Arbitral Autonomy

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Abstract
This Article presents concrete proposals to amend the current arbitration law for minimizing court intervention into arbitration proceedings and enforcement of arbitral awards. As a method of dispute resolution, arbitration offers an alternative to litigation. Yet arbitration is frequently interspersed with litigation. As a true alternative, arbitration should be, and can be, autonomous, that is, litigation-free. Arbitral autonomy fails when parties go to court to challenge validity of the arbitration agreement, to obtain emergency relief, or to contest enforceability of the award, among other reasons. To accomplish litigation-free arbitration, first, the need to go to court must be minimized; second, the desire to go to court must be deterred. In developing arbitral autonomy, the Article offers theoretically defensible and practically feasible proposals to remove both the need and the desire to go to court. In endorsing arbitral autonomy, however, the Article warns against arbitration blackout that thrives on secrecy, quasi-lawlessness, and pro-arbitration judicial exuberance, a blackout that hurts weak and vulnerable parties drawn into mandatory arbitration.

* Professor of Law, Washburn University. I am grateful to a number of colleagues for making instructive comments when I presented the thesis of this Article at a faculty development workshop in 2011. Freddy Sourgens and Patricia Judd offered useful suggestions to improve the thesis of the Article. I also wish to thank scores of students who, while studying arbitration law with me, reacted to and commented upon the ideas that would over the years develop into the concept of arbitral autonomy. This article is dedicated to Syed Maqbool Alam and Tanvir Ahmed Khan, friends who died long before death was due.
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I. **INTRODUCTION**

In 1981, the Connecticut Supreme Court offered an insightful paradigm: “Arbitration is a contractual remedy designed to expedite informal dispute resolution. Its autonomy requires a minimum of judicial intrusion.”¹ Although the Connecticut court’s words have rarely been cited in other jurisdictions,² the autonomy of arbitration, as a guiding paradigm for restraining judicial intrusion, is a topic in need of scholarly attention. Autonomous arbitration occurs when it is initiated, conducted, and concluded, and the arbitration award enforced, all without any need or desire for judicial intervention.³ Endorsing the autonomy paradigm in its own words, the United States Supreme Court has affirmed “the unmistakably clear Congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”⁴ Derived from the contract theory of arbitration,⁵ arbitration statutes, court rulings, and arbitral institutional rules, the autonomy paradigm offers concrete proposals for minimizing court intervention in arbitration processes and outcomes. If these proposals aimed at transforming the technical infrastructure of arbitration law⁶ are adopted, arbitration will undergo a revolutionary change, developing into a complete alternative to

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² Westlaw research (database: allcases) shows only seven cases, all in Connecticut, which repeat the formulation of the “autonomy of arbitration.” (as of February 14, 2013).
³ *Developments in the Law - The Paths of Civil Litigation*, 113 Harv. L. Rev. 1851, 1862-63 (2000)(courts and commentators are conflicted over the efficiency benefits and fairness concerns of arbitration).
⁵ The contract theory of arbitration, as explained in this Article, state that arbitration is a creature of contract. Arbitration is a method of dispute resolution that parties choose by means of a contract. Under the contract theory, therefore, arbitration cannot be imposed on a party without the party’s consent.
⁶ Unless otherwise indicated, *arbitration law* refers to the Federal Arbitration Act, the Uniform Arbitration Act, and state and federal cases decided under these statutes and common law. Even though this Article is confined to the United States, the principles discussed may have universal appeal and application.
litigation. In presenting these proposals, I invite scholars, lawyers, and judges to further refine the concept of arbitral autonomy (arbitration paradigm)\(^7\) framed in this Article.

The autonomy paradigm does not advocate that arbitration, as a method of dispute resolution, is inherently superior to litigation. Litigation conducted in public courts is critical for clarifying cases and statutes for future guidance. Arbitration cannot supplant litigation. In the past few decades, however, arbitration has gone well beyond commercial dispute resolution; it has proliferated in numerous areas of law reserved for litigation, including antitrust laws and statutory rights. The historical common law prejudice against pre-dispute arbitration clauses has waned, expanding the scope of arbitration.\(^8\) Courts burdened with cases are eager to uphold arbitration agreements to lighten their docket.\(^9\) Even lawmakers, facing budget rationing, have little interest in opposing arbitration as an alternative method of dispute resolution since litigation costs money to the public treasury.\(^10\)

Unfortunately, arbitration as currently practiced does not free up judicial resources; nor does arbitration necessarily lead to arbitral autonomy. The arbitration law has left open numerous

\(^7\) In this Article, I use arbitral autonomy and arbitration paradigm as synonymous concepts.

\(^8\) Common law was averse to enforcing pre-dispute arbitration agreements but was wholly willing to enforce post-dispute arbitration agreements. In the nineteenth century, courts will not enforce the arbitration agreement if a party changes its mind after the dispute arose. Justice Story opined that a “reluctant party” cannot be forced to submit to arbitration and surrender access to common courts of justice. Tobey v. County of Bristol, 23 F.Cas. 1313, 1320-21 (C.C.D. Mass. 1845)

\(^9\) Reginald Alleyne, Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 385 (1996) (arguing that the “hidden motive” behind the pro-arbitration stance is a judicial desire to reduce case load). There are state judges, however, with dissenting voices against the invasion of arbitration. In Casarotto v. Doctor's Associates, Inc., 886 P.2d 931, 939 (Mont. 1994) , for example, Justice Trieweiler takes issues with “those federal judges who consider forced arbitration as the panacea for their ‘heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy.” (Trieweiler, J., concurring).

\(^10\) “Harry Arkin, Dispute Resolution A Comparative Analysis under Differing Legal Systems, 39 A RMMLF-INST 11 (1995). “[I]n litigation, the taxpayers, not the disputing parties, pay for the Courts, (i.e. the rent for the Court Room, salaries of the Judges, their clerks, and their administrators.)” Since 1961, the volume of §1983 litigation has exploded more than one hundredfold, costing substantial costs to taxpayers. See American Bar Association, SWORD & SHIELD REVISED: A PRACTICAL APPROACH TO SECTION 1983, at 142 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 2006).
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escape routes for parties to resort to litigation. Parties may choose arbitration by means of an agreement, either before or after disputes arise.\textsuperscript{11} In most cases, the agreement obligates parties to settle specific or all disputes by arbitration. By choosing arbitration, \textit{obligated parties}\textsuperscript{12} give up the right to litigate disputes identified in the arbitration agreement. In reality, however, arbitration parties may not completely abandon litigation, a phenomenon that may be called \textit{arbitral litigation}.\textsuperscript{13} The autonomy paradigm is designed to minimize, if not to completely eliminate, arbitral litigation.

In arbitral litigation, a \textit{renegade party} is one that undercuts the arbitration agreement and revivifies litigation. The renegade party may resort to arbitral litigation for a host of reasons at various stages of arbitration. For example, the renegade party may refuse to submit to arbitration, challenging the existence of the arbitration agreement. It may contest the arbitrability of issues submitted to arbitration. The renegade party may litigate to seek preliminary relief for the preservation of assets. If arbitration proceedings are successfully completed the renegade party may petition the court to vacate the arbitration award.\textsuperscript{14} Because the definition of award includes certain arbitral decisions delivered during the arbitration proceedings, a party may litigate to vacate such decisions.

As an overarching principle, the autonomy paradigm proposes that state and federal courts summarily reject challenges to all facets of arbitration. This rejection is necessary because law rarely precludes the filing of petitions, including frivolous and meritless petitions. Arbitral autonomy can be activated, and judicial intervention denied, as soon as parties choose arbitration to settle disputes between them. A policy opposing arbitral litigation sends a forceful systemic message that parties should deliberate before committing disputes to arbitration because renegade parties will not be allowed to perforate arbitral autonomy. Arbitral autonomy is further

\textsuperscript{11} Arbitration law no longer requires that the arbitration agreement be in writing and signed. Responding to electronic age of emails, faxes, videos, and audios, law now requires that there be an authenticated record rather than a signed writing. Unif. Arbitration Act (amended 2000) §1(6).

\textsuperscript{12} An obligated party means a party that has agreed by means of an arbitration agreement to settle selected disputes by means of arbitration.

\textsuperscript{13} Arbitral litigation occurs when an arbitration party approaches the court to contest some aspect of arbitration. Arbitral litigation tends to undermine arbitration as a true alternative to litigation.

\textsuperscript{14} The arbitration law allows judicial relief against the enforcement arbitration awards for a host of reasons.
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...garrisoned when arbitration organizations provide effective mechanisms to redress meritorious grievances emanating from arbitration processes and outcomes, thus eliminating the need to go to court. In understanding the autonomy paradigm, distinguish de jure autonomy from de facto autonomy. Generally, parties are free to conduct and conclude arbitration without any court assistance. De facto autonomy occurs when all stages of arbitration proceedings are successfully concluded and the award is enforced without court intervention. However, when a renegade party seeks court intervention at any stage of arbitration, de facto autonomy ceases to exist. Going beyond de facto autonomy, the autonomy paradigm promotes de jure autonomy. Synonymous with de jure autonomy, the arbitration paradigm requires that the arbitration law effectively close escape routes to arbitral litigation so that renegade parties have little incentive, and might even face penalties, if they seek court intervention to oppose the arbitration agreement, arbitration proceedings, or the arbitration award.

Jurisprudentially, the legal system has not yet fully recognized that arbitral autonomy offers numerous benefits. In fact, the benefits of arbitration publicized in legal literature should be associated with arbitral autonomy and not with arbitration littered with litigation. For example, arbitral autonomy makes arbitration a more complete alternative to litigation as autonomy disconnects arbitration from litigation. By disconnecting litigation, arbitral autonomy

15 An arbitration organization “means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.” Unif. Arbitration Act (amended 2000) §1(1).
16 For example, parties should be able to remove partial arbitrators without going to court. See Am. Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures, R-17(2009)(allowing disqualification of an arbitrator for partiality or lack of independence).
17 The advantages of arbitration are listed as following: (1) Speedy resolution of disputes in months rather than years; (2) substantial savings in legal fees and costs; (3) avoidance of excessive jury verdicts; (4) avoidance of elected state court judges who favor the plaintiffs’ bar; (5) reduced punitive damages claims; (6) uniformity of arbitration law and procedures; (7) reduced class action lawsuits; (8) limited discovery; (9) limited right to appeal. See Alan S. Kaplinsky & Ballard Spahr, The Use of Pre-Dispute Arbitration Agreements in Consumer Contracts, 1946 PLI/CORP 201, 207-208 (2012).
delivers parties the confidence to recruit specialists to resolve complex disputes\textsuperscript{18} beyond the expertise of state and federal judges.\textsuperscript{19} Additionally, cost, efficiency, speed, and the need for confidentiality make arbitral autonomy much more attractive than arbitration punctuated with litigation. For resolving international disputes, parties belonging to different legal systems, sometimes to different legal traditions, may have little confidence in or familiarity with each other’s court system; hence, they seek arbitration fortified with autonomy.\textsuperscript{20} Most businesses, averse to negative publicity, would prefer autonomous arbitration over arbitration conducted under the Damoclean sword of litigation.\textsuperscript{21}

The autonomy paradigm makes several technical proposals, dispersed at appropriate places throughout the Article. These proposals expand the arbitrator’s authority necessary for foreclosing the corresponding litigation. Most importantly, the paradigm empowers the arbitrator to decide whether an arbitration agreement exists and is enforceable and whether a specific dispute falls within the scope of an arbitration agreement. Furthermore, the autonomy paradigm confers upon the arbitrator the severability power, that is, the authority to sever the arbitration agreement from the underlying contract. If the arbitration agreement is enforceable, arbitration proceeds to settle the issues including voidability of the underlying contract. Additionally, arbitral autonomy empowers the arbitrator to grant preliminary, emergency, and exemplary

\textsuperscript{18} For example, disputes arising out of software, structural engineering, patents, and similar sciences and technology require sophisticated knowledge of the relevant field. Experts in the relevant field can be much more effective judges than lay judges. In many such disputes, the knowledge of sciences may be much more relevant than the knowledge of law for an efficacious and fair dispute resolution.

\textsuperscript{19} Arbitrators may be former state judges, experts, academics, lawyers, indeed any person that the parties consider to be qualified to resolve the dispute. Unlike state judges, formally educated in law with considerable law practice experience, arbitrators may have expertise in areas other than law.

\textsuperscript{20} Gary Born, \textit{A New Generation of International Adjudication}, 61 DUKE L.J. 775, 827-28 (2011). “[A]lthough consensual as a formal matter, accepting arbitration is, in many circumstances, effectively mandatory for states that wish to do business with foreign private parties.” Id.

\textsuperscript{21} One might argue that parties choose arbitration knowing that if arbitration goes wrong the safety net of litigation is available; consequently, arbitral autonomy might stifle arbitration. (Professor Patricia Judd made this argument while reviewing this article.) Whether arbitral autonomy would indeed chill arbitration is an empirical question that cannot be answered via speculation. In any event, arbitral autonomy makes arbitration a more authentic and measured method of dispute resolution.
relief, without any court assistance. Likewise, the need to go to the court is foreclosed when a private appellate avenue is available to review the arbitration award. Accordingly, the autonomy paradigm endorses private review of arbitration awards.

