Article

Pirate Arbitration

David Horton†

INTRODUCTION

In August 2019, Ava Teverbaugh filed a motion to confirm an arbitration award in federal court in Illinois.[1] Teverbaugh alleged that she had prevailed on a claim against her mortgage lender, Lima One Capital, in a hearing administered by the Sitcomm Arbitration Association (SAA).[2] Teverbaugh submitted the award, which ordered Lima One to pay her $327,600,[3] and a declaration authenticating it.[4] When Lima One did not appear, the court granted her request.[5]

But then the court took a second look at the award. It was—as another federal judge would later proclaim—"unlike any other [that] this [c]ourt has ever seen."[6] Most arbitral decisions are concise, but the ruling spanned nineteen pages[7] and consisted of "a bizarre jumble of inconsistent, nonsensical word salad."[8] For example, in a con-

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† Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law.

1. *See* Motion to Confirm Arbitration Award, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Aug. 14, 2019) (on file with author).

2. *See* Memorandum in Support of Motion to Confirm Arbitration Award at 1, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Aug. 14, 2019) (on file with author) [hereinafter Teverbaugh Memorandum]; Letter from Rankin Blair to Ava Teverbaugh, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Oct. 8, 2019) (on file with author) (referencing a dispute over real property that was the basis for the arbitration).

3. *See* Teverbaugh Memorandum, *supra* note 2, at 6–25.

4. *See* Affidavit, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Aug. 14, 2019) (on file with author).

5. *See* Notification of Docket Entry, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Sept. 24, 2019) (on file with author).

6. U.S. Bank v. Nichols, No. 19-CV-482-JED-FHM, 2019 WL 4276995, at *3 (N.D. Okla. Sept. 10, 2019).

7. *See* Teverbaugh Memorandum, *supra* note 2, at 6–25.

8. *U.S. Bank*, 2019 WL 4276995, at *2.

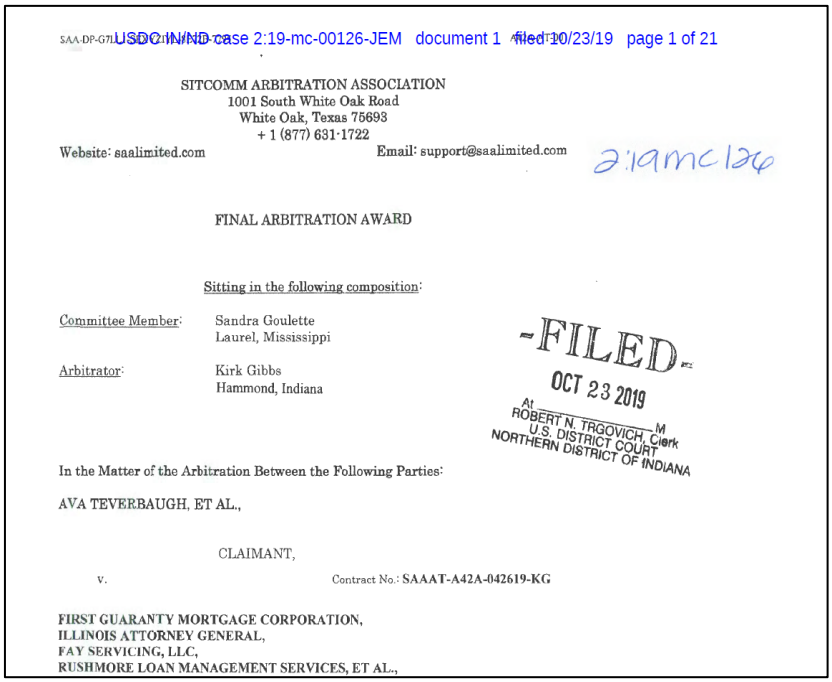
fusing passage, the arbitrator held that Teverbaugh had offered to arbitrate her cause of action and that Lima One had accepted her proposal by silence:

> [T]he Claimant and the Respondent(s) entered into a written, self-executing, binding, irrevocable, contractual agreement coupled with interests, for the complete resolution of their misconvictions and other conflicts respecting their previous relationship. The Respondent(s) made an attempt to change the terms of that contractual agreement and the Claimant presented a counter offer or conditional acceptance of the offer to the Respondent(s). The record clearly documents that the Respondent(s) have failed to properly respond . . . whereby such nonresponse would equate to tacit acquiescence . . . .[9]

The award's analysis of the merits was even more alarming. It did not mention the underlying facts. It cited a string of irrelevant rules, like the Tucker Act[10]—an 1877 statute that partially waived the federal government's sovereign immunity[11]—and made cryptic references to the Uniform Commercial Code,[12] trusts and estates law,[13] copyright registration,[14] and a "NATIONAL BANKING HOLIDAY."[15] Finally, the arbitrator found Lima One liable for "depriving [Teverbaugh] of . . . The Pursuit of Happiness [sic] and the enjoyment of life,"[16] and threatened to impose punitive damages on the company if it did not pay her within thirty days.[17]

9. Teverbaugh Memorandum, *supra* note 2, at 9.
10. *See id.*
11. 28 U.S.C. §§ 1346(a), 1491.
12. *See* Teverbaugh Memorandum, *supra* note 2, at 11.
13. *See id.* at 20.
14. *See id.* at 13.
15. *Id.* at 17.
16. *Id.* at 8.
17. *Id.* at 20.

Figures 1-2: Excerpts from Teverbaugh's SAA Awards



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SITCOMM ARBITRATION ASSOCIATION
1001 South White Oak Road
White Oak, Texas 75693
+ 1 (877) 631-1722

Website: saalimited.com Email: support@saalimited.com

2:19mc126

FINAL ARBITRATION AWARD

Sitting in the following composition:

Committee Member: Sandra Goulette
Laurel, Mississippi

Arbitrator: Kirk Gibbs
Hammond, Indiana

FILED
OCT 23 2019
At
ROBERT N. TRGOVICH, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

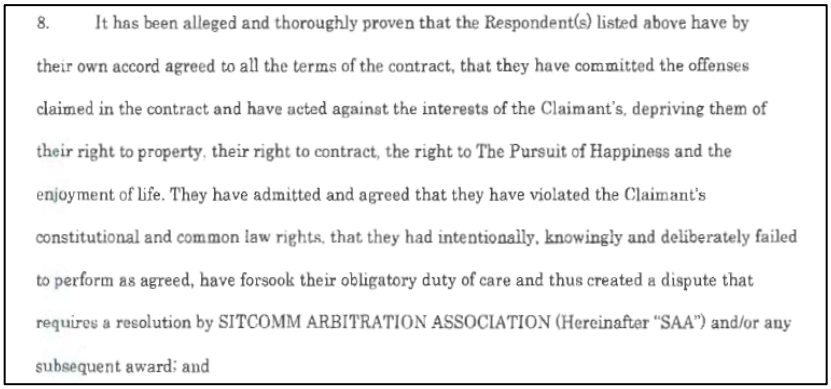
In the Matter of the Arbitration Between the Following Parties:

AVA TEVERBAUGH, ET AL.,

CLAIMANT,

v. Contract No.: SAAAT-A42A-042619-KG

FIRST GUARANTY MORTGAGE CORPORATION,
ILLINOIS ATTORNEY GENERAL,
FAY SERVICING, LLC,
RUSHMORE LOAN MANAGEMENT SERVICES, ET AL.,



8. It has been alleged and thoroughly proven that the Respondent(s) listed above have by their own accord agreed to all the terms of the contract, that they have committed the offenses claimed in the contract and have acted against the interests of the Claimant's, depriving them of their right to property, their right to contract, the right to The Pursuit of Happiness and the enjoyment of life. They have admitted and agreed that they have violated the Claimant's constitutional and common law rights, that they had intentionally, knowingly and deliberately failed to perform as agreed, have forsook their obligatory duty of care and thus created a dispute that requires a resolution by SITCOMM ARBITRATION ASSOCIATION (Hereinafter "SAA") and/or any subsequent award; and

These jarring details prompted the court to vacate its original order.[18] Eventually, the judge denied Teverbaugh's motion, reasoning that she had failed to "provide[] any details about the nature of the arbitration forum or [the] . . . arbitration procedure[s]."[19]

Yet Teverbaugh was not done trying to convert SAA awards into judgments. In October 2019, she filed a motion to confirm the same arbitration decision with another judge in Illinois, changing the plaintiff from herself to "A.M.T. Design."[20] Two weeks later, she filed a third request to enforce the ruling in Mississippi.[21] There, she won an entry of default against Lima One until the court reconsidered due to its "misgivings that there is a valid agreement and award in the case."[22] Finally, while these matters were pending, Teverbaugh sought judicial approval in both Illinois and Indiana of a different SAA decision granting her more than $600,000 in damages.[23] Although this award was supposedly issued by a different arbitrator, it was a nearly-verbatim copy of the ruling against Lima One, including the references to the Tucker Act, the "Pursuit of Happiness," and the threat of awarding punitive damages in the future.[24]

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Candy Richardson sued General Motors after being injured in an accident.[25] The parties reached a structured settlement that called

18. *See* Notification of Docket Entry, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Oct. 2, 2019) (on file with author).

19. *See* Order at 3, Teverbaugh v. Lima One Cap., LLC, No. 1:19-cv-05482 (N.D. Ill. Oct. 23, 2019) (on file with author).

20. *See* Affidavit, A.M.T. Design v. Lima One Cap., LLC, No. 1:19-cv-06692 (N.D. Ill. Oct. 9, 2019) (on file with author).

21. *See* Motion to Confirm Arbitration Award, Teverbaugh v. Lima One Cap., LLC, No. 2:19-mc-00159-KS-MTP, 2020 WL 448259 (S.D. Miss. Jan. 28, 2020).

22. Teverbaugh v. Lima One Cap., LLC, No. 2:19-mc-00159-KS-MTP, 2020 WL 448259, at *2 (S.D. Miss. Jan. 28, 2020).

23. *See* Memorandum in Support of Motion to Confirm Arbitration Award at 3, Teverbaugh v. First Guar. Mortg. Corp., No. 1:19-cv-05485 (N.D. Ill. Aug. 14, 2019) (on file with author); Final Arbitration Award, Teverbaugh v. First Guar. Mortg. Corp., No. 2:19-mc-00126-JEM (N.D. Ind. Oct. 23, 2019) (on file with author).

24. *Compare* Memorandum in Support of Motion to Confirm Arbitration Award at 4, 5 Teverbaugh v. First Guar. Mortg. Corp., No. 1:19-cv-05485 (N.D. Ill. Aug. 14, 2019) (on file with author), *with* Final Arbitration Award at 4, 5, Teverbaugh v. First Guar. Mortg. Corp., No. 2:19-mc-00126-JEM (N.D. Ind. Oct. 23, 2019) (on file with author).

25. *See* Symetra Life Ins. Co. v. Rapid Settlements Ltd., No. H-05-3167, 2007 WL

for Richardson to receive $1,081 per month for the rest of her life.[26] But later, Richardson changed her mind and decided that she wanted to receive the proceeds in one lump sum. She signed a contract with a factoring company, Rapid Settlements, in which she transferred $69,646 worth of future payments in return for $11,200 cash.[27]

But the deal soon hit a roadblock. Because factoring companies are infamous for exploiting tort victims, they are heavily regulated.[28] Forty-nine jurisdictions, including Richardson's home state of Texas, have passed Structured Settlement Protection Acts (SSPAs).[29] These laws condition the validity of a sale of structured settlement funds on a court finding that the transaction "is in the best interests of the [tort victim]."[30] A Texas trial court refused to approve the agreement between Rapid Settlements and Richardson.[31] The judge reasoned that Richardson needed the regular infusions of income "because she was not married, had three dependent children, did not have a job, had no means of support other than her structured settlement payments, and owed significant medical and credit card bills."[32]

However, Rapid Settlements found another way to get what it wanted. With Richardson's consent, it initiated an arbitration against her for breach of contract.[33] The arbitrator, who was handpicked by Rapid Settlements, entered a decision that was identical to the exchange that the court had rejected: he awarded Richardson $11,200 cash but also found her liable for $69,646 in future settlement payments.[34] Rapid Settlements then persuaded a different Texas trial court to confirm the award, transforming it into a judgment.[35]

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Abraham Inetianbor borrowed $2,525 over the Internet from Western Sky Financial LLC at an annual interest rate (APR) of

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114497, at *5 (S.D. Tex. Jan. 10, 2007), *aff'd*, 775 F.3d 242 (5th Cir. 2014).

26. *See id.*

27. *See id.* at *1, *5.

28. *In re* Fee, No. 06 CV 1423, 2006 WL 3478944, at *4–5 (Pa. Ct. Com. Pl. June 30, 2006).

29. *See* DANIEL W. HINDERT, JOSEPH JULNES DEHNER, & PATRICK J. HINDERT, STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS § 1.02 [6][b][ii] (2021).

30. *Symetra Life Ins. Co.*, 2007 WL 114497, at *3.

31. *See id.* at *5.

32. *Id.* at *6.

33. *See id.*

34. *See id.*

35. *Id.* at *7.

135%.[36] On paper, Western Sky was owned by Martin Webb, a member of the Cheyenne River Sioux Tribe.[37] But in reality, the company was a front for a California payday lender called CashCall.[38] Shielded by tribal sovereign immunity, Western Sky would lend money at illegal APRs and immediately transfer the loans to CashCall, which reaped the profits.[39] Inetianbor filed a lawsuit alleging that CashCall had violated consumer protection statutes and wrongly flagged his account as delinquent, ruining his credit score.[40]

However, Western Sky's arbitration regime was a microcosm of its under-the-table business model. For starters, it disclaimed the entire American legal system, stating that it was subject "to the exclusive laws and jurisdiction of the Cheyenne Sioux Tribe" and that "no other state or federal law or regulation shall apply."[41] Similarly, it mandated that the arbitrator be a tribal representative and follow the tribe's consumer dispute rules.[42] But when Inetianbor tried to file a proceeding, he learned that the tribe "'does not authorize [a]rbitration"[43] and that "tribal consumer dispute rules simply do not exist."[44]

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As is well known, forced arbitration is a hallmark of American civil justice. In 1925, Congress passed the Federal Arbitration Act (FAA) to abolish ancient strands of the common law that invalidated pre-dispute arbitration clauses.[45] In the late twentieth century, the U.S. Supreme Court vastly expanded the FAA's scope, holding that it

36. *See* Inetianbor v. CashCall, Inc., No. 13-60066-CIV, 2013 WL 1325327, at *1 (S.D. Fla. Apr. 1, 2013).

37. *See* Chris Morran, *Online Payday Lender Can't Hide Behind Western Sky's Tribal Affiliation*, CONSUMERIST (Sept. 2, 2016), https://consumerist.com/2016/09/02/online-payday-lender-cant-hide-behind-western-skys-tribal-affiliation [https://perma.cc/JM5V-DB3A].

38. *See id.*

39. *See id.*

40. *See Inetianbor*, 2013 WL 1325327, at *1.

41. Inetianbor v. CashCall, Inc., 923 F. Supp. 2d 1358, 1360 (S.D. Fla. 2013).

42. *Inetianbor*, 2013 WL 1325327, at *3.

43. *Id.* at *1.

44. Inetianbor v. CashCall, Inc., 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013), *aff'd*, 768 F.3d 1346 (11th Cir. 2014).

45. *See* Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14).

embodies a "liberal federal policy favoring arbitration agreements."[46] As scores of companies placed arbitration clauses in their contracts, "alternative" dispute resolution became "a phenomenon that pervade[s] virtually every corner of the daily economy."[47] Then, in the 2010s, the Roberts Court decided a rash of cases that made arbitration clauses into *de facto* waivers of class action rights[48] and allowed drafters to delegate important questions about the arbitration itself to arbitrators.[49] Not surprisingly, recent studies have found arbitration provisions in tens of millions of consumer and employment contracts.[50]

The Court's "arbitration revolution" has sparked decades of heated debate.[51] The talking points on both sides are familiar. On the one hand, businesses and their allies contend that private dispute resolution is faster and cheaper than litigation.[52] As the U.S. Chamber

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46. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

47. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008).

48. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (prohibiting courts from interpreting arbitration clauses that do not expressly permit class actions to allow such proceedings); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that judges cannot deem class arbitration waivers to be unconscionable); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013) (extending *Concepcion* to alleged violations of federal statutes); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (reversing the National Labor Relations Board's determination that class arbitration waivers violate the National Labor Relations Act).

49. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 71–72 (2010) (permitting an arbitrator to decide whether the agreement to resolve the merits of the case was fair).

50. *See CFPB Study Finds that Arbitration Agreements Limit Relief for Consumers*, CONSUMER FIN. PROT. BUREAU (2015), https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf [https://perma.cc/H76H-Y8GM] (finding arbitration clauses in ninety-nine percent of payday loans and ninety-two percent of prepaid card agreements); Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use
-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60
-million-american-workers [https://perma.cc/2K6B-K2GS] (concluding that sixty million workers are subject to forced arbitration provisions).

51. David L. Noll & Zachary D. Clopton, *An Arbitration Agenda for the Biden Administration*, 2021 U. ILL. L. REV. ONLINE 104, 104.

52. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (arguing that arbitration facilitates low value claims that attorneys would not pursue in court); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 107 (2017) (describing "arbitration's

of Commerce argued in a recent letter to Congress, arbitration "benefits consumers, small businesses and employees" by allowing them to resolve conflict without having to slog through the formalities of the court system.[53] But on the other hand, plaintiffs' lawyers, public interest organizations, and most legal academics argue that forced arbitration suppresses claims.[54] According to this cohort, the real reason firms use arbitration is to place roadblocks in the path of plaintiffs, discourage attorneys from taking cases, and create a "legal lockout."[55]

Conversely, this Article explores a different consequence of the FAA's rise. Some individuals and entities exploit the Court's arbitration caselaw to accomplish goals that have nothing to do with streamlining dispute resolution or engaging in "do-it-yourself tort reform."[56] Instead, these parties use arbitration to *break the law*. Because courts must "'rigorously enforce' arbitration agreements according to their terms"[57] and confirm awards that contain "serious,

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tendency to reduce process costs relative to litigation").

53. *Coalition Letter on H.R. 963, and S. 505, the "Forced Arbitration Injustice Repeal (FAIR) Act"*, U.S. CHAMBER COM. (May 18, 2021), https://www.uschamber.com/letters-congress/coalition-letter-hr-963-and-s-505-the-forced-arbitration-injustice-repeal-fair-act [https://perma.cc/LKW4-PGWG].

54. For some of the pioneering articles about forced arbitration, see David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; and Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH U. L.Q. 637, 637 (1996). For critiques of the Roberts Court's FAA jurisprudence, see Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 365 (2018); David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017); and Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 133 (2011).

55. Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 500 (2017) (quoting Richard Cordray, Dir., Consumer Fin. Prot. Bureau, *Prepared Remarks at the Field Hearing on Arbitration Clauses* (May 5, 2016), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses [https://perma.cc/P29C-96FQ]).

56. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249 (2009).

57. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

'improvident, [or] even silly' errors,"[58] the process can function as an armor-plated vehicle for illegal schemes. Indeed, it allows wrongdoers to commit extortion, pursue unlawful claims, and rip people off. I call this phenomenon "pirate" arbitration.

Pirate arbitration diverges from forced arbitration for two main reasons. First, critics assert that forced arbitration *indirectly* undermines the rule of law by creating "a governance scheme that is more favorable to the firm."[59] But reasonable minds can differ on whether forced arbitration reduces the volume of claims, the odds of a plaintiff victory, or average damage awards relative to litigation. In contrast, pirate arbitration transcends this chin-stroking debate by featuring parties who seek to accomplish *flagrantly* illegal objectives. Second, forced arbitration supposedly serves as a fig leaf for conduct that is external to dispute resolution, such as consumer fraud or employment discrimination. Conversely, in most forms of pirate arbitration, *arbitration itself* is how wrongdoers break the law.

Consider Eva Teverbaugh's filings. Since mid-2019, courts have been flooded with motions to confirm awards stemming from arbitrations that never happened.[60] Many of these decisions have come from the SAA, which claims to be an arbitration administrator like the American Arbitration Association (AAA) and JAMS, but issues fake awards against victims "despite no arbitration hearing having ever been held, no arbitration provision existing that permits the parties to arbitrate their claims, and without proper notice or an opportunity for any party to be heard."[61] Likewise, other bogus arbitration providers have emerged, such as the Healing My People Arbitration Association (HMP), which sells awards to monthly subscribers,[62] and Dalwickman Arbitration Services (DAS), which purportedly has religious ties and requests a "donation" to generate a ruling.[63]

Likewise, as Rapid Settlements recognized, arbitration can validate illicit deals. In general, "courts are not involved in the oversight

58. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

59. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 33 (2013).

