Cal. 4th 394, 406, 58 (Cal.Rptr.2d 875, 881 926 P.2d 1061 (1996)

⁵⁷ Jordan, 100 Cal.App. 4th at 443, 53 Cal.Rptr. 2d at 131, and Advanced Micro Devices Inc., v. Intel Corp., 9 Cal. 4th 362, 375-76, 36 Cal.Rptr. 2d 581, 589, 885 P.2d 586 (1994). However, in Gueyffier v. Ann Summers, Ltd., 43 Cal. 4th 1179, 77 Cal.Rptr. 3d 613, 184 P.3d 739 (2008), the California Supreme Court approved Micro Devices language regarding remedies not authorized by the agreement, but found that the language of the arbitration agreement sub judice prohibiting the arbitrator from "modifying" or "changing" the terms of the agreement did not prevent the arbitrator from finding equitable excuses for non-performance to any term of the agreement. But compare California Faculty Ass'n v. Superior Court, 63 Cal.App. 4th Cal.Rptr. 2d (1st Dist. 1998).

⁵⁸ Cable Connections, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 92 Cal.Rptr. 3d 229, 190 P.2d 586 (2008). The language chosen by the parties would appear to be critical in application of Cable Connections. In Christensen v. Smith, 171 Cal.App. 4th 931, 90 Cal.Rptr. 3d 57, 61 (4th Dist. 2009) the Court refused to apply the Cable Connections ruling when the parties agreed the arbitrator "shall render an award in accordance with substantive California law." The Court interpreted this language as merely a "choice of law" clause, not a decision by the parties to "expressly deprive the arbitrator of the power to commit legal errors."

⁵⁹ Hall Street Assoc. L.L.C. v. Mattel, Inc., ___ U.S. ___, ___, 128 S.Ct 1396, 1404-05, 170 L.Ed 2d 252 (2008). In Comedy Club, 553 F.3d 1227, the Ninth Circuit held that this ruling did not, however, overrule the "manifest disregard" basis for vacatur, although there is some doubt as to whether other circuits will agree with this position. See Ramos-Santiago v. UPS, 524 F.3d 120, 124 n.3 (1st Cir. 2004). The Ninth Circuit appears to base the "manifest disregard" rule on the "exceeded its powers" language of 9 USC §510 (a) (4) and unlike California limits § 10 (a) (4) to a "manifest disregard" analysis.

of law or legal reasoning..." Such a clause, under the CAA, permitted (if not required) the court to review the arbitration award for errors of law but, under the FAA, was not deemed to increase the court's powers of vacatur beyond the basis for vacatur otherwise available under the FAA. Hall Street would therefore appear to leave the "manifest disregard" and "public policy" as the remaining grounds for vacatur under the FAA.⁶⁰

Cable Connections seems to place a substantial premium on the skill and foresight of the attorney drafting the applicable arbitration clauses, since it assumes, as implied in Barnes that absent such a clause the parties and their counsel have knowingly assumed the risk of errors of law or violations of due process of law, an assumption we believe is unwarranted. Indeed, the policies cited by Cable Connections to support its holding and its refusal to follow Hall Street Associates are those offered here in support of a broader judicial review of errors of law and violations of due process.⁶¹

"The judicial system reaps little benefit from forcing parties to choose between the risk of an erroneous arbitration award and the burden of litigating these disputes entirely in court. Enforcing contract provisions for review of awards on the merits relieves pressure on congested trial court dockets... Incorporation of

⁶⁰ Both the FAA and CAA provide additional grounds for vacatur unrelated to the merits or procedures of the arbitration not discussed here, mainly involving corruption, bias or misconduct by the arbitrator. Cal. Code of Civil Procedure §1286.2(a)(1), (2), (3), (5) and (6); 9 USC §10(a)(1), (2) and (3).