The Article lays out the argument for arbitral autonomy in the following sequence. Part II examines the contract theory of arbitration, emphasizing the point that parties forfeit the right to litigation when they select arbitration. Part III lays out the primary attributes of arbitral autonomy. Part IV examines issues of non-arbitrability, proposing ways to encounter fractional arbitration that leads to litigation. Part V argues that the severability doctrine, under which the validity of arbitration agreement is analyzed separately from that of the underlying contract, fortifies arbitral autonomy. Part VI presents the parity principle under which arbitrators are granted powers equal to those of trial judges. This parity expedites the arbitration process and eliminates the need to go to court for seeking procedural, emergency, or substantive reliefs. Part VII makes proposals to avoid arbitral litigation in the enforcement of arbitration awards. Part VIII defines the limits of autonomy paradigm. The discussion warns against any sightless enforcement of mandatory arbitration clauses (MACs) forced upon consumers and employees. This discussion strengthens, and not weakens, the argument for arbitral autonomy.

II. FORFEITING LITIGATION

The autonomy paradigm postulates that parties definitively forfeit the right to litigation when they establish contractual arbitration. As discussed below, the autonomy paradigm respects the right to litigation that parties enjoy in the absence of arbitration agreement. In most legal systems, state-supported courts are available to settle disputes. Access to courts establishes a systemic right to litigation. This right to litigation, however, may be surrendered in favor of arbitration by means of an agreement. Below is a brief overview of the right to litigation.

A. Right to Litigation

One might argue that a general right to litigate civil disputes has not been identified as a constitutional right or a human right. Even so, a right to access courts has been recognized since

22 The author has been unable to find a constitutional or treaty text that proclaims “a right to litigation.” However, the absence of these specific words in constitutions and treaties does not prove that there is no right to litigation. For example, the right to litigation may be phrased as a right to a judicial forum. See, e. g., Wright v. Universal
the early nineteenth century.\textsuperscript{23} The right permeates both criminal and civil cases.\textsuperscript{24} In criminal cases, the defendant is armed with a series of constitutional and human rights to contest charges. The presumption of innocence is the cardinal principle promised to protect defendants in criminal cases.\textsuperscript{25} The right to litigation is protected even in civil cases where the state itself engages in unlawful activity.\textsuperscript{26} For example, the right to litigation is available if the state appropriates private property without just and prompt compensation. Likewise, the right to litigation is protected to enforce the right to free speech, the right to freedom of religion, indeed to enforce a complex set of civil, political, and economic rights. In most legal systems, the people enjoy a right to litigate civil disputes against state actors and instrumentalities, a right available to both natural and juridical persons. This right to litigation allows individuals and businesses to use state-administered resources, including courts and agencies, for obtaining legal and equitable reliefs.

The right to litigation against non-state entities, including natural persons and businesses, is a bit more complex in its underpinnings. While a general, individual-qua-individual, right to litigation is rarely anchored in constitutional protections one might argue that state dispute resolution services are indispensable for the enforcement of fundamental rights against non-state entities. For example, an employee victimized on the basis of race or religion has the right to seek relief through courts. Rights against myriads forms of discrimination in the private sector would be meaningless if the state provides no access to remedial litigation. Litigation to protect constitutional and statutory rights against non-state entities, one might argue, is so critical that

\begin{itemize}
  \item Maritime Service Corp., 525 U.S. 70, 82(1998)(recognizing employees’ right to a judicial forum for federal claims of employment discrimination).
  \item Margarite Tarkington, A Free Speech Right to Impugn Judicial Integrity In Court Proceedings, 51 B.C. L. REV. 363, 380(2010)(suggesting that Due Process clause and the First Amendment Right to Petition are the sources of the right to access to courts in both criminal and civil cases).
\end{itemize}
there exists indeed a de facto right to litigation.\textsuperscript{27} A state cannot discharge its obligations to protect ordered liberty if it does not provide dispute resolution services at affordable cost.\textsuperscript{28}

The right to litigation must be distinguished from the obligation to litigation. An aggrieved party, whether individual or business, whose interests have been injured, has the right but not the obligation to seek remedies through litigation.\textsuperscript{29} The legal system rarely imposes an obligation on aggrieved parties to seek remedies through litigation. An aggrieved party may abandon legitimate and meritorious claims and decide not to litigate against the offender. Furthermore, rational litigants take into account the transaction cost of litigation and may not pursue a claim if the cost of litigation exceeds the expected benefit.\textsuperscript{30}

While an aggrieved party has no obligation to litigate, the defendant against whom the claim is filed incurs an obligation to defend the civil action. A defendant who does not respond to the civil action runs the risk of facing a default judgment. Even in frivolous and meritless cases, the defendant must litigate to defeat the civil action.\textsuperscript{31} While a plaintiff is free to walk

\textsuperscript{27} State ex rel. Dunlap v. Berger, 567 SE 2d 265 (2002). “These fundamental rights do not exist just for the benefit of individuals who have disputes, but \textit{for the benefit of all of us}. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends.” Id., at 276.

\textsuperscript{28} Id. “Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws—to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals—tribunals that involve, in the case of the jury, members of the general citizenry.” Id. at 276.

\textsuperscript{29} Institutional plaintiffs, such as corporations, may have structural constraints emanating from their charter of organization to pursue legal remedies in certain cases. Organized businesses, therefore, may not have the complete internal freedom to abandon the right to litigation. Individuals, however, enjoy more freedom not to exercise the right to litigation.

\textsuperscript{30} Kimberly A. Moore, \textit{Populism and Patents}, 82 N.Y.U. L. REV. 69, 94 (2007)(a patentee, for example, may not sue for a patent infringement because of the prohibitive cost of litigation, running at $2 million per side).

\textsuperscript{31} In St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993), Justice Scalia makes an interesting commentary on this question: “The books are full of procedural rules that place the perjurer (initially, at least) in a better position than the truthful litigant who makes no response at all. A defendant who fails to answer a complaint will, on motion, suffer a default judgment that a deceitful response could have avoided. . . . A defendant whose answer fails to contest critical averments in the complaint will, on motion, suffer a judgment on the pleadings that untruthful denials could have avoided. . . . And a defendant who fails to submit affidavits creating a genuine issue of fact in response to
away from litigation, the defendant cannot do so. In more complex cases, where claims are intertwined with counterclaims, a party’s right to litigation is also intertwined with the party’s obligation to litigation.

The right to litigation levies a financial burden on taxpayers. The state maintains court buildings, pays salaries to judges and staff, and incurs numerous other costs associated with the civil justice system. Parties litigating a civil dispute pay court fees but these are rarely sufficient to cover the state expenses of litigation.\textsuperscript{32} For the most part, taxpayers rather than litigants bear the cost of judicial and administrative services available for resolution of civil disputes. If law allows litigants to request jury trials, ordinary citizens are summoned to invest time and suffer opportunity cost to assist in dispute resolution.\textsuperscript{33} Thus, a systemic right to litigation imposes both direct and indirect costs on taxpayers.

Public expenditure on resolution of civil disputes is indispensable for safeguarding ordered liberty. If legal justice is unavailable or unaffordable, social order is undermined. The right to litigation is meaningless without access to courts. Circuit Judge Diana Wood accurately points out that “(i)f courts are unavailable or unable to function, as was the case following Hurricane Katrina, little stands between the citizenry and the breakdown of the rule of law.”\textsuperscript{34}

Even in normal times while litigants settle their disputes “in the shadow of the law,” as most do, the availability of courts makes real the coercive imminence of law. Law without courts may still

\textsuperscript{32} Cassandra Burke Robertson, \textit{Transnational Litigation and Institutional Choice}, 51 B.C.L. REV. 1081(2010)(arguing that court fees should be increased for foreign litigants accessing U.S. courts to recoup the actual cost of litigation).

\textsuperscript{33} Paula Hannaford-Agor, \textit{Systematic Negligence in Jury Operations: Why the Definition of Systemic Exclusion in Fair Cross Section Claims Must be Expanded}, 59 DRAKE L. REV. 761, 796-97 (2011). “Although courts rarely acknowledge it explicitly, most recognize the jury system is heavily subsidized by the in-kind contributions of jurors, their employers, and their communities. Only a small portion of the actual costs of the jury system are incurred by the courts for administrative expenses, juror fees, and mileage reimbursement. Lost income--or alternatively, lost wages paid by employers who compensate employees while on jury service--averages $100 per day, and a conservative estimate of lost productivity by employed jurors is $675 per day.” (footnotes omitted) Id.

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furnish a normative framework for litigants to articulate and debate issues leading to settlement.\(^{35}\) Yet, the availability of courts and the associated public expense is a steadying element in the maintenance of social order and subsidization of legal justice.\(^{36}\)

The right to litigation, however, belongs to the genre of welfare rights.\(^{37}\) The state is under a moral obligation to spend public monies for subsidizing the right to litigation for poor and middle classes.\(^{38}\) However, the wealthy themselves can pay for exercising the right to litigation. There is little moral or pragmatic justification for spending public funds to support litigation between wealthy individuals or mega-companies, particularly if litigation involves disputes of marginal social utility.\(^{39}\) Even in cases where substantial public interest is at stake, law can simply require that dispute resolution be open and not confidential. Public disclosure of a socially crucial case does not further require that public funds be spent to resolve the dispute.

**B. Foregoing Litigation Rights**

By choosing arbitration, parties forego several rights accompanying litigation. For example, arbitration parties surrender the Seventh Amendment constitutional right of jury trial because arbitration is conducted without juries.\(^{40}\) More broadly, parties surrender the right to access courts. Likewise, parties give up the right to due process of law and equal protection of the laws in that arbitration does not rigidly subscribe to these constitutional rights. Parties also give up the right to discovery under the rules of civil procedure, the right to properly filtered evidence under the rules of evidence and the right to appeal legally erroneous decisions. All these rights are surrendered to acquire the potential expedition, efficiency, informality, and the


\(^{38}\) Issachar Rosen-Zivi, *Just Fee Shifting*, 37 FLA. ST. L. REV. 717(2010)(proposing an attorney’s fees shifting system under which the poor can successfully assert their rights).


\(^{40}\) U.S. Const. amend. VII.
finality of the arbitration process.\textsuperscript{41} This bargain of swapping litigation rights with arbitration advantages is defended, if not justified, in the name of freedom of contract.\textsuperscript{42}

Furthermore, by choosing arbitration parties shift the cost of dispute resolution from taxpayers to themselves. On a shared basis, parties pay all costs related to arbitration. Parties pay to arbitration organizations, such as American Arbitration Association, which provide critical services and default rules for the initiation, continuation, and conclusion of arbitration proceedings.\textsuperscript{43} Parties pay to arbitrators for their expertise and time in resolving disputes. Parties pay all other expenses related to renting the place for arbitration, summoning witnesses, equipment used in presenting evidence, translation services, etc. If the award is voluntarily enforced, parties bear the entire cost of arbitration.

In employment disputes, however, the autonomy paradigm requires that employers, and not low-income employees, pay the entire cost of arbitration. The traditional rule under which both parties shoulder the cost of litigation need not apply to employment disputes.\textsuperscript{44} The low-income employee may surrender the systemic right to litigation, if the employer undertakes to bear the full cost of arbitration. Otherwise, arbitration becomes oppressive as low-income employees, in order to avoid the cost of arbitration, would abandon even meritorious claims. The purpose of employment arbitration is not to defeat meritorious claims but to provide an alternative means of dispute resolution. Employers may offer arbitration as a condition of employment in that an applicant who does not agree to arbitrate employment disputes may be

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\textsuperscript{41} Kloss v. Edward D. Jones, 54 P. 3d 1, at 17 fn.1 (2002).
\textsuperscript{42} Some commentators argue that parties should have the freedom of contract to shape procedural rules in litigation as well. See Michael L. Moffitt, \textit{Customized Litigation: The Case for Making Civil Procedure Negotiable}, 75 GEO. WASH. L. REV. 461, 462 (2007) (proposing that conventional procedural rules should be treated as default rules, rather than as nonnegotiable parameters).
\textsuperscript{43} Arbitration organizations establish bodies that oversee arbitration awards and appoint arbitrators. For example, the International Chamber of Commerce has instituted the International Court of Arbitration. The London Court of International Arbitration and the International Centre of the American Arbitration Association discharge similar functions. These entities are not courts; they are administrative bodies.
\textsuperscript{44} However, parties may equally share the cost of arbitration if the dispute arises between the company and the chief executive officer or other well-paid employees. However, equal cost sharing cannot be imposed on clerks, janitors, and other low-income employees.
\end{flushleft}
denied the job. In such cases, arbitral autonomy is morally well-founded when low-income employees are exempt from sharing the cost of arbitration.

In sum, arbitral autonomy recognizes that there exists a right to litigation civil disputes that parties may forego by means of an arbitration agreement. When parties choose arbitration, they forfeit the right to litigation with respect to disputes identified in the arbitration agreement. The arbitration law will do no jurisprudential harm, and it will be consistent with the contract theory of arbitration, if the law closes all escape routes to litigation for parties that have freely chosen arbitration as an alternative method of dispute resolution.

III. ATTRIBUTES OF ARBITRAL AUTONOMY

This section lays out the attributes of arbitral autonomy. These attributes, some of which have gradually evolved to become part of the arbitration law, minimize arbitral litigation. The autonomy paradigm endorses these attributes. However, the paradigm has serious reservations about the MACs that harm rather than benefit arbitral autonomy.

