**Article**

# Forced Arbitration in the Fortune 500

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*As the Federal Arbitration Act (FAA) nears its centennial, its most controversial byproduct—forced arbitration—has entered uncharted territory. For years, companies exploited their power over fine print to produce ambitious dispute resolution regimes. This trend reached its apex in the 2010s, when the Supreme Court held that arbitration is incompatible with class actions and gave its blessing to delegation provisions, which allow the arbitrator to decide whether a case must be arbitrated. But around 2020, the dynamic changed. Plaintiffs' lawyers discovered a tactic called "mass arbitration" that gains settlement leverage by bombarding defendants with scores of individual claims. In addition, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which excludes claims of sexual wrongdoing from the FAA, and is weighing other anti-arbitration measures.*

*But one fact that shines through the debate over these developments is how little we know about the prevalence and content of forced arbitration clauses. To be sure, some scholars have published helpful surveys of arbitration agreements. Yet this work tends to be out of date, based on tiny sample sizes, restricted to certain industries, and focused on consumer transactions to the exclusion of employment arrangements.*

*This Article improves our grasp of forced arbitration through an empirical study of the arbitration provisions of the largest corporations in America (the Fortune 500). This original, hand-collected dataset of 582 forced clauses yields three main insights.*

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*First, big businesses actively engage in procedural rulemaking. Indeed, nearly eighty percent of Fortune 500 enterprises mandate arbitration for at least some of their customers or workers (or both). Second, private tribunals are probably less hospitable to plaintiffs than the judiciary. Seventy-seven percent of forced arbitration clauses expressly prohibit class actions, seventy-eight percent contain delegation clauses, and about half feature a term that may be substantively unconscionable. Third, and most surprisingly, the drafting quality varies tremendously. Some private procedural codes reflect the meticulous care of a watchmaker, but others are marred by shocking mistakes. The Article then explains how its findings shed light on proposals to weaken the FAA, mass arbitration, and judicial review of forced arbitration clauses under the unconscionability doctrine.*

TABLE OF CONTENTS

## INTRODUCTION

Sheri Shelton filed a class action against Walmart in California state court.[1] Shelton had worked as a driver for Walmart's Spark program, which delivers orders from the giant retailer to its customers.[2] She alleged that Walmart had misclassified her and 14,506 other plaintiffs as independent contractors, rather than employees, and thus failed to pay them overtime, give them rest and meal breaks, and reimburse them for business expenses.[3] She sought to vindicate 135,593 separate violations of the California Labor Code and to recover $17,829,221.88 in damages.[4]

Anyone who is familiar with modern American civil justice can predict what happened next. Walmart moved to compel arbitration.[5] It argued that Shelton had assented to a "Non-Disclosure and Dispute Resolution Agreement" on the Spark platform before she had started her job.[6] This contract stated that Shelton would arbitrate disputes against Walmart individually, rather than as part of a class.[7] It also contained a delegation provision, which gave the arbitrator, not the trial court, the exclusive power to decide whether a plaintiff must arbitrate the merits of their case.[8] Thus, six months after Shelton filed her mammoth

1. *See* Walmart Inc.'s Notice of Removal Pursuant to 28 U.S.C. §§ 1332, 1441, 1446 & 1453 Exhibit A, ¶ 1, Shelton v. Delivery Drivers Inc., No. 22-cv-02135, 2023 WL 2629027 (C.D. Cal. Jan. 31, 2023) (describing suit as a "class action for wage and labor violations").

2. *See id.* Exhibit A, ¶ 7 ("Plaintiff worked for Defendant through June 2022, as a delivery driver, delivering goods for Defendant's client, Walmart, Inc., through Defendant and Walmart's Spark program.").

3. *See id.* Exhibit A, ¶¶ 10–14.

4. *See id.* ¶¶ 22(c), 41.

5. *See generally* Defendants Walmart Inc. and Delivery Drivers, Inc.'s Motion to Compel Arbitration, *Shelton*, 2023 WL 2629027 (No. 22-cv-02135).

6. Declaration of Adam Dodge in Support of Motion to Compel Arbitration at 2, *Shelton*, 2023 WL 2629027 (No. 22-cv-02135).

7. *Id.* Exhibit A, at 2 (requiring "the Parties to resolve all disputes on an individual basis in final and binding arbitration to the fullest extent permitted by law").

8. *See id.* Exhibit A, at 10 (noting that "[o]nly an arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute" regarding arbitration provision within contract); *see infra* Figure 1 (highlighting Walmart's delegation clause).

class action, it vanished into a private tribunal, presumably to be arbitrated as a single claim.[9]

Walmart's ability to disaggregate Shelton's lawsuit stems from the Federal Arbitration Act (FAA)—a statute that turned 100 years old in 2025.[10] Congress passed the FAA to abolish the ancient judicial practice of refusing to specifically enforce pre-dispute arbitration agreements.[11] The FAA was a mere cog in the civil justice machinery until the 1980s, when the Court began to expand it.[12] Companies exploited this "liberal federal policy favoring arbitration agreements"[13] by requiring their customers and workers to resolve their claims privately, sparking passionate debate about whether arbitration erodes substantive rights[14] or is faster, cheaper, and more accessible than litigation.[15] Then, in the 2010s, the Court handed businesses and their

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9. *See Shelton*, 2023 WL 2629027, at *4 (granting Walmart's motion to compel arbitration).