⁶¹ 44 Cal. 4th at 1363, 52 Cal.Rptr. 3d at 253, 190 P.3d at 606. The Court also emphasized that "arbitral decisions carry no precedential value absent judicial review and such precedential value will help develop the law in specialized areas often subject to arbitration." Compare Vandenburg v. Superior Court, 21 Cal. 4th 825, 834, 88 Cal. Rptr. 2d 3666, 278-79, 982 P.2d 119 (1999) which denies collateral estoppel effect to factual judgments in arbitrations against third parties. A similar sentiment was expressed by the District of Columbia Circuit in holding that the Supreme Court's faith in arbitral fora's ability to adjudicate statutory claims is vindicated only if "judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous..." Cole v. Burns Int'l Security Services, 105 F.3d 1465, 1487 (D.C. Cir. 1997) quoted in Sawtelle v. Waddell & Reed, Inc., 304 A.D. 103, 114-15, 754, N.Y.S. 2d 264, 276 (1st Dept. 2003).

traditional judicial review by express agreement preserves the utility of arbitration... which allowing the parties to protect themselves from perhaps the weakest aspect of the arbitral process, its handling of disputed rules of law."

We argue below that wider use of existing standards -- i.e. the "public policy" and "manifest disregard" rules -- can have the same beneficial results described above by the California Supreme Court with no loss of the "utility" or efficiency of arbitration as alternative dispute resolutions.

D. Arbitration Awards Affecting Third Party Rights

It would appear that third parties who do not appear in an arbitration, because the arbitration has no jurisdiction over them would also be able to avoid any binding effect of an arbitration award.⁶² However, the courts apparently have exercised their power to enforce arbitration awards against third parties under an "alter ego" theory with no adversary proceeding or review of the underlying claim, directly in violation of due process rules, particularly Vandenberg v. Supreme Court⁶³, which holds that no collateral estoppel shall

⁶² See Carpenters 46 Northern Cal. Counties Conf. Bd. v. Zweigle, 130 Cal. App. 3d. 337, 343, 181 Cal.Rptr. 805, 808 (3rd Dist. 1982) (arbitrator has "no power to determine the rights and obligations of one who is not a party to the proceeding.") See also NEC Electronics, Inc. v. Hurt, 208 Cal. App. 3d 772, 256 Cal. Rptr. 551 (6th Dist. 1989) and + Katzir's Floor and Home Design Inc. v. M-MLS.COM, 394 F.3d 1142 (9th Cir. 2004) for operation of the analogous principle limiting the effect of court judgments. Compare the New York Arbitration Law, CPLR § 7511(b)(2) which appears to directly prevent application of arbitration awards or findings to third parties, through a petition for vacatur. See Hirsch v. Hirsch, 4 A.D. 3d 450, 453, 774 N.Y.S. 2d 48, 50 (Dept. 2004) (award which affects third party's rights to real property deprives third party of due process and "was not binding on him.").

⁶³ 21 Cal. 4th 815, 834, 88 Cal.Rptr. 2d 366, 378-79, 982 P.2d 119 (1999). Vandenberg is not followed in all states some of which determine the collateral estoppel effect of arbitrator awards on an individual case-by-case basis. See also Brosterhaus v. State Bar of California, 12 Cal.4. 315, 325, 906 P.2d 1242, 48 Cal. Rpt.2d 87, 93 (1996) (a party may litigate civil rights and constitutional issues decided in a State Bar arbitration on a de novo basis). The California courts remarkably hold that a person who did not participate in an arbitration which had no jurisdiction over him can be added to a judgment on a summary basis with no evidentiary hearing confirming an arbitration award as a purported "alter ego" under the general authority of Cal. Code of Civ. Proc. § 187, allowing courts to amend judgments to "properly designate" the parties. See Hall, Goodhue, Haisley and Barker v. Marconi Conf. Center Bd., 41 Cal.App. 4th 1551,

apply under California law against a non-party in an arbitration based on "due process concerns." The applicable due process principle, however, goes well beyond Vandenberg, and generally holds that it is a "cardinal principle of jurisprudence that a judgment shall not bind or conclude a man, either in respect of his person or property until he has had his day in court."⁶⁴ The California Supreme Court in Motores de Mexicali v. Superior Court,⁶⁵ directly addressed the issue in a context involving court judgments: whether a court has the authority to add a judgment debtor (as an alleged "alter ego") to a judgment after a default judgment against a corporation. The Court rejected this extraordinary request and the same logic should apply in arbitration awards. The courts, however, are not consistent in enforcing this important rule in extensions of arbitration awards through ex parte factual findings of an arbitrator, apparently based on the deference accorded arbitral judgments.