60. *See infra* text accompanying notes 209–30.

61. PennyMac Loan Servs., LLC v. Sitcomm Arb. Ass'n, No. 2:19-CV-193-KS-MTP, 2020 WL 1469458, at *1 (S.D. Miss. Mar. 26, 2020).

62. *See* Orman v. Cent. Loan Admin. & Reporting, No. CV-19-04756-PHX-DWL, 2019 WL 6841741, at *7 n.5 (D. Ariz. Dec. 16, 2019).

63. Complaint at 5, Ford Motor Credit Co. v. Rocha, No. 4:19-cv-00098-DN-PK (D. Utah Nov. 26, 2019) (on file with author).

or approval of contracts."[64] But a handful of "suspect agreements"—such as certain settlements, assignments of lottery winnings, and sales of assets by nonprofits—either raise fairness concerns or impact third parties and do not become effective unless a judge ratifies them.[65] However, when a court vetoes a proposed exchange, some parties have found a workaround. They submit a fabricated dispute to a cherrypicked arbitrator who enters an award that is identical to the unauthorized transaction.[66]

Finally, the arbitration clauses of "rent-a-tribe" lenders like Western Sky are part of their elaborate plans to "violate[] a host of state and federal . . . laws."[67] These entities are funded and controlled by conventional payday lenders, but pass themselves off as Native American firms to try to invoke sovereign immunity.[68] Their arbitration regimes are equally opportunistic: they select biased arbitrators, disclaim U.S. law, and mandate the application of phantom tribal legal principles.[69] Thus, their efforts go beyond "cases involving mere disincentives to pursue arbitral relief"[70] by "manufactur[ing] a parallel universe in which state and federal law claims are avoided entirely."[71]

The Article then argues that pirate arbitration may become a more serious problem. Admittedly, the legal system has largely managed to keep these schemes in check. For example, courts have uniformly vacated fraudulent awards on the grounds that the victim never agreed to arbitrate[72] or under section 10 of the FAA, which strikes down arbitral rulings that were "procured by corruption, fraud, or undue means."[73] Similarly, courts have enjoined Rapid Settlements from using arbitration to end run SSPAs and invalidated

64. 64th Assocs., L.L.C. v. Manhattan Eye, Ear & Throat Hosp., 813 N.E.2d 887, 889 (N.Y. 2004).

65. *See infra* text accompanying notes 258–62.

66. *See infra* text accompanying notes 275–88.

67. Hayes v. Delbert Servs. Corp., 811 F.3d 666, 669 (4th Cir. 2016).

68. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 753 (2012).

69. Inetianbor v. CashCall, Inc., 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013), *aff'd*, 768 F.3d 1346 (11th Cir. 2014).

70. *Hayes*, 811 F.3d at 675.

71. Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016).

72. Imperial Indus. Supply Co. v. Thomas, 825 F. App'x 204, 204 (5th Cir. 2020).

73. Magee v. Nationstar Mortg., LLC, No. 5:19-MC-017-H, 2020 WL 1188445, at *2 (N.D. Tex. Mar. 11, 2020) (quoting 9 U.S.C. § 10(a)).

some rent-a-tribe arbitration regimes.[74]

Yet there is tension between these holdings and the Court's FAA decisions. First, emboldened by the Court's laissez-faire view of contract formation, firms can compel people to arbitrate based on the thinnest veneer of contractual consent.[75] Thus, it is far easier than one might imagine for a con artist to create an arbitration "agreement" out of whole cloth. In turn, this raises the possibility that more sophisticated scam providers will emerge in the future.[76] Second, because the Court gives drafters broad leeway to create their own procedural fiefdoms, a wrongdoer might be able to contract around section 10 of the FAA and thus limit judicial review of an award.[77] Third, the Court has permitted arbitrators to decide a range of issues, including whether the parties' contract is illegal and whether an arbitration provision is fair.[78] The amplification of arbitral power creates special problems in the pirate arbitration context: because arbitrators are often co-conspirators, allowing them to take the reins of a case makes it likely that a scheme will succeed.

Finally, the Article proposes a novel solution to the pirate arbitration dilemma. The FAA only throws its protective cloak around an agreement to resolve a claim "by arbitration."[79] Thus, if a process "is not FAA 'arbitration,' [it] is not enforceable under the FAA."[80] Counter-intuitively, the Article demonstrates that most varieties of pirate arbitration are not "arbitration." Although the definition of "arbitration" is surprisingly hazy, it has long required a neutral decisionmaker[81]—an attribute that pirate arbitration often lacks. Thus, courts should conduct a gateway inquiry into whether a suspicious process qualifies as "arbitration" before acceding to the text of an

74. *See infra* text accompanying notes 298, 329–34.

75. *See infra* Part I.B.3.

76. For example, in *Al-Qarqani v. Chevron Corp.*, heirs of two Saudi Sheikhs tried to confirm an $18 billion award against several companies affiliated with Chevron. No. C 18-03297 JSW, 2019 WL 4729467, at *1 (N.D. Cal. Sept. 24, 2019), *aff'd*, 8 F.4th 1018 (9th Cir. 2021). The Chevron entities argued that "the [a]ward was the product of sham proceedings." *Id.* A federal district court agreed, finding that the parties never agreed to arbitrate and "the arbitral panel was highly irregular and appears to have been engineered to produce a result in favor of [the heirs]." *Id.* at *3–6.

77. *See infra* Part I.B.5.

78. *See infra* Part I.B.2, I.B.4.

79. 9 U.S.C. § 2.

80. Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1238 (11th Cir. 2008).

81. *See infra* Part III.D.

agreement or an award.

The Article contains three Parts. Part I explores the history of arbitration and emphasizes how the primacy of the FAA has made it difficult for courts to police arbitration-related misconduct. Part II surveys three examples of pirate arbitration: fraudulent awards, the use of arbitration as a substitute for judicial review of suspect contracts, and the black hole of rent-a-tribe arbitration. Part III exposes the friction between the FAA and the rules that constrain pirate arbitration. Indeed, although many such scams are crude—the equivalent of robocalls or phishing emails—more sophisticated variants have already succeeded, and the Court's recent cases offer a blueprint for future wrongdoers. Part III then urges courts to fight back by focusing on the threshold question of whether an agreement or award involves "arbitration" under the FAA.

I. THE ARBITRATION REVOLUTION

During the twentieth century, arbitration changed from a forum for merchants to resolve intramural disputes to a parallel justice system that favors corporations. This Part describes this evolution, focusing on how the Court's FAA imperialism has inspired wrongdoers to try to use arbitration to achieve illegal objectives.

A. EARLY PIRATE ARBITRATION

In the 1800s and 1900s, America's approach to arbitration was schizophrenic. On the one hand, courts went out of their way to thwart the process. They applied anti-arbitration principles, such as the ouster doctrine (which invalidated contracts that tried to displace the jurisdiction of the courts)[82] and the revocability rule (which allowed a party to withdraw her assent to arbitrate before the arbitrator ruled).[83] But on the other hand, state legislatures encouraged merchants to submit disputes to private judges.[84] For example, many jurisdictions passed statutes that allowed arbitration awards to become "a rule of court, backed by the contempt power."[85]

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82. *See* Kill v. Hollister (1746) 95 Eng. Rep. 532; 1 Wils. KB 129.

83. *See, e.g.*, Vynior's Case (1609) 77 Eng. Rep. 595, 597; 8 Co. Rep. 81b.

84. *See, e.g.*, IAN R. MACNEIL, AMERICAN ARBITRATION LAW 15 (1992) ("[A]t the turn of the century, arbitration was neither a new nor an uncommon practice in the United States.").

85. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 149 (1977); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 473 (1984) (describing a 1753 Connecti-

When judges were asked to confirm an award, they bent over backwards to comply. They refused to second-guess an arbitrator's ruling even if her fact-finding or reasoning would not pass muster in the court system.[86] As an eighteenth century treatise explained, arbitrators "are not tied down to the same strictness, formality[,] and precision as courts of law."[87] By regarding awards with "liberal indulgence,"[88] the legal system both preserved arbitration's efficiency and empowered arbitrators "to do compleat [sic] and perfect justice between the parties."[89]

However, there was one context in which courts routinely overturned awards. Some parties tried to arbitrate "matters of an illegal nature[] or a claim which is absolutely forbidden by statute."[90] One example involved "suspect agreements": contracts that require judicial approval. For instance, New York has long followed the principle that "no religious corporation can sell . . . any real estate without [a] chancellor's order."[91] In 1857, the First Methodist Episcopal Church and some of its members attempted to submit the propriety of selling a church-owned building to an arbitrator.[92] The New York Supreme Court invalidated the award, reasoning that the parties could not entrust this question "to any tribunal[] other than that pointed out by law."[93] Other parties asked arbitrators to enforce unlawful contracts: usurious loans,[94] speculation in cotton,[95] or, shortly after

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cut statute that required disputants "to submit to arbitration and to abide by the award, with failure to do either punishable by contempt process").

86. *See, e.g.*, Fain v. Headerick, 44 Tenn. (4 Cold.) 327, 337 (1867), *rev'd*, Sherfy v. Argenbright, 48 Tenn. (1 Heisk.) 128 (1870) (acknowledging that arbitrators "generally have a wider range, in the adjustment of the matters in dispute, than could be exercised by a Court"); Thompson v. White, 4 Serg. & Rawle 135, 141 (Pa. 1818) (calling arbitrators "the sole judges of the competency and effect of evidence, and of every question of law or fact arising in the cause").

87. 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 7 (Windham 1796).

88. Underhill v. Van Cortlandt, 2 Johns. Ch. 339, 361 (N.Y. Ch. 1817), *rev'd*, 17 Johns. Ch. 405 (N.Y. 1819).

89. SWIFT, *supra* note 87.

90. Benton v. Singleton, 40 S.E. 811, 812 (Ga. 1902) (quoting 6 JOHN D. LAWSON, RIGHTS, REMEDIES & PRAC. § 3306 (1890)).

91. Wyatt v. Benson, 23 Barb. 327, 333 (N.Y. Gen. Term 1857). The rule remains in force today. *See* Mosdos Chofetz Chaim, Inc. v. RBS Citizens, 14 F. Supp. 3d 191, 217 (S.D.N.Y. 2014).

92. *See Wyatt*, 23 Barb. at 327–28.

93. *Id.* at 336.

94. *See In re* Gale, 27 N.Y.S.2d 18, 20 (Sup. Ct. 1941), *rev'd*, 262 A.D. 834 (N.Y. App. Div. 1941), *appeal denied*, 262 A.D. 1006 (N.Y. App. Div. 1941); *cf.* Hall v. Kim-

the Civil War, a transaction to be paid in illicit Confederate dollars.[96] If the arbitrator upheld the deal, courts vacated the ruling, reasoning that "[t]he mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality."[97] Indeed, as an incredulous Missouri appellate court asked, "[w]ould any one say that a claim for money to be paid for the commission of murder may be made sound and legal by being awarded by arbitrators?"[98] These lines of authority became known as the "public policy" defense to award enforcement.[99]

B. THE FAA

However, the relationship between arbitration and lawbreaking became more complex in 1925, when Congress passed the FAA.[100] The statute abolished the ouster and revocability doctrines through its centerpiece, section 2, which makes pre-dispute arbitration clauses "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[101] The FAA thus places arbitration agreements "upon the same footing as other contracts."[102]

The FAA also regulates the interplay between parties, arbitrators, and courts. First, it assigns the task of deciding "arbitrability"—the threshold issue of whether a claim must be arbitrated—to judges.[103] Under FAA section 4, if there is a question about "the making of

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mer, 28 N.W. 96, 98 (Mich. 1886) (involving a fee for performing services that greatly exceeded a prescribed statutory maximum).

95. *See Benton*, 40 S.E. at 811.

96. *See* Fain v. Headerick, 44 Tenn. (4 Cold.) 327, 329 (1867), *rev'd*, Sherfy v. Argenbright, 48 Tenn. (1 Heisk.) 128 (1870).

97. Smith v. Gladney, 98 S.W.2d 351, 352 (Tex. Comm'n App. 1936); Pittsburgh Constr. Co. v. W. Side Belt R. Co., 151 F. 125, 130 (C.C.W.D. Pa. 1907) ("The law will not enforce an award based on an illegal contract.").

98. Tandy v. Elmore-Cooper Live Stock Comm'n Co., 87 S.W. 614, 618 (Mo. Ct. App. 1905).

99. *See Fain*, 44 Tenn. at 338.

100. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1925).

101. 9 U.S.C. § 2.

102. H.R. REP. NO. 68-96, at 1 (1924).

103. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). More specifically, courts presumptively decide "substantive arbitrability": whether a dispute falls within the scope of a valid arbitration clause. *See* James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76, 79 (Del. 2006). Conversely, arbitrators hear "procedural arbitrability," which encompasses topics that are likely to arise in arbitration, "such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation

the arbitration agreement[,]" the court must resolve it.[104] Second, section 10 codifies the tradition of deferring to arbitrators by only allowing courts to vacate decisions "where the award was procured by corruption, fraud, or undue means" or "there was evident partiality or corruption in the arbitrators."[105] These high hurdles make judicial oversight of awards "so limited as to be little better than a rubber stamp."[106]

Initially, the FAA did not alter how judges dealt with efforts to use arbitration to break the law. For instance, in 1936, in *Smith v. Gladney*, a Texas appellate court refused to enforce "an award of arbitrators based upon a gambling transaction."[107] S.W. Gladney claimed that Bert Smith owed him money stemming from a futures trade that was "undoubtedly in violation of public policy."[108] The parties submitted the dispute to the Arbitration Committee of a trade association to which they belonged, and the panel held in favor of Gladney.[109] The court vacated the award, reasoning that arbitration could not launder illegal conduct:

> A claim that cannot be made the basis of a suit cannot be made the basis of an arbitration .... "[C]an an award, springing out of an illegal contract, which no Court can enforce, stand on any higher ground than the contract itself? Is the contract purged of its illegality, by the award? We think not; and we apprehend, no authority can be found, that goes to this extent."[110]

However, in the second half of the century, arbitration changed dramatically. The next subsections explain how the Court set the stage for pirate arbitration by magnifying the power of arbitrators at the expense of judges, finding that the FAA preempts state law, and making it easy for contract drafters to bind counterparties to arbitration clauses.

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to arbitrate." *Howsam*, 537 U.S. at 85. Confusingly, the Court refers to questions of substantive arbitrability as "arbitrability" and matters of procedural arbitrability as not involving arbitrability. *See id.* at 83–84. Because procedural arbitrability is not relevant for my purposes, I will use the Court's terminology and simply refer to "arbitrability."

104. 9 U.S.C. § 4.

105. *Id.* § 10(a)(1)–(3).

106. Consolidation Coal Co. v. United Mine Workers of Am., Local Union 1545, 213 F.3d 404, 406 (7th Cir. 2000).

107. Smith v. Gladney, 98 S.W.2d 351, 351 (Tex. Comm'n App. 1936).

108. *Id.*

109. *See id.*

110. *Id.* at 352 (quoting Fain v. Headerick, 44 Tenn. (4 Cold) 327, 338 (1867)).

1. Separability

In 1967, the Court created a mind-melting fiction known as the separability doctrine.[111] Separability governs the issue of whether courts or arbitrators should decide claims that the contract that contains the arbitration clause (the "container" contract) is invalid.[112] It answers this question by deeming arbitration clauses to be "'separable' from the contracts in which they are embedded."[113] That is, separability divides every agreement that includes an arbitration clause into two contracts: (1) the container contract and (2) the agreement to arbitrate.[114] If a party challenges the arbitration clause itself—for instance, by contending that a harsh procedural rule is unconscionable—then a court hears her allegations, because she has raised an issue about "the making of the arbitration agreement" under section 4 of the FAA.[115] But on the flip side, if a litigant only argues that the *container contract* is unenforceable, she has not attacked the freestanding arbitration clause, which kicks in, sending her cause of action to arbitration.[116]

Separability made arbitration clauses in illegal contracts enforceable. Because courts can only hear claims that "specifically [target] the validity of the agreement to arbitrate,"[117] arbitrators decide if the container contract is unlawful. For instance, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court allowed an arbitrator to determine whether a usurious payday loan was "criminal on its face."[118] Similarly, in *Nitro-Lift Techs*., *L.L.C. v. Howard,* the Court enforced arbitration provisions in non-competition agreements that were governed by Oklahoma law even though non-competes are "unenforceable as against Oklahoma's public policy."[119]

However, separability's nuances proved to be slippery. Its blunt and binary dichotomy seemed appropriate when a party attacked the

111. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967).

112. *See id.* at 402.

113. *Id.*

114. *See* Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 Nev. L.J. 107, 109–10 (2007).

115. *See Prima Paint*, 388 U.S. at 403–04.

116. *See id.* at 406 (compelling arbitration of a company's claim that it was fraudulently induced to sign the container contract).

117. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006).

118. *Id.* at 443.

119. Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 19 (2012) (quoting Howard v. Nitro-Lift Techs., L.L.C., 273 P.3d 20, 27 (Okla. 2011)).

container contract under a defense like economic duress, fraudulent inducement or mutual mistake of fact. Applied to those fact patterns, the doctrine functioned like a default rule.[120] If both parties manifested assent to an agreement that included an arbitration provision, separability indulged in the plausible assumption that they intended to arbitrate a broad range of disputes—including those over whether their apparent assent to the container contract was legitimate.[121] But other scenarios were more complicated. What if a party argued that her signature on the container contract was forged, or obtained at gunpoint, or was meaningless due to her minority or mental incapacity? On the one hand, these were challenges to the container contract, and thus seemed to be questions for the arbitrator. On the other hand, mandating arbitration would be perverse: arbitration draws its force from the parties' consent, and these theories cast doubt on the notion that the party had truly "agreed" to *anything*. Thus, courts have long disagreed about whether judges or arbitrators decide these claims.[122]

2. Preemption

In 1984's *Southland v. Keating* the Court ignored evidence that Congress had intended the FAA to be a mere procedural rule for federal courts and held that section 2 of the statute applies in state court and preempts conflicting state law.[123] The Court opined that although section 2 permits courts to strike down arbitration agreements under "generally applicable contract defenses, such as fraud, duress, or unconscionability," states cannot resurrect the ouster and

120. *See* Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 29–30 (2003).

121. *See id.* at 29 (arguing that separability is a default rule that assumes that "the parties did indeed wish the matter of contractual validity to be entrusted to arbitrators").

122. *See* Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 472 (5th Cir. 2002) (holding that a mental incapacity defense was for the arbitrator); Spahr v. Secco, 330 F.3d 1266, 1273 (10th Cir. 2003) (reaching the opposite conclusion). Twice the Court has opined in dicta that "[t]he issue of the contract's validity is different from the issue whether any agreement . . . was ever concluded." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 n.2 (2010) (same). This implies that arbitrators cannot decide whether a party assented to the container contract. *But cf.* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296 (2010) (creating confusion by declaring that "where the dispute at issue concerns contract formation, the dispute is *generally* for courts to decide" (emphasis added)).

123. *See* Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).

revocability doctrines by formulating laws that "singl[e] out arbitration provisions for suspect status" or "appl[y] *only* to arbitration provisions."[124] This muscular reading of the FAA voided a Montana statute that required arbitration clauses to be conspicuous,[125] a California law that exempted claims for lost wages from arbitration,[126] and New York's recent effort to "render[] 'null and void' any provision in an employment contract that requires the arbitration of claims of unlawful discriminatory sexual harassment."[127] Thus, the Court has rejected "any wisdom that state legislatures or courts might bring to bear on the increasing prevalence of arbitration clauses in contracts."[128]

In the 2010s, the Court harnessed FAA preemption to cripple the class action. This string of decisions included 2011's *AT&T Mobility LLC v. Concepcion*, which effectively made class arbitration waivers bulletproof,[129] and 2019's *Lamps Plus, Inc. v. Varela*, which precluded judges and arbitrators from interpreting an arbitration clause that does not expressly allow class arbitration to permit such proceedings.[130] It would be difficult to exaggerate the controversy that these opinions engendered. A chorus of critics has argued that by forcing consumers and employees to arbitrate their own low-value claims, rather than allowing them to ride the wake of a class action, the Court has created a "'[g]et out of jail free' card" for corporate liability.[131]

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124. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996).