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

11. *See* GEORGE GRAHAM, TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. No. 68-96, at 1–2 (1st Sess. 1924) (explaining that Congress passed FAA to override the "anachronism" that courts "refus[e] to enforce . . . agreements to arbitrate").

12. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (compelling arbitration of complicated antitrust claims); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that FAA applies in state court and "foreclose[s] state legislative attempts to undercut enforceability of arbitration agreements").

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

14. *See, e.g.*, 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, 37 ("[D]isplacing adjudication through pre-dispute arbitration clauses systematically reduces the legal liability of corporate defendants."); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 681 (1996) ("The truth is that businesses opt for arbitration not only to reduce transactions costs that may or may not accrue equally to consumers, but also to reduce their payouts.").

15. *See, e.g.*, David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99 (1999) ("Because it is faster and less expensive, arbitration is arguably more accessible to employees."); 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) ("In a world without employment arbitration as

allies two huge victories. First, the Court effectively held that arbitration agreements implicitly waive an individual's right to bring a class action.[16] Second, the Court encouraged firms to use delegation clauses, which, as in Shelton's case, give arbitrators—not trial courts—the exclusive power to decide whether a plaintiff must arbitrate the merits of their complaint.[17]

The FAA is to corporations what the Rules Enabling Act is to the Advisory Committee for the Federal Rules of Civil Procedure.[18] Indeed, the twelve-page, nearly-8,000 word contract that Shelton signed is essentially a micro-version of the Federal Rules for Walmart employees.[19] In addition to barring class actions, it regulates how to initiate a claim, select a decision-maker, choose a forum, conduct discovery, file a dispositive motion, and share the cost of the proceeding.[20] It boasts fifty-one choice-of-law provisions—one for employees in every state and the District of Columbia.[21] And its delegation provision slices jurisdiction thinly by entrusting arbitrators with determining whether a case needs

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an available option, we would essentially have a 'cadillac' system for the few and a 'rickshaw' system for the many.").

16. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that the FAA bars courts from finding class arbitration waivers to be unconscionable); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019) (prohibiting judges from using "silence []or ambiguity" about the permissibility of class arbitration as the basis for holding that parties agreed to the procedure).

17. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) (permitting an arbitrator to decide whether the contract to arbitrate the merits of the dispute was unconscionable); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 531 (2019) (holding that courts cannot ignore delegation provisions even when a party's theory about why a case must be arbitrated is "wholly groundless"); *see also supra* text accompanying notes 1–9 (describing arbitration agreement at issue in *Shelton*).

18. *Compare* Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14) (allowing corporations to create arbitration rules), *with* Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072) (authorizing the Court to create general rules for federal district courts which the Court then delegated to the Rules Advisory Committee).

19. I use the term "employee" loosely because Walmart contends that its Spark drivers are independent contractors. *See* Declaration of Adam Dodge in Support of Motion to Compel Arbitration Exhibit A, at 2, Shelton v. Delivery Drivers Inc., No. 22-cv-02135, 2023 WL 2629027 (C.D. Cal. Jan. 31, 2023).

20. *See id.* Exhibit A, at 4–10.

21. *See id.* Exhibit A, at 4–6. As I explain *infra* Part II.C.1, these provisions ensure that Walmart's arbitration agreement will be enforceable even if a court finds that the FAA does not apply.

to be arbitrated but requiring judges to rule on topics relating to the scope or enforceability of the class waiver.[22]

**Figure 1: Walmart's Delegation Clause**

> ii. *Delegation Clause*: Only an arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute arising out of or relating to the interpretation, applicability, enforceability, or formation of this Arbitration Provision, including without limitation any dispute concerning arbitrability. However, the preceding sentence shall not apply to any dispute relating to or arising out of the Class Action Waiver and/or Representative Action Waiver—including, but not limited to, any claim that all or part of the Class Action Waiver and/or Representative Action Waiver is unenforceable, unconscionable, illegal, void, or voidable; that a breach of either such Waiver has occurred; or that arbitration has been sought in a manner that violates the individual arbitration requirement in the Class Action Waiver and Representation Action Waiver—which must proceed in a court of competent jurisdiction and cannot be heard or arbitrated by an arbitrator. Moreover, all disputes relating to or arising out of whether either Party has satisfied the condition precedent of engaging in a pre-arbitration informal telephonic dispute resolution conference discussed below, shall be decided only by a court of competent jurisdiction and not by an arbitrator. The Parties agree that any and all due dates for arbitration fees shall be tolled while the Parties resolve a dispute relating to or arising out of the Class Action Waiver and/or Representative Action Waiver.

Recently, however, the field of forced arbitration has entered a volatile phase. For one, plaintiffs' lawyers have compensated for their inability to seek class relief by filing mass arbitrations; flurries of freestanding claims that bludgeon defendants into settling to avoid paying millions of dollars in up-front arbitration expenses.[23] This tactic has been so successful that Amazon and Tik Tok recently dropped their consumer arbitration clauses.[24]

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22. *See id.* Exhibit A, at 7 ("[The arbitration provision] shall not apply to any dispute relating to or arising out of the Class Action Waiver and/or Representative Action Waiver.").

23. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022) [hereinafter Glover, *Mass Arbitration*] (defining mass arbitration); J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 WASH. U. L. REV. 1617, 1618 (2023) [hereinafter Glover, *Winners and Losers*] (detailing the "shockwave" effect mass arbitration had on corporate defendants); David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 672–74 (2020) [hereinafter Horton, *Arbitration Rules*] (describing how the "Arbitration Rules" led to proliferation of mass arbitration).