III

PROPOSED RECONSIDERATION OF CURRENT JUDICIAL DEFERENCE TO ARBITRAL JUDGMENTS

A. Fairness In Private Dispute Resolution Can Create More Efficient Private Dispute Resolution

Private dispute resolution can create judicial efficiency and cost savings without rank injustice and violation of due process standards and in our opinion is more likely to do so if the process of private dispute resolution are viewed as

1554-55, 49 Cal.Rptr. 2d 286, 288 (1st Dist. 1996), a decision which appears to ignore the cases discussed in the text and notes 9, 64 and 65, as well as the principles of Vandenberg. See also note 71 below.

⁶⁴ Tay, Brooks & Backus v. Hawley, 39 Cal. 93, 95 (1870) followed in Meller & Snyder v. R & T Properties, Inc., 63 Cal.App. 4th 1202, 1306-14, 73 Cal.Rptr. 2d 740, 742-47 (2d Dist. 1998) in the case of joint debtor proceedings under Cal. Code of Civil Proc. § 939.

⁶⁵ 51 Cal. 2d 171, 331 P.2d 1, 3 (1958).

more fair than they are today. Appropriate and focused judicial review may in fact lessen the burden of civil litigation in courts if in fact more parties are convinced private dispute resolution were even minimally fair or "due," as Cable Connections recognizes. The authors of this article are aware by anecdotal evidence of widespread skepticism of the arbitration processes and the belief that "anything can happen" in an arbitration, whose discretion is seemingly final and beyond review. One prominent Southern California businessman, who has engaged in extensive litigation for decades, told one of the authors that he never agrees to arbitration unless he has a case he thinks he would lose in court, because he has a better chance for an irrational decision from an arbitrator who (unlike a judge) does not think he will be reviewed and reversed.

The courts should not ignore these seemingly widespread (if improvable) sentiments in favor of freedom of contract and conservation of resources. To do otherwise is to ignore the true basis for arbitration agreements which we believe is to obtain better outcomes than those available in court.⁶⁶ Effective judicial review could well limit the incidence of irrational arbitration decisions if the arbitrators are aware that their decision on issues of law will be scrutinized carefully. Every practitioner knows the effect that judicial review (and particularly reversals) has on trial courts. Is there any reason to suppose the same would not be true of arbitrators, or that the absence of that "awareness" does not affect arbitration decisions? Such a heightened "awareness" on the part of arbitrators will in our view reinforce the policies of freedom of contract and truly conserve judicial resources, while taking into account the principles of judicial control of remedies and procedure. This review is also necessary in our

⁶⁶ Compare the more idealistic explanation of why parties choose arbitration agreements in Stolt-Nielsen SA v. AnimalFeed International Corp., 548 F.3d 85, 91-92 (2d Cir. 2008) following Porzig v. Dresdner, Kleinwort, Benson North America LLC, 497 F.3d 133, 138-39 (2d Cir. 2007) and other authorities. But compare more nuanced discussion in Cole v. Burns Int'l Security Services, 105 F.3d 1465, 1485 & n. 17 (D.C. Cir. 1997) which appears to recognize the "inherent bias" issues discussed in the text.

view to counter the inherent “unprovable” bias in certain arbitration panels, such as IFTA discussed above, and the lack of transparency and a public record of comparable decisions, another serious failing of the IFTA arbitration system and a problem emphasized by Cable Connections in its decision.

Much discussion of judicial review of arbitration award has proceeded based on a supposed conflict between the public policy of clearing court dockets (i.e. limiting use of judicial resources) and the fairness of enforcing an arbitration award that may be wrong, unfair or unjust. A belief seems to have developed that even limited judicial review of arbitration decisions will open up a "Pandora's box" of new civil litigation, imposing new burdens on the courts. We believe this expansion of civil litigation will not occur but argue here that any such risk is necessary and worth taking to assure fairness and justice to litigants. After all, no arbitration award is self-enforcing. Each award is no better than the parties' willingness to implement its findings and conclusions, absent judicial enforcement in court and later enforcements through state judgment creditor proceedings.⁶⁷ There is, we argue, no substantial basis for concerns that vacatur proceedings (already common and numerous) will take more court time than standard "law and motion" practice and will be disposed of in such shorter periods of time than standard civil proceedings, even if the judiciary reviews for errors of law.