125. *See id.*

126. *See* Perry v. Thomas, 482 U.S. 483, 491–92 (1987).

127. N.Y. ARBITRATION LAW § 7515 comm. (McKinney 2021); Gilbert v. Indeed, Inc., 513 F. Supp. 3d 374, 395–96 (S.D.N.Y. 2021) (holding that the FAA preempts this statute).

128. Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1186 (2021).

129. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that judges cannot deem class arbitration waivers in consumer contracts to be unconscionable).

130. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

131. Avery Anapol, *"Monopoly Man" Crashes Former Equifax CEO's Senate Hearing*, HILL (Oct. 24, 2017), https://thehill.com/homenews/senate/353825-monopoly-man-crashes-former-equifax-ceos-senate-hearing [https://perma.cc/CJ4C-RVDK]; CellInfo, LLC v. Am. Tower Corp., 506 F. Supp. 3d 61, 64 (D. Mass. 2020) ("[I]t apparently makes no difference to the Supreme Court majority that . . . customers complaining about alleged telephone overcharges cannot, as a practical matter, afford to pursue their claims unless they can pursue a class action.").

3. Contract Formation

Meanwhile, with a push from the Court, the meaning of contractual assent evolved. As noted, to decide "whether the parties agreed to arbitrate a certain matter," courts "apply ordinary state-law principles that govern the formation of contracts."[132] However, contract law's marquee concept—agreement—is highly manipulable,[133] and the Rehnquist and Roberts Courts' views of what it means in the arbitration context has arguably been even "more market-oriented than the *Lochner* Court."[134] For instance, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, rookie investors argued that because their brokers had shown them their contracts "face down," the documents' arbitration provisions were "beyond the[ir] reasonable expectations."[135] The Court responded with a single terse sentence rejecting the idea that the clauses were "adhesive in nature."[136]

The Court's free market perspective influences how lower courts define "agreement." For example, judges have held that consumers and employees assent to arbitration clauses that appear on websites,[137] in emails,[138] on smartphone apps,[139] or inside shipping containers.[140] Likewise, most courts allow businesses to unilaterally amend their dispute resolution terms. Service providers, lenders, and employers are often locked into ongoing agreements with their clients and workers. But since the 1990s, many of these entities—including American Express, AT&T, Bank of America, Chase, Citibank, Comcast, Discover Bank, First USA, Fleet Bank, Sears, Shell, and MBNA Corp.—have tried to graft arbitration clauses into existing contracts.[141] Judges generally uphold these one-sided modifications

132. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

133. *See, e.g.*, RADIN, *supra* note 59, at 21–28 (explaining that what we think of as "contractual consent" occupies a spectrum that includes "informed consent," "problematic consent," and "sheer ignorance").

134. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 437 (1993).

135. Brief for Petitioners at 2, 46, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (No. 88-385), 1989 WL 1127804.

136. *Rodriguez de Quijas*, 490 U.S. at 484.

137. *See* Needleman v. Golden 1 Credit Union, 474 F. Supp. 3d 1097, 1102 (N.D. Cal. 2020).

138. *See* Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248, 1259 (10th Cir. 2012).

139. *See* Meyer v. Uber Techs., Inc., 868 F.3d 66, 70 (2d Cir. 2017).

140. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997).

141. *See, e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 624–36 (2010) (discussing the rise of the unilat-

if the drafter clearly conveys the new terms to the individual and gives her a chance to opt out.[142]

4. Arbitrating Arbitrability

The Court also opened the door for parties to "arbitrate arbitrability"[143] by entrusting arbitrators (not judges) with the gateway question of whether the merits of a lawsuit must be arbitrated. As noted, section 4 of the FAA instructs courts to decide arbitrability, including disputes about the validity of the arbitration clause.[144] However, in a 1995 decision, *First Options of Chicago, Inc. v. Kaplan*, the Court implied that this division of power was a mere default rule.[145] Manuel Kaplan, his wife, and a company he owned called MKI entered into four contracts with First Options.[146] One included an arbitration clause, and only MKI had signed it.[147] A dispute arose, and First Options filed an arbitration against both MKI and the Kaplans.[148] The Kaplans argued to the arbitrators that they had never agreed to arbitrate with First Options, but the arbitrators rejected this assertion and then found for First Options on the merits.[149] This prompted the Kaplans to file a motion to vacate the award.[150]

The Court granted certiorari to clarify how judges should review

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eral amendment).

142. *See, e.g.*, Rivera-Colon v. AT&T Mobility Puerto Rico, Inc., 913 F.3d 200, 205, 211 (1st Cir. 2019) (holding that employee assented to after-the-fact arbitration clause when she clicked on a webpage button acknowledging she had reviewed it). Some courts also require the original contract to contain a clause that expressly empowers the drafter to make unilateral amendments. *See* Beneficial Nat'l Bank v. Payton, 214 F. Supp. 2d 679, 687 (S.D. Miss. 2001) ("The agreement authorized Beneficial to 'change the terms of the agreement,' which Beneficial did by mailing to its cardholders . . . a notice of the change in terms which included an arbitration provision."). This requirement may be largely irrelevant now that many contracts include these change-of-terms provisions. *See* Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 GA. L. REV. 657, 681–82 (2021) (surveying 500 website terms and conditions and finding that a whopping 479 "enable[] the firm to change the consumer agreement"). Similarly, some statutes expressly allow lenders to unilaterally amend their contracts with borrowers. *See, e.g.*, DEL. CODE ANN. tit. 5, § 952 (West 2021–22); Horton, *supra* note 141, at 625 n.131 (collecting more examples).

143. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

144. *See supra* text accompanying note 104.

145. *First Options*, 514 U.S. at 944–45.

146. *Id.* at 940.

147. *Id.* at 941.

148. *Id.*

149. *Id.*

150. *Id.*

an arbitrator's determination that a person or entity had agreed to arbitrate.[151] The Court held that the issue revolves around the contracting parties' intent.[152] On the one hand, if the parties "agree[d] to submit the arbitrability question itself to arbitration," then judges should give the arbitrators' resolution of that issue the same extraordinary deference they give awards on the merits of a case under section 10 of the FAA.[153] On the other hand, "if . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."[154] Finally, the Court explained that because the idea of arbitrating whether a case must be arbitrated "is rather arcane," there should be a strong presumption against finding that the parties had so agreed.[155] Specifically, the Court held that judges "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[156]

By acknowledging that an arbitrator's decision about whether a case must be arbitrated could be binding in some circumstances, *First Options* implied that section 4 of the FAA does not prohibit parties from "submit[ting] the arbitrability question itself to arbitration."[157] Corporations seeking to limit judicial oversight of their contracts quickly realized that the clear and unmistakable test was no match for their dominion over fine print. To showcase their desire to arbitrate arbitrability, they started experimenting with "delegation clauses": circular-seeming terms announcing that "any dispute over the enforceability, scope, reach or validity of this agreement to arbitrate . . . shall be decided by the arbitrator(s)."[158]

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151. *Id.*

152. *Id.* at 943.

153. *Id.*

154. *Id.*

155. *Id.* at 945.

156. *Id.* at 944. *First Options* was an easy case under the newly minted "clear and unmistakable" rule. Only MKI, and not the Kaplans, had even signed a contract that contained an arbitration clause. *See id.* at 941, 946. In addition, although the Kaplans had participated in the arbitration, they did so merely to protest the arbitrators' assertion of jurisdiction over them. *See id.* at 946. Thus, there was no plausible argument that the Kaplans had unequivocally agreed to arbitrate whether they had agreed to arbitrate the merits of their dispute. *See id.* at 946–47.

157. *Id.* at 943.

158. Terrell v. Regions Bank, 518 F. Supp. 3d 935, 940 (N.D. Miss. 2021).

The Court created powerful incentives for companies to use delegation clauses in its 2010 decision *Rent-A-Center West, Inc. v. Jackson*.[159] Antonio Jackson sued Rent-A-Center, his former employer, for race discrimination.[160] Before Jackson had started his job, he signed an arbitration provision that also stated that the arbitrator "shall have exclusive authority to resolve any dispute relating to . . . this [arbitration] Agreement."[161] Rent-A-Center moved to compel arbitration and Jackson responded that "the arbitration agreement as a whole" was unconscionable because it saddled him with arbitral fees and limited discovery.[162]

The Court began by conceptualizing delegation provisions in a bold new way. Extending the separability doctrine, the Court opined that just as an arbitration clause is an independent agreement nestled within a container contract, a delegation clause is a contract within a contract within a contract: (1) an agreement to arbitrate whether to arbitrate the merits of a case (2) within an agreement to arbitrate the merits of a case (3) within a container contract.[163]

In turn, this sleight-of-hand was fatal to Jackson's attempt to avoid arbitration. Recall that a challenge to the container contract (but not the arbitration clause) is a matter to be resolved in arbitration.[164] Doubling down on this principle, the Court held that if a contract includes a delegation clause, an attack on the agreement to arbitrate the merits (but not the delegation provision) is also for the arbitrator.[165] Accordingly, a plaintiff cannot ask a judge to review the fairness of the agreement to arbitrate the merits unless she first proves that the delegation clause is invalid. This meant that Jackson had conceded the relevant issue: although he had argued that the agreement to arbitrate the merits was unconscionable, he had not offered any reason that *the delegation clause itself* was invalid.[166]

159. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

160. *See id.* at 65.

161. *Id.* at 66.

162. Opposition to Motion to Compel Arbitration and for Attorney Fees at 5, Jackson v. Rent-A-Ctr. W. Inc., No. 03:07-CV-0050-LRH (RAM), 2007 WL 7030394 (D. Nev. June 7, 2007) *aff'd in part, rev'd in part*, Jackson v. Rent-A-Ctr., W., Inc., 587 F.3d 912 (9th Cir. 2009), *rev'd,* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010).

163. *See Jackson*, 561 U.S. at 68–69. As the Court put it, "[t]he delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* at 68.

164. *See supra* text accompanying note 116.

165. *See Jackson*, 561 U.S. at 70–71.

166. *See id.* at 72.

Thus, the Court ordered him to arbitrate the question of whether the arbitration clause was unconscionable.[167]

In addition, under *Rent-A-Center*'s wooden rubric, many common grounds for nullifying agreements to arbitrate the merits of a lawsuit do not apply to delegation clauses. For instance, judges often find arbitration clauses to be unconscionable when they restrict the remedies that a plaintiff can receive.[168] But the mere fact that a company has waived a consumer's or an employee's right to recover punitive or consequential damages does not inform the exceedingly narrow inquiry of whether it is unfair to arbitrate the issue of whether it is unfair to arbitrate a complaint. Similarly, shortened statutes of limitations and reduced discovery can thwart a plaintiff's ability to prevail on the merits, but have no bearing on the propriety of arbitrating whether a case must be arbitrated. And finally, just as with separability, "it is unclear whether a challenge to the very existence of an agreement to arbitrate can ever be delegated to an arbitrator."[169] If a plaintiff argues that she never even manifested assent to the container contract, she had not objected to "the delegation clause itself," and thus might have to pursue relief in arbitration. But then again, the lack of contractual consent should nullify the entire transaction between the parties, including any arbitration and delegation clauses within it.

5. *Hall Street*

Finally, the Court aggrandized arbitrators by limiting judicial review of awards. The touchstone here is the Court's 2008 decision *Hall Street Assocs. v. Mattel, Inc.*[170] A commercial landlord and a tenant signed an arbitration clause that supplemented section 10's narrow grounds for vacatur by authorizing a court to overrule an award if it either was not supported by substantial evidence or contained legal errors.[171] The Court voided the clause, declaring that "the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration."[172] For one, the Court reasoned that because section 10 only allows judges to second-guess an arbi-

167. *See id.* at 75.

168. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682 (Cal. 2000).

169. Firstlight Fed. Credit Union v. Loya, 478 S.W.3d 157, 166 (Tex. App. 2015).

170. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008).

171. *Id.* at 579.

172. *Id.* at 586.

trator's ruling for serious defects, it would be anomalous if parties could empower judges to vacate awards for garden-variety factual or legal errors.[173] The Court also cited section 9 of the FAA—which states that judges "must grant" a motion to confirm an award unless it suffers from one of the flaws listed in section 10[174]—and explained that "[t]here is nothing malleable" about this language."[175] Thus, *Hall Street* established that the FAA bars parties from subjecting arbitrators' decisions to heightened scrutiny.[176]

Moreover, *Hall Street* may have abolished the venerable public policy defense to enforcing awards. Although the public policy rule has deep roots, it does not appear on the face of the FAA. This is problematic, because *Hall Street* suggests that the grounds for vacatur listed in section 10 of the statute are "exclusive."[177] As a result, a rising number of courts refuse to apply the public policy doctrine because it is "not specifically provided for in the statute."[178] Thus, the rule that once served as the primary bulwark against pirate arbitration could be defunct.

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173. *See id.*

174. *Id.* at 587 (quoting 9 U.S.C. § 9).

175. *Id.*

176. Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 510 n.8 (7th Cir. 2018).

177. Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc., 660 F.3d 281, 284 (7th Cir. 2011). There is currently a deep split in authority over whether another common law ground for vacatur—"manifest disregard"—survived *Hall Street*. *See, e.g.*, Luciano v. Tchrs. Ins. & Annuity Ass'n of Am., No. 15-6726 (MAS) (DEA), 2021 WL 1663712, slip op. at *2 n.2 (D.N.J. Apr. 28, 2021).

178. Soaring Wind Energy, LLC v. CATIC USA, Inc., 333 F. Supp. 3d 642, 655 (N.D. Tex. 2018), *aff'd sub nom.* Soaring Wind Energy, L.L.C. v. Catic USA Inc., 946 F.3d 742 (5th Cir. 2020); *see* Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) ("judicially-created bases for vacatur are no longer valid in light of *Hall Street*"); Four Star Beauty Supply Corp. v. GIB, LLC, No. 16-C-1351, 2017 WL 6622549, at *1 (E.D. Wis. Dec. 28, 2017) ("a party cannot assert a public policy challenge under the FAA"); Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC, No. 16 C 8306, 2017 WL 1397553 at *7 (N.D. Ill. Apr. 19, 2017), *aff'd*, 876 F.3d 900 (7th Cir. 2017) (holding that public policy cannot "overturn a commercial arbitration award"); Seldin v. Est. of Silverman, 939 N.W.2d 768, 787 (Neb. 2020) ("We hold that under the FAA, a court is not authorized to vacate an arbitration award based on public policy grounds because public policy is not one of the exclusive statutory grounds set forth in [section] 10 of the FAA."); Sanwan Tr. v. Lindsay, Inc., 251 F. Supp. 3d 353, 359 (D. Mass. 2017) (suggesting that "*Hall Street* . . . abrogated the right to review an award under the FAA on non-statutory grounds," including public policy). *But see* Immersion Corp. v. Sony Comp. Ent. Am. LLC, 188 F. Supp. 3d 960, 969 (N.D. Cal. 2016) (observing that, in the Ninth Circuit, "the public policy defense appears to have survived").

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As shown above, the Court has steadily ratcheted up the power of arbitrators and paved the way for businesses to foist arbitration agreements on their consumers and workers. Policymakers, courts, and commentators worry that this partial privatization of the justice system prevents plaintiffs from vindicating their rights.[179] However, as the next Part explains, the FAA is also responsible for an even more insidious trend: parties who use it as cover to attempt to break the law.

II. PIRATE ARBITRATION

This Part is the descriptive heart of the Article. It offers three case studies in pirate arbitration: fraudulent awards, arbitral decisions that have the same effect as forbidden contracts, and proceedings that are literally "lawless."[180] It also highlights the sobering fact that the Court's recent FAA cases have made it difficult for courts to regulate some of these schemes.

A. FAKE AWARDS

Arbitration providers like the AAA and JAMS handle thousands of cases every year.[181] However, this Section reveals that these institutions have inspired fraudulent arbitration administrators to sell fake awards to plaintiffs who seek "to extract money from [d]efendants."[182]

Scam arbitration emerged in the 2000s in the debt settlement industry. During this time, Americans were borrowing at record rates.[183] As credit card balances came due and subprime mortgage

179. *See supra* text accompanying notes 56–57.

180. Plaintiff's Brief in Support of Renewed Motion for Court to Reconsider its Order Requiring Arbitration at 18, Inetianbor v. CashCall, Inc., 962 F. Supp. 2d 1303 (S.D. Fla. 2013) (No. 13-60066-CIV), 2013 WL 12315286.

181. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 32, 39 (2019) (finding that the AAA and JAMS collectively handled 32,698 consumer and employment cases between 2010 and 2016).

182. Decormier v. Nationstar Servicers, LLC, No. 1:20-CV-00062-DAD-JLT, 2020 WL 5257737, at *2 (E.D. Cal. Sept. 3, 2020), *report and recommendation rejected*, No. 1:20-CV-00062-DAD-JLT, 2020 WL 5989180 (E.D. Cal. Oct. 9, 2020).

183. *See* Tamara Draut & Javier Silva, *Borrowing to Make Ends Meet: The Growth of Credit Card Debt in the '90*s, DĒMOS 9 (2003), https://www.demos.org/sites/default/files/publications/borrowing_to_make_ends_meet.pdf [https://perma.cc/WMA2-7HLH] (observing that credit card debt in the U.S. nearly tripled between

payments ballooned, consumers increasingly placed their faith in businesses that claimed that they could reduce or eliminate debt.[184] Debt settlement firms accomplished this goal by brokering deals in which creditors accepted a one-time payment for less than the total amount the borrower owed.[185] Soon there were over 200 such companies serving more than 154,000 clients.[186]

Unfortunately, some of these enterprises were run by con artists who "prey[ed] on the needs of unsophisticated borrowers who [were] in financial trouble."[187] These fly-by-night companies prepared "protest documents" for their customers to send to lenders: rambling letters "peppered with legalese, and even statutory and caselaw citations . . . mixed liberally with a dose of conspiracy theories hinting at dark forces controlling the federal government and banking system."[188] Buried within these missives was a sentence in which borrowers offered the creditor a token consideration in return for exoneration of their debt and stated that the creditor would "accept[] the 'offer' by failing to respond to it."[189] This guerilla tactic—trying to bind the lender by silence—was called the "exchange" theory.[190]

Not surprisingly, the exchange theory failed to gain traction. Borrowers who invoked it were laughed out of court,[191] and archi-

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1989 and 2001).

184. *See* Eleanor Laise, *Debt-Relief Firms Attract Complaints*, WALL ST. J. (Oct. 14, 2008), https://www.wsj.com/articles/SB122394458494631223 [https://perma.cc/Y7J2-7TWV].

185. *See* Jasmine S. Chean, Note, *Can't Live with Them, Can't Live Without Them: How Mini-CFPAs and Surety Bonds Could Make a World with Debt Settlement Companies More Bearable*, 21 FORDHAM J. CORP. & FIN. L. 379, 380–81 (2016).

186. Ryan McCune Donovan, Note, *The Problem with the Solution: Why West Virginians Shouldn't "Settle" for the Uniform Debt Management Services Act*, 113 W. VA. L. REV. 209, 213 n.7 (2010).

187. Stuart B. Wolfe, *Debt Elimination Schemes*, 59 CONSUMER FIN. L.Q. REP. 357, 357 (2005).

188. John W. Scott, *Combating Credit Card Debt Elimination Schemes*, 61 CONSUMER FIN. L.Q. REP. 835, 835–36 (2007).

189. Wolfe, *supra* note 187, at 358; Swanson v. Wash. Mut. Bank, No. CV 6:05-3286-HFF-WMC, 2006 WL 8446414, at *1 (D.S.C. Jan. 31, 2006) ("The document would also contain a provision providing that the lender's silence was deemed as consent.").