First, the most important attribute of arbitral autonomy treats arbitration parties with equal respect and concern. This attribute acknowledges that no person can be forced to settle disputes through arbitration. Parties custom design arbitration by authenticating an arbitration agreement that incorporates their mutual will. Party autonomy is the source of determining issues to be arbitrated, the method of selecting the arbitrator, the language in which arbitration proceedings will be conducted, the place of arbitration, and the choice of law that would govern the resolution of substantive disputes, and other related matters. Equal respect requires that the obligation to arbitrate be reciprocal in that each arbitration party is similarly bound to submit


46 Through this Article, I use the phrase “the arbitrator” to include an arbitration panel of two, three, or more.

47“Although arbitrators generally enjoy broad powers to resolve disputes, there are occasions when an arbitrator’s authority may be unclear, in the absence of express agreement of the parties. For this reason, parties may wish to specify, in their arbitration agreement, precisely what the arbitrator can and cannot do.” Steven C. Bennett, ARBITRATION: ESSENTIAL CONCEPTS 86 (ALM Publishing 2002). For efficiency purposes, arbitration parties may adopt the rules of an arbitration organization, such as the American Arbitration Association, which provide the essentials of arbitration.
identified disputes to arbitration. The autonomy paradigm rejects asymmetrical arbitration under which one party is bound to arbitration but the other is free to litigate the same disputes – reaffirming the adage: what’s good for the goose is good for the gander.

Second, the autonomy paradigm recognizes the expanding universe of arbitration beyond the classical contours of business-to-business arbitration. Disputes identified in the arbitration agreement need not be international or commercial in nature. Nor is arbitration limited to contractual transactions. Arbitration is available to settle a variety of disputes, including the ones arising from torts, labor, consumer transactions, employment, and anti-trust laws. There is no bar in submitting to arbitration claims involving statutory rights. “By agreeing to arbitrate a statutory claim, (however,) a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”48 The Supreme Court has rejected the argument that disputes involving “the pervasive public interest” are not fit for arbitration.49 The ever-expanding universe of arbitration excludes fewer and fewer claims from its domain.50

Third, the autonomy paradigm embraces specific performance of arbitration agreements and, therefore, compels renegade parties to submit to arbitration.51 It is a fundamental principle of contracts that while parties are free not to enter into a contract, but if they do they are obligated to perform contractual obligations. The freedom to enter a contract at will does not include the freedom to revoke the contract at will. A party breaching the contract is lawfully obliged to compensate the aggrieved party. In arbitration, however, opting out of the arbitration agreement by paying damages is unavailable. Arbitration agreements warrant specific

49 Id., at 629.
51 Ordinarily, a party may compel arbitration if another party renegades against the arbitration agreement and files a civil action. If a party files a civil action and the other party does not compel arbitration, the plaintiff may be held to have waived the contractual right to arbitration and may be refused the request for arbitration. However, the waiver is far from automatic. The plaintiff does not surrender the contractual right to arbitration by filing a civil action. The defendant must show some sort of injury or prejudice for the court to deny plaintiff the exercise of the contractual right to arbitration.
enforcement;\textsuperscript{52} damages are seldom sufficient to opt out of arbitration. Furthermore, arbitration law does not allow the revocation of arbitration agreements.\textsuperscript{53}

Fourth, the autonomy paradigm does not discriminate between pre- and post-dispute arbitration agreements; and, it enforces both types of agreements with equal resolve.\textsuperscript{54} Historically, post-dispute arbitration has been the most accepted form of arbitration because parties are fully aware of what is at stake in an existing dispute when they surrender the right to litigation in favor of arbitration. Over the centuries, common law courts have had little problem in enforcing post-dispute arbitration agreements. However, common law courts have been reluctant to enforce pre-dispute arbitration agreements on the theory that such agreements ought to be revocable after a dispute arises if one of the parties no longer reckons that arbitration is the most appropriate method to resolve the dispute.\textsuperscript{55} The so-called common law hostility was primarily against pre-dispute arbitration clauses; it was rarely against post-dispute arbitration agreements.\textsuperscript{56}

Finally, the autonomy paradigm views with suspicion mandatory arbitration clauses (MACs) inserted in consumer and employment contracts. MACs pose equity threats to the autonomy paradigm.\textsuperscript{57} The principle that parties forfeit the right to litigation and willingly opt for arbitration faces distortion in take-it-or-leave-it bargains under which one party commands

\textsuperscript{52} Textile Workers v. Lincoln Mills of Ala. 353 U.S. 448, 451 (1957)(holding that the agreement to arbitrate grievance disputes, contained in a collective bargaining agreement, should be specifically enforced); Southland v. Keating, 465 U.S. 1, 18 (1984)(ruling that the purpose of Federal Arbitration Act was to annul the common law rule against specific enforcement of arbitration agreements).

\textsuperscript{53} Unif. Arbitration Act (amended 2000) §6(a). This provision is non-waivable. Id. § 4(b)(1).


\textsuperscript{55} In 1950s, the United States Supreme Court held that a predispute arbitration clause regarding a claim under the Securities Act is unenforceable. See Wilko v. Swan, 346 U.S. 427 (1953). The Wilko was later overruled. See Shearson /American Express v McMahon, 482 US 220 (1987).

\textsuperscript{56} See supra note 7.

\textsuperscript{57} The word “coercive” seems forceful to describe mandatory arbitration clauses that businesses and employers impose on consumers and employees respectively. Ordinarily, the word implies the use of force or intimidation to obtain compliance. Here the word coercion is used to connote absence of actual consent, even though formal consent might be present, such as initialing the arbitration clauses.
disproportionate market power in relation to the other. MACs are inseparably tied to take-it-or-leave-it bargains. Consumer and employment arbitration agreements are in most cases coercive contracts. Businesses selling or leasing goods and services include binding arbitration as a mandatory condition in sales and lease contracts. Consumers have the option to turn down the bargain and refuse to buy or lease goods and services from such businesses. But if they need to buy goods and services, consumers must submit to MACs. Likewise, employers may not offer jobs unless applicants accept mandatory arbitration for resolving employment disputes, including racial, religious, gender, or other discrimination claims. Such take-it-or-leave-it bargains distress the contract theory of arbitration particularly if consumers and employees have no viable market option to turn down the bargain. In such cases, to say that consumers and employees willingly surrender the right to litigation and voluntarily opt for arbitration is a stretched truth.

In sum, the autonomy paradigm is most suitable for the enforcement of arbitration agreements free of procedural coercion and substantive unconscionability. If parties negotiate to surrender the right to litigation in favor of arbitration and they freely negotiate the terms of arbitration, they have little excuse to resort to arbitral litigation. The legal system should disallow any weakening or undermining of freely negotiated arbitration agreements. The autonomy paradigm derives its conceptual clarity and moral vigor from freedom of contract. However, the autonomy paradigm does not endorse MACs that embody substantive unfairness. Foreclosing judicial scrutiny of MACs can entrench market abuse and exploitation of the weak and the vulnerable. This point is further discussed in Part VIII in the context of arbitration blackout.

IV. AUTONOMY AND ARBITRABILITY

This Part explains the relationship between arbitral autonomy and arbitrability. For the most part, arbitral autonomy is compatible with the concept of arbitrability (also called non-arbitrability), a permanent feature of arbitration law, which excludes certain disputes from the scope of arbitration. Non-arbitrability limits arbitration as non-arbitrable disputes are reserved for litigation. Arbitral autonomy is relevant only if disputes are arbitrable and have been submitted to arbitration. The distinction is clear: autonomy suppresses arbitral litigation whereas

58 David Horton, Arbitration as Delegation, 86 N.Y.U.L. REV. 437 (2011)(commenting on the popular jurisprudential postulate that arbitration is based on consent, not coercion).
non-arbitrability suppresses arbitration itself. Historically, arbitration has been a favored method for settling commercial disputes while non-commercial disputes were reserved for litigation. In the past few decades, legislatures and courts have been exceedingly open to arbitration and the historically limited scope of arbitration has substantially expanded, reaching employment, consumer, and antitrust matters. Fewer and fewer areas of law, civil disputes, and specific issues are non-arbitrable. As non-arbitrability shrinks in scope, the autonomy paradigm becomes more and more valuable.

For analytical purposes, non-arbitrability may be divided into two distinct categories, state non-arbitrability and party non-arbitrability. As discussed below, the autonomy paradigm raises different issues with respect to these categories. As a general principle, with only few caveats, the autonomy paradigm respects state non-arbitrability that excludes certain matters from arbitration; it similarly respects party non-arbitrability in that arbitration parties may freely identify issues they would submit to arbitration and reserve others for litigation.

A. State Non-Arbitrability

State non-arbitrability refers to laws and policies that a state may adopt to exclude designated matters from the scope of arbitration. State arbitral paternalism, discussed below, is a jurisprudential construct for defending state-initiated non-arbitrability. State arbitral paternalism disallows arbitration, preserves the right to litigation, and consequently guides persons to litigate rather than arbitrate certain disputes.59 For example, the state has monopoly over the dissolution of marriage.60 Even though parties may negotiate marital property settlement and child custody

59 In the past few years, the controversy over faith-based arbitrations has stirred legal and political circles. The Sharia-based arbitration intensifies Islamophobia and some legitimate concerns with respect to Western values of female equality. See Jean-Francoise Gaudreault-Desbiens, Constitutional Values, Faith-Based Arbitrations, and the Limits Private Justice in a Multicultural Society, 19 NAT’L J. CONST. L. 155 (2005); See also Liaquat Ali Khan, Kansas Legislature Does Harm in Barring Islamic Law, THE HUFFINGTON POST (May 15, 2012).

60 Boddie v Connecticut, 401 US 371, 376 (1971)(“we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and, more fundamentally, the prohibition against remarriage, without invoking the State’s judicial machinery.”). States also exercise control over the formation of marriage. Marriage regulations vary from state to state. See generally Adam Candeub &Mae Kuykendal, Modernizing Marriage, 44 U. MICH. J. L. REFORM 735 (2011).
issues, the dissolution of marriage itself is non-arbitrable and only courts are empowered to
dissolve marriages. The court is not bound to accept the negotiated settlement, even though most
courts defer to the parties. The parental abuse of children also warrants state paternalism.\(^{61}\) The
state monopoly over dissolution of marriages to the exclusion of arbitration may be judicious for
the protection of children’s rights.\(^{62}\)

As a jurisprudential construct, state arbitral paternalism plays a beneficial role in
protecting the community’s weak and vulnerable sections. In preserving social order, economic
justice, or elements of fairness, the state may exclude certain legal matters from private justice of
arbitration and retain them in the public realm of state courts. In modern societies, state arbitral
paternalism does not emanate from the will of a “philosopher-judge”\(^{63}\) who might see the ills of
arbitration that no one else does. State choices of non-arbitrability are frequently democratic
choices, made after due debate and deliberations in people’s elected chambers, and legislated in
state statutes. To declare all such democratic choices in determining the scope of arbitration as
“hostility to arbitration” is analytically inaccurate and morally indefensible.

State non-arbitrability, however, is undergoing serious judicial deconstruction and
dismantlement. The state power to freely declare non-arbitrability in certain areas of law has
been challenged through the constitutional doctrine of preemption. Both Congress and federal
courts have flattened the fortress of state non-arbitrability. If parties opt for arbitration but the
state mandates litigation, federal courts side with parties and not the state. As a broad principle,
the contractual right to arbitration trumps state non-arbitrability.

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\(^{61}\) For example, state as parens patriae protects children from neglectful parents. However, excessive state
paternalism over family matters could rather harm than protect children. Coyla J. O’Connor, *Childhood Obesity and

\(^{62}\) See generally Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy
Defense*, 2 Cardozo L. Rev. 481, at 500 (1981)(arguing that arbitration resolves competing interests of parties
(parents) and since the child is not an arbitration party, the child’s welfare may not be fully represented or protected
in the arbitration proceedings.). But see Lawrence S. Kubie, *Provisions for the Care of Children of Divorced
Parents: A New Legal Instrument*, 73 Yale L.J. 1197, 1198 (1964)(arguing that arbitration is suitable for disputes
involving child welfare).

\(^{63}\) Dean Norman Redlich, with whom I studied a course in Legal Education, offered the phrase “philosopher-judge”
By enacting the Federal Arbitration Act (FAA) in 1925, Congress set in motion a process of undermining state non-arbitrability. The FAA protects the specific enforcement of arbitration agreements. The courts have employed the FAA to strike down state statutes that collide with the specific enforcement of arbitration agreements. According to the United States Supreme Court, in enacting the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.” In conflicts over arbitrability between state statute and arbitration agreement, federal courts enforce the arbitration agreement and not the state statute. Even when state courts favor non-arbitrability, federal courts rely on the FAA to overrule state courts and support the specific enforcement of arbitration agreements.

Consider a state non-arbitrability statute. The California Franchise Investment Law provides: “Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.” In reading this provision, the California Supreme Court ruled that claims asserted under the Franchise Investment Law are non-arbitrable. In others words, parties to a franchise agreement cannot surrender their right to litigation in favor of arbitration. Parties must litigate and find judicial solutions to issues arising under the Franchise Law. The United States Supreme Court struck down the Californian non-arbitrability statute as an unlawful barrier to the scope of arbitration. It preempted the statute and upheld the freedom of parties to arbitrate franchise disputes.

Under the evolving law of arbitrability, private contracts can preempt state statutes that bar arbitration. Parties may use an arbitration agreement to defeat state non-arbitrability. If a certain matter is non-arbitrable under state law, parties may nonetheless agree to submit such non-arbitrable matter to arbitration. They count on the FAA’s supportive role in defeating the

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65 9 U.S.C. §§ 9-11 (2006). The reluctant party that agreed to arbitrate can be compelled to abide by the agreement.
state barrier. That arbitration parties may use the power of contract to defeat state non-arbitrability is a remarkable triumph of private law over legislative policies.