⁶⁷ Compare Wyatt v. Cole, 54 U.S. 158, 112 S.Ct. 1827, 115 L.Ed 2d 504 (1992) and Lugar v. Edmundson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed 2d 482 (1982) which explicitly hold that private use of state judgment creditor laws, which do not provide due process of law to the debtor prior to levy, is state action for purposes of private actions alleging violations of civil rights (deprivation of due process) under 42 USC §1983. The authors believe these cases are not consistent with the cases discussed at note 7 which find enforcement of arbitration awards made without due process are not "state action." See also Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1264-67 (3d Cir. 1994) (use of state confession of judgment processes is subject to Wyatt/Lugar analysis); Audio Odyssey, Ltd. v. Brenton First National Bank, 245 F.3d 721, 740 (8th Cir. 2001).

The judicial "handprint" is inevitable once enforcement of an award is sought, and any enforced award must bear the imprimatur of the constitution and our judicial system. Arbitration is fundamentally different than mediation or settlement agreements and should not be enforced like the results of a binding agreement after negotiation or mediation, since arbitration occurs before the parties know the parameters of a dispute. Arbitration is an adversarial process which is "intended" by the parties to be a simple, more efficient but fair trial, not an enforcement of an arbitrary result independent of normal remedial processes.⁶⁸

Should this judicial imprimatur be given to seriously flawed arbitration awards? In one case, a court enforced an arbitration award against a party as a purported "alter ego" arising in an arbitration which had no jurisdiction over him, based on ex parte hearsay evidence in the arbitration, presented in declaration form, of an alleged "false representation" which never occurred. The so-called "evidence" relied upon by the arbitrator was in fact contradicted by all percipient witnesses none of whom were called to testify at the arbitration or the enforcement hearing. Later, a second arbitration enforced that judgment against other non-parties after expiration of the statute of limitations and in violation of res judicata (since the matter was then subject to a final judgment), and uphold an award of attorney fees in favor of the losing party. Arbitration awards have made based on rank hearsay evidence with no right to confront the witnesses and other similar violations of fundamental due process rights. These types of results do not encourage private dispute resolution, as Cable Connections recognizes.

B. Towards A Due Process Model of Judicial Review

⁶⁸ As discussed in the note 35 above, this principle is really no different than existing judicial limitations on the enforcement of choice of law and choice of jurisdiction clauses. Indeed, Hall St. Associates following Kyocera (oddly enough) supports this argument since these decisions deny judicial enforcement of a freely negotiated contract clause mandating judicial review of arbitration awards.

With the foregoing principles and policies in mind, we suggest a new view of the current judicial rules regarding vacatur discussed above. We argue that consistent application of known legal principles to similarly situated parties (particularly application of remedies) and fundamental principles of due process of law, based squarely on the Federal and state constitution, are in fact a violation of “public policy... which is well defined and dominant” as well as “exceeding the power of the arbitrator” (i.e. are unconstitutional) absent a “willing” and “knowing” waiver of these rights. Indeed, this argument would appear to be self-evident yet is denied repeatedly in practice by judicial deference to arbitration awards which deny both principles, largely we believe because of the Barnes view that parties knowingly and willingly waive their due process and equal protection rights by agreeing to arbitration.⁶⁹ However, Cable Connections, we believe, deals a death blow to this argument: If the parties can contract explicitly to protect their equal protection and due process rights, then why would a failure to do so be anything other than legal malpractice absent an explicit waiver of such rights by the client? Indeed the logic of Hall Street is equally devastating to the Barnes argument, since that case holds parties are prohibited by the FAA from protecting themselves against violation of due process and equal protection rights, i.e. the parties cannot avoid waiver of their due process and equal protection rights in arbitration even if they explicitly sought to do so.