24. *See* Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html [https://perma.cc/Q4EF-WQJD] (noting that Amazon took this action after being "hit with roughly 75,000 arbitration claims" saddling it with "tens of millions of dollars in [arbitration] fees"); Sapna Maheshwari, *TikTok Quietly Changes User Terms amid Growing Legal Scrutiny*, N.Y. TIMES (Dec. 14, 2023), https://www.nytimes.com/2023/12/14/business/media/tiktok-changes-user-terms.html [https://perma.cc/SP6A-36FD] (attributing TikTok's decision to delete its consumer arbitration clause, in part, to fear of mass arbitrations).

However, other firms are digging in by amending their agreements to include a slew of newfangled anti-mass arbitration measures.[25] Meanwhile, the possibility that the federal government will ban forced arbitration in whole or in part—once a progressive pipe dream—is no longer unimaginable.[26] In 2022, Congress approved the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (Ending Forced Arbitration Act), which exempts cases with sexual misconduct claims from the statute.[27] Its success has emboldened critics of forced arbitration, who are trying to fan the flames of a right-wing populist revolt against the process,[28] and have proposed similar laws in the Capitol.[29]

These developments expose a gap in our understanding of private dispute resolution: We know little about forced arbitration provisions themselves. Although some arbitration clauses appear on website terms of service (TOS), most are scattered throughout the economy in innumerable private contracts.[30] To be sure, a few scholars have overcome these obstacles and

25. *See, e.g.*, Glover, *Winners and Losers*, *supra* note 23, at 1635–43 (highlighting examples of anti-mass arbitration strategies); Myriam Gilles, *Arbitration's Unraveling*, 172 U. PA. L. REV. 1063, 1067 (2024) (discussing the burgeoning use of "anti-mass-arbitration provisions").

26. *See infra* text accompanying notes 115–31 (detailing the growing anti-arbitration sentiments of lawmakers in recent years).

27. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 402(a), 136 Stat. 26, 27 (codified as amended at 9 U.S.C. §§ 401–02) ("[A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable."); David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J .F. 1, 2 (2022) (describing the structure and design of Ending Forced Arbitration Act).

28. *See infra* text accompanying notes 125–27 (noting the bipartisan support for the Ending Forced Arbitration Act).

29. *See, e.g.*, Forced Arbitration Injustice Repeal (FAIR) Act of 2023, H.R. 2953, 118th Cong. § 2 (2023) (banning forced arbitration of antitrust, consumer, employment, and civil rights claims); Arbitration Fairness for Consumers Act (AFCA), S. 3755, 117th Cong. § 2 (2022) (targeting forced arbitration clauses in consumer contracts).

30. *See* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 11 [hereinafter Rutledge & Drahozal, *Contract and Choice*] ("Ordinarily, companies [a]re not obligated to disclose their arbitration agreements systematically in a form usable by researchers.").

published helpful studies.[31] However, this work tends to be out of date,[32] have small sample sizes,[33] be limited to discrete industries,[34] and focus on consumers to the exclusion of employees.[35]

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31. *See, e.g.*, Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55, 57 (reporting the results of a study investigating the frequency in which consumers encounter arbitration); Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 538 (2012) [hereinafter Drahozal & Rutledge, *Credit Card Agreements*] (examining a dataset of consumer credit card agreements); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RSRV. L. REV. 341, 341 (2014) (analyzing social media arbitration agreements); *Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROT. BUREAU 2 (Mar. 2015) [hereinafter *CFPB Arbitration Study*], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/9BKH-HZEU] (studying pre-dispute arbitration in the consumer finance sector); Ryan Miller, Current Development, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After* Concepcion *and* American Express, 32 GEO. J. LEGAL ETHICS 793, 794 (2019) (examining arbitration agreements before and after recent key Court cases); Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 UC DAVIS L. REV. ONLINE 233, 234 (2019) [hereinafter Szalai, *Consumer Arbitration*] (evaluating arbitration agreements and practices of the top 100 companies in the United States); Christopher R. Drahozal, *Arbitration and Rule Production*, 72 CASE W. RSRV. L. REV. 91, 94 (2021) (examining the impact of arbitration on precedent production and the creation of legal rules).

32. *See, e.g.*, Demaine & Hensler, *supra* note 31, at 60 (collecting data from 2001).

33. *See, e.g.*, Miller, *supra* note 31, at 804 (studying arbitration provisions from 100 "businesses of various sizes and revenues").

34. *See, e.g.*, Drahozal & Rutledge, *Credit Card Agreements*, *supra* note 31, at 551 (surveying credit card agreement arbitration clauses); Koenig & Rustad, *supra* note 31, at 351 (critiquing arbitration clauses in social media companies' terms of service); Drahozal, *supra* note 31, at 115–16 (tracking the use of arbitration clauses in franchise agreements over time).