It is unclear, however, whether federal courts would remove every conceivable state arbitral barrier under the preemption doctrine. Parties take some risk when they defy state non-arbitrability laws and agree to submit matters to arbitration. In most cases, state non-arbitrability is a non-issue if both parties are committed to arbitration. State non-arbitrability becomes an issue only when a renegade party challenges the arbitration agreement on the basis of a state statute prohibiting arbitration. In such cases, federal courts are disinclined to rescue the renegade party; they uphold the arbitration agreement and not the state barrier.

The autonomy paradigm does not advocate that all state barriers to arbitration be completely removed. As noted before, the autonomy paradigm aims at eliminating arbitral litigation; it does not prefer arbitration over litigation. The state may have weighty policy considerations in excluding certain legal matters from the scope of arbitration. Some such barriers may survive the law of preemption. The autonomy paradigm respects the law of preemption that dismantles non-principled state barriers to arbitration; and, it also respects legitimate state concerns for reserving certain matters exclusively for judicial forums.

In addition to dismantling state non-arbitrability, federal courts are equally resolved to dismantle federal non-arbitrability. The United States Supreme Court has interpreted federal statutes granting “the right to sue” to include the option to arbitrate. The theory is still good that Congress can grant a non-waivable right to sue. However, unless the language of the federal statute is crystal clear in excluding arbitration as a method of dispute resolution, the right to sue would be interpreted to include the right to arbitration. Even “repeated use of the terms "action," "class action," and "court"—terms that . . . call to mind a judicial proceeding” in a federal statute will not be construed to conclude that the statute requires litigation and prohibits arbitration. The powerful pro-arbitration trend in federal courts rarely rules in favor of non-arbitrability.

Should the arbitrator have the preemption power to strike down a state statute prohibiting arbitration? The autonomy paradigm will be greatly strengthened if arbitrators may lawfully exercise the preemption power and thereby eliminate the need to go to the court. For understanding this proposition, consider the franchise case discussed above. The California statute excludes franchise-related matters from the scope of arbitration, requiring litigation. Ignoring the state statute, the parties enter into a franchise agreement that includes an arbitration clause to settle franchise disputes. When a dispute arises, one party requests arbitration while the other objects to arbitration pleading state non-arbitrability statute.

If the arbitrator is empowered to decide the non-arbitrability question, the arbitrator may uphold the California statute and conclude that the dispute is non-arbitrable. In that case, arbitration will no longer be available unless the court decides otherwise and preempts the state non-arbitrability statute. A more serious situation arises if the arbitrator believes that the California statute is an unlawful barrier to arbitration. Should the arbitrator be granted the preemption power to decide that the California statute is an unlawful barrier to arbitration under the combined impact of party autonomy and federal law?

The judicial power of preemption is a sensitive constitutional question impinging upon state sovereignty. Granting the preemption power to arbitrators is a non-starter because it will invite stiff opposition from judges, lawmakers, and other legal professionals. Numerous arguments may be summoned against granting preemption power to arbitrators. First, since even non-lawyers can be arbitrators, they would lack the expertise of the understanding and application of preemption law. Second, arbitrators and judges may reach conflicting conclusions on preemption creating systemic confusion and potentially increasing arbitral litigation. Third, since arbitration awards cannot be set aside for legal or interpretive errors, judges will have little power to overrule erroneous interpretations of preemption law in arbitration circles. Fourth, constitutional matters, such as preemption, must not be privatized because no private person ought to have the power to nullify a state statute. On the basis of these and other arguments, the autonomy paradigm does not propose to disturb the exclusive judicial preemption power to strike down state non-arbitrability statutes.
B. Party Non-Arbitrability

Party autonomy empowers arbitration parties to determine the scope of the arbitration agreement. Party non-arbitrability is the subpart of a broader concept of party autonomy to make and shape bargains. The arbitration law generally respects party autonomy. “Through their contracts, parties determine the arbitrators’ substantive and procedural powers. Arbitrators who comply with the resulting substantive and procedural limits demonstrate deference to the parties and reinforce the parties’ autonomy.”74 Exercising party autonomy, parties to an arbitration agreement may exclude certain matters from arbitration.75 Law does not obligate parties to accept arbitration for all disputes between them. Parties are free to hybridize dispute resolution by choosing arbitration for some disputes and reserving litigation for others, a phenomenon I call fractional arbitration. The mere existence of arbitration agreement does not automatically determine that every dispute between the parties is subject to arbitration.

Arbitral autonomy disapproves asymmetrical arbitration agreements that retain the right to litigation for one party but not for the other. Asymmetrical clauses rarely emanate from genuine party autonomy. In most cases, the stronger party, such as an employer, imposes asymmetrical arbitration obligation on the weaker party, such as the employee.76 Employment contracts at nonunion workplaces may contain arbitration clauses with asymmetrical obligations. The clause may bind workers but not the employer to submit employment disputes to arbitration. Under such one-sided clauses, the employer does not surrender the right to litigation in favor of

73 In conflict of laws, party autonomy empowers parties to select the law governing their contract, subject to limitations. Volt info. Sciences, Inc. v. Bd. 489 U.S. 468, at 491(1989). Here, I use the concept of party autonomy in a broader meaning to include the power to make legally enforceable bargains.


75 Party autonomy refers to issues that arbitration parties decide to submit to arbitration. It also includes issues that parties reserve for litigation. By contrast, autonomous arbitration minimizes court intervention with respect to issues submitted to arbitration. Autonomous arbitration has no bearing on issues reserved for arbitration.

76 “(T)he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.” Armendariz v. Foundation Health Psychare, 6 P. 3d 669, 770 (2000).
arbitration but the employee does. Courts have refused to enforce asymmetrical clauses declaring them unconscionable.77

1. Prohibiting Fractional Arbitration

Ordinarily, parties select arbitration as the exclusive method of settling all issues arising out of a transaction. A standard arbitration clause may read as follows: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration.”78 This all-inclusive pre-dispute clause submits all contract controversies and claims to arbitration and reserves nothing for litigation. A similar all-inclusive pre-dispute agreement may be drafted to settle non-contractual claims and controversies by arbitration. Despite this common practice of using all-inclusive arbitration clauses, the law would respect fractional arbitration and allows parties to reserve some matters for litigation.

Analytically, there are two distinct questions: “(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.”79 These two questions constitute party non-arbitrability. The first question identifies whether parties have selected arbitration as a forum of dispute resolution. The second question identifies whether the parties have selected arbitration for less than all disputes, and have thus opted for fractional arbitration. Party non-arbitrability is rarely as an issue when parties submit all disputes to arbitration by means of a valid arbitration agreement.

Fractional arbitration, however, though sound under the contract theory of arbitration, spawns arbitral litigation. When parties establish a hybrid regime reserving some issues for arbitration and some for litigation, they invite confusion and conflict. Parties will inevitably fight over the border line that separates arbitration issues from litigation issues. This border dispute is even more troublesome if issues reserved for litigation arise under the same contract or relate to the same transaction. Parties will use courts to delineate the border that the arbitration agreement might have vaguely drawn. Since fractional arbitration breeds arbitral litigation, it clashes with the rationale of the autonomy paradigm.

Arbitral autonomy proposes to prohibit fractional arbitration. This prohibition makes much more sense with respect to pre-dispute arbitration agreements when the nature and scope of future disputes is unknown. Parties are most likely to disagree over the scope of a pre-dispute arbitration agreement because parties may see arbitration differently when a specific dispute arises. (A post-dispute arbitration agreement under which a particular dispute is submitted to arbitration does not fall under the concept of fractional arbitration.) Arbitration institutions may fashion rules to curb pre-dispute fractional arbitration. They already do by proposing broad, comprehensive pre-dispute arbitration clauses. The courts may also refuse to fine-comb an arbitration agreement to determine whether a dispute is excluded from arbitration.  

2. **Arbitrating Fractional Arbitration**

Until law prohibits fractional arbitration, the autonomy paradigm lets the arbitrator decide disputes involving party non-arbitrability. While state non-arbitrability barriers to arbitration may be reserved exclusively for courts, party arbitral choices should be subjected to arbitration. In fractional arbitration, if both parties agree that a certain dispute should not be submitted to arbitration and must be litigated, the autonomy paradigm is not in question. If parties disagree over whether a dispute falls within the scope of arbitration agreement, a scenario that usually occurs after a dispute has arisen, the road to arbitration is no longer clear. If parties agree that the issue of party non-arbitrability may be submitted to arbitration, they may do so and thus preserve the autonomy of arbitration. If parties disagree over the party non-arbitrability of an issue and one party calls for arbitration while the other for litigation, the deadlock invites arbitral litigation and consequently threatens the autonomy paradigm.

To resolve such deadlocks arising from fractional arbitration agreements, the arbitration paradigm confers upon the arbitrator the inherent power to decide whether a particular dispute is within the scope of the arbitration agreement.

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80 “Where the arbitration clause is broad, only an express provision excluding a specific dispute, or ‘the most forceful evidence of a purpose to exclude the claim from arbitration’ will remove the dispute from consideration by the arbitrators.” Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 577 (6th Cir. 2003).
controversy is arbitrable under the arbitration agreement. The arbitrator’s power to determine fractional arbitration controversies would eliminate the need for the parties to go to courts. A fractional arbitration agreement is essentially a contract that does not raise intricate constitutional or statutory questions. Reserving fractional arbitration questions for arbitrators promotes efficiency of dispute resolution. It makes little sense to reserve fractional arbitration disputes exclusively for courts because, in that case, parties will be forced to litigate such disputes, a consequence leading to arbitral litigation that the autonomy paradigm strives to eliminate.

The contract theory of arbitration may be invoked to argue that fractional arbitration disputes must be litigated in courts. Conceptually, arbitration occurs because parties have voluntarily agreed to submit disputes to arbitration. If a certain dispute falls within the scope of arbitration agreement, the renegade party may be compelled to arbitrate because such compulsion is consistent with specific enforcement of arbitration agreements. However, if a party has not agreed to submit a specific dispute to arbitration, the law cannot compel the party to arbitrate that specific dispute. A party contesting the arbitrability of a specific dispute is not a renegade party but a non-party that has not agreed to settle the specific dispute by arbitration. On the basis of this contract-based logic, a party contesting fractional arbitrability makes a credible claim against what it believes to be coercive arbitration.

The arbitration law offers a multilayered solution. First, it draws a distinction between procedural and substantive arbitrability. The arbitrator has the power to decide issues of procedural arbitrability, what it calls “a condition precedent to arbitrability,” such as time limits, laches, notice, estoppels, and other objections to the maintenance of a claim. Substantive arbitrability is indeed another name for fractional arbitration, With respect to fractional arbitration, that is, whether a dispute is encompassed by an agreement to arbitrate, the arbitration law provides that the court shall decide such a controversy. The U.S. Supreme Court has upheld

81 The United States Supreme Court has ruled that parties may arbitrate the “gateway” questions of arbitrability, such as whether the parties have agreed to arbitrate and whether their arbitration agreement covers a particular controversy. Rent-A-Car, West, Inc., v. Jackson, 130 S.Ct. 2772, 2777 (2010).


the judicialization of fractional arbitration.\textsuperscript{84} This solution is consistent with the contract theory of arbitration that forbids coercive arbitration.\textsuperscript{85}

The judicialization of fractional arbitration, however, is not a mandatory rule. It is a default rule that parties may alter in order to preserve arbitral autonomy.\textsuperscript{86} The parties may include a specific clause in the arbitration agreement empowering the arbitrator to decide the questions of party non-arbitrability. Some arbitration organizations, including the American Arbitration Association, provide rules under which the arbitrator decides the questions of party non-arbitrability.\textsuperscript{87} By adopting such institutional rules, parties effectively opt out of the existing default rule. The courts have upheld institutional rules that empower the arbitrator to decide the questions of party non-arbitrability.\textsuperscript{88}

To keep fractional arbitration out of courts, the autonomy paradigm proposes that the law should be amended to empower the arbitrator to decide questions of party non-arbitrability. There are different ways to amend the law. First, the law can be amended to switch the default

\begin{itemize}
  \item \textsuperscript{84} First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
  \item \textsuperscript{85} However, arbitration proceedings are not automatically halted if a party files a civil action to contest fractional substantive arbitrability. The arbitration proceedings may continue unless the court issues a restraining order or decides that the controversy is non-arbitrable. The arbitrator, however, possesses the discretionary power to halt arbitration proceedings until the court reaches a decision on fractional arbitration.
  \item \textsuperscript{86} Unif. Arbitration Act (amended 2000) § 4(a). This section allows parties to waive the judicialization of substantive arbitrability).
  \item \textsuperscript{87} See, for example, See Am. Arbitration Ass’n-R7
    (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
    (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
    (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.
  \item \textsuperscript{88} Daiei v. United States Shoe Corp., 755 F. Supp. 299 (D. Haw. 1991) (noting that parties incorporated by reference in their arbitration agreement the rules of the International Chamber of Commerce providing that "any decision as to the arbitrator's jurisdiction shall lie with the arbitrator").
\end{itemize}
rule from judges to arbitrators. Under the new default rule, parties may choose a clause under which judges resolve the questions of party non-arbitrability. If parties fail to include such a clause in the arbitration agreement, the default rule empowers the arbitrator to decide the questions of party non-arbitrability. Second, the law can be amended to completely take courts out of party non-arbitrability. Under this option, the arbitrator will have the exclusive power to decide the questions of party non-arbitrability. This option is most consonant with the autonomy paradigm.