Are violations of due process or arbitrary application of legal principles to similarly situated parties a “manifest disregard of the law”? Bobker, Duferco and

⁶⁹ The "state action" limitation on judicial review of due process or equal protection violations in arbitration awards, see note 7 above, would appear to be unconvincing if not incoherent, not only because state judgment creditor proceedings do constitute "state action" if such proceedings deny due process, see note 67 below, but because enforcement of equal protection and due process rights is authorized by the very language of the FAA and CAA and judicial decisions interpreting both, as argued in the text. Elimination of this “slender reed” supporting judicial deference (i.e. no "state action") leaves us with the Barnes argument discussed in the text.

other cases cited above have developed a basis for distinguishing between “manifest disregard of the law” and a mere reversible error of law, focusing we argue on arbitral misconduct (“ignoring” the law) or on infringement of judicial control of remedies. But the distinction remains more nice than obvious when we consider judicial review of arbitration awards generally (as opposed to only one award). This distinction admits arbitrary application of legal principles to similarly situated parties based on what we argue is a highly subjective test of how irrational or irresponsible the arbitrator or the award must be to meet the “manifest disregard” standard. The cases talk of this “rarely used” power, to be exercised in “extreme” circumstances with little principled discussion of why one particular error of law is so egregious as to require reversal and another is not, virtually authorizing district courts to ignore serious error of law or, more likely, make unexpressed and opaque judgments on the “equity” of the particular cases.

Further, the cases, particularly in the Ninth Circuit, fail to distinguish between the “public policy” basis for vacatur and the “manifest disregard” basis for vacatur, hence failing to clearly delineate which errors of law are the basis for reversal based on the importance of the public policy involved, as opposed to the arbitrator’s “misconduct” in refusing to apply known legal principles or use of an inapplicable remedy. There appears to be no principled basis to exclude fundamental due process and equal protection principles from the limited review permitted by the FAA and CAA, discussed above, under either theory, either as “manifest disregard of the law” or “public policy” violations (other than Barnes’ waiver theory, which we believe is not tenable). Even the statutory history of both laws, reflecting the view that “arbitration agreements are purely a matter of contract”, supports our view.

The common law limitations and restrictions on enforcement of contractual “penalties” — “purely a matter of contract” law— appear to be based on a

distinction between enforcement of a party's intention to perform the contract or bargain (on the one hand) and enforcement of the parties' optimistic "hopes" in the event of non-performance (on the other hand). The first set of private "expectations" or promises are deserving of judicial enforcement and necessary to the free enterprise system of economic activity. The second set of private "expectations" or promises are not necessary to such economic activity and are deserving of judicial enforcement only when such expectations do not in effect constitute an impermissible encroachment of the right and authority of the courts to establish both remedies for breach of contracts and basic fair processes to determine the facts of the controversy and equal application of the law to similarly situated people.

Judicial withdrawal from this authority is not authorized by law, is inconsistent with the court's role as the dispenser of public justice and would conceivably harm, not promote economic activity if unfair and unreasonable consequences attach to claimed breaches of private contracts. Indeed judicial enforcement of "penalties" — either by choice of penalty clauses or through unfair arbitration awards with the same result — extend the very basis of judicial enforcement of private contracts beyond agreed performance for consideration to a wholly different arena, i.e. remedial proceedings and their fairness.

The courts should also not ignore disparities in private negotiating power or the advantages that economic power may give one party in dispute resolution, a consideration now part of California law on "penalty" or choice of remedy clauses. One recent study⁷⁰ suggests that larger economic organizations use arbitration far more frequently against those with less economic power than with those parties of equal economic power. In certain cases, it is generally believed,

⁷⁰ Eisenberg, Miller & Sherwin, Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. Mich. J. Law Reform 871, 887-89, 895-96 (2008).

if not provable in court, that arbitrators applicable to a particular industry or business tend to favor the economic interests of one group utilizing their services over others.