35. For attempts to determine the prevalence of forced employment arbitration, see 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. 4 (Sept. 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration [https://perma.cc/W59G-HNZZ] (conducting a telephone survey of 627 human resources departments and determining that fifty-four percent mandated arbitration); Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, NAT'L INST. FOR WORKERS' RTS. 3 (Mar. 2018) [hereinafter Szalai, *Workplace Arbitration*], https://niwr.org/wp-content/uploads/2018/03/NELA-Institute

Thus, the consensus has long been that "the empirical record on arbitration remains incomplete"[36] and battles over the process are "being waged in a data vacuum."[37]

This Article takes a step towards filling this void by reporting the results of an empirical study of the arbitration provisions of the largest corporations in America (the Fortune 500). This dataset of 582 forced clauses—assembled largely from thousands of pages of trial court filings—reveals three central points. First, many big businesses impose arbitration upon at least some of their customers or workers. For starters, more than 80% of consumer-facing Fortune 500 firms mandate arbitration in some fashion.[38] In addition, although forced employment clauses are less common, they still can be found in 60% to 89% of agreements in most industries.[39] Second, these contracts typically favor businesses. Seventy-seven percent of the forced provisions under my microscope bar class arbitration, 78% feature delegation clauses, and about half contain a term that some judges would find to be substantively unconscionable.[40] Third, and in sharp contrast to the conventional wisdom, the drafting quality of forced provisions varies tremendously.[41] Some corporations, like Walmart, are highly attuned to the intricacies of the FAA.[42] But although arbitration is a high-stakes topic and every entity in my database has the deepest of pockets, some of their forced clauses suffer from jaw-dropping typos and choices that betray confusion about the law.[43]

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-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf [https://perma.cc/7C7W-UE52] (concluding that about half of the 100 largest companies in the United States force employees to arbitrate).

36. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1170 (2011) [hereinafter Drahozal & Rutledge, *Contract and Procedure*].

37. Koenig & Rustad, *supra* note 31, at 347.

38. *See infra* Part II.B.1 (detailing the results of data regarding Fortune 500 companies and forced arbitration).

39. *See infra* Part II.B.1 (noting variances in the data between industries ).

40. *See infra* Part II.C (finding the persistent use of unconscionable terms in Fortune 500 arbitration agreements).

41. *See infra* Part II.C.1 (noting the "sloppy" drafting of many of these provisions).

42. *See supra* text accompanying notes 19–22 (outlining Walmart's sophisticated use of the mechanisms of arbitration).

43. *See infra* Part II.C.1 (providing examples of arbitration clauses that undermined the company's own goals).

The Article then explores the policy and doctrinal implications of its findings. It starts by investigating a question that bitterly divides the pro and anti-arbitration camps: Is the ubiquity of private dispute resolution problematic? The Article concludes that the answer depends largely on how one defines the potential "problem." Some skeptics argue that because forced arbitration is so common, it illicitly transfers procedural rulemaking authority in many cases from public servants to firms.[44] Anyone who subscribes to this belief will likely feel that my research reinforces it. Indeed, the rate of forced consumer clauses among Fortune 500 vendors in the industries that are woven into everyday life—media, food and drug stores, telecommunications, and transportation—is 100%.[45] But anti-arbitration voices also claim that the widespread use of forced procedures is troubling because people cannot find products, services, or jobs that allow them to maintain access to the courts.[46] My data either do not support or do not inform this more aggressive assertion. Several Fortune 500 firms only mandate arbitration for some of their customers or workers, and even arbitration-saturated markets may feature companies that do not use forced clauses.[47]

The Article also evaluates fairness in forced arbitration. Defendants argue that two factors prevent them from overreaching. First, arbitration providers like the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS) have adopted rules that protect consumers and employees.[48] Second, judges can find forced clauses to be unconscionable under section two of the FAA.[49] The Article's research substantiates these claims in part. The fact that forty-six percent of forced clauses do not contain a single potentially

44. *See infra* text accompanying notes 137–38 (highlighting how business have crafted arbitration procedures to favor their interests).

45. *See infra* Part III.A.1 (explaining that forced arbitration is widespread).

46. *See infra* text accompanying notes 320–21 (arguing that the data presented in the study conflicts with this broad critique).

47. *See infra* text accompanying notes 221–26 (finding variety in who and what was covered under Fortune 500 arbitration agreements).

48. *See infra* text accompanying note 139 (reciting a common corporate defense claim).

49. *See infra* text accompanying note 140 (explaining how supporters of these arbitration clauses argue that judicial review under the FAA ensures agreements without unconscionable terms).

unconscionable term suggests that corporations do not enjoy carte blanche when they create procedural rules.[50] Nevertheless, the Article also shows that many firms have become skilled at gaining the maximum permissible advantage.[51] Because they cherry-pick which claims must be arbitrated and skew procedures in subtle ways, they enjoy home field advantage.

Next, the Article explains why its discovery of sloppy forced clauses supports an idea that verges on the blasphemous: Arbitration bans may not be as devastating for some businesses as is commonly believed. To be clear, forced arbitration is a godsend for top shelf drafters like Walmart, which have sunk vast resources into limiting their liability exposure. However, not all companies fit this description. The FAA produces a ceaseless river of precedent, and even wealthy and highly motivated entities cannot stay apace.[52] They end up paying their lawyers to create byzantine procedural regimes that do not function as intended.[53] For them, forced arbitration is little more than a tax in the form of transaction costs.[54] Moreover, the problem of the defective forced clause is only going to get worse with the emergence of mass arbitration. Companies may find a way to block mass filings, but only after a period of experimentation in which judges strike down their initial attempts and send them back to the drawing board.[55] As Amazon and Tik Tok recognized, it might be cheaper to bow out of the procedural rulemaking game than to experiment with terms that do nothing.[56]

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50. *See infra* Part II.C (presenting the findings of the prevalence of "problematic terms" in these agreements).

51. In addition, as I will discuss, the mere fact that a forced clause lacks unconscionable terms does not make it fair. For example, the Court has basically immunized two powerful pro-drafter terms—class arbitration waivers and delegation clauses—from the unconscionability doctrine. *See infra* text accompanying notes 88–104.