190. Wolfe, *supra* note 187, at 358.

191. *See, e.g.*, Frances Kenny Fam. Tr. v. World Sav. Bank FSB, No. C 04-03724 WHA, 2005 WL 106792, at *6 (N.D. Cal. Jan. 19, 2005) (reprimanding an attorney for his involvement in such a lawsuit).

tects of the strategy were charged with mail and wire fraud.[192] But some debt settlement companies tried a different approach. They saw how corporations had managed to add arbitration clauses to their existing contracts.[193] Adapting the exchange theory, they instructed debtors to try to unilaterally amend the arbitration clause in their contracts with lenders. Financial institutions usually selected one of three arbitration institutions: the AAA, JAMS, or the National Arbitration Forum (NAF).[194] Under the guidance of the debt settlement company, borrowers sent a small payment to the lender along with a notice that accepting the money manifested the lender's assent to arbitrate "subject to the rules and procedures for the arbitration service listed herein."[195] The borrower then named an arbitration entity that the debt settlement company controlled, such as the National Arbitration Council (NAC),[196] the Arbitration Forum of America (AFOA),[197] the Solomon Arbitration Group (SAG),[198] National Arbitration Specialists,[199] the Consumer Arbitration Forum (CAF),[200] or Century Arbitration Associates.[201]

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192. *See* United States v. Heineman, No. CR 05-00611 WHA, 2006 WL 2374580, at *1 (N.D. Cal. Aug. 16, 2006), *aff'd sub nom.* United States v. Johnson, 610 F.3d 1138 (9th Cir. 2010).

193. *See supra* text accompanying notes 141–42.

194. *See* Verified Complaint at 3, Chase Manhattan Bank USA v. Nat'l Arb. Council, Inc., No. 3:04-CV-1205-J-20HTS, 2005 WL 1270504 (M.D. Fla. May 27, 2005) (2004 WL 2888892) [hereinafter NAC Complaint]; MBNA Am. Bank v. Bodalia, 949 So. 2d 935, 936 (Ala. Civ. App. 2006).

195. Citibank (S.D.) v. Nat'l Arb. Council, Inc., Nos. 3:04-CV-1076-J-32MCR, 3:04-CV-1205-J-20MCR, 2006 WL 2691528, at *1 (M.D. Fla. Sept. 19, 2006); *see* MBNA Am. Bank v. Bodalia, 949 So. 2d 935, 936 (Ala. Civ. App. 2006) (featuring a debtor who enclosed a check for $10); Scott, *supra* note 188, at 838 (noting that debtors declared that "[i]f I have not heard back from you to the contrary within the next twenty-five days, or if you cash this check, or simply hold on to it without cashing or returning it to me, such will constitute acceptance of these terms by you").

196. *See Citibank*, 2006 WL 2691528, at *1.

197. *See In re* Malfatti, No. 09-04318, 2012 WL 3590751, slip op. at *1 (B.A.P. 9th Cir. Aug. 21, 2012).

198. *See* Mercurio v. Am. Express Centurion Bank, 363 F. Supp. 2d 936, 936 (N.D. Ohio 2005).

199. National Arbitration Specialists was a late entry into the sham arbitration provider parade. At some point, a debt settlement company that had formerly used NAC began mailing "exactly the same package of 'pleadings' that NAC sen[t] . . . , except that [the company] ha[d] blacked out NAC's name and address with a marker." NAC Complaint, *supra* note 194, at 2.

200. *See* MBNA Am. Bank. v. Davis, No. 20040993-CA, 2005 WL 434496, at *1 (Utah Ct. App. Feb. 25, 2005).

201. *See* Sorensen v. Fleet Bank (R.I.), No. 04-14 ADM/RLE, 2004 WL 964265, at

These providers would hold a "hearing." But as a federal judge later found, "[t]here [were] apparently no actual proceedings in [these] arbitrations, no witnesses called, or the like."[202] Instead, as one debt settlement company's lawyer admitted in court, the arbitrator would enter an award for exactly the amount the borrower owed plus the fees of the debt settlement company:

> THE COURT: So I'm a cardholder, I owe Chase Manhattan Bank $20,000, I go to [a debt settlement company], I pay [the company] $170, and I get a piece of paper that says, I don't owe them any money anymore and they owe me $20,000 plus $170? Right?
>
> MS. TROUTWINE: Yes.[203]

Ultimately, one state court confirmed over 100 decisions by AFOA arbitrators.[204] Likewise, the NAC issued 278 awards against Citibank and 262 against Chase.[205]

In the late 2000s, creditors turned the tide. They won a series of verdicts finding debt settlement companies liable for tortious interference, vacating their awards for fraud, and enjoining them from conducting arbitrations.[206] Institutions like the NAC were dissolved, and fake awards dropped off the radar.[207]

Then, in 2019, scam arbitration suddenly returned with a vengeance. Indeed, since then, "many institutions have recently been experiencing an influx of fake arbitration awards."[208] To understand

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*1 (D. Minn. Apr. 30, 2004).

202. Citibank (S.D.) v. Nat'l Arb. Council, Inc., No. 3:04-cv-1076-J-32MCR, 2006 WL 2691528, at *2 n.5 (M.D. Fla. Sept. 19, 2006).

203. Chase Manhattan Bank USA v. Nat'l Arb. Council, Inc., No. 3:04-CV-1205-J-32HTS, 2005 WL 1270504, at *2 n.5 (M.D. Fla. May 27, 2005).

204. *See* Brief of Appellees at 4–10, Malfatti v. Bank of Am. 99 So. 3d 1221 (Ala. 2012) (No. 1101112), 2011 WL 7074025 [hereinafter AFOA Brief].

205. *See* Citibank (S.D.) v. Nat'l Arb. Council, Inc., Nos. 3:04-cv-1076-J-32MCR, 3:04-cv-1205-J-20MCR, 2007 WL 106565, at *1 (M.D. Fla. Jan. 9, 2007).

206. *See Citibank*, 2006 WL 2691528, at *6 (barring NAC from administering arbitrations); Chase Bank USA v. Disp. Resol. Arb. Grp., No. 2:05 CV 1208 LRH (LRL), 2006 WL 1663823, at *4 (D. Nev. June 9, 2006) (prohibiting a variety of different sham providers from conducting arbitrations); AFOA Brief, *supra* note 204, at *4–5 (discussing an unreported opinion by an Alabama state court enjoining the AFOA); *cf.* Stein v. Am. Express Centurian Bank, No. 05CVH-02-01364, 2005 WL 1278357, at *3 (Ohio Ct. Com. Pl. May 16, 2005) (raising questions about whether an SAG award was "a 'scam' sold over the internet and in which [the debtor] has participated by 'buying' an 'arbitration award'").

207. *See* Karnette v. Wolpoff & Abramson, L.L.P., No. 3:06CV44, 2007 WL 922288, at *2 n.4 (E.D. Va. Mar. 23, 2007).

208. Castro v. Bank of N.Y. Mellon, No. 3:20-cv-264-MOC-DSC, 2020 WL 2542864, at *1 (W.D.N.C. May 19, 2020).

the scope of the problem, I used PACER and Bloomberg's docket search function to examine cases that do not appear on Lexis or Westlaw. I uncovered motions to confirm fraudulent awards in Arizona,[209] California,[210] Connecticut,[211] Florida,[212] Georgia,[213] Hawaii,[214] Illinois,[215] Iowa,[216] Minnesota,[217] Mississippi,[218] New Mexico,[219] New York,[220] North Carolina,[221] Oklahoma,[222] Pennsylvania,[223]

209. *See* Orman v. Cent. Loan Admin. & Reporting, No. CV-19-04756-PHX-DWL, 2019 WL 6841741, at *2 (D. Ariz. Dec. 16, 2019).

210. *See* Elfar v. Wilmington Tr., No. 2:20-mc-0273-TLN-KJN PS, 2020 WL 7074609, at *1 (E.D. Cal. Dec. 3, 2020); EEON Found. v. Google, Inc., No. 20-cv-01317-SBA, 2020 WL 3433128, at *1 (N.D. Cal. June 23, 2020); Andrew v. Walzl, No. CV 20-3423 AB (PVCx), 2020 WL 1953622, at *1 (C.D. Cal. Apr. 23, 2020); Grant v. Bank of Am., No. 8:19-cv-01977-VAP-ADSx, 2020 WL 2095813 (C.D. Cal. Jan. 29, 2020) (on file with author); Sroka v. Cooper, No. 8:19-cv-00807-JLS-ADS (C.D. Cal. May 1, 2019) (on file with author); Gadia v. Nat'l City Bank, No. 2:19-cv-03615 PA (SSx), 2019 WL 12345719 (C.D. Cal. May 17, 2019) (on file with author).

211. *See* Aurora Loan Servs., LLC v. Decormier, No. KNLCV096001681S, 2020 WL 854612, at *1 (Conn. Super. Ct. Jan. 17, 2020).

212. *See* Nash v. Bank of Am., No. 6:20-cv-1696-Orl-37GJK, 2020 WL 7768462, at *1 (M.D. Fla. Dec. 30, 2020); Quamina v. U.S. Bank, No. 20-CV-61637-RAR, 2020 WL 9349559, at *1 (S.D. Fla. Dec. 24, 2020); Rodrick v. Putnam Cnty. Tax Collector, No. 3:20-cv-174-J-20MCR, 2020 WL 2768779, at *1 (M.D. Fla. Apr. 27, 2020).

213. *See* Satcomm v. PayPal, No. 5:19-mc-10-MTT, 2020 WL 1609503, at *2 (M.D. Ga. Apr. 1, 2020); Smith v. U.S. Bank, No. 3:20-cv-00056 (N.D. Ga. May 11, 2020) (on file with author).

214. *See* Thomas v. Imperial Indus. Supply Co., No. 20-00282 LEK-RT, 2020 WL 6304164, at *1 (D. Haw. Oct. 27, 2020).

215. *See* Williams v. Cnty. of Cook, 524 F. Supp. 3d 813, 816 (N.D. Ill. Mar. 5, 2021); Teverbaugh v. First Guar. Mortg. Corp., No. 19 C 05485, 2019 WL 11505576, at *1 (N.D. Ill. Aug. 30, 2019).

216. *See* Petition to Confirm Award and Judgement Enforcement, Hill v. Bank Am., (S.D. Iowa Aug. 20, 2020) (No. 4:20-cv-00171-RGE-CFB), 2020 WL 5870425 (on file with author).

217. *See* Domino v. Barr, No. 20-2583 (ECT/BRT), 2021 WL 1795762, at *1 (D. Minn. Feb. 8, 2021); Swanson v. Wilford, Geske, & Cook, No. 19-cv-117 (DWF/LIB), 2019 WL 4575826, at *3 (D. Minn. Aug. 30, 2019).

218. *See* Imperial Indus. Supply Co. v. Thomas, 825 F. App'x 204 (5th Cir. 2020); Nichols v. U.S. Bank, No. 2:19-MC-162-KS-MTP, 2020 WL 61049, at *1 (S.D. Miss. Jan. 6, 2020); Brown v. Ally Fin. Inc., No. 2:18-CV-70-KS-MTP, 2019 WL 6718672, at *1 (S.D. Miss. Dec. 10, 2019); Teverbaugh v. Lima One Cap., LLC, No. 2:19-mc-159-KS-MTP, 2020 WL 448259, at *2 (S.D. Miss. Jan. 28, 2020).

219. *See* First Amended Complaint for Declaratory Judgment, Injunctive Relief, Libel, Tortious Interference with Contract, Civil Conspiracy, Violation of Federal Civil RICO 18 U.S.C. § 1962(c), Conspiracy to Violate Federal Civil RICO 18 U.S.C. § 1962(d), and to Vacate Arbitration Award at 3, Pennymac Loan Services, LLC v. Innovated Holdings, Inc., No. 2:19-cv-00193-KS-MTP (S.D. Miss. Aug. 10, 2020) (on file with author) [hereinafter SAA Complaint] (referencing a New Mexico case that does not appear to be publicly available).

South Carolina,[224] Texas,[225] Tennessee,[226] Utah,[227] Virginia,[228] the U.S. Court of Federal Claims,[229] and the Federal Circuit.[230]

These awards stem from an enigmatic new crop of scam providers. The leader of this pack—the SAA—is shrouded in mystery. The Fifth Circuit believes that the SAA is based in Missouri,[231] but other sources claim that it is an arm of Innovated Holdings, Inc., which is incorporated in Wyoming.[232] Its primary rival appears to be HMP, a

220. *See* Martinez v. Trump, No. 20-CV-9651 (CM), 2021 WL 797645, at *1 n.1 (S.D.N.Y. Feb. 26, 2021); Renaud v. Trump, No. 20-CV-9248 (CM), 2021 WL 293570, at *1 (S.D.N.Y. Jan. 28, 2021); King v. Trump, No. 20-CV-9268 (CM), 2020 WL 7248820, at *1 (S.D.N.Y. Dec. 8, 2020); Final Arbitration Award, Polanco v. Chase, No. 9:19-mc-80732 (N.Y. Sup. Ct. Nov. 1, 2019) (on file with author).

221. *See* Castro v. Bank of N.Y. Mellon, No. 3:20-cv-264-MOC-DSC, 2020 WL 2542864, at *1 (W.D.N.C. May 19, 2020).

222. *See* U.S. Bank v. Nichols, No. 19-CV-482-JED-FHM, 2019 WL 4276995, at *2 (N.D. Okla. Sept. 10, 2019).

223. *See* Bozek v. PNC Bank, No. 20-cv-2875-JMY, 2020 WL 6581491, at *1 (E.D. Pa. Nov. 10, 2020); Brief of Appellee Transcon. Gas Pipe Line Co. at *24, Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres, Nos. 19-2738, 19-3412, 2020 WL 3576892 (3d Cir. June 29, 2020); Abstract of Arbitration Award, Buczek v. Nationstar Mortg., LLC (Pa. Super. Ct. Feb. 25, 2020) (No. 808135/2015) (on file with author).

224. *See* Hallman v. U.S. Dep't of Just., No. 3:19-3089-MBS-KFM, 2019 WL 10894031, at *1 (D.S.C. Nov. 20, 2019).

225. *See* Brett-Andrew: House of Nelson v. Walzl, No. 3:20-cv-02906-C (BT), 2021 WL 1877055, at *1 (N.D. Tex. Apr. 15, 2021); Complaint, Redmond v. Graham, No. 4:21-mc-00004-ALM (E.D. Tex. Jan. 7, 2021) (on file with author); Brett-Andrew: House of Nelson v. Jackson, No. 1:20-CV-00069-H-BU, 2020 WL 8458834, at *1 (N.D. Tex. Dec. 4, 2020); Ford Motor Credit Co. v. Rocha, No. 4:20-cv-00346-O, 2020 WL 4718066, at *2 (N.D. Tex. June 17, 2020); Magee v. Nationstar Mortg., LLC, No. 5:19-MC-017-H, 2020 WL 1188445, at *1 (N.D. Tex. Mar. 11, 2020); Kalmowitz v. Fed. Home Mortg. Corp., No. 6:19-MC-00010-JCB-JDL, 2019 WL 6249298, at *1 (E.D. Tex. Oct. 22, 2019).

226. *See* Williams v. Smith, No. 3:20-cv-00336, 2020 WL 6702873, at *1 (M.D. Tenn. Nov. 13, 2020).

227. *See In re* Arb. Award of Robert Presley of HMP Arb. Servs., No. 4:19-cv-00088-DN-PK, 2019 WL 10817149, at *1 (D. Utah Nov. 13, 2019), *aff'd sub nom.* Wicker v. Bayview Loan Servs., LLC, 843 F. App'x 117 (10th Cir. 2021).

228. *See* Johnson v. Pennymac Loan Servs., LLC, No. 3:19cv837 (DJN), 2020 WL 5371347, at *1 (E.D. Va. Sept. 8, 2020); Meekins v. Lakeview Loan Servicing, LLC, No. 3:19cv501 (DJN), 2019 WL 7340300, at *1 (E.D. Va. Dec. 30, 2019).

229. *See* Schlihs v. United States, 146 Fed. Cl. 495, 497 (2020).

230. *See* Harvey v. United States, 845 F. App'x 923, 924–25 (Fed. Cir. 2021).

231. *See* Imperial Indus. Supply Co. v. Thomas, 825 F. App'x 204, 205 (5th Cir. 2020) ("Imperial received the 'Notice of Arbitration Hearing' from SITCOMM, a Missouri based arbitration association.").

232. *See* SAA Complaint, *supra* note 219, at 4. Some of the individuals associated

California operation run by Robert Presley.[233] HMP describes itself as a "members only . . . association"[234] that charges a subscriber fee of $9 per month.[235] In addition, there is the DAS, which claims to be affiliated with a ministry, "lists suggested 'donation' prices for the arbitration services" on its website, and allows "claimants [to] initiate proceedings simply by clicking the 'DONATE' icon in the right-hand corner of the screen."[236]

To some degree, these new entities operate like the "first wave" scam providers of the early 2000s. For instance, they assert jurisdiction over victims under an acceptance-by-silence theory. They tell their clients to send a notice declaring that if the recipient does not reply, "a new contract will be created . . . that includes an arbitration provision."[237] This variation of the exchange theory lays the groundwork for the arbitrator to find that the defendant agreed to arbitrate by "tacit acquiescence."[238] Likewise, most recent fraudulent arbitrations arise out of mortgages, car loans, or credit cards, which sug-

with the SAA allegedly have criminal backgrounds or have filed for bankruptcy. *See id.* at 5–7; Satcomm v. PayPal, No. 5:19-MC-10-MTT, 2020 WL 1609503, at *3 (M.D. Ga. Apr. 1, 2020) ("[T]he Court finds that the purported arbitration award was procured by fraud.").

233. *See In re* Arb. Award of Robert Presley of HMP Arb. Ass'n Dated Apr. 18, 2019, No. 1:19-cv-01592-NONE-BAM, 2021 WL 389660, at *2 (E.D. Cal. Feb. 4, 2021).

234. Brief of Appellee Transcon. Gas Pipe Line Co. at *24 n.14, Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres, Nos. 19-2738, 19-3412, 2020 WL 3576892 (3d Cir. June 29, 2020) (quoting *Healing My People*, SSM (HMP SERVS.), https://web.archive.org/web/20200215034352/http://hmpservices.org).

235. *See* Orman v. Cent. Loan Admin. & Reporting, No. CV-19-04756-PHX-DWL, 2019 WL 6841741, at *7 n.5 (D. Ariz. Dec. 16, 2019).

236. Complaint at 5, Ford Motor Credit Co. v. Rocha, No. 4:19-cv-00098-DN-PK (D. Utah Nov. 26, 2019) (on file with author); *cf.* Elfar v. Wilmington Tr., No. 2:20-mc-0273-TLN-KJN PS, 2020 WL 7074609, at *1 (E.D. Cal. Dec. 3, 2020) (featuring a sham provider called American Arbitration Management Services); Resolution to Dispute Resolution Complaint, Redmond v. Graham, No. 4:21-mc-00004-ALM (E.D. Tex. Jan. 7, 2021) (on file with author) (involving a sham provider called Private International Arbitration Association).

237. SAA Complaint, *supra* note 219, at 9. Like fake awards, this document is peppered with non-sequiturs, including references to "an 1895 Supreme Court case on the Interstate Commerce Commission, and an executive order by President Franklin Roosevelt." Teverbaugh v. First Guar. Mortg. Corp., No. 19 C 05485, 2019 WL 11505576, at *1 (N.D. Ill. Aug. 30, 2019).

238. *See* Quamina v. U.S. Bank No. 20-CV-61637-RAR, 2020 WL 9349559, at *1 (S.D. Fla. Dec. 24, 2020). For reasons that are unclear, the arbitrator determines that (1) the defendant initiated this process by trying to change the terms of an existing contract, (2) the plaintiff then "presented a counteroffer or conditional acceptance of the offer" that included the arbitration agreement, and (3) the defendant accepted by silence. *See id.*

gests that they may have ties to debt settlement schemes.[239] Finally, scam providers do not seem to hold proceedings. Indeed, in one case, the proponent of a fake award admitted that "he had never met [the arbitrator] and that an arbitration hearing had not occurred."[240]

However, the SAA, HMP, DAS and their ilk are also unique in several ways. For one, because they market themselves as full-service arbitration providers, they attract a variety of plaintiffs and claims, not just borrowers seeking to expunge debt. For example, the SAA "conducted" a products liability claim[241] and HMP "heard" an eminent domain action under the Natural Gas Act.[242] Similarly, some clients use faux providers to fabricate awards against famous companies or individuals, such as Google,[243] YouTube,[244] PayPal,[245] former President Donald Trump, Chief Justice John Roberts, and Speaker of the House Nancy Pelosi.[246]

In addition, rather than merely purporting to cancel a customer's debt, these new scam arbitrators often find defendants to be liable for millions of dollars.[247] For instance, HMP slapped a defendant with $54,850,000 in damages,[248] and SAA awards routinely reach eight figures.[249] And on top of these sums, the awards frequently im-

239. *See Elfar*, 2020 WL 7074609, at *1 (involving a foreclosure).