V. SEVERABILITY DOCTRINE

The autonomy paradigm supports but reconfigures the severability doctrine under which the arbitration clause is severable from remainder of the underlying contract and enforceable even if remainder of the contract is unenforceable. As a matter of federal law, arbitration clauses are "separable" from contracts in which they are embedded. If an underlying contract containing an arbitration clause is allegedly induced by fraud, the renegade party must show, separately, that the arbitration clause too is induced by fraud. If the arbitration clause is free of fraudulent inducement, while the underlying bargain was allegedly procured by fraud, the disputes relating to the fraudulent underlying bargain must be resolved through arbitration, not litigation. Of course, the severability doctrine is irrelevant to cases where the arbitration agreement stands alone and is not a part of a larger contract.

Over the decades, courts have been struggling over the enforcement of arbitration clauses embedded in void and voidable contracts. The autonomy paradigm presents two competing models to capture the debate. The older model, which may be called the organic model, considers the contract as an organic whole; under this model, the contract enjoys the unity of

89 The separability doctrine is not free of academic criticism. Professor David Horton calls the doctrine “the fiction.” See David Horton, The Federal Arbitration Act And Testamentary Instruments, 90 N.C.L. REV. 1027, 1033 (2012).
91 Id. at 406. Because arbitrators are compensated corresponding to the volume of arbitration they perform, they might have a personal interest in prolonging the arbitration and not holding that the underlying contract is void. Id, at 416. (Justice Black, dissenting).
92 A void contract produces no legal obligation. By contrast, a voidable contract creates legal obligation but is subject to rescission. Voidable contacts may be cured by ratification.
existence and enforceability; it is indivisible; no part of the contract can be enforced if any part is infected with illegality. The newer model, which may be called the mechanical model, considers the contract as a mechanical assembly of numerous distinct parts; under this model, the contract, almost like a vehicle, consists of many parts; ideally, all parts function together for the best performance of the contract. However, if all parts cannot functions together, good parts may be separated from bad parts. Good parts are retained even if bad parts will have to be eventually thrown away.

When applied to arbitration cases, organic and mechanical models yield dramatically opposite outcomes. Under the organic model, if the underlying contract is void, the arbitration clause embedded in the contract cannot be enforced. Accordingly, the parties must litigate their disputes. Under the mechanical model, the problem-free arbitration clause is enforced even if the underlying contract is void. This mechanical model, which focuses on the legality of the arbitration clause separate and free from the underlying contract of which it is a part, is the conceptual foundation of the severability doctrine. If the arbitration clause in itself is legally sound, the contractual obligation to arbitration is enforced and parties must contest the legality of the underlying contract before the arbitrator.

In order to avoid arbitral litigation, the autonomy paradigm subscribes to the mechanical model and not the organic model. The United States Supreme Court has upheld the mechanical model under the FAA, to liberate arbitration from doctrinal niceties of state law.93 In enforcing the mechanical model, the Court declines to entertain any distinctions between void and voidable contracts.94 In a rising trend, most states subscribe to the mechanical model even in purely domestic cases that involve no interstate commerce.95 A few states, however, have refused to follow the mechanical model in cases subject to the state arbitration statute.96 Accordingly, the organic model has not been completely discarded even though the mechanical model dominates federal and state courts.

95 The separability doctrine originated in the jurisprudence of New York courts and was initially contested in other jurisdictions.
96 See e.g.,
In embracing the mechanical model, the autonomy paradigm views a large contract as a series of micro-bargains. Specifically, the autonomy paradigm views the choice of arbitration as a distinct micro-bargain between the parties. If some micro-bargains in the contract are legally unenforceable, a legally sound arbitration bargain need not be thrown away. Enforcing the arbitration micro-bargain under the mechanical model allows arbitration to proceed even if the entire underlying bargain is allegedly fraudulent or unconscionable.

The mechanical model, however, cannot answer the question whether the arbitrator or the court should have the initial authority to separate and enforce the arbitration clause. If only a court can separate and enforce the arbitration clause, arbitral litigation is inevitable and consequently arbitral autonomy is punctured. If the arbitrator has the primary power to separate and enforce the arbitration clause, the parties need not go to the court.

In upholding the autonomy paradigm, the United States Supreme Court has ruled that “unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.” The Court declined to confine its rulings to contracts contested in federal courts. The Court declared that “regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” This ruling, however, does not answer the more complicated question involving arbitration clauses. The following discussion grapples with the bifurcated suite of existence and enforceability of arbitration agreement.

A. Existence & Enforceability

The mechanical model can separate an arbitration clause from the underlying contract but it cannot sort out conceptual disputes buried within the arbitration clause. For example, the conceptual border between existence and enforceability of an arbitration agreement, currently

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97 The idea of “series of bargains” has been applied to explain the concept of firm. See G. Mitu Gulati et, al., Connected Contracts, 47 UCLA L. REV. 887, 940-41 (2000).
100 Id. at
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maintained in arbitration law, which invites arbitral litigation, is beyond the reach of mechanical model. Under the current law, parties must fight in court to determine if the arbitration agreement exists because the law empowers the court to decide “whether an agreement to arbitrate exists.”101 By exclusion, the arbitrator has no inherent power to decide whether an agreement to arbitrate exists. This exclusion, under which no arbitration can take place without the existence of an arbitration agreement, comports with the contract theory of arbitration. Courts refer to this judicial determination as a “gateway matter.”102 If the court decides that the arbitration agreement exists, parties are then placed under a legal obligation to engage in arbitration to settle enforceability issues. Consequently, questions of the arbitration agreement’s existence are allocated to courts, questions of its enforceability to arbitrators.103

The conceptual border between existence and enforceability of an arbitration agreement is problematic and elusive. Problems arise because courts are unsure whether to fuse the formation of an arbitration agreement with its fairness. Ordinarily, courts undertake to analyze the existence of a valid arbitration agreement, and not merely the existence of an arbitration agreement.104 When existence and validity are fused, judicial approaches are likely to pursue divergent paths. For example, a party asserting that an arbitration agreement is unconscionable admits existence of the agreement. Likewise, a party claiming that the arbitration agreement contains ambiguities regarding the award of attorney’s fees is nonetheless admitting existence of the arbitration agreement.105 Some judges would not only consider whether the agreement is free of formation flaws, such as coercion, they would also consider whether the agreement is valid in light of defenses, such as unconscionability.106 Others will focus only on formational validity,

102 Davis v. KB Homes of South Carolina (2011).
103 The FAA provides: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (2009).
104 The arbitration law empowers the arbitrator to decide “whether a contract containing a valid agreement to arbitrate is enforceable.” Unif. Arbitration Act (amended 2000) §6 (c). Accordingly, the courts must decide whether a valid agreement to arbitrate exists.
and decline to consider fairness defenses to the arbitration agreement.\textsuperscript{107} This divergence spawns arbitral litigation.

The autonomy paradigm offers two ways to place both existence and enforceability issues within the jurisdiction of arbitration. First, exercising party autonomy, parties may specifically waive the bifurcated stratagem\textsuperscript{108} in the arbitration agreement and authorize the arbitrator to decide whether an agreement to arbitrate exists. The arbitration law does not prohibit such a waiver.\textsuperscript{109} Some arbitration organizations furnish rules to confer on the arbitrator the power to decide “the existence, scope or validity of the arbitration agreement”\textsuperscript{110} making it unnecessary for parties to specifically waive the bifurcated stratagem. By incorporating institutional rules in the arbitration agreement, parties empower the arbitrator to decide all issues related to existence and enforceability of the arbitration agreement.

Second, the arbitration law may be amended to construct a new gateway rule. Under the new gateway rule, unless parties otherwise agree, the arbitrator and not the court will have the primary power to decide both existence and enforceability issues.\textsuperscript{111} If the arbitrator decides that the arbitration agreement exists and is enforceable, the need for arbitral litigation is minimized. If the arbitrator decides that the arbitration agreement does not exist or is unenforceable, parties are free to litigate disputes in the court without any further arbitration proceedings. The new gateway rule, though it supports the autonomy paradigm, contaminates the purity of contract theory of arbitration to the extent that there would be cases in which arbitration proceedings would initiate without the existence of a valid arbitration agreement. The law might be willing to pay this minor price in compromising the contract theory of arbitration to reap the benefits of arbitral autonomy in reality.

In sum, the arbitration paradigm endorses the severability doctrine to enforce a valid arbitration clause even if the rest of the contract is allegedly voidable or void. Let the arbitrator decide voidability disputes arising from the underlying contract. Furthermore, the arbitration

\textsuperscript{107} Id. (Judge Wechsler, dissenting).
\textsuperscript{110} Am. Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures, R-7(a) (2009).
\textsuperscript{111} Or, the law may simply discard the elusive distinction between existence and enforceability, merge the two concepts, and authorize the arbitrator to declare whether the arbitration agreement is binding.
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paradigm proposes to fuse the existence and enforceability issues, empowering the arbitrator to decide whether an arbitration agreement exists and is enforceable. This fusion will minimize litigation.

**B. Revisiting Volt**

The contract theory of arbitration needs another minor adjustment. The autonomy paradigm proposes that the choice of law contained in a contract should not be used to defeat the arbitration clause embedded in the same contract if the two clauses are irreconcilable. The conflict arises when the arbitration clause mandates that parties arbitrate a dispute while the choice of law clause permits the parties to litigate the same dispute. If the two clauses are incompatible, the arbitration paradigm proposes to enforce the arbitration clause, denying the renegade party the choice to litigate. This proposal, however, would require that the Supreme Court revisit Volt.112

In Volt, the parties included a pre-dispute arbitration clause in their underlying construction contract, which mandated that all disputes “arising out of or relating to this contract” be submitted to arbitration.113 The choice of law clause embedded in the construction contract, a form contract, opted for laws of the place of the construction project. When a dispute arose, Stanford, a party to the construction contract, sued Volt, the contractor, in a California court. Stanford joined two other defendants not bound by the arbitration agreement. Stanford, the renegade party, relied on the choice of law clause to resort to litigation instead of arbitration. Since the project was located in California, the choice of law clause triggered the application of the California Civil Procedure Code that “permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it.”114 Suspending arbitration is viewed necessary because simultaneous arbitration and litigation raise the “possibility of conflicting rulings on a common issue of law or fact.”115 Invoking the arbitration clause, Volt demanded arbitration.

113 Id. at 470.
114 Id. at 471.
115 Id. at 471.
In view of incompatibility between the arbitration clause and the choice of law clause, the United States Supreme Court upheld the choice of law clause to allow litigation and denied Volt’s motion to compel arbitration. The Court reasoned that arbitration parties are free to custom-design the arbitration clause and may embrace state (civil procedure) barriers to arbitration through the choice of law clause. By specifying the laws of California as the governing law of the contract, the Court reasoned, the parties incorporated the rules of the California Civil Procedure into the arbitration clause.

The Court relies on the contract theory of arbitration to interpret the scope of an arbitration agreement.\textsuperscript{116} The contract theory of arbitration would allow parties to embrace any arbitration barriers that a state, such as California, allows. That, however, is not the critical question in \textit{Volt}. The critical question involves a conflict analysis between arbitration clause and choice of law clause. These clauses lead to different directions, one toward arbitration while the other toward litigation. The Court does not consider, let alone resolve, the conflicting clauses. By contrast, dissenting Justices provide a piercing analysis of the choice of law clauses in general and rightfully conclude that parties in \textit{Volt} did not intend to defeat the arbitration clause with a generic, non-state specific, choice of law clause preprinted in a form contract.\textsuperscript{117}

It is common in domestic and international transactions for parties to adopt two clauses in an underlying contract. By choosing the choice of law and the choice of forum clauses, parties take control of dispute resolution. By adopting these clauses, parties wish to avoid the cost and uncertainty associated with the conflicts of law litigation. The autonomy paradigm enforces both clauses since the purpose of arbitration clause is to provide the forum whereas the purpose of choice of law clause is to identify the law that would govern resolution of disputes. Arbitration parties rarely intend that the choice of law nullify the choice of forum clause. The conflict between the two clauses arises because parties (and their lawyers) cannot see through all possible consequences flowing from the confluence of the two clauses. Most important, the choice of arbitration clause is much more specific and purposeful than the choice of law clause that

\footnotesize
\textsuperscript{116} Id. at 478.
\textsuperscript{117} Id. 488-491 (Brennan, J., dissenting).
potentially covers scores of statutes and hundreds of cases that may come to bear on substantive dispute resolution.\footnote{\cite{Doctor's Associates, Inc. v. Distajo, 107 F.3d 126, 131 (2d Cir. 1997).}}

If perchance choice of law and choice of forum clauses conflict, courts need not reward the renegade party that wishes to litigate after a dispute has arisen even though it has specifically agreed to arbitration. Sheltering the renegade party under the choice of law clause weakens arbitral autonomy and opens yet another escape route from arbitration to litigation. The autonomy paradigm, therefore, proposes that \textit{Volt} be revisited and confined to its facts involving non-arbitration parties. As a general principle, the autonomy paradigm proposes that in cases of incompatibility, the choice of law clause should not be allowed to defeat the arbitration clause.

\section*{VI. Parity Principle}

In granting case management powers necessary to successfully conduct and conclude arbitration proceedings, the autonomy paradigm proposes the \textit{parity principle} under which the arbitrator wields powers in parity with the trial court.\footnote{\cite{Leather Manufacturer's Bank v. Cooper, 120 U.S. 778, 780 (1884).}} The parity principle is a principle of powers granted to the arbitrator; its purpose is not to turn arbitration into a mirror image of litigation. The purpose of arbitration will be defeated if arbitration mimics litigation. Under the parity principle, the arbitrator is granted the same powers that the trial court has for effective case management and disposal.\footnote{\cite{Marsch v. Williams, 23 Cal. App. 4th 238, 246 (1994)(holding that the power to appoint receivers is unique and cannot be extended to arbitrators in the absence of legislative action).}} The parity principle is essential to curb arbitral litigation. The parity principle is already recognized in the arbitration law to some extent and may be further strengthened in light of the following analysis.