52. *See infra* Part II.C (using study results to show the unruly nature of arbitration precedent).

53. *See infra* Part III.A.5 (arguing that arbitration has negative effects for businesses as well as plaintiffs).

54. *See infra* Part III.A.5 (describing how businesses sometimes struggle to adapt their arbitration clauses).

55. *See infra* Part III.A.4 (highlighting the impact of mass arbitration on current business attitudes towards forced arbitration clauses).

56. *See infra* Part III.A.4 (explaining the risky burden of experimenting with new arbitration terms).

Finally, the Article turns to doctrine. It evaluates three open issues: whether drafters can imply delegation clauses into adhesion contracts, make forced clauses procedurally conscionable by giving individuals a chance to opt out of arbitration, or recover their attorneys' fees from plaintiffs who object to a motion to compel.[57] Each question involves the propriety of a corporate technique that tries to preclude courts from asking whether a forced provision is substantively unconscionable.[58] Because the Article finds that most forced clauses contain at least one unfair term, courts should rebuff these attempts to eliminate their gatekeeping function.

The Article contains three Parts. Part I provides background. It offers a primer on both the FAA's transformation and the empirical literature on forced arbitration clauses. Part II describes my research methods and results. It casts fresh light on how many large companies use forced clauses. It also surveys the incidence of class arbitration waivers, delegation clauses, and other terms that stack the deck in favor of the dealer. Part III applies the insights from Part II to hot topics such as federal anti-arbitration measures, mass arbitration, and the role of courts.

## I. BACKGROUND

This Part lays a foundation for the rest of the Article. It first offers a thumbnail sketch of the forced arbitration controversy by tracing the evolution of the FAA. It then summarizes the empirical work on forced arbitration clauses, concluding that while it has added to our understanding, it leaves many key questions unanswered.

### A. THE FORCED ARBITRATION CONTROVERSY

In the last four decades, the FAA has risen from relative obscurity to become one of the most important and divisive statutes in the American civil justice system. This Section describes its unlikely evolution.

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57. *See infra* text accompanying notes 400–11.

58. *See infra* Part III.B (detailing the corporate maneuvering to avoid terms of their arbitration agreements being found unconscionable).

Congress passed the FAA in 1925 to abolish judicial suspicion of arbitration.[59] Its nucleus, section two, makes pre-dispute arbitration clauses specifically enforceable unless they violate some tenet of contract law, like fraud, duress, or lack of assent.[60] In addition, sections three and four of the statute entrust trial courts with resolving conflict about "the making of" the arbitration clause before granting a motion to compel.[61] Finally, section one specifies that the FAA does not govern "contracts of employment of . . . workers engaged in foreign or interstate commerce"[62]—an injunction that lawmakers intended to exclude all employment agreements.[63] Although the statute's text and legislative history are sparse, most experts believe that it was supposed to be a procedural rule for federal courts[64] that governed fact-bound disputes between merchants rather than "points of law of major importance."[65]

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59. *See* GRAHAM, *supra* note 11, at 1–2 (explaining that the FAA overrode common law rules that barred judge from specifically enforcing pre-dispute arbitration provisions).

60. *See* 9 U.S.C. § 2 (declaring that arbitration clauses in contracts that affect interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

61. *Id.* §§ 3–4 (instructing courts to "be[] . . . satisfied that the issue . . . is referable to arbitration" and to resolve disputes about "the making of the agreement for arbitration").

62. *Id.* § 1.

63. *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Piatt, Chairman, Comm. on Com., Trade, & Com. L., Am. Bar Ass'n) (clarifying that the exclusion of workers "engaged in . . . interstate commerce" would cover all employees that Congress could regulate at the time).

64. *See, e.g.*, IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 83–147 (1992) (detailing the legislative history of the FAA and critiquing the courts' subsequent application of it to state courts); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Created by Congress*, 34 FLA. ST. L. REV. 99, 127–30 (2006) (challenging the reasoning of the Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984)). *But see* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2004) (noting strong indications that the drafters of the FAA intended the statute to apply to state courts).

65. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) ("[Arbitration] is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.").

However, near the end of the twentieth century, the Court began to interpret the FAA broadly. The Court held that the statute applies in state court,[66] preempts state law[67] and covers every type of contract[68] and claim.[69] The Court justified this change by announcing that arbitration and litigation are equally effective tribunals for vindicating complaints:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[70]

Businesses responded by mandating arbitration in the fine print of consumer and employment contracts, sparking what the *New York Times* dubbed the "arbitration war": "a battle over whether the United States will increasingly have a privatized system of justice that bars people from enforcing rights in court and, if so, what will be considered fair in that system."[71]

The FAA's expansion triggered a tug-of-war between corporations and courts. Some enterprises seemed determined to test the limits of their newfound power to make procedure. Rather

66. *See Keating*, 465 U.S. at 11 ("We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.").

67. *See id.* at 8 (holding that the FAA preempts state law).

68. *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (holding that the FAA applies to arbitration clauses in most employment contracts).

69. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (compelling arbitration of alleged violations of the Sherman Act); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991) (same for the Age Discrimination in Employment Act).