240. Johnson v. Pennymac Loan Servs., LLC, No. 3:19cv837 (DJN), 2020 WL 5371347, at *2 (E.D. Va. Sept. 8, 2020).

241. *See* Imperial Indus. Supply Co. v. Thomas, 825 F. App'x 204, 204–05 (5th Cir. 2020).

242. *See* Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres, No. 4:17-CV-00289, 2019 WL 6481528, at *2 (M.D. Pa. Oct. 8, 2019), *aff'd sub nom.* Transcon. Gas Pipe Line Co., v. Permanent Easement for 2.59 Acres, Temp. Easements for 5.45 Acres & Temp. Access Easement for 2.12 Acres in Pine Grove Twp., Schuylkill Cnty., PA, Tax Parcel No. 21-04-0016.000 361, Chapel Drive, Pine Grove, Pine Grove Twp., Schuylkill Cnty. PA, 834 F. App'x 752 (3d Cir. 2020).

243. *See* EEON Found. v. Google, Inc., No. 20-cv-01317-SBA, 2020 WL 3433128 (N.D. Cal. June 23, 2020).

244. *See id.*

245. *See* Satcomm v. PayPal, No. 5:19-mc-10-MTT, 2020 WL 1609503, at *1–3 (M.D. Ga. Apr. 1, 2020).

246. *See* Martinez v. Trump, No. 20-CV-9651 (CM), 2021 WL 797645, at *1 (S.D.N.Y. Feb. 26, 2021).

247. *See, e.g.*, Orman v. Cent. Loan Admin. & Reporting, No. CV-19-04756-PHX-DWL, 2019 WL 6841741, at *1 (D. Ariz. Dec. 16, 2019).

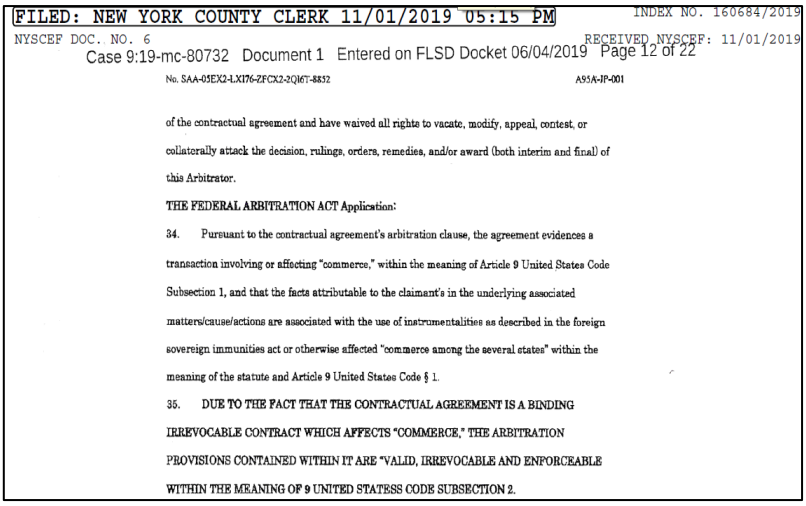
248. *See* Final Arbitration Award at 27, Transcon. Gas Pipe Line Co., v. Permanent Easement for 2.59 Acres, No. 4:17-cv-00289-MWB (M.D. Pa. July 8, 2019), ECF No. 240-1 (on file with author) [hereinafter Transco Award].

249. *See Satcomm*, 2020 WL 1609503, at *3.

pose monetary sanctions if the victim fails to comply immediately.[250] In fact, the DAS's website even contains a separate section for "Punitive Arbitration Hearings," which recommends that if a defendant has not paid within thirty days, the plaintiff "request a separate award for just the punitive damages."[251]

Finally, one of the most bizarre aspects of these awards is that they are nearly identical. Indeed, no matter which entity publishes them, they are generated from a protest-document-like template of nonsensical citations and analysis. The only difference from award to award is the identification of the provider, the names of the parties, and the amount of damages.[252] Figures 3 through 5 are excerpts of awards from the SAA, HMP, and DAS. If one looks closely, one can see that they are essentially verbatim copies of each other.

Figure 3: Excerpt from SAA Award



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of the contractual agreement and have waived all rights to vacate, modify, appeal, contest, or collaterally attack the decision, rulings, orders, remedies, and/or award (both interim and final) of this Arbitrator.

THE FEDERAL ARBITRATION ACT Application:

34. Pursuant to the contractual agreement's arbitration clause, the agreement evidences a transaction involving or affecting "commerce," within the meaning of Article 9 United States Code Subsection 1, and that the facts attributable to the claimant's in the underlying associated matters/cause/actions are associated with the use of instrumentalities as described in the foreign sovereign immunities act or otherwise affected "commerce among the several states" within the meaning of the statute and Article 9 United States Code § 1.

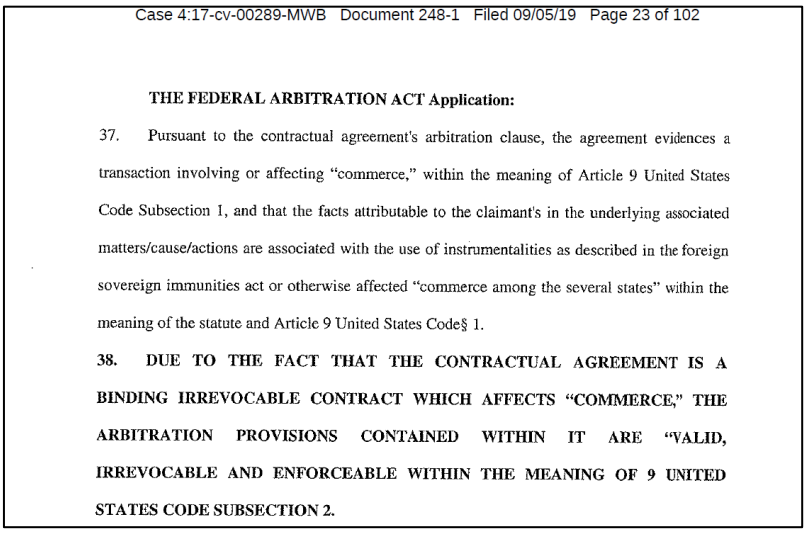
35. **DUE TO THE FACT THAT THE CONTRACTUAL AGREEMENT IS A BINDING IRREVOCABLE CONTRACT WHICH AFFECTS "COMMERCE," THE ARBITRATION PROVISIONS CONTAINED WITHIN IT ARE "VALID, IRREVOCABLE AND ENFORCEABLE WITHIN THE MEANING OF 9 UNITED STATESS CODE SUBSECTION 2.**

250. *See* Harvey v. United States, No. 2020-2279, 845 F. App'x 923, 924 (Fed. Cir. Feb. 3, 2021) (featuring an award for "$5,158,667.43 in damages for breach of contract and $54,252,793.54 in additional penalties").

251. *Services*, ROUDENBUSH MINISTRIES, https://roudenbushministries.org/services [https://perma.cc/D2XL-XJ7E]. The website also suggests a $700 "donation" for a punitive arbitration but offers a "substantially reduced" rate "for those who used [DAS] to obtain their award." *Id.*

252. *See* Teverbaugh v. First Guar. Mortg. Corp., No. 19 C 05485, 2019 WL 11505576, at *1 (N.D. Ill. Aug. 30, 2019) (describing an SAA award); Final Arbitration Award, Ford Motor Credit Co. v. Rocha, No. 4:20-cv-00346-O, 2020 WL 4718066 (N.D. Tex. June 17, 2020) (on file with author); *see also* Transco Award, *supra* note 248 (involving a nearly identical HMP award).

Figure 4: Excerpt from HMP Award



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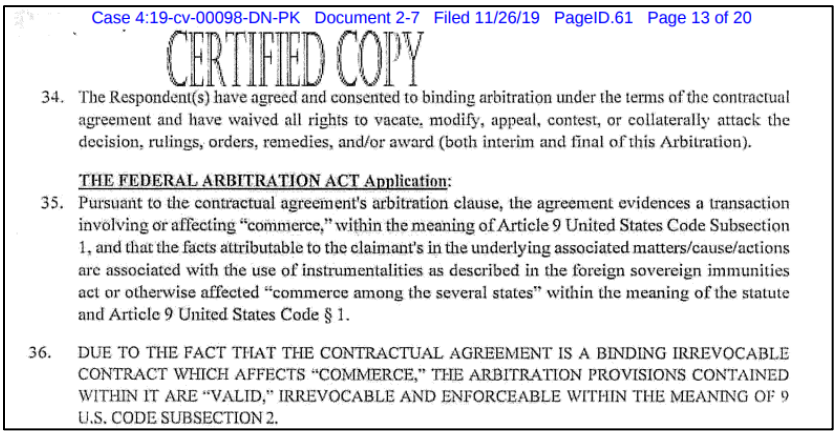
THE FEDERAL ARBITRATION ACT Application:

37. Pursuant to the contractual agreement's arbitration clause, the agreement evidences a transaction involving or affecting "commerce," within the meaning of Article 9 United States Code Subsection 1, and that the facts attributable to the claimant's in the underlying associated matters/cause/actions are associated with the use of instrumentalities as described in the foreign sovereign immunities act or otherwise affected "commerce among the several states" within the meaning of the statute and Article 9 United States Code§ 1.

38. DUE TO THE FACT THAT THE CONTRACTUAL AGREEMENT IS A BINDING IRREVOCABLE CONTRACT WHICH AFFECTS "COMMERCE," THE ARBITRATION PROVISIONS CONTAINED WITHIN IT ARE "VALID, IRREVOCABLE AND ENFORCEABLE WITHIN THE MEANING OF 9 UNITED STATES CODE SUBSECTION 2.

Figure 5: Excerpt from DAS Award



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34. The Respondent(s) have agreed and consented to binding arbitration under the terms of the contractual agreement and have waived all rights to vacate, modify, appeal, contest, or collaterally attack the decision, rulings, orders, remedies, and/or award (both interim and final of this Arbitration).

THE FEDERAL ARBITRATION ACT Application:

35. Pursuant to the contractual agreement's arbitration clause, the agreement evidences a transaction involving or affecting "commerce," within the meaning of Article 9 United States Code Subsection 1, and that the facts attributable to the claimant's in the underlying associated matters/cause/actions are associated with the use of instrumentalities as described in the foreign sovereign immunities act or otherwise affected "commerce among the several states" within the meaning of the statute and Article 9 United States Code § 1.

36. DUE TO THE FACT THAT THE CONTRACTUAL AGREEMENT IS A BINDING IRREVOCABLE CONTRACT WHICH AFFECTS "COMMERCE," THE ARBITRATION PROVISIONS CONTAINED WITHIN IT ARE "VALID," IRREVOCABLE AND ENFORCEABLE WITHIN THE MEANING OF 9 U.S. CODE SUBSECTION 2.

As I will discuss in further depth in Part III, courts uniformly refuse to confirm fake awards. For one, they find that the victim did not agree to arbitrate.[253] They brush aside scam arbitrators' findings that

253. *See* Bruce v. Bank of Am., No. 2:19-02854-BHH-KDW, 2020 WL 9894186, at *4 (D.S.C. Aug. 18, 2020).

the defendant consented by silence as "dubious and unsubstantiated."[254] In addition, several judges also invoke FAA section 10, which strikes down arbitral determinations that were "procured by corruption, fraud, or undue means."[255] As a federal magistrate judge in California reasoned, these rulings "are mere pieces of paper . . . that have no legal effect."[256] Similarly, a Virginia court explained that because "[t]he [a]ward contains no specific factual findings or coherent legal conclusions . . . [it] could only have been the product of undue means."[257] Yet as I will also reveal, these holdings are surprisingly precarious, and it may be hard for judges to identify and vacate better-camouflaged bogus awards.

B. SUSPECT AGREEMENTS

Another species of pirate arbitration involves "suspect agreements": contracts that are not enforceable unless a court approves them. As this Section explains, some parties use arbitration to effectuate transactions that judges have rejected.

Suspect agreements come in many shapes and sizes. For example, settlements are commonly subject to judicial review.[258] Courts must also give their imprimatur to assignments of lottery winnings,[259] modifications of child support obligations,[260] sales of assets by non-profit corporations,[261] and certain contracts with minors.[262]

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254. Harvey v. United States, 845 Fed. App'x, 923, 926 (Fed. Cir. 2021).

255. Magee v. Nationstar Mortg., LLC, No. 5:19-MC-017-H, 2020 WL 1188445, at *2 (N.D. Tex. Mar. 11, 2020).

256. Decormier v. Nationstar Servicers, LLC, No. 1:20-CV00062-DAD-JLT, 2020 WL 5257737, at *2 (E.D. Cal. Sept. 3, 2020), *report and recommendation declined*, 2020 WL 5989180, at *2 (E.D. Cal. Oct. 9, 2020).

257. Johnson v. Pennymac Loan Servs., LLC, No. 3:19CV837 (DJN), 2020 WL 5371347, at *4 (E.D. Va. Sept. 8, 2020).

258. *See* Brooks v. Sherman Phoenix LLC, No. 20-CV-35-PP, 2021 WL 977071, at *1 (E.D. Wis. Mar. 16, 2021) (claims under the Fair Labor Standards Act); Romano v. United States, No. 20-1852-KSM, 2020 WL 7364453, at *2 (E.D. Pa. Dec. 15, 2020) (lawsuits filed on behalf of or against a decedent's estate); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 966 (Del. Ch. 1996) (derivative suits).

259. *See* Allstate Settlement Corp. v. Rapid Settlements, Ltd., 559 F.3d 164, 165 (3d Cir. 2009).

260. *See* Cooper v. Ebert, No. 2816-04-4, 2005 WL 3287229, at *3 (Va. Ct. App. Dec. 6, 2005).

261. *See* 51-53 W. 129th St. HDFC v. Att'y Gen., 95 A.D.3d 674, 675 (N.Y. App. Div. 2012).

262. *See* FLA. STAT. § 743.08 (2021) (requiring court approval for agreements with minors to perform entertainment-related services).

As noted, some parties have asked arbitrators to ratify suspect agreements.[263] For instance, in 1990, a synagogue attempted to use a group of rabbinical arbitrators to bypass New York's longstanding rule that judges must authorize a religious corporation's land contracts.[264] A state appellate court rejected this gambit, explaining that judicial approval was "a condition precedent to the sale of real property," and that the synagogue "could not obtain such authorization from the rabbinical panel."[265]

But in the 2000s, a factoring company called Rapid Settlements took this tactic to the next level. Factoring companies purchase structured settlements from tort victims.[266] The purpose of a structured settlement is to provide tort victims with a steady stream of income rather than a one-time award, and thus prevent them from squandering huge judgments that were supposed to cover their long term medical and living costs.[267] To fund the arrangement, the tortfeasor buys an annuity from a life insurance company, which then sends the tort victim regular disbursements.[268] However, factoring companies invert this arrangement by paying a lump sum to buy future payments from tort victims.[269] Although factoring companies typically offer much less than the discounted present value of the income stream, a tort victim "may accept the offer anyway, either because he does not understand the transaction or he needs the money."[270]

States actively regulate the structured settlement market. Because factoring companies earned a reputation for exploiting tort victims "who were ill equipped to appreciate the value of their future payments or to understand the onerous terms of factoring agree-

263. *See supra* text accompanying notes 90–92.

264. *See* Agudist Council of Greater New York v. Imperial Sales Co., 158 A.D.2d 683, 683 (N.Y. App. Div. 1990).

265. *Id.*

266. James Gordon, Note, *Enforcing and Reforming Structured Settlement Protection Acts: How the Law Should Protect Tort Victims*, 120 COLUM. L. REV. 1549, 1552 (2020).

267. *See* Ellen S. Pryor, *After the Judgment*, 88 VA. L. REV. 1757, 1769–70 (2002) (explaining how structured settlements typically work). Structured settlements became common around 1980 when the IRS clarified that their payments were tax-free. *See id.* at 1770.

268. *See id.* at 1769–70.

269. *See* Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 898–901 (describing the rise of factoring companies).

270. Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 775 F.3d 242, 245 (5th Cir. 2014).

ments"[271] forty-nine jurisdictions have enacted SSPAs.[272] These "paternalistic statute[s]"[273] combat abuse in the factoring industry by declaring that no transfer of structured settlement funds is valid unless it "has been approved in advance in a final court order" that expressly finds that it "is in the best interests of the [tort victim.]"[274]

Yet Rapid Settlements devised a shortcut around this layer of judicial review. It began by placing arbitration provisions in its agreements with potential clients.[275] Then, if a court rejected a proposed exchange, the company would concoct a phony breach of contract claim against the tort victim.[276] For example, Rapid Settlements would argue that the tort victim had either sold the annuity to a third party, refused to return a cash advance, or failed to perform certain duties that would have made judicial approval more likely.[277] These allegations—which were usually crafted with the tort victim's cooperation—were a ploy to file an arbitration that was "designed to circumvent the SSPAs' exclusive method for transferring future payments."[278] The proceedings took place in Texas, where Rapid Settlements was located.[279] The tort victim appeared by phone and usually without counsel.[280] The arbitrator, who was selected by Rapid Settlements, invariably entered an award that "re-offered the terms of the contract: [the company] would pay the annuitant the same lump sum if the annuitant . . . transferred the same future payments."[281] For good measure, the arbitrator also found that "the pro-

271. Daniel W. Hindert & Craig H. Ulman, *Transfers of Structured Settlement Payment Rights What Judges Should Know About Structured Settlement Protection Acts*, 44 JUDGES' J. 19, 20 (2005).

272. *See* Gordon, *supra* note 266, at 1553.

273. Johnson v. Structured Asset Servs., 148 S.W.3d 711, 729 (Tex. App. 2004).

274. *Model Structured Settlement Protection Act*, NAT'L STRUCTURED SETTLEMENTS TRADE ASS'N § 4 (2000), https://ncoil.org/wp-content/uploads/2016/04/7202011StructuredSettlementsModel.pdf [https://perma.cc/GD6G-BAFB].

275. *See* Symetra Life Ins. Co. v. Rapid Settlements Ltd., No. H-05-3167, 2007 WL 114497, at *4 (S.D. Tex. Jan. 10, 2007), *aff'd*, 775 F.3d 242 (5th Cir. 2014).

276. *See id.* at *5. Rapid also sometimes invoked the arbitration agreement without even trying to submit the sale of structured settlement proceeds for court approval. *See id.*

277. *See id.* at *6–7.

278. Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 775 F.3d 242, 246 (5th Cir. 2014).

279. *See id.*

280. *See id.*

281. *Id.*

posed transfer satisfies all applicable statutory requirements."[282] Finally, Rapid Settlements capitalized on the strong presumption in favor of confirming the award to "convert [it] into a judgment."[283]

For example, in 2004, Rapid Settlements and a Tennessee resident named Troy Walker signed a proposed contract.[284] The deal called for Rapid Settlements to pay Walker $30,000 up front in return for $210,000 in structured settlement proceeds (which had a discounted present value of $108,864).[285] Citing this imbalance, a Tennessee state court held that the contract "was not in Walker's best interests."[286] The company responded by filing an arbitration that baselessly argued that Walker had breached their tentative agreement "by attempting to cancel it."[287] The private judge then entered an order that was the spitting image of the thwarted exchange.[288]

In the late 2000s and early 2010s, Rapid Settlements suffered a series of legal defeats that brought its arbitration strategy to a screeching halt. These lawsuits were filed by life insurance companies that were managing the tort victims' annuities. They noted that Rapid Settlements' practices "required [them] to pay twice": if a court rejected a transfer, they had to continue disbursing funds to the tort victim, but if an arbitrator approved the same deal, they needed to send money to Rapid Settlements.[289] Courts were sympathetic. For example, a Texas appellate court held that SSPAs prohibited arbitrators from making "best interest" determinations.[290] Likewise, the Second Circuit, a Mississippi appellate court, and a different Texas appellate panel held that SSPAs made court approval a condition precedent to the formation of structured settlement sales.[291] In

282. Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 599 F. Supp. 2d 809, 825 (S.D. Tex. 2008), *aff'd*, 567 F.3d 754 (5th Cir. 2009).