Arbitrators are not judges, with no other cases or business interests, and are not subject to the oaths, disciplinary rules and statutory control as are state and Federal judges. Arbitrators often serve in the very industries subject to the applicable arbitration system, making a bias almost inevitable and in fact virtually expected by the voluntary association providing the arbitral system. Finally, many arbitration clauses are included either in pure "contracts of adhesion" or in contracts where the party insisting on arbitration has much greater resources or greater access to information on the actual workings of the arbitral system in practice.

There is no basis in principles of freedom of contract to ignore arbitration clauses but it is equally true that there is no basis in judicial principles of due process and equal protection of law to treat the contracting parties as if each fully understood the procedural and remedial consequences of their "agreement" regarding proceedings for breach in arbitrations. And there is nothing in the principles of contract law authorizing deference to arbitral judgments, based on an idealistic belief that the parties knowingly took the risk of arbitrary decisions denying due process rights to the loser, a result not expressly bargained for as consideration for any promise, all in search of a more efficient or cheaper method of dispute resolution. What losing party can really be said to have contracted in advance for such unfairness or denial of fundamental legal rights?

The selection of arbitration as a remedy in a general arbitration clause (as is customary) would not under normal principles be viewed as an express waiver of an important procedural or remedial right in a judicial proceeding, which normally would require advice of counsel and specific disclosure of

consequences to the affected party. The general policies of "freedom of contract" conflict with the specific judicial principles that important judicial and remedial rights must be knowingly and clearly waived. "Freedom of contract" is present in both cases, but the level of specificity, disclosure and understanding are dramatically different, thus protecting the court's role as the ultimate arbiter of remedies and process. Indeed, the very principle of judicial review of legislative acts is based squarely on such constitutional authority of the courts.

Based on the foregoing, we argue that no party should be presumed to have waived a claim of fundamental remedial and procedural rights applicable to other similarly situated people by acceptance of a general arbitration clause and courts should not delegate their constitutional authority in such matters to private parties, absent the conditions that would apply to waiver of such rights in a judicial proceeding. To do so will not affect private contractual expectations or promises regarding the economic activity in issue, the basis of enforcing contracts, but rather excludes delegation of core judicial functions absent specific disclosure and understanding. Naturally not all aspects of a civil proceeding fall into these categories of fundamental remedial and procedural rights, as we discuss below.

Therefore, the standard of review of arbitration decisions must continue to recognize the conservation of judicial resources through private dispute resolution, but not accept this principle to the exclusion of other principles even if these standards might cause some increase in judicial responsibilities. The majority of arbitrations, as Cable Connections appears to acknowledge, do not resolve disputed issues of law and procedure. This statement is particularly true of labor arbitrations in the motion picture industry. Our proposed judicial review will not affect these cases at all. For example, supervision of discovery and the fact finding process and judgment on disputed issues of fact -- the core of the

time and expense of trial -- if conducted consistent with fundamental procedural protection would remain in the private dispute resolution process with (as discussed below) a much lesser standard of review than would apply to appellate reviews of trial court decisions. There is every reason to both assume and hold as a matter of law that these not fundamental aspects of a remedial process are waived by agreement to arbitration.

Indeed, it could be argued that Cable Connections goes too far in basing its reasoning on the agreement of the parties, as opposed to judicial protection of fundamental principles of fairness and control of remedies. Could parties agree, for example, to a "substantial evidence" form of judicial review of arbitration awards? Or a review based on the many general procedural issues that arise in court trials, such as the propriety of in limine evidentiary exclusions, denial of discovery rights under state discovery laws (themselves based on due process concerns), the denial of international discovery methods (such as letters rogatory), improper application of state law privileges (e.g. "trade secrets") and other real, but arguably not fundamental, process rights available in court? The judicial reticence to review all these issues in proceedings, conducted by arbitrators without judicial training or, frankly, temperament, should not, however, prevent judicial control of more fundamental principles of due process, judicial control of remedies and equal application of the laws. We argue the better view would be judicial enforcement of these principles, not only what form of judicial review is chosen by the parties.