70. *Mitsubishi Motors*, 473 U.S. at 628; *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266 (2009) (reasoning that arbitration is litigation's peer (citing *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 472 U.S. at 628))); Preston v. Ferrer, 552 U.S. 346, 359 (2008) (affirming the holding and reasoning of *Mitsubishi Motors* (quoting *Mitsubishi Motors*, 472 U.S. at 628)); *Adams*, 532 U.S. at 123 (opining on benefits of arbitration in allowing parties to avoid litigation costs); *Gilmer*, 500 U.S. at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (explaining courts' shifts in support of arbitration (quoting *Mitsubishi Motors*, 472 U.S. at 628)); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 229–30 (1987) (indicating support for *Mitsubishi* and precedent developed from it regarding arbitration (citing *Mitsubishi Motors*, 472 U.S. at 628, 633–34)).

71. Editorial, *The Arbitration War*, N.Y. TIMES (Nov. 26, 2010), https://www.nytimes.com/2010/11/27/opinion/27sat1.html [https://perma.cc/Q6ZB-99VM].

than just mandating arbitration, they slashed discovery,[72] made the proceedings confidential,[73] shortened the statute of limitation,[74] chose an inconvenient forum,[75] saddled the plaintiff with arbitration fees,[76] and reversed the American rule by directing the arbitrator to award attorneys' fees to the winner.[77] But judges pushed back. Exercising their prerogative under section two of the FAA to strike down arbitration clauses under black letter contract defenses, they deemed many of these lopsided procedures to be unconscionable.[78]

Arbitration providers also helped keep drafters in check. Companies like the AAA,[79] ADR Services, Inc.,[80] the International Institute for Conflict Prevention and Resolution (CPR),[81]

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72. *See, e.g.*, Est. of Ruszala v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 821 (N.J. Super. Ct. App. Div. 2010) (holding the use of an arbitration clause to limit discovery is unconscionable).

73. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (finding a confidentiality provision within an arbitration unconscionable).

74. *See, e.g.*, Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 672 (Cal. Ct. App. 2004) ("The arbitration agreement's provision of a six-month statute of limitations unlawfully restricts an employee's ability to vindicate his civil and statutory rights.").

75. *See, e.g.*, Acosta v. Fair Isaac Corp., 669 F. Supp. 2d 716, 722 (N.D. Tex. 2009) ("Given that Fair Isaac does not reside in or near California, this provision seems to have little justification other than to deter employees from bringing legitimate claims against Fair Isaac because of financial constraints.").

76. *See, e.g.*, Velasco v. Wash. Mut. Bank, No. CV0801104, 2008 WL 11336581, at *2–3 (C.D. Cal. July 17, 2008) (finding the arbitration fees associated with the agreement unconscionable).

77. *See, e.g.*, Pokorny v. Quixtar, Inc., 601 F.3d 987, 1004 (9th Cir. 2010) ("[T]he Rules of Conduct include a fee-shifting clause that unfairly exposes IBOs to a greater financial risk in arbitrating claims than they would face if they were to litigate those same claims in federal court.").

78. *See* David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012) (noting the judicial tug of war against unconscionable terms in arbitration agreements); *see also supra* sources cited notes 72–73 (highlighting examples of when the Court has found arbitration procedures unconscionable).

79. *Consumer Arbitration Rules*, AM. ARB. ASS'N 6 (Sept. 1, 2014) [hereinafter *AAA Consumer Rules*], https://www.adr.org/sites/default/files/Consumer%20Rules.pdf [https://perma.cc/8X4N-LNT7] (outlining AAA's procedural rules).

80. *Arbitration Rules*, ADR SERVS. 3 (Apr. 17, 2017), http://www.adrservices.com/wp-content/uploads/2017/04/ADR-ARBITRATION-RULES-Final-Version-4-11-17.pdf [https://perma.cc/GYJ4-YMVH] (outlining ADR Services' procedural rules).

81. *See, e.g.*, *2019 Administered Arbitration Rules*, CPR DISPUTE RESOL. 1 (Mar. 1, 2019) [hereinafter *CPR Rules*], https://drs.cpradr.org/rules/arbitration/

and JAMS[82] handle thousands of cases a year under their own procedural rules.[83] Some tried to shave the rough edges off forced arbitration by creating "Due Process Protocols"[84] or "Minimum Standards."[85] These principles limit a plaintiff's fees and declare that the institution will not administer a matter unless the arbitration clause meets certain fairness benchmarks.[86]

Yet the forced arbitration storm intensified in the 2000s with the advent of the class arbitration waiver. Companies, which had long seen aggregate proceedings as "judicial blackmail,"[87] amended their contracts to require plaintiffs to arbitrate

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administered-arbitration-rules-2019 [https://perma.cc/TSC6-JN8Y] (outlining CPR's procedural rules).

82. *See, e.g.*, *Comprehensive Arbitration Rules & Procedures*, JAMS 6 (June 1, 2021), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Comprehensive_Arbitration_Rules-2021.pdf [https://perma.cc/K63B-5FZJ] (outlining JAMS' procedural rules).

83. *See* Horton, *Arbitration Rules*, *supra* note 23, at 624–25 (examining the new procedural landscape created by arbitration).

84. *See generally, e.g.*, *Consumer Due Process Protocol Statement of Principles*, AM. ARB. ASS'N (Apr. 17, 1998) [hereinafter *AAA Consumer Due Process*], https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf [https://perma.cc/9B88-J9FZ]; *Employment Due Process Protocol*, AM. ARB. ASS'N (May 9, 1995) [hereinafter *AAA Employment Due Process*], https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [https://perma.cc/B9KC-YL2Q] (showing examples of arbitration due process protocols).