283. *Symetra Life Ins. Co.*, 775 F.3d at 247.

284. *Symetra Life Ins. Co.*, 599 F. Supp. 2d at 823.

285. *See id.*

286. *Id.*

287. *Id.*

288. *See id.* (explaining that the arbitrator "awarded Rapid the payments that Walker would have transferred to Rapid under the parties' proposed transfer agreement").

289. Third Amended Complaint at 5, Symetra Life Ins. Co. v. Rapid Settlements, Ltd., No. 405CV03167, 2007 WL 5192581 (S.D. Tex. Aug. 9, 2007).

290. *See* Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 234 S.W.3d 788, 800 (Tex. App. 2007).

291. *See* Pac. Life Ins. Co. v. Rapid Settlements, Ltd., No. 06-CV-6554L, 2007 WL

turn, without judicial authorization, there was no binding contract between the parties and therefore "no arbitration provision to be enforced."[292] Several of these decisions enjoined Rapid Settlements "from attempting to use arbitration and court orders confirming arbitration awards to accomplish what 'the substantive law clearly prohibits.'"[293]

Yet these opinions may no longer be good law. Indeed, almost all of them were decided before the Roberts Court's watershed FAA cases. Consider the idea that only judges can evaluate whether a deal is in the "best interests" of a tort victim.[294] This proposition is hard to square with the Court's recent statements that "the FAA supersedes state laws lodging primary jurisdiction in another forum"[295] and that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[296] Indeed, as the Texas Supreme Court noted in a 2018 case involving a factoring contract, because the FAA "preempts any state law that would interfere with parties' freedom to contract to arbitrate their disputes," it prohibits "grants of exclusive jurisdiction over a matter to a court."[297] For this reason—and

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2530098, at *2 (W.D.N.Y. Sept. 5, 2007), *aff'd*, 309 F. App'x 459 (2d Cir. 2009); *In re* Transfer of Structured Settlement Payment Rts. *ex rel*. Saucier, 130 So. 3d 1108, 1121 (Miss. Ct. App. 2013); *In re* Rapid Settlements, Ltd., 202 S.W.3d 456, 461 (Tex. App. 2006).

292. *In re* Transfer of Structured Settlement Payment Rts. *ex rel.* Saucier, 130 So. 3d at 1121; *Pac. Life Ins. Co*., 2007 WL 2530098, at *3 ("The attempt to transfer was void . . . . The arbitrator was out [of] jurisdiction."); *In re Rapid Settlements*, 202 S.W.3d at 462 ("[U]nless the transferee obtains a court order approving the transfer, the transfer agreement is not effective, and none of its provisions, including the arbitration clause, can be enforced."). Alternatively, the Third Circuit and a Florida district court found that annuity providers were not bound by Rapid Settlements' awards because they were not signatories to the contract that included the arbitration clause and thus "did not consent to arbitration." R & Q Reinsurance Co. v. Rapid Settlements, Ltd., No. 06-14329-CIV, 2007 WL 2330899, at *1 (S.D. Fla. Aug. 13, 2007); Allstate Settlement Corp. v. Rapid Settlements, Ltd., 559 F.3d 164, 170 (3d Cir. 2009) ("Allstate was not a party to any agreement between Ward and Rapid Settlements.").

293. Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 599 F. Supp. 2d 809, 838 (S.D. Tex. 2008) (quoting Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 234 S.W.3d 788, 800 (Tex. App. 2007)).

294. *Rapid Settlements*, 234 S.W.3d at 800 ("The SSPA and the policy underlying it render Rapid's claim nonarbitrable.").

295. Preston v. Ferrer, 552 U.S. 346, 359 (2008).

296. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

297. RSL Funding, LLC v. Newsome, 569 S.W.3d 116, 122 (Tex. 2018).

others I explore below—we likely have not seen the last attempt to use arbitration to validate a suspect agreement.

C. RENT-A-TRIBE LENDERS

A third species of pirate arbitration involves payday lenders that use artificial partnerships with Native American nations to create their own skewed legal system. This Section describes this "rent-a-tribe" arbitration strategy.

A primer on payday lending can frame the issue of rent-a-tribe arbitration. The practice surfaced in the 1980s as an extension of check cashing services.[298] On weekends, when banks were closed, some stores would cash checks for a small fee.[299] Eventually, these companies agreed not to deposit checks for several days—usually until after the customer's next payday—in return for an additional charge.[300] This became payday lending: the practice of taking out a small, short-term, high APR loan by writing a postdated check.[301]

Over the next three decades, the payday lending market exploded, sparking fierce debate. In 1990, there were about two hundred payday lenders in America.[302] By the early 2000s, there were more than 20,000: a figure that exceeded the number of "McDonald's, Burger King, Sears, J.C. Penney, and Target stores combined."[303] Studies revealed that payday loans facilitated access to emergency funds for people who had poor credit ratings and were shut out of the traditional financial system.[304] Yet they also found that payday lenders charged stratospheric APRs of between 300% and 1,000%[305] and that payday loans frequently "rolled over," meaning that bor-

298. *See* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 862 (2007).

299. *See id.*

300. *See id.*

301. *See id.*

302. *See* JOHN P. CASKEY, THE ECONOMICS OF PAYDAY LENDING 3 (2002).

303. Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSP. 169, 169–70 (2007).

304. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 98–103 (2002) (canvassing research that shows that individuals who take out payday loans often "lack . . . access to traditional credit").

305. *See Show Me the Money! A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures,* STATE PUB. INTEREST RSCH. GRPS. & CONSUMER FED. OF AM., 1 (2000), https://uspirg.org/sites/pirg/files/reports/Show_Me_The_Money_USPIRG.pdf [https://perma.cc/4D45-TRAY].

rowers took out new loans to pay off existing loans.[306]

As the 2000s progressed, these concerns prompted lawmakers to crack down. Some states banned payday loans.[307] Others capped APRs,[308] subjected lenders to licensing requirements,[309] or prohibited rollovers.[310] This tightening vise caused the payday lending market to shrink by about twenty-five percent.[311]

Yet some payday lenders parried this thrust by adopting a new business model. They joined forces with "cash-strapped Native American communit[ies]" to "offer[] loans over the internet, bypassing state interest-rate caps and other restrictions by claiming sovereign immunity."[312] These new lenders flaunted their tribal affiliations. They featured pastoral names such as Great Plains Lending, LLC, Majestic Lake Financial, Inc., Mountain Summit Financial, Inc., and Silver Cloud Financial, Inc.[313] Likewise, they were located on the reservation and ostensibly owned by the tribe.[314] Nevertheless, the

306. *See* Johnson, *supra* note 304, at 57–64.

307. *See* ARIZ. REV. STAT. ANN. § 6-613 (2021); D.C. CODE ANN. § 26-319 (West 2021); GA. CODE ANN. § 16-17-1 (West 2021); N.J. STAT. ANN. § 17:15A-47 (West 2021); McGhee v. Arkansas State Bd. of Collection Agencies, 289 S.W.3d 18, 28 (Ark. 2008) (holding that a state statute that permitted payday loans was unconstitutional under the state constitution).

308. *See, e.g.*, CAL. FIN. CODE § 23036 (2021) (fifteen percent); COLO. REV. STAT. ANN. § 5-3.1-105 (West 2021) (thirty-six percent); FLA. STAT. § 560.404 (2021) (ten percent); IOWA CODE § 533D.9 (2021) ($15 of the first $100 and $10 on each additional $100 increment).

309. *See, e.g.*, IDAHO CODE ANN. § 28-46-402 (West 2021); 815 ILL. COMP. STAT. 122/3-3 (2021); MICH. COMP. LAWS § 487.2131 (2021); N.D. CENT. CODE § 13-08-02 (2021); OHIO REV. CODE § 1321.36 (2021); OR. REV. STAT. § 725A.020 (2021); WASH. REV. CODE § 31.45.030 (2021).

310. *See, e.g.*, FLA. STAT. § 560.404; 815 ILL. COMP. STAT. 122/2-30 (2021); MINN. STAT. § 47.60 (2021); OHIO REV. CODE § 1321.41(2021); TENN. CODE § 45-17-112 (2021); VA. CODE § 6.2-1816 (2021).

311. *See* Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, WALL ST. J. (Feb. 10, 2011) https://www.wsj.com/articles/SB10001424052748703716904576134304155106320 (last visited Mar. 28, 2022).

312. Ben McLannahan, *US Authorities in Crackdown on "Rent-a-Tribe" Payday Lenders*, FIN. TIMES (June 28, 2015), https://www.ft.com/content/82ca6198-1dc3-11e5-aa5a-398b2169cf79 [https://perma.cc/UD2X-JE3D].

313. *See* Dillon v. BMO Harris Bank, 856 F.3d 330, 332 (4th Cir. 2017) (noting that Great Plains Lending, LLC is "wholly owned by the Otoe-Missouria Tribe of Indians"); Hengle v. Asner, 433 F. Supp. 3d 825, 838 (E.D. Va. 2020) (observing that Majestic Lake Financial, Inc., Mountain Summit Financial, Inc., and Silver Cloud Financial, Inc. are "formed under the laws of the Habematolel Pomo of Upper Lake").

314. *See* Kyra Taylor, Leslie Baily & Victoria W. Ni, *Stretching the Envelope of Tribal Sovereign Immunity?*, PUB. JUST. FOUND. 3 (2017), https://www.publicjustice.net/

tribe's involvement was often a façade. In many cases, the "tribal" entity was controlled by the conventional payday lender,[315] serviced borrowers throughout the country (not just on the reservation),[316] and immediately transferred their loans to a subsidiary of the conventional lender to reap the illegal windfall.[317] This arrangement became known as "rent-a-tribe" lending.[318]

Because rent-a-tribe companies were designed to break the law—their APRs were astronomical, and they did business in states where they were not licensed—they faced a barrage of litigation.[319] Some plaintiffs succeeded in piercing the veil of sovereign immunity[320] and pursued relief against both the tribal entity and the conventional payday lender behind the tribal curtain.[321]

These disputes revealed that arbitration was as vital to the rent-

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wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf [https://perma.cc/7WNV-PVVN] ("Lenders, both on their own websites and in the documents they submitted to courts in an effort to show tribal ownership, portrayed the tribe as the primary business operator.").

315. *See* Heather L. Petrovich, Note, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326, 342–45 (2012).

316. *See* Hayes v. Delbert Servs. Corp., 811 F.3d 666, 668 (4th Cir. 2016).

317. *See* Gibbs v. Haynes Invs., LLC, 368 F. Supp. 3d 901, 909 (E.D. Va. 2019), *aff'd*, 967 F.3d 332 (4th Cir. 2020).

318. Paul Walsh & Neal St. Anthony, S*tate Bars Internet Lender, Wins $11.7M Settlement over 'Rent-a-Tribe' Loans*, STAR TRIB. (Aug. 18, 2016), https://www.startribune.com/state-bars-internet-lender-wins-11-7m-settlement-over-rent-a-tribe-loans/390577961 [https://perma.cc/2VTJ-5AER].

319. *See Hayes*, 811 F.3d at 669; *see also* Edward Ericson Jr., *Pay Day Lender Faces RICO Suit in Rent-a-Tribe Class Action*, COURTHOUSE NEWS SERV. (Apr. 13, 2020), https://www.courthousenews.com/pay-day-lender-faces-rico-suit-in-rent-a-tribe-class-action [https://perma.cc/YC6W-FFVY] (describing a lender that allegedly lent to Maryland residents despite not being licensed in that state).

320. One prominent tribal lender, Western Sky Financial, went belly-up. *See Hayes*, 811 F.3d at 669. However, even after it stopped issuing new loans, conventional payday lenders continued to profit from servicing old loans. *See id.* Thus, complaints against Western Sky and its allies have been drifting through the legal system for years. *See id.*

321. *See infra* text accompanying notes 322–33. Rent-a-tribe arbitration clauses take pains to protect not only the tribal lender, but also conventional lenders. They mandate arbitration for "all disputes with the 'holder or servicer [of the loans] . . . as well as any marketing, servicing, and collection representatives and agents." Memorandum of Law in Support of Delbert Services Corporation's Motion to Dismiss the First Amended Complaint, or, Alternatively, to Compel Arbitration at 3, Hayes v. Delbert Servs. Corp., No. 3:14-cv-258, 2015 WL 269483 (E.D. Va. July 28, 2014) (2014 WL 11031308). Courts generally hold that this language allows conventional lenders to piggyback on the tribal lender's arbitration clause. *See, e.g.*, *Hayes*, 811 F.3d at 670.

a-tribe scam as sovereign immunity. For one, tribal lenders require the case to be handled by the tribe and presided over by a tribal member.[322] One problem with this mandate is straightforward: some tribes have no mechanism for administering arbitrations.[323] Thus, it simply not possible for plaintiffs to pursue claims under these clauses. Making matters worse, conventional lenders have leveraged their connections to appoint biased arbitrators. For example, in one case, the conventional lender selected Robert Chasing Hawk, a tribal elder, to serve as the arbitrator.[324] Chasing Hawk told the court that he had "no preexisting relationship with either party."[325] But the plaintiff then discovered that both Chasing Hawk and his daughter worked for the tribal lender.[326] Finally, in their boldest stroke, rent-a-tribe lenders attempt to substitute tribal law for American law:

> Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement . . . shall be subject to and construed in accordance only with the provisions of the laws of the . . . Tribe, and that no United States state or federal law applies to this Agreement.[327]

As the Fourth Circuit quipped, these provisions "underhandedly convert a choice of law clause into a choice of no law clause."[328]

Rent-a-tribe provisions have divided courts. The Seventh Circuit cited concern that a tribal arbitrator is likely to be biased to find such a clause to be unconscionable.[329] The Eleventh Circuit held that a tribe's lack of infrastructure for handling arbitrations makes the forum "illusory."[330] The Second and Fourth Circuits found that the di-

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322. *See* Inetianbor v. CashCall, Inc., No. 13-60066-CIV, 2013 WL 1325327, at *3 (S.D. Fla. Apr. 1, 2013).

323. *See id.*

324. *See* Inetianbor v. CashCall, Inc., 962 F. Supp. 2d 1303, 1306 (S.D. Fla. 2013), *aff'd*, 768 F.3d 1346 (11th Cir. 2014).

325. *Id.*

326. *See id.* at 1306–08.

327. Hayes v. Delbert Servs. Corp., 811 F.3d 666, 669–70 (4th Cir. 2016).

328. *Id.* at 675.

329. *See* Jackson v. Payday Fin., LLC, 764 F.3d 765, 779 (7th Cir. 2014) (reasoning that it "ensure[d] partiality"); *cf. Hayes*, 811 F.3d at 672 (noting the "problems stemming from the lack of a reputable arbitrator").

330. *See* Parm v. Nat'l Bank of California, 835 F.3d 1331, 1337 (11th Cir. 2016). Courts can select a substitute forum if the one designated by the parties is not available. *See* 9 U.S.C. § 5. However, "'the failure of the chosen forum preclude[s] arbitration' whenever 'the choice of forum is an integral part of the agreement to arbitrate.'" Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1350 (11th Cir. 2014) (alteration in original) (quoting Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000)). Some judges have held that the "pervasive references to the tribal forum and

rective to apply tribal law impermissibly waived a borrower's federal statutory rights.[331] However, some tribal lenders have added language allowing the AAA or JAMS to administer the matter "to the extent that [their] rules and procedures do not contradict either the law of the . . . Tribe or the express terms of this Agreement."[332] Several federal district courts have determined that this new option "defeats the argument that the specified forum is illusory or nonexistent."[333] In addition, they have refused to override the "choice of no law clause," electing to leave "[t]he final decision about which law to apply . . . to the arbitrator."[334]

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The ruse of trying to convert a mere piece of paper into a lucrative judgment is "part of a fraudulent enterprise that is rapidly evolving."[335] It may only be a matter of time before other parties mimic Rapid Settlements and use arbitration awards to enforce suspect agreements without court approval. And the status of rent-a-tribe arbitration is still up in the air. In the next Part, I take a closer look at the doctrines that will determine the future of pirate arbitration.

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its rules provide evidence that the forum . . . was not simply an ancillary concern." *Parm*, 835 F.3d at 1338; *Inetianbor*, 768 F.3d at 1351 ("In total, the contract references the Tribe in five of its nine paragraphs regarding arbitration."); *cf. Jackson*, 764 F.3d at 778 (holding that the tribal forum rendered the arbitration clause procedurally unconscionable because "[t]he Tribe has neither a set of procedures for the selection of arbitrators nor one for the conduct of arbitral proceedings" and thus it was not possible for the Plaintiffs to ascertain the dispute resolution processes and rules to which they were agreeing").

331. *See* Gingras v. Think Fin., Inc., 922 F.3d 112, 127 (2d Cir. 2019) ("[A]rbitration agreements that waive a party's right to pursue federal statutory remedies are prohibited."); *Hayes*, 811 F.3d at 673 ("This arbitration agreement fails for the fundamental reason that it purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims.").

332. Yaroma v. CashCall, Inc., 130 F. Supp. 3d 1055, 1063 (E.D. Ky. 2015).

333. *Id.*; *cf.* Chitoff v. CashCall, Inc., No. 0:14–CV–60292, 2014 WL 6603987, at *1 (S.D. Fla. Nov. 17, 2014) (upholding rent-a-tribe arbitration clause because the "[p]laintiff has provided no evidence that the Cheyenne River Sioux Tribe is unavailable as an arbitration forum" (emphasis omitted)). *But see* Heldt v. PayDay Fin., LLC, 12 F. Supp. 3d 1170, 1191 (D.S.D. 2014) (observing that the arbitration clause still required the arbitrator to be a tribal member, and there was no evidence that anyone who fit that description was on the AAA's or JAMS's roster of arbitrators).

334. *Yaroma*, 130 F. Supp. 3d at 1064.

335. Complaint for Permanent Injunction at 2, Nationstar Mortg. LLC v. Presley, No. 1:20-cv-00620-NONE-JLT (E.D. Cal. Apr. 30, 2020) (on file with author).

III. REGULATING PIRATE ARBITRATION

This Part critiques the rules that courts use to keep pirate arbitration in check. It explains that many of these principles are unsettled, such as the precise definition of "agreeing" to arbitrate, the ability of parties to waive judicial review of awards, and the border between judicial and arbitral power. Thus, parties may be able to design schemes that slip through these cracks. Finally, to minimize this risk, this Part urges courts to add an additional weapon to their arsenal: inquiring whether a dispute resolution process qualifies as "arbitration" under the FAA.

A. AGREEMENT

One of the FAA's core concepts is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[336] This doctrine looms large in the scam arbitration context. Indeed, judges repeatedly refuse to confirm fraudulent arbitral decisions due to "the utter lack of any evidence of any arbitration agreement in the first place."[337] However, this Section reveals that these holdings are in tension with other cases that allow firms to foist arbitration on individuals seemingly without their consent. Moreover, because the concept of "agreement" is so elastic, future scammers may be able to conjure it out of thin air.

Courts frequently invalidate scam arbitration awards on the grounds that "no agreement to arbitrate exist[s]."[338] As noted above, proponents of fake awards argue that defendants agreed to arbitrate by "failing to respond to [their] notices—that is, '[t]he contract be-

336. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986); United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

337. Imperial Indus. Supply Co. v. Thomas, 825 F. App'x 204, 204 (5th Cir. 2020); *see also* Harvey v. United States, 845 Fed. App'x 923, 926 (Fed. Cir. 2021) (finding no evidence of mutual intent to form an enforceable contract); Martinez v. Trump, No. 20-CV-9651 (CM), 2021 WL 797645, at *2 (S.D.N.Y. Feb. 26, 2021) (ruling the petitioner's assertion of a contract to be frivolous); Castro v. Bank of N.Y. Mellon, No. 3:20-cv-264-MOC-DSC, 2020 WL 4726289, at *1 (W.D.N.C. July 10, 2020) (deciding that an arbitration agreement between parties was nonexistent). Likewise, section 13 of the FAA requires parties seeking confirmation of an award to file the underlying arbitration agreement in the record. *See* 9 U.S.C. § 13 (2020). Courts sometimes cite the lack of such an agreement as an independent reason to deny a motion to enforce a scam award. *See* Williams v. Smith, No. 3:20-cv-00336, 2020 WL 6702873, at *1 (M.D. Tenn. Nov. 13, 2020).