In understanding the parity principle, one caveat is called for. The parity principle does not dictate that the arbitrator follow procedural and evidentiary rules the same way and to the
same extent as the trial court must. The arbitrator’s procedural powers may not be confused with procedural rules that govern litigation. The rules of civil procedure and the rules of evidence provide a complex infrastructure to guide court litigation. Many of these rules are designed to conduct jury trial, something that arbitration does not have. Parties choose arbitration in part to avoid the procedural and evidentiary thicket and the attendant cost and delay. Parties “trade[e] the procedures . . . for the simplicity, informality, and expedition of arbitration.” Arbitration loses efficacy, if the arbitrator were obligated to follow procedural and evidentiary rules in their entirety. In conducting arbitration in a manner “appropriate for a fair and expeditious disposition of the proceeding,” the arbitrator enjoys the discretion to select the appropriate rules of procedure and evidence. The arbitrator may proactively consult parties before the hearing to determine the admissibility, relevance, materiality, and weight of any evidence. The arbitrator’s proactive management of evidence with the assistance of parties is a feature unavailable to judges in litigation.

A. Preliminary Reliefs

The autonomy paradigm proposes two distinct sets of procedural powers for the arbitrator. First, the arbitrator must have the authority to grant every form of preliminary relief that the trial court may permit. Second, the arbitrator may be granted the exclusive power to grant preliminary reliefs, thus eliminating judicial intrusion at initial stages of arbitration proceedings. The first set of powers belongs to the parity principle. The second set is designed to further minimize the need to go to court.

121 Douglas G. Smith, The Historical and Constitutional Contexts of Jury Reform, 25 Hofstra L. Rev. 377, 444 (1996)(rules of evidence were framed to restrict the information available to jurors in rendering verdicts).


Under the parity principle, the arbitrator, just like a trial court, may grant preliminary reliefs, such as issuing restraining orders, ordering discovery appropriate for the resolution of controversy, issuing subpoenas for the attendance of witnesses and for the production of documentary and electronic records, and taking action against a renegade party “to the extent a court could if the controversy were the subject of a civil action.”\textsuperscript{126} The arbitrator is granted these preliminary tools to protect the efficacy and integrity of the arbitration process, just as the trial court employs these tools for the efficacy and integrity of a civil action. If these tools are unavailable to the arbitrator, parties will need to go to the court to obtain restraining order, effect discovery, and obtain information pertinent to the case – a consequence that defeats the purpose of arbitration as an alternative method of dispute resolution.\textsuperscript{127}

In order to further minimize arbitral litigation, the autonomy paradigm proposes that the arbitrator should be the sole dispenser of preliminary reliefs. For seeking preliminary relief, if a party is granted the option to go either to the arbitrator or to the court, there is no guarantee that the party would choose the arbitrator and not the court. The party may approach the court out of convenience or for stalling or undermining arbitration proceedings. In order to minimize arbitral litigation, the option to go to the court for obtaining preliminary relief is taken away. If the renegade party approaches the court to obtain preliminary relief, the court would summarily direct the party to seek such relief from the arbitrator.\textsuperscript{128}

While the arbitration law recognizes the arbitrator’s power to grant preliminary reliefs, the law may not grant the arbitrator the exclusive authority to provide preliminary reliefs. State and federal courts tend to retain the authority to grant reliefs even if the arbitration proceedings are under way and the arbitrator is available for seeking a necessary relief. In a Georgia case, for example, a party presented the exclusivity argument to the Georgia Supreme Court contending that “the parties’ agreement to arbitrate strips this Court of its equitable powers to enter injunctive relief.”\textsuperscript{129} The Georgia Supreme Court rejected the exclusivity argument reminding the

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\textsuperscript{126} Unif. Arbitration Act (amended 2000) §17(d).
\textsuperscript{127} Am. Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures, R-34 (2009)(granting the arbitrator the authority to provide interim relief).
\textsuperscript{128} The party may even be fined for litigating a dispute that falls under arbitration. However, I do not fully explore this point in this Article.
\textsuperscript{129} Rose Hall Resort v. The Ritz-Carlton Hotel Company of Jamaica, 2009 WL 7798803
\end{flushleft}
party that the “overwhelming majority of federal courts . . . have concluded that a binding arbitration clause does not bar a plaintiff from seeking emergency injunctive relief or other provisional remedies in court.”

130 Showing annoyance, the Georgia Court concluded that the law in this area is so well developed that the party’s exclusivity argument that “this Court has no authority to award relief of any kind borders on the sanctionable.”

The Georgia Court is fusing (and possibly confusing) emergency relief with preliminary relief, ignoring the distinction between them. As the discussion in the next section shows, seeking emergency relief before an arbitrator is appointed is distinguishable from seeking preliminary relief after the arbitrator has been appointed. The courts need not intervene if the arbitrator is available for granting preliminary or emergency relief.

B. Emergency Reliefs

Even if law empowers the arbitrator to grant preliminary reliefs, a key structural difference between arbitration and litigation challenges the autonomy paradigm. Courts are perennial institutions available at any time a party needs emergency relief. This is not the case with arbitration. The arbitration panel, consisting of one or more arbitrators, conceived in the arbitration agreement, is unavailable at the time a dispute arises. Parties frequently provide a procedure for appointing the arbitrator. For example, they may subscribe to institutional rules for nominating the arbitrator or designating an appointing authority that would select the arbitrator. Regardless of the procedure provided for the appointment of the arbitrator, the appointment occurs after a dispute has arisen and only upon the request of a party seeking arbitration. Sometimes, the selection of the arbitrator takes time. In many cases, therefore, the arbitrator is unavailable when a dispute arises and emergency relief is needed.

130 Id.
131 Id.
133 “In important high-dollar cases, sophisticated parties are sometimes able to secure temporary relief in court almost immediately, even at night from a judge at home in his or her pajamas.” Christopher R. Drahozal & Stephen J. Ware, Why Do Businesses Use (Or Not Use) Arbitration Clauses, 25 Ohio J. on Disp. Resol. 433, 456 (2010).
The temporality gap between occurrence of a dispute and appointment of the arbitrator forces the party seeking emergency relief to go to the court. The courts are willing to grant emergency relief if “necessary to preserve the status quo and the meaningfulness of the arbitration process.” In such cases, the court is not obstructing or preempting arbitration but stepping in to provide conservatory relief without which arbitration might be undermined. The court provides emergency relief because there is no arbitrator on board to do so.

The autonomy paradigm, however, can be preserved by closing the temporality gap. The parties may construct a mechanism to obtain emergency relief before the arbitrator is appointed. They may name the arbitrator at the time of authenticating the arbitration agreement authorizing the arbitrator to provide emergency relief. Judicial intervention for emergency relief can be avoided if parties have engaged institutional arbitration services and subscribed to special institutional rules that provide relief through the appointment of an emergency arbitrator. In that case, the party approaches the institution, and not the court, for obtaining emergency relief. Many arbitration organizations require parties to specifically adopt emergency relief rules.

If parties wish to preserve the autonomy paradigm, the arbitration agreement needs to include an effective mechanism under which an aggrieved party can obtain emergency relief from the arbitrator. To minimize arbitral litigation, the autonomy paradigm proposes that arbitration organizations integrate emergency relief procedures into general institutional rules for arbitration.

C. Exemplary Reliefs

The autonomy paradigm proposes that the arbitrator have the inherent power to grant punitive damages, attorney’s fees, and other exemplary reliefs in appropriate cases. If the

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136 Am. Arbitration Ass’n, for example, requires parties to subscribe to emergency rules, which are not integrated to general rules of arbitration.
137 Patricia Shaughnessy, Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules, 849 PLI/LIT 119, (2011). The Stockholm Chamber of Commerce (SCC) has adopted emergency rules for urgent relief before the arbitrator is appointed; and the SCC emergency rules are integrated into the SCC rules for arbitration. Id. at 134.
arbitrator is denied the power to grant these remedies, arbitral litigation is inevitable. Parties will need to go to the court to seek and defend claims of punitive damages and attorney’s fees. As noted above, arbitral litigation adds time and cost inefficiencies to dispute resolution.

Granting punitive damages is a power that judges use in select cases to deter egregious behavior. “Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might ‘indulge in similar conduct in the future.” Even though the plaintiff receives punitive damages as a windfall, punitive damages serve the social purpose of deterrence, retribution, and possibly behavior modification. Punitive damages are “a social exemplary remedy, [and] not a private compensatory remedy.” It is a quasi-criminal sanction.

Some courts and commentators argue that arbitrators should not be granted the power to award punitive damages. A New York law specifically prohibits arbitrators from awarding punitive damages, even if agreed upon by the parties; the power to award punitive damages is limited to judicial tribunals. Because punitive damages are unavailable for mere breach of contract, state-appointed judges are best suited to determine whether an award of punitive damages would serve public purpose. Private judges not representing the state or the people or the rule of law, such as arbitrators, are hired to do justice between private parties before them; they cannot be trusted with a punitive power the sole purpose of which is to guard the welfare of the state and the people.

141 Fabiano v. Philip Morris, Inc. 54 AD 3d 146, 150 (2008).
144 Garrity v. Lyle Stuart, 40 N.Y.2d 354, 358 (1976). The court summons theoretical/jurisprudential insights, citing the work of Hans Kelsen, to argue that the state alone has (and should have) monopoly over the exercise of coercive power. Private use of coercion, the court concludes, is barbaric. Id. at 359-60.
Furthermore, punitive damages granted in litigation are subject to judicial and appellate review. In litigation, juries are empowered to award punitive damages. If lay jurors can award punitive damages, one might argue, arbitrators are frequently more qualified than lay jurors to understand the rationale and gravity of punitive damages. However, there is a difference. The trial court and appellate courts may reject a jury award, if the basis or the amount of punitive damages violates the law. Since judicial review of arbitration awards is limited, the argument proceeds, punitive damages arbitral awards may not receive the same systematic judicial review.

The United States Supreme Court allows arbitrators to award punitive damages in arbitration cases involving interstate commerce. Unless arbitration parties exclude the award of punitive damages in the arbitration agreement, the federal arbitration law would preempt state restrictions on the arbitrator’s power to award punitive damages. This ruling, however, is limited in its preemptive reach. It allows parties to agree to exclude punitive damages from arbitration awards. It allows states to prohibit arbitrators from awarding punitive damages in cases not involving interstate commerce. The states, however, may allow the arbitrator to grant punitive damages.

The Uniform Arbitration Act upholds the parity principle and allows the arbitrator to grant punitive damages and other exemplary relief if the law would authorize similar damages and relief involving the same claim in a civil action. To construct further symmetry between litigation and arbitration, the Act requires that the evidence produced at the arbitration hearing justify the award of punitive damages and exemplary relief “under the legal standards otherwise

148 Id. at 59.
150 Unif. Arbitration Act (amended 2000) § 21(a). The Act also allows the arbitrator to award attorney’s fees.
applicable to the claim.”\(^{151}\) This symmetrical standard allows the arbitrator to grant punitive damages and other exemplary relief at par with the court. The arbitrator must consider legal standards and the case law of the relevant jurisdiction and in compliance with the choice of law.\(^ {152}\)

Although parties may preclude the awarding of punitive damages by means of an arbitration agreement, the preclusion raises a red flag. Punitive damages preclusions are frequently embedded in take-it-or-leave-it bargains. In most the cases, the weaker party waives punitive damages benefitting the stronger party most likely to engage in misconduct warranting punitive damages. Courts are reluctant to enforce preclusions on the theory that arbitration is an alternative forum to litigation established under the parity principle.\(^ {153}\) Consequently, the remedies available in litigation ought to be available in arbitration. An arbitration agreement is unconscionable if it precludes an employee from recovering punitive damages and attorney’s fees in anti-discrimination claim.\(^ {154}\)

The parity principle discussed above shores up arbitral autonomy. It empowers the arbitrator to grant preliminary, emergency, and exemplary reliefs, just as a court is empowered to provide such reliefs in litigation. Arbitration is unlikely to be a self-sustaining method of dispute resolution if courts continue to claim monopoly over the granting of these critical reliefs while a dispute is designated for arbitration.

VII. VACATING ARBITRATION AWARDS

The judicial review of arbitration awards poses a systemic threat to the autonomy paradigm for it leads to inevitable arbitral litigation. A losing party against whom an arbitration

\(^{151}\) Id.

\(^{152}\) The United States Supreme Court offers three guideposts in awarding punitive damages. (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).


\(^{154}\) Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83 (2000).
award is rendered may approach the court to vacate the award or challenge its enforcement; in either case, the autonomy paradigm ceases to exist. Confirming an award is a pro-arbitration action, vacating an award is an anti-arbitration action. Vacatur completely nullifies the time and expense invested in, and the outcome produced by, the arbitration process. Vacatur returns parties back to square one with the dispute unresolved. After the vacatur, the parties may attempt to arbitrate the dispute one more time, settle, or may resort to litigation, depending on why the award is vacated.

The arbitration law provides a number of grounds upon which a court may vacate the award. The FAA, the UAA, and the New York Convention, the Panama Convention and other treaties, all provide specific grounds for vacating the award. Judges have added a few more grounds to vacate awards. As a general principle, judges respect arbitral outcomes and do not

155 Distinguish between vacating and non-enforcement. When an award is vacated, it loses its validity and cannot be enforced. However, the mere non-enforcement of an award does not vacate the award. For example, if a country refuses to enforce a foreign award, it is not vacated. The same award may be enforced in another country.