C. What Is Appropriate Due Process of Law In Arbitration?

The Supreme Court has held that denial of government benefits requires a minimum "fundamental" level of due process.⁷¹ An arbitration award should be

⁷¹ Brock v. Roadway Express, Inc., 481 U.S. 252, 262, 107 S.Ct. 1970, 1747, 95 L.Ed 2d 239 (1987). Cf. Cole v. Burns Int'l Security Services, 105 F.3d 1465, 1483 n. 11 (D.C. Cir. 1997) (refers to Department of Labor guidelines on what constitutes "procedural fairness" in arbitration decisions). A similar analogy is to standards of due

enforced against any party or representative only if given with sufficient due process of law that a court can, consistent with its responsibilities, enforce the award against any party or their representatives.⁷² No waiver of any due process claim should be held against any party except if knowingly and intelligently made under the otherwise applicable legal principles. This does not mean that every aspect of due process law, as interpreted by the courts for their processes, must apply to determine the enforceability of an award by collateral estoppel or otherwise, which seemed to have been the real import of Barnes. Only fundamental due process, as elucidated by the Supreme Court, in the denial of

process, necessary for enforcement of tribal court judgments, is discussed in the leading case of Bird v. Glacier Elec. Corp., 255 F.3d 1136, 1149-52 (9th Cir. 2001). See also note 6 above regarding due process review under the New York Convention on foreign arbitration awards. The analogy we draw is to denial of the benefits of membership in an association providing an arbitral system by violation of due process or equal protection of law by that system. See note 11 above. Specifically the Supreme Court has held that the Sixth Amendment right to "confront witnesses" is a requirement of due process of law in Willner v. Committee on Character & Fitness, 272 U.S. 96, 103-04, 83 S.Ct. 1175-1180, 10 L.Ed 2d 224 (1963) (denial of right to practice law). See In Re Lucero L., 22 Cal. 4th 1227, 1244-45, 96 Cal.Rptr. 56, 69, 998 P.2d 1019 (2000) ("...hearsay evidence alone "is sufficient to satisfy the requirements of due process of law"..." and "parties generally have a due process right to cross-examine available hearsay declarants"). This basic element of due process also underlies the refusal of the Federal Courts to give collateral estoppel or res judicata effect to state court rulings at proceedings which did not provide an "adequate representation" of the party sought to be bound, i.e. when the proceeding denied the party due process of law. The leading case is Kremer v. Chemical Construc. Corp., 456 U.S. 461, 480-82, 102 S.Ct. 1883, 1897-98, 72 L.Ed 2D 262 (1982). See Wright, Miller & Cooper, Federal Practice and Procedure - Jurisdiction 2d §4469.1, at 151-152; § 4471.2, at 306-15, and discussion at 277-80 of Haring v. Prorise, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed 2d 595 (1983). This is the central reason discussed in Vandenberg as to why there is no collateral estoppel against non-participating parties under California law regarding factual findings in arbitration awards. See also Citizens for Open Access to Sand and Tile, Inc. v. Seadrift Ass'n., 60 Cal.App. 4th 1053, 1070, 71 Cal.Rptr. 2d 77, 87 (1st Dist. 1998) (no collateral estoppel against parties who did not participate in the applicable proceeding based on due process concerns).

⁷² Compare the reasoning of Vandenberg v. Superior Court, 21 Cal. 4th 815, 834, 88 Cal.Rptr. 2d 366, 278-89, 982 P.2d 119 (1999) and note 63 above regarding the due process required to give collateral estoppel effect, which we believe cannot be reconciled with the reasoning (as opposed to the specific holding) of Barnes. We argue that the due process standards described herein should be the basis for review of whether an arbitration hearing is "fundamentally fair" and hence provide specific due process standards for a vague test that is currently no more than dicta. See note 10 above.

government benefits or in the enforceability of judgments against non-parties, should be the basis for reversal of an award.

Naturally, the courts will define what is fundamental through precedent and individual case review, but certain general rules are suggested below. What is the minimal level of due process of law? By analogy to other areas, we suggest the following:

1. Right to specific notice of the issues for resolution and limitation of the arbitration to those issues.

2. Right to defend and present a case at an oral hearing on these issues with sufficient time to do so.

3. Right to confront witnesses against the affect party, i.e. no decision can be based principally on hearsay testimony of a material witness.