85. *See, e.g.*, *JAMS Policy on Consumer Arbitration Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JAMS (May 1, 2024) [hereinafter *JAMS Consumer Arbitration Policy*], https://www.jamsadr.com/consumer-minimum-standards [https://perma.cc/3W3L-KTWH]; *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS (July 15, 2009) [hereinafter *JAMS Employment Arbitration Policy*], https://www.jamsadr.com/employment-minimum-standards [https://perma.cc/RA6W-E3N9] (showing an older version of JAMS (Judicial Arbitration and Mediation Services) minimum standards).

86. *See AAA Consumer Due Process*, *supra* note 84, at 1–3 (providing guidance for how to ensure the fairness of arbitrations, such as having open access to information and a neutral selection process for the arbitrators); *AAA Employment Due Process*, *supra* note 84, at 1–4 (same); Freeman v. SmartPay Leasing, LLC, 771 F. App'x 926, 934 (11th Cir. 2019) (describing the impact of JAMS' Minimum Standards on a consumer's fees).

87. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 386 (2005) (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)).

individually.[88] Most judges held that these provisions were unconscionable when a plaintiff sought to vindicate wrongdoing that deprived many people of small sums, reasoning that "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[89]

Drafters devised an ingenious response. To address concern that class waivers destroyed low-value complaints, some companies created incentives for plaintiffs to arbitrate these claims on an individual basis.[90] For example, AT&T Mobility LLC specified that any consumer who won more in arbitration than it offered to settle the case would recover an additional $10,000, their expert witness expenses, and twice their attorneys' fees.[91]

This gambit paid dividends. At first, lower courts continued to find that these self-described "pro-consumer"[92] class waivers were unconscionable on the grounds that few people would bother trying to win the bounties.[93] However, in 2011, with

88. *See, e.g.*, *id.* at 397–98 (describing how American Express exemplified the individualized arbitration trend in amending their contract to force individual arbitration).

89. *In re* Checking Acct. Overdraft Litig., 718 F. Supp. 2d 1352, 1358 (S.D. Fla. 2010) (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)), *rev'd sub nom.* Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir. 2017); *see also* Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 275 (Ill. 2006) (holding that Cingular's class action waiver was unconscionable because the plaintiffs' only means of receiving a "complete remedy" was through a class action); Discover Bank v. Superior Ct., 113 P.3d 1100, 1108–09 (Cal. 2005) (describing how plaintiffs who might be owed a small amount of money would be deprived of their consumer rights under Discover's class action waiver, rendering the waiver unconscionable).

90. *See* Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 856–58 (2012) (providing examples of how different companies have incentivized arbitration).

91. *See AT&T Consumer Service Agreement*, AT&T §§ 3–4, http://www.att.com/legal/terms.wirelessCustomerAgreement.html [https://perma.cc/T8ME-M884].

92. AT&T Mobility's Brief in Support of its Motion to Compel Arbitration and to Dismiss Action at 3, Francis v. AT&T Mobility, LLC, No. 07-cv-14921, 2008 WL 786803 (E.D. Mich. Mar. 20, 2008), 2008 WL 393982.

93. *See, e.g.*, Laster v. T-Mobile USA, Inc., No. 05CV1167, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008) ("Th[e] overarching policy concern of deterring corporate wrongdoing is not sufficiently addressed by [AT&T Mobility's] revised arbitration provision."), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v.

*AT&T Mobility LLC v. Concepcion*, the Court granted certiorari of such an opinion.[94] Rather than producing a narrow ruling limited to generous arbitration clauses, the Justices announced that the FAA preempts any judicial determination that a class arbitration waiver is too unfair to enforce.[95] Two years later, in *American Express Co. v. Italian Colors Restaurant*, the Court extended *Concepcion*'s logic to a federal common law doctrine that judges had also used to nullify class arbitration waivers.[96] Finally, in 2019, with *Lamps Plus, Inc. v. Varela*, the Court delivered the *coup de grace* by finding that the FAA prevents courts from construing contracts that do not expressly authorize class arbitration to permit such proceedings.[97] Therefore, to prohibit class actions, an arbitration clause now only needs to never mention them.

In the meantime, the Court also enlarged the power of arbitrators over topics pertaining to the arbitration itself. Recall that sections three and four of the FAA give trial courts authority to decide whether a claim falls within the ambit of an enforceable arbitration clause.[98] In the 1980s, the Court hinted that parties could override this default rule and assign the issue to arbitrators if there is "'clear and unmistakable' evidence" of their intent to do so.[99] Corporate counsel saw this as an invitation to limit

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Concepcion, 563 U.S. 333 (2011), *amended in part*, No. 05CV1167, 2012 WL 1681762 (S.D. Cal. May 9, 2012).

94. *Laster*, 584 F.3d 849, *cert. granted sub. nom.* AT&T Mobility LLC v. Concepcion, 560 U.S. 923 (2010).

95. *Concepcion*, 563 U.S. at 352 (noting that the FAA preempted judicial restrictions on class-wide proceedings).

96. 570 U.S. 228, 238–39 (2013) (holding that the common law regime was a "judicially created superstructure" not sanctioned by the FAA).

97. 139 S. Ct. 1407, 1419 (2019) (holding that ambiguous agreements do not authorize class actions). For a taste of the criticism these opinions have inspired, see Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623, 629 (2012) ("[M]ost class cases will not survive the impending tsunami of class action waivers."); 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) (accusing the Court of giving corporations "the power to impose a mandatory, no-opt-out system in their own private 'courts' designed to preclude aggregate litigation").