156 “Confirmation is a summary proceeding that converts a final arbitration award into a judgment of the court.” See Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc., 665 F.3d 1091, 1094 n.1 (9th Cir. 2011). Upon confirmation, an award is treated similar to a judgment in a civil action, and may be similarly enforced. Id.

157 The FAA (9 U.S.C. §§ 9-11 (2006)) allows three months after the rendering of the award to vacate an award but reserves a year for seeking court confirmation of the award. After the passage of three months, a party defending a motion to confirm is not allowed to seek vacatur. Taylor v. Nelson, 788 F. 2d 220, 225 (4th Cir. 1986).

158 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 330 U. N. Treaty Ser. 38. A full discussion of the non-enforcement of awards under the Convention is not within the scope of this Article. The Convention allows non-enforcement of foreign awards; it does not vacate foreign awards. Id. art. V.

159 There are regional and global treaties that establish bodies for international arbitration. The Inter-American Convention on International Commercial Arbitration, commonly known as the Panama Convention, is a regional treaty that provides rules for arbitration in the Americas. The European Convention on International Commercial Arbitration (1961) is another regional arbitration treaty. The 1965 Washington Convention is a global treaty that has instituted the International Center for the Settlement of Investment Disputes (“ICSID”), which provides arbitration rules for the settlement of disputes between signatory states and foreign investors.

160 Manifest disregard of law, for example, is a prominent judicially created ground for vacating awards. See discussion in Part VII-B of this Article.
lightly vacate arbitration awards. The “judicial review of an arbitration award is extraordinarily narrow” and "exceedingly deferential."161 Stringent review standards reduce arbitral litigation surrounding the enforcement of arbitration awards. Yet the goal of the autonomy paradigm is to minimize, and possibly eliminate, the need and desire for judicial review of arbitration awards.

The grounds for vacating the award may be grouped in two distinct categories. First, a lawful arbitration award must preserve the process integrity of arbitration. The grounds safeguarding the process integrity of arbitration are nearly universal. Process integrity mandates that an award be vacated if procured by illegal means, including corruption and fraud.162 Undue means employed in the procurement of an award vitiate the integrity of arbitration process.163 Likewise, the arbitrator’s misconduct that prejudices the rights of a party may also compromise the process integrity of arbitration. If the neutral arbitrator is evidently partial in favor of a party, the arbitration process loses integrity. Even if the arbitrator is unbiased, he or she may nonetheless conduct the arbitration hearing in a manner that substantially prejudices the rights of a party. For example, the integrity of an arbitration hearing is questionable, if the arbitrator refuses to consider evidence material to the controversy.164 A substantially defective hearing lacks integrity. Non-arbitrability and blatant violations of law, though substantive questions, may also undermine the process integrity of arbitration. An award may be challenged on the ground that the law (including public policy) forbids the arbitration of claims included in the award165 or that the award was rendered in manifest disregard of law.

163 Undue means the employment of immoral behavior to procure an award. However, meritless arguments made to win an award do not constitute undue means. AG Edwards & Sons, Inc., v. McCollough, 967 F. 2d 1401, 1403-4 (9th Cir. 1997).
164 Tempo Shain v. Bertek, 120 F.3d 16 (2nd Cir. 1997).
165 “A court's refusal to enforce an arbitrator's award on the basis of a violation of public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.” City of Hartford v. Hartford Municipal Employees, 39 A.3d 1146, 1153 (2012). New York Convention specifically provides the non-enforcement of an award if the “subject matter is not capable of settlement by arbitration under the law of [the enforcing] country.” Art V(2)(a).
Second, a lawful arbitration award must preserve the contractual integrity of an arbitration agreement. An award may be vacated if obtained in violation of the arbitration agreement. “Where arbitrators act ‘contrary to express contractual provisions,’ they have exceeded their powers.” 166 As discussed before, the right and obligation to arbitrate chosen disputes are anchored in the arbitration contract, a device by which arbitration parties surrender the right to litigation in favor of arbitration. The arbitration agreement defines the scope of arbitration and empowers the arbitrator to render an award. Logically, therefore, an award cannot be enforced if there was no agreement to arbitrate. In the absence of a valid arbitration agreement, the award-holder had no right to arbitration in the first place. 167 Under a similar logic, an award is vacated if the arbitrator exceeded the powers that the agreement conferred on the arbitrator. For example, the arbitrator cannot render an enforceable award with respect to a claim that parties have excluded from the scope of arbitration.

Note, however, that judicial confirmation or review of an arbitration award is not mandatory. The arbitration law does not require judicial confirmation or review of arbitration awards. If an award is accepted and voluntarily enforced, no judicial confirmation is needed and the autonomy paradigm remains intact. 168 However, a party seeks court confirmation of an award only when the award is likely to remain unsatisfied. Likewise, an unhappy losing party may not comply with the award and seek judicial review for its vacatur.

The availability of judicial review of arbitral awards cannot be abandoned to fortify the autonomy paradigm. However, the autonomy paradigm can be preserved by shifting the award review from courts to arbitration organizations. Already, arbitration organizations provide appellate award review on the same grounds available to courts. 169 Once the parties have used the organizational appellate review of an award, any further review by courts may be foreclosed.

166 Delta Queen Steamboat Co. v. AFL-CIO, 889 F.2d 599, 604 (5th Cir. 1989).
167 However, this ground is unavailable if the party denying the arbitration agreement does not object to the arbitration proceeding in a timely fashion. Unif. Arbitration Act (amended 2000) § 23 (5).
168 However, if the losing party does not accept the award or refuses to comply, the arbitral award needs to be enforced through a court; arbitral awards are not self-enforcing. See Thomas S. Meriwather, Limiting Judicial Review of Arbitral Awards under the Federal Arbitration Act: Striking the Right Balance, 44 HOUS. L. REV. 739, 743-44 (2007).
169 Am. Arbitration Ass’n, optional rules for emergency measures of protection, available online.
This foreclosure is necessary to deter parties from seeking court intervention after the organizational appellate review is complete; for, otherwise, the organizational appellate review will turn into an additional, and perhaps unnecessary, layer in the enforcement of awards.

VIII. ARBITRATION BLACKOUT

Does arbitral autonomy breed a counterculture of quasi-lawlessness shrouded in secrecy, disregard of law, preclusions of remedies, and waivers of rights? The general answer is in the negative. In some cases, however, arbitral autonomy may lead to a quasi-lawless blackout. Consider a MAC embedded in a take-it-or-leave-it bargain. In such a bargain, the weaker party has no negotiating power to modify any feature of the MAC. The MAC may waive class action, punitive damages, and attorney’s fees. The MAC may further state that arbitration proceedings will be confidential and that the arbitrator need not render a reasoned award. Add to these features the limited statutory grounds available to vacate the award rendered in secrecy without providing reasons. Although each provision of the MAC is lawful, the combined effect of provisions produces quasi-lawlessness that hides in the fold of secrecy without arbitral accountability, systemic deterrence, or meaningful judicial scrutiny.

The United States Supreme Court has upheld take-it-or-leave-it bargains containing arbitration as the sole method of dispute resolution, though with a compelling dissenting voice. This judicial concession in favor of MACs must not be construed to conclude that the Court has also discarded or weakened the doctrine of unconscionability. State and federal courts analyze MACs in terms of unconscionability. They administer two-tier analysis. First, they determine whether an arbitration contract is procedurally unfair. Second, whether the substantive bargain of the arbitration contract is unfair. The courts hold arbitration contracts unconscionable only if the combined procedural and substantive unfairness is oppressive. Under this analysis,

172 See, e.g., Kilgore v. KeyBank, 673 F. 3d 947 (9th Cir. 2012).
take-it-or-leave-it arbitration clauses are procedurally unfair since one party imposes arbitration on the other. However, the court would find no unconscionability if terms of arbitration are fair. In procedurally coercive arbitration contracts, therefore, the critical question is to assess substantive fairness of arbitration terms. The academic literature is divided over the issue. Some academics criticize MACs in consumer and employment contracts. Others argue that MACs benefit consumers and employees.

Another genre of MACs tends to circumvent rights and remedies available in litigation. For example, an arbitration agreement may shorten the statute of limitations for filing claims; another may limit the amount of damages to actual damages for breach of contract; yet another may waive federal statutory remedies. Such arbitration agreements are coercive in nature because no rational party will willingly surrender rights and remedies available in litigation. A party with superior bargaining power cannot, therefore, be allowed to use arbitration autonomy to unfairly tilt the playing field in its own favor, dramatically reduce its legal obligations, and deprive the weaker party of rights and remedies that law guarantees in a civil action.

Despite endorsing the lawfulness of MACs, courts are reluctant to endorse class action waivers. The enforceability of class action waivers appears to be a special (touchy) matter that courts mull over with extensive analytical anguish. Courts point out that class action lawsuits are indispensable for vindicating statutory rights. Class action “is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an

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177 This type of arbitration agreement breaches the parity principle discussed in Part VI of this Article.
179 In Re American Exp. Merchant’s Litigation, 667 F. 3d 204, 214 (2012).
individual action.” Courts do not wish to completely outlaw class action waivers; but they want to retain the authority to analyze and rule upon each waiver on its own merit. Class action waivers, therefore, will continue to spawn arbitral litigation.

Critics of the arbitration highlight points of contrast between litigation and arbitration. Litigation is open and accessible to the public; arbitration is frequently confidential and its records are unavailable to the public. Litigation produces judicial opinions justifying orders and judgments; arbitration renders standard awards without supportive rationale. Published judicial opinions make litigation intellectually transparent; unpublished arbitration awards make arbitration relatively opaque. Judicialization of dispute resolution generates legal precedents binding in similar cases; arbitration rarely offers or relies on binding precedents. Most important, law is closely applied in litigation and appellate courts overturn lower court judgments resting on violations of law or abuse of judicial discretion. No such safeguards are available in arbitration where awards cannot be vacated for erroneous understandings or interpretations of statutes and cases. Errors of law may proliferate in an arbitration blackout where arbitrators are not lawyers.

The arbitration blackout would joyously embrace arbitral autonomy, presented in this Article, which minimizes court intervention into arbitration. MACs peppered with preclusion of remedies and waivers of rights would draw strength from the autonomy paradigm that restraints court scrutiny. Businesses and employers, in forcing arbitration on consumers and employees, would welcome arbitral autonomy that promises even less judicial oversight over arbitration than currently available. The autonomy paradigm does not benefit persons desperately looking for jobs, who have little negotiating power to modify boilerplate arbitration clauses implanted in employment contracts. If the autonomy paradigm is a force of good, it cannot be permitted to favor the powerful and the privileged and hurt the weak and the vulnerable. The following

180 Id.
181 Id. at 219.
183 Professor Thomas Stipanowich proposes the establishment of “The Arbitration Fairness Index” to promote fair and effective arbitration of employment and consumer disputes. See Thomas J. Stipanowich, The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective
corrective measures are necessary to ensure that arbitral autonomy does not support arbitration blackout.

A. Arbitration Secrecy

The arbitration blackout is pro-secrecy. Companies and employers prefer confidential arbitration. Secrecy allows businesses to avoid adverse publicity associated with embarrassing discrimination treatments against which employees seek relief. Secrecy “diminishes the likelihood that the success of one claim by a consumer or employee will encourage others like it.” Defenders of arbitration confidentiality, however, point out that even mediations and negotiated settlements are confidential. Arbitration as an alternative method of dispute resolution might lose some of its appeal, defenders argue, if arbitration confidentiality is restricted or outlawed. Some scholars distinguish between privacy and secrecy, though the distinction is elusive; but, even if the distinction is conceptually available, arbitration rules may preempt the distinction requiring that arbitration deliberations be both private and secret.

Certainly, there are degrees of secrecy, some benign, others unconscionable. The autonomy paradigm does not protect unconscionable secrecy that harms public interest; it allows

Arbitration of Employment and Consumer Disputes, 60 U.KAN.L.REV.985 (2012). “Given the fact that binding arbitration serves as the adjudicative backdrop for consumer disputes or employer-employee conflict, the choice of arbitration and the kind of justice available under arbitration agreements may be every bit as important as consumer warranties and other substantive rights and remedies set forth in the contract.” Id. at 1069.


185 Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, 7 VA. J.L. & TECH. 4, 8-9 (2002).