338. Castro v. Bank of N.Y. Mellon, 852 Fed. App'x 25, 29 (2d Cir. 2021).

came operational by their silence.'"[339] Yet it is well-established that "acceptance by silence is exceptional."[340] Not responding generally only counts as approval "where, because of previous dealings, the offeree has given the offeror reason to understand that silence is intended as a manifestation of assent."[341] Conversely, as one federal judge put it, telling a company out of the blue that they must *un*-assent to arbitration is an attempt to establish a "contract-by-ambush."[342]

For example, in *Imperial Industrial Supply Co. v. Thomas*, Quintina Maria Thomas tried to enforce a SAA award against the seller of an allegedly defective generator.[343] Thomas had informed the defendant that not replying would constitute assent to arbitrate, and the arbitrator had then found the defendant liable for $1,500,000.[344] A district court vacated the award and the Fifth Circuit affirmed.[345] The appellate panel reasoned that the parties had no history that would justify Thomas treating the defendant's non-response as acceptance:

> If Thomas's argument was valid, it would turn the notion of mutual assent on its head in ordinary purchase cases like this one: buy an item from a dealer or manufacturer, then mail a letter saying "you agree if you don't object," and you can have whatever deal you want if the dealer/manufacturer doesn't respond. Thomas fails to cite a single case that would support such a ridiculous notion.[346]

Therefore, the court concluded that "[t]acit acquiescence between relative strangers ignores the basic tenets of contract law."[347]

Yet these opinions coexist uneasily with the cases that allow businesses to bind consumers and employees to arbitrate through roughly similar mechanisms. As noted, numerous companies have managed to add dispute resolution terms to existing contracts.[348]

339. *Williams*, 2020 WL 6702873, at *1 (alteration in original).

340. Meekins v. Lakeview Loan Servicing, LLC, No. 3:19CV501 (DJN), 2020 WL 1922765, at *4 (E.D. Va. Apr. 21, 2020) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69 (AM. L. INST. 1981)).

341. Brown v. Ally Fin. Inc., No. 2:18-CV-70-KS-MTP, 2019 WL 6718672, at *2 (S.D. Miss. Dec. 10, 2019) (quoting R.C. Const. Co. v. Nat'l Off. Sys., Inc., 622 So. 2d 1253, 1255–56 (Miss. 1993)).

342. *Meekins*, 2020 WL 1922765, at *4.

343. *See* 825 F. App'x 204, 205 (5th Cir. 2020).

344. *See id.*

345. *See id.* at 205–06.

346. *Id.* at 207.

347. *Id.* at 206.

348. *See supra* text accompanying notes 140–41.

Consider Cricket Wireless. In 2014, Cricket sent its customers text messages informing them that it had "updated [its] Terms and Conditions."[349] If subscribers had clicked on the link that followed, they would have navigated to a webpage that contained an arbitration provision, a class arbitration waiver, and a clause declaring that "[y]our [a]greement with Cricket begins when you . . . pay[] for [s]ervice . . . or in any way us[e] the [s]ervice."[350] In 2020, a federal court in California found that a plaintiff who made calls after receiving the text manifested assent to the new terms.[351] The court reasoned that the customer could have simply stopped using his phone if he did not want to be bound.[352]

Admittedly, one can square these two lines of authority. Scam plaintiffs usually target longtime adversaries, such as creditors that are foreclosing on their home.[353] Given this underlying antagonism, it would be especially unreasonable to interpret the defendant's lack of response as approval of anything the plaintiff proposes.[354] Furthermore, businesses frequently give both conspicuous notice of new terms and a chance for consumers and employees to opt out,[355] but scammers try to "obtain[] an arbitration 'hearing' by sending [defendants] an incomprehensible agreement to arbitrate and using their non-response to initiate an arbitration."[356] Finally, as the Cricket Wireless example elucidates, companies do not deem *silence* to be assent; rather, they specify that individuals manifest assent to an amendment through their *conduct*, such as continuing to use a ser-

349. *See* Thomas v. Cricket Wireless, LLC, 506 F. Supp. 3d 891, 895–96 (N.D. Cal. 2020). This maneuver was especially galling because Cricket had famously muscled its way into the cellular market in the early 2010s by boasting that it offered service with "no contract." Mike Freeman, *Cricket Goes National with Its No-Contract Wireless Service*, CHI. TRIB. (Sept. 23, 2011), https://www.chicagotribune.com/sdut-cricket-goes-national-its-no-contract-wireless-ser-2011sep23-story.html [https://perma.cc/74GT-PBWJ].

350. *Thomas*, 506 F. Supp. 3d at 896.

351. *See id.* at 900.

352. *See id.* at 902–03.

353. *See* Kalmowitz v. Fed. Home Mortg. Corp., No. 6:19-MC-00010-JCB-JDL, 2019 WL 6249298, at *1 (E.D. Tex. Oct. 22, 2019) (noting that scam plaintiffs are often "facing bankruptcy or foreclosure").

354. *See* Orman v. Cent. Loan Admin. & Reporting, No. CV-19-04756-PHX-DWL, 2019 WL 6841741, at *5 (D. Ariz. Dec. 16, 2019) ("Orman and Respondents have been legal adversaries for most of the past ten years.").

355. *See supra* text accompanying note 142.

356. Meekins v. Lakeview Loan Servicing, LLC, No. 3:19cv501 (DJN), 2019 WL 7340300, at *3 (E.D. Va. Dec. 30, 2019).

vice[357] or credit card[358] or remaining at a particular job.[359] Thus, the fact that many corporations have been able to insert arbitration clauses into existing contracts does not necessarily mean that fraudsters should also be able to do so, too.

However, a con artist could easily replicate the tactics that firms have honed. To fabricate an arbitration agreement, one need only send a plain English notice to a service provider or employer that continuing an ongoing relationship constitutes their assent to arbitrate.

In fact, consumers in one case have already reverse-engineered this approach to eliminate an arbitration clause from a contract. In *Cook's Pest Control v. Rebar*, Robert and Margo Rebar signed a one-year termite services agreement with Cook's Pest Control, which included an arbitration clause.[360] About eleven months later, Cook's reminded the Rebars to renew.[361] The Rebars submitted their payment with an addendum that said "[a]rbitration shall not be required" and "[c]ontinued honoring of this account by you acknowledges agreement to these terms."[362] Cook's cashed the check and inspected the Rebars' home.[363] Shortly afterwards, the Rebars sued Cook's for allowing their house to become infested.[364] The Alabama Supreme Court reasoned that because the initial one-year agreement had expired, Cook's renewal request was an offer to which the Rebars' addendum was a counteroffer.[365] In turn, because Cook's had engaged in "the exact method specified by the Rebars for acceptance of the proposed modifications to the agreement," the court held that

357. *See* Klein v. Verizon Commc'ns, Inc., 920 F. Supp. 2d 670, 680 (E.D. Va. 2013), *rev'd and remanded on other grounds*, 674 F. App'x 304 (4th Cir. 2017) (holding that a telephone customer assented to unilateral modification through "continued use of [the] services").

358. *See* Cicle v. Chase Bank USA, 583 F.3d 549, 555 (8th Cir. 2009) (opining that a consumer's "continued use [of the] card . . . affirmatively accepted the amendment").

359. *See* Davis v. Nordstrom, Inc., 755 F.3d 1089, 1093 (9th Cir. 2014) ("Where an employee continues in his or her employment after being given notice of the changed terms or conditions, he or she has accepted those new terms or conditions . . . .").

360. 852 So. 2d 730, 732 (Ala. 2002).

361. *See id.* at 733.

362. *Id.*

363. *See id.*

364. *See id.* at 733–34.

365. *See id.* at 737.

the company had agreed to drop its arbitration provision.[366] Cases like *Cook's* illustrate how easy it is to manufacture assent to arbitrate.

B. JUDICIAL REVIEW OF AWARDS

Pirate arbitration also raises fresh questions about judicial review of arbitration awards under section 10 of the FAA. As this Section explains, wrongdoers may be able to draft around this safety valve.

Section 10 prevents tainted arbitrations from becoming judgments. As noted, it allows courts to annul awards that were "procured by corruption, fraud, or undue means" or "where there was evident partiality or corruption in the arbitrators."[367] As a result, courts routinely cite it to strike down decisions by SAA, HMP, and DAS arbitrators.[368]

Moreover, section 10 helps maintain fairness in arbitration in another way. The Due Process Clause of the Fourteenth Amendment requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[369] Yet its protections "do not extend to 'private conduct abridging individual rights.'"[370] Indeed, due process only applies to state action, and "numerous courts . . . have held that [this] element . . . is absent in private arbitration cases."[371] Thus, if a party did not receive adequate notice or a hearing—which sometimes occurs in scam arbitrations—they may only be able to challenge the award under section 10.[372]

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366. *Id.*

367. 9 U.S.C. § 10(a)(1)–(2).

368. *See supra* text accompanying notes 254–56.

369. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

370. Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190 (11th Cir. 1995) (quoting Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)).

371. *Id.* at 1191 (holding that an arbitrator's award of punitive damages cannot violate the Due Process Clause); Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987) (upholding an arbitrator's decision not to hold a hearing and reasoning that "[t]he arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator").

372. *See, e.g.*, Ebbe v. Concorde Inv. Servs., LLC, 392 F. Supp. 3d 228, 236–37 (D. Mass. 2019), *aff'd on other grounds*, 953 F.3d 172 (1st Cir. 2020) (summarizing the caselaw). Admittedly, some cases suggest that "[a]lthough a party in arbitration proceedings is not entitled to full due process, parties are entitled to a fundamentally fair hearing process." Emerald Aero, LLC v. Kaplan, 215 Cal. Rptr. 3d 5, 20 (Cal. Ct. App. 2017). However, the "fundamental fairness" doctrine *also* arises out of section 10 of the FAA. *See* Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 18 (2d Cir. 1997). Techni-

But even though section 10 plays these crucial roles, parties may be able to draft around it in part. After all, the Court has opined that the "central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'"[373] And one way that parties exercise this autonomy is by trying to narrow judicial review of an award. For example, factoring companies purport to make "the arbitrator's decision . . . final, binding, and nonappealable,"[374] and similar language in bogus arbitration notices or rent-a-tribe contracts could insulate pirate schemes from regulation.

Although *Hall Street* bars parties from expanding judicial review of awards,[375] the law on *limiting* court oversight is "not clear."[376] The Ninth Circuit has invalidated a provision that purported to "eliminate[] all federal court review of arbitration awards, including review under [section] 10."[377] Citing *Hall Street*, the appellate panel explained that the clause violated section 9's command that judges "must" uphold an arbitral ruling that satisfies section 10.[378] In addition, the court reasoned that allowing parties to insulate awards from oversight would destroy "safeguards against arbitral abuse."[379] Likewise, in pre-*Hall Street* cases, the Second, Third, and Eleventh Circuits reached the same conclusion, announcing that "[s]ince fed-

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cally then, it would not apply if the parties drafted around section 10.

373. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 53–54 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

374. Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 234 S.W.3d 788, 793 (Tex. App. 2007).

375. *See supra* Part I.B.5 (discussing Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)).

376. Kim-C1, LLC v. Valent Biosciences Corp., 756 F. Supp. 2d 1258, 1264 (E.D. Cal. 2010); *see* Beckley Oncology Assocs., Inc. v. Abumasmah, No. 5:18-cv-01549, 2019 WL 2721146, at *3 (S.D.W. Va. June 28, 2019), *appeal dismissed*, 993 F.3d 261 (4th Cir. 2021) ("The status of the law regarding contractual waiver of any judicial review of arbitration awards governed by the [FAA] is less clear . . . ."). To waive judicial review, a party must "plainly state that the arbitrator's decision [is] completely unreviewable." Swenson v. Bushman Inv. Props., Ltd., 870 F. Supp. 2d 1049, 1057 (D. Idaho 2012). If there is any ambiguity, courts will likely construe a provision limiting court involvement as only waiving *appellate review* of the trial court's grant of confirmation or vacatur. *See, e.g.*, *Emerald Aero*, 215 Cal. Rptr. 3d at 21 (holding that a "waiver of 'judicial rights to discovery and appeal' is not sufficiently specific to waive the right to challenge a judgment confirming an arbitration award" (emphasis omitted)).

377. *In re* Wal-Mart Wage & Hour Emp. Pracs. Litig., 737 F.3d 1262, 1264 (9th Cir. 2013).

378. *Id.* at 1267.

379. *Id.* at 1268.

eral courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards."[380]

A few decisions cut the opposite way, but they are less persuasive. For instance, in *Frontera Eastern Georgia, Ltd. v. Arar, Inc.*, the parties agreed to "irrevocably waive any challenges" to an arbitrator's ruling "under any . . . legal or equitable basis."[381] A trial court enforced the language as written[382] and the Fifth Circuit affirmed.[383] However, the Fifth Circuit's analysis consisted of a single conclusory sentence.[384] Likewise, although the Tenth Circuit has opined that "parties to an arbitration agreement may eliminate judicial review by contract,"[385] this passage is *dicta* from a case that preceded *Hall Street* by seven years.[386] Thus, if the FAA applies, it appears that "awards are [always] reviewable for allegations consistent with the grounds from [section] 10."[387]

Nevertheless, the FAA does not invariably control judicial review of an award. Because section 10 expressly governs "United

380. Hoeft v. MVL Grp., 343 F.3d 57, 64 (2d Cir. 2003), *abrogated by* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); *see* Commc'ns Consultant, Inc. v. Nextel Commc'ns of Mid-Atl., Inc., 146 F. App'x 550, 552–53 (3d Cir. 2005) (opining that where the parties agreed to foreclose judicial review, a court could still override an award for "'corruption, fraud, or partiality,' or [if] . . . the [arbitration] panel failed to provide a hearing to consider each party's views prior to issuing its decision") (citing Tabas v. Tabas, 47 F.3d 1280, 1288 (3d Cir. 1995)); Rollins, Inc. v. Black, 167 F. App'x 798, 799 n.1 (11th Cir. 2006) ("A 'binding, final, and non-appealable' arbitral award . . . does not mean the parties relinquish their right to appeal an award resulting from an arbitrator's abuse of authority, bias, or manifest disregard of the law.") (quoting Team Scandia, Inc. v. Greco, 6 F. Supp. 2d 795, 798 (S.D. Ind. 1998)).

381. Appellee's Brief at *15, Frontera E. Ga., Ltd. v. Arar, Inc., 483 F. App'x 896 (5th Cir. 2012) (No. 11-20661), 2012 WL 725789.

382. *See id.* (explaining that the district court held that "having expressly agreed to such a waiver, . . . [the party who lost in arbitration] is contractually precluded from pursuing any challenges to the Final Award.").

383. *See* Frontera E. Georgia., Ltd. v. Arar, Inc., 483 F. App'x 896, 899–900 (5th Cir. 2012).

384. *See id.* In addition, further undermining *Frontera Eastern Georgia*, in a more recent Fifth Circuit case, the litigants stipulated that if a provision "barred all federal court review—namely, the ability to oppose confirmation and move for vacatur in district court—then the waiver would not be enforceable." Vantage Deepwater Co. v. Petrobras Am., Inc., 966 F.3d 361, 369 (5th Cir. 2020).

385. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001).

386. *See id.* at 930.

387. Osco Motors Co. v. Quality Mark, Inc., No. 14-887 (MJD/JJK), 2014 WL 4163595, at *5 (D. Minn. Aug. 21, 2014).

States [district] court[s],"[388] several state supreme courts have held that it "does not apply to state court proceedings."[389] In turn, if section 10 is irrelevant in these state court systems, so too is *Hall Street*.[390] In these jurisdictions, drafters may expand—or, more importantly for my purposes, *constrict*—judicial oversight of awards.[391] In fact, five years after *Hall Street*, a New York court held that arbitration's twin goals of "reducing litigation and conserving judicial resources" mandated upholding a clause that "limit[ed] judicial review."[392] Furthermore, in disputes in federal court, "[p]arties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the F[AA]."[393] Thus, by selecting the law of New York or a similar jurisdiction, a scam plaintiff could shield an award from judicial oversight in both state and federal courts.

One final point about fake awards deserves mention. As noted, decisions by SAA, HMP, and DAS arbitrators are generated from the same template, which is riddled with bewildering citations and "meaningless legalese."[394] This tactic of trying to legitimate the ruling

388. 9 U.S.C. § 10(c).

389. Gov't of the Virgin Islands v. United Indus., Serv., Transp., Pro. & Gov't Workers of N. Am. Seafarers Int'l Union, 57 V.I. 649, 656 n.3 (V.I. 2012), *vacated and remanded sub nom.* United Indus., Serv., Transp., Pro. & Gov't Workers of N. Am. Seafarers Int'l Union *ex rel.* Bason v. Gov't of Virgin Islands, 767 F.3d 193 (3d Cir. 2014); *see* Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1169 (Ala. 2010) (refusing "to apply [section] 10 in state court proceedings on motions to vacate or to confirm an arbitration award"); *see also* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 599 (Cal. 2008) (same); Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 99 (Tex. 2011) (same).

390. *See Cable Connection*, 190 P.3d at 599 ("We conclude that the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations.").

391. *See Nafta Traders*, 339 S.W.3d at 97 (holding that the Texas Arbitration Act "presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error").

392. Brian B. v. Lauren B., 975 N.Y.S.2d 708, at *4 (N.Y. Sup. Ct. 2013). *But cf.* Caso v. Coffey, 359 N.E.2d 683, 685 (N.Y. 1976) (holding that in a "compulsory" labor arbitration, "availability of review sufficient to meet due process standards is required").

393. Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1269 (9th Cir. 2002), *opinion amended on denial of reh'g*, 289 F.3d 615 (9th Cir. 2002); *see also* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . ."). *But see* Christopher R. Drahozal, *Contracting Around* Hall Street, 14 LEWIS & CLARK L. REV. 905, 921 (2010) (questioning whether parties can displace *Hall Street*'s holding so easily).

394. Quamina v. U.S. Bank, No. 20-CV-61637-RAR, 2020 WL 9349559, at *1 (S.D.

by making it long and discursive is exactly backwards. In fact, "an arbitrator is 'under no compulsion' to provide a written decision."[395] Thus, these awards raise a fluorescent red flag. Ironically, it would be far harder for courts to identify and vacate sham awards that contain no reasoning at all.

C. ARBITRAL POWER

The growth of arbitral power is a subtle but crucial component of the Court's interpretation of the FAA. As this Section explains, each species of pirate arbitration plunges courts into the thicket of the separability doctrine and delegation clauses.

As mentioned, SAA, HMP, and DAS arbitrators determine that the victim "tacit[ly] acquiesce[d]" to arbitrating the merits of the "dispute."[396] As a result, they resolve not just the substance of the phony complaint, but also the question of whether the lawsuit must be arbitrated. To be sure, this ploy only goes so far. Recall that *First Options* held that courts do not need to defer to an arbitrator's arbitrability findings unless the parties clearly and unmistakably agreed to arbitrate the issue.[397] Currently, the notices that scam plaintiffs send to victims do not expressly permit the arbitrator to decide whether the parties agreed to arbitrate.[398] Thus, because these documents flunk the clear and unmistakable test, judges need not review the arbitrator's arbitrability conclusion through the soft-focus lens of section 10; rather, they can scrutinize its application of the facts and law "independently."[399]

However, if scam plaintiffs added delegation clauses to their notices, courts would face the "open question" of whether a drafter can empower an arbitrator to decide whether a party agreed to *anything*.[400] As noted, some judges have suggested that "even disputes

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Fla. Dec. 24, 2020).

395. Ebbe v. Concorde Inv. Servs., LLC, 392 F. Supp. 3d 228, 235–36 (D. Mass. 2019), *aff'd on other grounds*, 953 F.3d 172 (1st Cir. 2020) (quoting Zayas v. Bacardi Corp., 524 F.3d 65, 70 (1st Cir. 2008)).

396. *See supra* text accompanying notes 236–38.

397. *See supra* text accompanying note 155.

398. *See, e.g.*, Conditional Acceptance for Value and Counter Offer/Claim for Proof of Claim and Tender of Payment Offering, Smith v. U.S. Bank, No. 3:20-cv-00056 (M.D. Ga. May 11, 2020) (on file with author).

399. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

400. MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 401 (3d Cir. 2020).

over contract formation could be committed to arbitration."[401] In turn, if the issue of contractual assent *can* be delegated, extortionists would have a fighting chance at transforming invented arbitrations into judgments. Courts could only reverse the arbitrator's finding that the victim accepted the offer to arbitrate under section 10: "one of the narrowest standards of judicial review in all of American jurisprudence."[402] And making matters worse, as mentioned above, an arbitration notice might even be able to waive section 10's protections.[403]

Likewise, the cases that hold that SSPAs establish a condition precedent to the validity of factoring contracts stand on shaky ground. It is unclear why courts even have jurisdiction to decide this issue. Recall that under the separability doctrine, challenges to the sanctity of the container contract are reserved for arbitrators.[404] Thus, most courts have held that arbitrators—not judges—hear allegations that the container contract has not satisfied a condition precedent to its formation.[405] Indeed, in this context, the parties have manifested assent to the transaction, which should trigger the separability default: the assumption that they have formed a self-contained agreement to arbitrate any future dispute (including those related to the enforceability of the container contract). After all, if arbitrators decide whether the "container contract is illegal,"[406] then

401. Allstate Ins. Co. v. Toll Bros., 171 F. Supp. 3d 417, 423 (E.D. Pa. 2016). I have previously argued that a delegation clause cannot empower an arbitrator to decide whether the parties manifested assent to the container contract. *See* Horton, *supra* note 54, at 424. Because arbitration arises from mutual consent, allowing an arbitrator to determine *whether* the parties mutually consented to the container contract would jump the proverbial gun. *See id.* at 401. Thankfully, most courts agree. *See MZM Constr. Co.*, 974 F.3d at 401; Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd., 944 F.3d 225, 234 (4th Cir. 2019); *In re* Auto. Parts Antitrust Litig., 951 F.3d 377, 385–86 (6th Cir. 2020); Lloyd's Syndicate 457 v. FloaTEC, L.L.C., 921 F.3d 508, 515 (5th Cir. 2019); Nebraska Mach. Co. v. Cargotec Sols., LLC, 762 F.3d 737, 741 & n.2 (8th Cir. 2014); CCC Info. Servs. Inc. v. Tractable Inc., No. 18 C 7246, 2019 WL 2011092, at *2 (N.D. Ill. May 7, 2019).

402. Samaan v. Gen. Dynamics Land Sys., Inc., 835 F.3d 593, 600 (6th Cir. 2016) (citations omitted).

403. *See supra* Part III.B.

404. *See supra* text accompanying notes 115–18.

405. *See* Schacht v. Beacon Ins. Co., 742 F.2d 386, 390–91 (7th Cir. 1984); Capitol Vial, Inc. v. Weber Scientific, 966 F. Supp. 1108, 1110–11 (M.D. Ala. 1997); Globecast N. Am. Inc. v. Eagle Broadband, Inc., No. 06-21721-CIV, 2006 WL 8432678, at *2 (S.D. Fla. Aug. 23, 2006).

406. Robbins v. Playhouse Lounge, No. 1:19-CV-08387-NLH-KMW, 2021 WL 2525709, at *12 (D.N.J. June 21, 2021).

they should also be able to determine whether a suspect agreement clears the necessary hurdles.

On top of this, *Rent-A-Center* introduces dizzying complexities. If an agreement between a factoring company and a tort victim contains a delegation provision, can the arbitrator decide whether it is permissible to arbitrate the issue of whether the sale is in the "best interests" of the tort victim? In 2018, with *RSL Funding, LLC v. Newsome*, the Texas Supreme Court suggested that the answer is "yes."[407] Rickey Newsome sold his structured settlement payments to RSL Funding, LLC in an agreement that included both an arbitration provision and a delegation clause.[408] Although a court approved the transfer, RSL Funding never paid Newsome, and he sued, seeking to undo the order.[409] The state high court enforced the delegation provision, sending the dispute into a hall of mirrors where the arbitrator determined whether the arbitrator could determine whether the factoring contract was valid.[410]

Likewise, rent-a-tribe lenders have discovered how arbitrating arbitrability can shield pirate schemes from judicial interference. In the mid-2010s, these companies added delegation clauses to their loans, giving arbitrators jurisdiction over "the validity, enforceability, or scope of this . . . [a]rbitration agreement."[411] Some courts, including the Third and Fourth Circuits, continued to annul the entire arbitration regime.[412] They reasoned that the same factors that make it unfair to arbitrate the merits of a case—the absence of tribal arbitration rules and the waiver of American law—also make it unfair to arbitrate whether it is unfair to arbitrate the merits of the case.[413] After all, in a doctrinal vacuum, it is unclear how the arbitrator can even

407. *See* 569 S.W.3d 116, 119 (Tex. 2018).

408. *See id.*

409. *See id.* at 119–20. In fact, the judge who approved the sale added a handwritten note that if RSL Funding did not pay within ten days, it would owe Newsome twice the purchase price. *See id.* at 119. Newsome and RSL Funding then agreed to remove this penalty provision, and the court entered a new order that reflected their updated understanding. *See id.* Thus, Newsome sought to invalidate both orders and their underlying contracts due to RSL Funding's nonpayment. *See id.* at 119–20.

410. *See id.* at 122.

411. Parnell v. CashCall, Inc., 804 F.3d 1142, 1148 (11th Cir. 2015).

412. *See* Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 240–41 (3d Cir. 2020); Gibbs v. Sequoia Cap. Operations, LLC, 966 F.3d 286, 293 (4th Cir. 2020); Dunn v. Glob. Tr. Mgmt., LLC, No. 8:19-CV-2223-WFJ-AEP, 2020 WL 7260771, at *8 (M.D. Fla. Dec. 10, 2020); Hengle v. Asner, 433 F. Supp. 3d 825, 855 (E.D. Va. 2020).

413. *See Williams*, 965 F.3d at 243; *Gibbs*, 966 F.3d at 293; *Hengle*, 433 F. Supp. 3d at 855.

assess the validity of the agreement to arbitrate the merits of the lawsuit.[414]

But recall that *Rent-A-Center* imposes a formalistic pleading requirement.[415] To avoid arbitration, plaintiffs must "specifically challenge the delegation provision."[416] In case after case, plaintiffs and their lawyers have failed to grasp that finicky detail. For example, in *Parnell v. CashCall, Inc.*, a borrower cited fatal defects in both the container contract and the agreement to arbitrate the merits:

> The Loan Agreement is unconscionable because the interest rate is usurious; the designation of tribal law and jurisdiction is contrary to Georgia law and public policy; the forum selection clause is unconscionable as such a forum deprive[s] Plaintiff and the putative class of their day in court; arbitration is prohibitively expensive; and the Loan Agreement prohibits class actions (alteration in original).[417]

Nevertheless, as the Eleventh Circuit held, these theories did not thread the needle by "challeng[ing] the parties' agreement to commit to arbitration the question of the enforceability of the arbitration agreement."[418] Likewise, in March 2021, the Sixth Circuit reached the same result even though the borrower had requested a "judgment declaring that 'arbitration *clauses* in [the lender's] loan documents are void.'"[419] Because the plaintiff had failed to recite the magic word "delegation clause," the appellate court sent her arguments about the sham nature of the arbitration process to the arbitrator.[420]

In sum, wrongdoers are increasingly able to remove courts from the equation and task arbitrators with answering pivotal questions. Notably, in pirate arbitration, arbitrators are often part of the con: they lend their names to scam awards, dutifully enter rulings that recreate the terms of rejected factoring agreements, and—under some rent-a-tribe contracts—work for the lender. Thus, in this con-

414. *See Dunn*, 2020 WL 7260771, at *8 ("[E]nforcing the delegation clause would put the arbitrator in the 'impossible position' of deciding the validity/enforceability of the agreement without a body of contract law to draw from.").

415. *See supra* text accompanying notes 163–67.

416. *Parnell*, 804 F.3d at 1144.

417. *Id.* at 1148–49.

418. *Id.* at 1149 (emphasis omitted); *see also* Banks v. Cashcall, Inc., 188 F. Supp. 3d 1296, 1302–03 (M.D. Fla. 2016) ("[N]either Plaintiff's Complaint, nor its response to the Motion, directly challenges the Delegation Provision."); Kemph v. Reddam, No. 13 CV 6785, 2015 WL 1510797, at *4 (N.D. Ill. Mar. 27, 2015) ("Plaintiffs must specifically contest that delegation[,] . . . [b]ut instead, Plaintiffs' challenges target the entire arbitration agreement, and in some respect the entire loan agreement.").

419. Swiger v. Rosette, 989 F.3d 501, 506 (6th Cir. 2021) (emphasis added).

420. *See id.* at 508.

text, the Court's arbitrating arbitrability cases are especially pernicious. By cutting judges out of the loop, they help parties use private adjudication to break the law.

D. PIRATE "ARBITRATION"

This Section outlines a different approach to combatting pirate arbitration. The FAA and its doctrinal baggage only govern "arbitration" agreements. Yet most forms of pirate arbitration are not actually "arbitration." In turn, this means that courts can regulate pirate arbitration without offending the FAA.

As mentioned, section 2—the heart of the FAA—presumptively validates "[a] written provision . . . to settle by arbitration a controversy."[421] Thus, to trigger the statute and its sprawling doctrinal infrastructure, a process must be "arbitration."[422] Unfortunately, "[t]he FAA does not define the term 'arbitration,'"[423] and judges "have had a difficult time defining just what types of procedures are enforceable under the statute."[424] But most of this confusion swirls around the issue of whether non-binding procedures, such as mediation and appraisals, count as "arbitration."[425] Outside of that context, there is consensus that an essential element of "arbitration" is an impartial decision-maker.[426] Indeed, dictionaries, courts, and scholars agree

421. 9 U.S.C. § 2.

422. *See* Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1238 (11th Cir. 2008) (finding that a dispute resolution process "is not 'arbitration' within the meaning of the FAA"); Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 172 (2014) (briefly exploring how some patently unfair arbitration clauses might not satisfy the definition of "arbitration"); Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2326 (2020) ("As a threshold matter, all types of arbitration must include certain common process characteristics—otherwise the process would not be defined as 'arbitration' under the FAA.").

423. Milligan v. CCC Info. Servs. Inc., 920 F.3d 146, 151 (2d Cir. 2019).

424. *Advanced Bodycare Sols., LLC*, 524 F.3d at 1238.

425. *See, e.g.*, AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 461–68 (E.D.N.Y. 1985) (finding that an agreement to submit a dispute to an "advisory third party" was "arbitration" when it was "highly likely" that the third party's ruling would end the dispute).

426. *See* Cheng-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 872 (Ct. App. 1996). There is a split in authority over whether federal or state law supplies the definition of "arbitration" under the FAA. *See, e.g.*, Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, 707 F.3d 140, 143 (2d Cir. 2013) (collecting authority). However, this dissensus is not relevant for my purposes, because both sources of law insist that arbitration be neutral. *See infra* text accompanying note 427.

that "arbitration" involves "parties [who] choose one or more neutral third parties to make a final and binding decision resolving the dispute."[427]

Although the issue rarely surfaces, a few courts have held that a rigged process is not "arbitration." For example, in *Cheng-Canindin v. Renaissance Hotel Associates*, an employee sued the hotel where she formerly worked for discrimination.[428] During her tenure, she had agreed to submit all disputes to a "Review Committee" that consisted of two employees, two managers, and the hotel's general manager, who cast the decisive vote in the event of a tie.[429] A California appellate court held that the FAA did not apply to this arrangement because the parties "did not enter into an arbitration agreement at all."[430] The court noted that the Review Committee was hardly impartial; to the contrary, "[e]veryone involved in the decision making process [wa]s employed by, selected by, and under the control of the [h]otel."[431]

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427. *Arbitration,* BLACK'S LAW DICTIONARY 125 (10th ed. 2014); Ciccio v. SmileDirectClub, LLC, No. 20-5833, 2021 WL 2621115, at *5 (6th Cir. June 25, 2021) (explaining that the AAA deems "arbitration" to occur "when 'the parties submit disputes to an impartial person (the arbitrator) for a decision.'"); Gerald Aksen, *Private Dispute Settlement*, 70 COLUM. L. REV. 178, 178 (1970) (book review) ("Arbitration is a procedure by which disputes are finally resolved through the efforts of an impartial expert . . . ."); Niall Mackay Roberts, Note, *Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1550 (2016) ("Arbitration is, at its essence, a consensual, binding, and neutral process for dispute resolution before a third party."). Admittedly, neutrality was not part of the definition of "arbitration" until the late twentieth century. *Compare Arbitration*, BLACK'S LAW DICTIONARY 134 (4th ed. 1968) (defining "arbitration" as "[t]he submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement"), *with Arbitration*, BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (defining arbitration as "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard"). However, one cannot have "arbitration" without an "arbitrator," and the definition of "arbitrator" has long emphasized impartiality. *See, e.g.*, *Arbitrator*, HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 85 (1891) (explaining that an "arbitrator" is a "private, disinterested person, chosen by the parties"). In addition, arbitration sometimes features partisan "party arbitrators." *See, e.g.*, Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001). Yet in these situations, "each party selects a party arbitrator, and those two nonneutral panelists select a neutral chairperson," ensuring that "at least one arbitrator is neutral." Gross, *supra* note 422, at 2336 n.36.

428. *See Cheng-Canindin*, 57 Cal. Rptr. 2d at 868.

429. *See id.* at 869.

430. *See id.* at 871.

431. *Id.* at 874.

Likewise, in *Hooters of America, Inc. v. Phillips*, Hooters, a restaurant chain, agreed to promulgate an arbitration system for its workers.[432] The company then unveiled procedures that the Fourth Circuit called "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding," including an arbitrator-selection mechanism that was "crafted to ensure a biased decisionmaker."[433] Although the court ultimately held that Hooters had breached its contractual duty, its reasoning also implied that the dispute resolution regime was not "arbitration":

> The parties agreed to submit their claims to arbitration—a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty . . . . By promulgating this system of warped rules, Hooters so skewed the process in its favor that [the plaintiff] has been denied arbitration in any meaningful sense of the word.[434]

Two varieties of pirate arbitration are even more extreme than these cases. For starters, fraudulent arbitrators are the polar opposite of dispassionate and objective. Indeed, their sole purpose is to rule for the scam plaintiff and against the victim. Similarly, when Rapid Settlements used arbitration to bypass judicial review of its factoring contracts, it would "prepare[] an . . . award for the arbitrator's signature."[435] These processes—which can only generate a single predetermined outcome—are not "arbitration" under the FAA.

Admittedly, rent-a-tribe arbitration is more complicated. Some judges have suggested that the requirement that the arbitrator be a tribal member is problematic. In fact, one Illinois district court even held that the tribal arbitrator was so likely to be prejudiced that the contract did not call for the appointment of an "arbitrator" or the process of "arbitration."[436] But I am skeptical of these broad

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432. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

433. *Id.* at 938.

434. *Id.* at 940–41.

435. Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 599 F. Supp. 2d 809, 824 (S.D. Tex. 2008), *aff'd*, 567 F.3d 754 (5th Cir. 2009).

436. Jackson v. Payday Fin., LLC, 764 F.3d 765, 771 (7th Cir. 2014) (quoting the district court's reasoning). The Seventh Circuit affirmed on the slightly different ground that the provision was unconscionable. *See id.* at 779. Likewise, the Second Circuit has also found a rent-a-tribe clause to be unconscionable because it gave tribal courts the power to vacate an award for any reason:

> Rather than the sharply limited federal court review of the arbitrators' decisions as constrained by the FAA, the review by tribal courts under these agreements hands those courts unfettered discretion to overturn an arbi-

brushstrokes. Deeming tribal arbitrators to be inherently untrustworthy smacks of xenophobia. Indeed, in other industries, the arbitrator and one of the parties often belong to the same community.[437] Thus, I would reserve the "not arbitration" label for extreme situations, such as where the arbitrator works for the lender[438] or the absence of relevant tribal law would make any decision purely arbitrary.[439]

In turn, by asking whether a process is "arbitration" at the outset of a case, courts could intervene before the FAA exerts its formidable pro-arbitration force. If a party proves that the arbitrator will rubber stamp an award in favor of the other party, it does not matter whether the contract contains a delegation clause or waives judicial review of the arbitrator's decision. Without an "arbitration" agreement, the FAA never enters the picture.

Finally, a hostile reader might object that my proposal jumps the proverbial gun by making arbitral neutrality a gateway issue. Be-

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> trator's award . . . . Adding to the unconscionability of arbitrating under these terms are the allegations of corruption in tribal government. Not only have several tribal officers pleaded guilty to federal corruption crimes, but an FBI and Interior Department investigation uncovered tribal judges who felt intimidated enough to rule for the Tribe when they otherwise may not have.

Gingras v. Think Fin., Inc., 922 F.3d 112, 127–28 (2d Cir. 2019). This reasoning—that plaintiff must pursue her claims in a "hostile forum"—could also support a determination that a process is not "arbitration." *Id.* at 128.

437. *See, e.g.*, Harter v. Iowa Grain Co., 220 F.3d 544, 555–56 (7th Cir. 2000) (grain industry); LaFontant v. Citigroup Glob. Mkts. Inc., No. 04 CIV. 9340 (NRB), 2005 WL 2978944, at *5 n.15 (S.D.N.Y. Nov. 4, 2005) (securities industry).

438. *See supra* text accompanying notes 323–25.

439. *See, e.g.*, Inetianbor v. CashCall, Inc., 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013), *aff'd*, 768 F.3d 1346 (11th Cir. 2014) (involving tribal "rules [that] . . . do not exist"). *But see Jackson*, 764 F.3d at 768 (featuring "tribal law [that] could be ascertained"). As noted, several courts have held that the waiver of American law violates the principle that individuals cannot prospectively relinquish their federal statutory rights. *See supra* text accompanying note 330. These cases are easiest to defend when the defendant is a conventional payday lender who "do[es] not profess to have any tribal affiliation." Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 780 (E.D. Pa. 2016). But when the defendant is a bona fide tribal entity, the matter is hazier. The Court has opined that the FAA "allows parties to an arbitration contract considerable latitude to choose what law governs," and explained that "they might choose to have portions of their contract governed by the law of Tibet [or] the law of pre-revolutionary Russia." DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 53–54 (2015). Against that backdrop, it might not be problematic for a tribal firm to select tribal law; after all, "America's indigenous inhabitants had their own methods of resolving conflicts long before Europeans set foot on the continent." Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 26 (2018).

cause section 10 annuls awards when the arbitrator exhibits "evident partiality," judges usually do not grapple with bias allegations until after the proceeding.[440] However, "evident partiality" usually involves mere conflicts of interest, such as an arbitrator who has a close personal or professional relationship with a party.[441] Pirate arbitration raises concerns of a different order of magnitude. The problem is not just that the decision-maker has incentives to skew her ruling; rather, it is that she is not really a "decision-maker" at all. Thus, courts should resolve this existential challenge to the process as a preliminary matter.

CONCLUSION

For decades, scholars have argued that the Court's expansion of the FAA leads to lawlessness. These critics argue that forced arbitration allows "private parties [to] effectively rewrite substantive law"[442] and "degrades the quality of constitutional governance through changes that it makes to the way legal claims are resolved."[443] Yet this Article has uncovered an even more sinister consequence of the arbitration revolution. Rather than merely seeking to tilt the scales of justice, some parties use alternative dispute resolution to pursue illegal objectives. Judges should recognize that one of the most effective ways to stem this tide is to ask whether an agreement or an award calls for "arbitration."

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440. *See, e.g.*, Boettner v. Century Graphics Corp., No. CIV. A. 87-5688, 1988 WL 12717, at *1 (E.D. La. Feb. 17, 1988) ("The plaintiff's request to inquire into the bias or prejudice of the arbitrator prior to arbitration is without legal precedent.").

441. *See, e.g.*, Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138–39 (2d Cir. 2007) (finding evident partiality when arbitrator learned about contract discussions between his company and the parent of a party and failed either to investigate the issue or disclose his intention not to investigate); Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 80 (2d Cir. 1984) (holding that evident partiality existed where there was "a father-son relationship between an arbitrator and an officer of one party to the arbitration").

442. Glover, *supra* note 54, at 3052.

443. Noll, *supra* note 54, at 1007.