4. Right to a clear statement of the basis for any decision with factual and legal findings that may be reviewed on any appeal.

5. Right to an impartial decision-maker with no potential or actual partiality.

6. Right to equal enforcement of any laws reflecting clear and established state or Federal public policy, such as res judicata and the statute of limitations.

7. Right of third parties to be free of collateral effect of arbitration awards on the same principles as applicable to judicial rulings and judgments.

8. Right of defending party to a burden of proof placed on the complaining party.

9. Right of defendants to be free of attorney fee awards or high compulsory arbitration fees, absent an award and a contract clause awarding attorney fees to the prevailing party.

10. Right of defendants to be free of racial or other actionable prejudice in the proceedings.

One of the provisions of due process is directly remedial -- no enforcement of any provision of an award that violates public policies which cannot be avoided by agreement, such as res judicata, statute of limitations, covenants not to compete, choice of law and the like. This rule is particularly compelling in awards of attorney fees or imposition of high arbitration costs.⁷³ An extension of the principles set forth above is that, while the courts must accept factual findings by arbitrators (done fairly and in accordance with due process), the courts need not defer to the choice of remedies chosen by the arbitrator and should not enforce remedies which a court would not grant on such facts (either as a matter of discretion or because it is prohibited from doing so). And all issues regarding extension of contractual liability beyond a party who executed the arbitration agreement should be decisions solely of the courts, as a matter of due process.

Finally, the courts should define what principles of law are "public policy" -- which cannot be ignored by arbitrators -- and which are not. The United States Supreme Court we argue will be well-advised to reject the confusing and uncertain Federal "manifest disregard" standard in favor of a clear statement of what principles of law should be enforced equally for similarly situated persons and which need not be, irrespective of the "conduct" of the arbitrator in either his knowledge or review of those principles of law. The case law regarding the limitations on enforcing choice of law or jurisdiction clauses or tribal judgments would be an appropriate beginning point for this analysis.

D. Proposed Legislative Reform of the FAA and CAA

We believe that the Congress and the state legislatures should reconsider the issues of judicial review of the arbitration award in light of Cable

⁷³ See notes 34 above relating to the very high costs imposed on a defendant effectively as attorney fees at the risk of default even without signing the arbitration agreement (i.e. based on "estoppel" or "successor in interest" premises) and without a specific attorney fees clause altering the so-called "American" rule on attorney fees. See note 32 above on this issue.

Connections and the developing (if not inconsistent) principles of judicial review discussed herein. Legislative action to clarify these principles is necessary, if for no other reason than to give clear guidance to practitioners as to what they can or should in fact include in arbitration clauses to protect their clients. One must wonder how a practitioner can avoid a legal malpractice claim if a client is denied fundamental due process or equal protection rights in an arbitration award, when he perhaps could have avoided that result by different language in the contract (e.g. choice of California law and Cable Connections type language). Indeed, one may wonder even after Hall Street Associates whether a practitioner may define what legal principles cannot be “manifestly disregarded” or are violations of “public policy”.

The law regarding due process rights in denial of government benefits may be a good guide post for the legislature or Congress to define what are the appropriate due process and equal protection rights guaranteed to each party in an arbitration. Similarly, the law regarding “knowing” and “willing” waiver of such rights would be the precedent to determine when sophisticated parties may be deemed to have waived enforcement of these rights by the courts. Finally, the appropriate level of deference to contracting parties in selection of remedies (or indeed choice of law or jurisdiction), such as California law on contractual “penalties”, may further provide a proven and even well-worn path for efficient yet fair application of judicial review.

The legislature and Congress would be well advised to heed the advice of the seminal Cable Connections decision. Public confidence in alternative dispute resolution processes and the related need for a transparent record of decision are as necessary to “freedom of contract” and efficiency policies that gave birth to widespread use of arbitration, as are policies of judicial deference. Many practitioners know how “broke” many arbitral systems really are, and use this

realization to their strategic benefit, which is certainly not an idealistic or rational basis for judicial deference to arbitration awards. Appropriate judicial review, as Cable Connections finds, is in fact an increasingly important if not urgent requirement for effective and widely used private dispute resolution.