186 Christopher R. Drahozal, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 417-18 (2002) (distinguishing between privacy and confidentiality). For example, arbitration proceedings are conducted in privacy but the information is released after the proceedings are concluded. In such cases, the arbitration proceedings are private but not secret. It is however likely that not all information is released to the public. Privacy thus acts as a forerunner of secrecy.


http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap02.htm#r15
confidential arbitration in some but not in all cases. The purpose of autonomy paradigm is to minimize court intervention and not to maximize secrecy of arbitration proceedings. Secrecy is not an indispensable attribute of arbitral autonomy. If arbitration secrecy is harmful to public interest, the autonomy paradigm requires that arbitration proceedings be open and arbitration records and outcomes be made public.\footnote{Amy J. Schmitz, \textit{Untangling the Privacy Paradox in Arbitration}, 54 KAN. L. R. 1211, 1238-40 (2006)(arguing for public disclosure of arbitration proceedings involving public health, public safety, and other public concerns).}

Arbitration secrecy is unconscionable when it exclusively benefits one arbitration party and hurts the other. In \textit{Ting}, for example, the Consumer Services Agreement (CSA), an adhesion contract, which AT&T offered its customers, restricted numerous rights and remedies in the event of a dispute with AT&T.\footnote{Ting v. AT&T, 319 F. 3d 1126, 1133.} The CSA mandates secret arbitration; it bans class action; and, it limits AT&T’s liability for non-negligence claims to the amount of service charges and precludes the company’s liability for punitive, reliance, special, and consequential damages. The CSA reserves benefits for AT&T and burdens for consumers. In view of this imbalance, the United States Court of Appeals concluded that secrecy provisions of the CSA were unconscionable.\footnote{Id., at 1151-52.}

The \textit{Ting} Court noted more broadly that secrecy provisions, though facially neutral, favor companies rather than individuals.\footnote{Id.} Companies, as repeat players\footnote{One court articulated the repeat player effect with the following observation: “The fact an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee. These advantages include knowledge of the arbitrators’ temperaments, procedural preferences, styles and the like…” Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 678-9 (2002).} in arbitration, accumulate a body of knowledge unavailable to consumer-plaintiffs due to arbitration secrecy. As repeat players, companies master the issues, develop winning arguments, and know what works, all which is unknown to new plaintiffs who might request arbitration for similar grievances. The Court noted that “the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against (the company).” Thus, secrecy provisions included in arbitration
agreements “gag” critical information from reaching future plaintiffs, tilting arbitration in favor of companies.  

With respect to secrecy provisions, the autonomy paradigm proposes the parity principle under which arbitration may be confidential to the extent a civil action involving the same issues protects confidentiality. For example, a company may shield trade secrets from disclosure. The United States Supreme Court has treated confidential business information, including trade secrets, as private property that cannot be converted into public property through forced disclosure. Likewise, privileged information recognized in civil action may be similarly protected in arbitration proceedings. However, companies cannot use arbitration to shield patterns of wrongdoing that they cannot protect in litigation. A cloak of confidentiality in all aspects of arbitration will be rarely available.

**B. Quasi-Lawlessness**

The arbitration blackout nurtures quasi-lawlessness. As noted earlier, arbitration awards cannot be vacated for erroneous applications or interpretations of law. Legal error as a ground for vacatur is not listed in the FAA or the UAA. Legal error is tolerated because arbitrators, while they bring valuable trade-related expertise to dispute resolution, may or may not be trained in law or adjudication. In choosing arbitration, parties suffer the risk that the arbitrator might misunderstand and misinterpret the applicable law. Vacating awards for legal errors would undermine arbitration as an alternative method of dispute resolution. The United States Supreme Court has further foreclosed legal error as a ground for vacatur, holding that arbitration parties cannot, by means of a contract, expand the statutory scope of judicial review to include legal errors.

Some courts vacate arbitration awards rendered in manifest disregard of law, a non-statutory standard of judicial review. In 1953, the United States Supreme Court invented the manifest

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193 Id.
197 Circuits are split over whether the manifest disregard of law ground is valid. The Second and Ninth Circuits favor survival. See Stolt-Nielsen SA v. Animal Feeds Int'l Corp., 548 F.3d 85, 93-95 (2d Cir. 2008); citing Comedy Club
disregard of law standard, declaring “that a failure of the arbitrators to decide in accordance with (the law or) . . . the interpretations of the law by . . . arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.” The standard opposes the arbitration blackout of rendering legally vacuous decisions. However, the manifest disregard of law sets a high bar; it “means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law.” The standard is met only if the arbitrator understands the law and yet renders a decision contrary to the law. The “manifest” part of the standard obliges the party challenging the award to show that the disregard of law is more than mere legal error. In some cases, the reasoning of the award might itself reveal the manifest disregard of law; while in other cases, the arbitrator’s conduct during the arbitration proceedings might evidence the arbitrator’s intentional dismissal of law.

The autonomy paradigm supports the manifest disregard of law as a valid standard for vacating arbitration awards rendered under MACs; thus, it suppresses the blackout that enforces the MACs arbitration awards regardless of their compliance with law. The MACs weaker parties rarely bargain for arbitration to avoid the applicable law. Almost always, arbitration agreements contain choice of law clauses that would govern in resolving substantive issues. The standard may or may not be useful to vacate awards related to freely negotiated arbitration clauses between sophisticated parties. The manifest disregard of law standard is most beneficial to review awards rendered under MACs where the weaker party does not negotiate

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203 See, e.g., Lukowski v. Dankert, 184 Wis.2d 142, 151, 515 N.W.2d 883 (1994).
terms of the arbitration agreement. In MACs, the weaker party failing to prevail in arbitration needs to know the reasons under law for which the arbitral decision is rendered. However, the standard is meaningful only if arbitrators write reasoned opinions supporting awards.

C. Reasonless Awards

The arbitration blackout prospers when arbitrators fail to render reasoned awards. Standard arbitration awards are reasonless awards; they simply announce the result without providing supportive reasoning. Reasonless awards, if made public, have no informational or precedential value. Arbitration parties themselves may not know why they have lost or won their competing claims. An arbitral decision is transparent when it is rendered in writing and includes supportive reasons. If no reasoning is provided and the award simply states that, say, the defendant is liable for a certain amount of money with interest, parties as well as courts cannot determine which facts, law, or legal analysis the arbitrator relied on to reach the award. This minimalist methodology of rendering bare awards without stating supportive analysis is in sharp contrast to adjudication where judicial decisions furnish the facts, applicable law, and legal reasoning, including public policy, supporting the judgment.

Institutional rules designed for arbitration may or may not support decisional transparency. Most institutions allow arbitration parties to opt out of reasoned awards. The AAA arbitration rules do not require that the arbitrator “render a reasoned award.” The arbitrator delivers the award in writing but without furnishing the facts or law or other reasons that support the award. The London Court of International Arbitration Rules furnish a default rule under which the arbitrator states the reasons upon which the award is based. However, arbitration parties may

204 See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) (holding that arbitrators have no obligation to the court to give their reasons for an award).
206 Morgan Keegan v. Pessel, Civil Action No. 11-cv-03293-RPM. (2012)(declining to vacate the award).
207 Am. Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures, R-42(b) (2009). Arbitration parties may change this default rule and agree to have a reasoned award. They must request in writing for a reasoned award prior to appointment of the arbitrator. The arbitrator has the discretion to deviate from the default rule if the arbitrator determines that a reasoned award is appropriate. Id.
208 LCIA, Art. 26.1 http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article26
change the default rule by agreeing otherwise in writing. The ICC rules, however, require that the arbitrator state the reasons upon which the award is based. There is nothing in the ICC rules under which arbitration parties may modify the rule and opt for an award without supportive analysis.

Unlike judicial opinions, reasoned awards may be written in a variety of ways. A standard judicial opinion contains key facts, issues, relevant law, legal analysis (parties’ arguments accepted and parties’ arguments rejected), and the order or judgment. Some opinions are more elaborate than others. Reasoned awards may be written following the format of a standard judicial opinion. Mostly, they are not. The amount of explanation offered in reasoned awards may vary from short analysis to detailed “findings of facts and conclusions of law.” However, courts, reluctant to recognize new grounds for vacatur, refuse to vacate awards if the arbitrator’s explanation supporting the award is substandard.

The autonomy paradigm embraces the ICC rule that requires arbitrators to render reasoned awards in cases founded on MACs. Parties may request that the arbitrator provide the explanation of facts and law critical to rendering of the award. The rendered award, however, may not meet the analytical standards of a good judicial opinion. The autonomy paradigm, which strives to minimize court intervention at all stages of arbitration, opposes vacating awards for inadequate supportive analysis.

What good is the reasoned award, one might ask, if the quality of supportive analysis is immune from judicial review? Reasoned awards provide numerous benefits other than the basis for judicial review. Reasoned awards reflect the arbitrator’s expertise and ability enabling future arbitration parties to make more informed decisions in hiring arbitrators.

\[\text{References}\]

209 ICC Rules, Art. 31 (2).
211 Id.
may provide reliable clues if the arbitrator exceeds the powers or engages in manifest disregard of law. If reasoned awards are regularly substandard in supportive analysis, arbitration organizations may face market accountability. The market pressure may force arbitration organizations to train arbitrators in writing more effective awards. The availability of published reasoned awards, like that of judicial opinions, will establish arbitration jurisprudence providing informative guidance in future cases. Judges too may benefit from reading reasoned awards in cases where arbitrators have trade-specific expertise that judges do not have.

D. Pro-Arbitration Exuberance

State skepticism of arbitration makes most sense with respect to MACs embedded in take-it-or-leave-it bargains. State legislatures make rational and moral choices when they pass legislation to protect consumers against corporate misconduct. For example, businesses disfavor class action lawsuits. Ordinarily, consumers while buying goods and services retain the right to a class action lawsuit. Businesses, however, will not do business unless consumers sign arbitration agreements and waive class actions. Thus arbitration has been turned into a business tool to circumvent class actions. A state legislature does no wrong if it outlaws class action waivers in arbitration agreements. This legislative choice reflects the reality of markets in which consumers do not freely sign class action waivers. The state legislature has every right, indeed a duty, to correct market conduct that undermines consumer rights.

the parties should be vigilant at the front end to obtain credible reasoned awards rather than relying on judicial safety net of vacatur).

214 Labor arbitral awards are most frequently published reasoned awards that provide valuable information to unions and employers.


218 Id.
Pro-business judges use preemptive power under the FAA to provide relief to businesses that they cannot obtain from state legislatures. Businesses wield money and influence in democratic processes at both federal and state levels. Business lobbies may petition a state legislature against present and future barriers to arbitration. If the legislature, despite lobbying, retains an old barrier or enacts a new barrier to arbitration, the legislative action embodies the will of the people of the state. Pro-business federal judges should respect state arbitration policy choices. They should not grant businesses an arbitration favor that the state legislature has denied. Nor should they use the power of preemption to dismantle “hundreds of state common law claims” and regulations made to protect “consumers and workers against corporate misconduct.” 219 It is ironic that conservative judges, otherwise vociferous defenders of state rights, abandon their ideology of state rights in arbitration.

The autonomy paradigm views pro-arbitration exuberance with caution and skepticism. Pro-business federal judges, enamored with arbitration, are predisposed to strike down state barriers to arbitration under the now worn-out slogan that state barriers are vestiges of “judicial prejudice against arbitration.” 220 Surely, centuries ago, common law courts were reluctant to enforce predispute arbitration agreements. There is a sea-change, however, between the so-called “historical prejudice” of common law judges and rational policy choices that elected state legislatures make after due democratic deliberations. To protect consumers and employees, state legislatures may exclude certain matters from the scope of arbitration. Federal courts need to be careful, if not reluctant, in preempting state legislation that refuses to ride the pro-business arbitration bandwagon.

The autonomy paradigm endorses Congressional efforts to oppose the unconscionability of MACs. 221 State judges can also undertake a more aggressive approach to reviewing MACs for unconscionability. 219 William E. Forbath, The Will of the People? Pollsters, Elites, and Other Difficulties, 78 GEO. WASH. L. REV. 1191, 1203 (2010).

220 AT&T v. Concepcion, 131 S. Ct. 1740, 1747 (2011) (holding that the FAA preempted the California law barring the enforcement of class action waivers in consumer contracts).

221 The autonomy of arbitration welcomes Congressional efforts to regulate CACs. See Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). This bill would amend the Federal Arbitration Act to include a provision stating: “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.” S. 987 § 402(a).
their compliance with fairness and freedom of contract. If pro-business federal judges do not dampen their pro-arbitration exuberance in upholding MACs, they will further entrench the arbitration blackout of quasi-lawlessness.222

IX. CONCLUSION

The autonomy of arbitration proposed in this Article minimizes court intervention into arbitration proceedings and outcomes. Arbitration’s efficacy as an alternative method of dispute resolution is dramatically increased when the arbitrator enjoys the same powers as does the trial court in litigation. The arbitration law recognizes the arbitrator’s procedural powers to order discovery, issue injunctions, and issue subpoenas for the attendance of witnesses, etc.223 The law also recognizes the arbitrator’s powers to grant punitive damages, attorney’s fees, and other exemplary relief remedies. In order to further fortify the autonomy paradigm, parties may authorize the arbitrator to decide questions of the existence, validity, and enforceability of the arbitration agreement, including questions of arbitrability arising under fractional arbitration. Parties may subscribe to emergency procedures of an arbitration organization to eliminate the need to go to court for obtaining relief before the arbitrator is selected. Likewise, parties may opt for the appellate procedures of arbitration organization to review the legality and enforceability of arbitration award. Under the combined effect of powers arising from arbitration law and arbitration agreement, arbitral litigation can be minimized.

Arbitral autonomy refuses to support arbitration blackout that promotes deviations from legal values critical to the maintenance of fairness and justice. Specifically, the MACs threaten the integrity and morality of arbitral autonomy. These clauses are embedded in take-it-or-leave-it bargains to undermine the right to class action, punitive damages, and other remedies. The MACs, coupled with arbitration secrecy and lack of reasoned awards, establish a regime of


223 Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd., 879 F. Supp. 878 (N.D. Ill. 1995) (holding that arbitrator had the power under FAA to subpoena a third party to produce documents and to testify at a deposition); Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994) (holding that because the burden was minimal, the nonparty would have to produce documents pursuant to arbitrator's subpoena under FAA)."
dispute resolution detrimental to arbitral autonomy. If the MACs are made immune from judicial scrutiny, arbitral autonomy will be disparaged as a jurisprudential construct that favors big guys, hides corporate misconduct, and harms the weak and the vulnerable.