98. *See supra* note 61 (describing sections three and four of the FAA).

99. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court,

judicial oversight of their handiwork. They began to try to meet the "clear and unmistakable" test through delegation clauses, which give the arbitrator dominion over "the validity, enforceability, or scope of th[e] [a]rbitration [p]rovision."[100]

Eventually, the Court paved the way for delegation clauses to go mainstream. In 2010's *Rent-A-Center West, Inc. v. Jackson*, the Court announced that delegation clauses are their own independent arbitration clauses nestled within the agreement to arbitrate the merits of the underlying case.[101] This mindboggling maneuver made delegation clauses generally enforceable unless a plaintiff threads the slenderest of needles by proving that it would be unconscionable to arbitrate the issue of whether it would be unconscionable to arbitrate their substantive claims.[102] Finally, in 2019, the Court declared in *Henry Schein, Inc. v. Archer & White Sales, Inc.* that trial judges must enforce delegation provisions even if a party's assertion that a case is subject to arbitration is "wholly groundless."[103] These fox-in-the-henhouse opinions gave arbitrators vast authority over the fairness of arbitration.[104]

But around 2020, the momentum in the field abruptly changed. First, plaintiffs' lawyers identified a loophole in companies' attempts to wipe out the class action. Unable to aggregate complaints, plaintiffs' attorneys did the next best thing and

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not the arbitrator." (citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583–84 (1960))); *see also* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944–47 (1995) (extending this rule from the labor context into the commercial setting).

100. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006) (quoting the arbitration provision analyzed in the case).

101. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) ("The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.").

102. *See id.* at 73–74 (describing how the plaintiff failed to prove the delegation provision was unconscionable). Without getting too deep in the weeds, this is because the Court's separability doctrine only allows courts to hear challenges to the arbitration clause itself, rather than the broader "container" contract. *See id.* at 70. Thus, because a delegation clause is an arbitration clause inside an arbitration clause inside the container contract, a plaintiff can only show that it is unconscionable by making "arguments specific to the delegation provision." *Id.* at 74.

103. 139 S. Ct. 524, 531 (2019).

104. *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 369–72 (2018) (describing how arbitration increasingly resolves key questions about the arbitration itself).

brought volleys of individualized but coordinated arbitrations against corporations such as Amazon,[105] DoorDash,[106] Family Dollar,[107] Intuit,[108] Lyft,[109] and Peloton.[110] Their goal was not really to win or even to fight all the way to the awards stage. Instead, they capitalized on the fact that the two most popular providers, the AAA and JAMS, require defendants to deposit more than $1,000 for every arbitration.[111] These fees add up quickly in mass filings. For example, the AAA charged Postmates approximately $9,360,000 when it received 4,925 arbitration demands from the firm's couriers[112] and JAMS demanded more

105. *See* Corkery, *supra* note 24 (describing the "en masse" complaints plaintiffs' lawyers lodged against Amazon, alleging that Alexa devices were recording consumers without their consent).

106. *See* Petitioners' Petition to Compel Arbitration; Memorandum of Points & Authorities in Support ¶ 1, Boyd v. DoorDash, Inc., No. CPF-19-516930 (Cal. Super. Ct. Nov. 19, 2019) ("Petitioners are 3,997 DoorDash couriers ('Dashers') who are attempting to arbitrate individual claims . . . .").

107. *See* Jack Newsham & Peter Coutu, *Family Dollar Forced Employees to Sign Arbitration Agreements. Here's What Happened When They Tried to Sue the Company over Unpaid Wages*, BUS. INSIDER (Dec. 21, 2021), https://www.businessinsider.com/family-dollar-unpaid-wages-mass-arbitration-keller-lenkner-2021-12 [https://perma.cc/LK6L-M53D] (detailing lawyers signing around 2,000 Family Dollar employees as clients).

108. *See* Justin Elliot, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle over Consumer Fraud*, PROPUBLICA (Feb. 23, 2022), https://www.propublica.org/article/turbotax-maker-intuit-faces-tens-of-millions-in-fees-in-a-groundbreaking-legal-battle-over-consumer-fraud [https://perma.cc/8XRY-N8HD] (describing how the mass-filing strategy is being used against Intuit).

109. *See* Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in [https://perma.cc/2C9Y-R238] (discussing how Lyft was hit with hundreds of individual arbitration complaints).

110. *See* Class Action Complaint ¶ 30, Skillern v. Peloton Interactive, Inc., No. 21-cv-06808 (S.D.N.Y. Aug. 12, 2021) (mentioning a "mass arbitration" against Peloton).

111. Horton, *Arbitration Rules*, *supra* note 23, at 673 ("[T]he AAA Commercial Rules and JAMS Comprehensive Rules require defendants to pay a deposit of about $1,500 for each arbitration."); *see also* Glover, *Mass Arbitration*, *supra* note 23, at 1345 (explaining that arbitration fees can amount to over $1,500 per claim); Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019), https://www.reuters.com/article/legal-us-otc-uber/uber-tells-its-side-of-the-story-in-mass-arbitration-fight-with-12500-drivers-idUSKCN1PA2PD [https://perma.cc/2C9Y-R238] (same).

112. Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1250 (N.D. Cal. 2019), *aff'd*, 823 F. App'x 535 (9th Cir. 2020).

than $18,000,000 to handle more than 12,000 cases against Uber.[113] Mass arbitrations thus produce tremendous pressure on defendants to settle merely "to avoid the administrative costs."[114]

Second, a surge of anti-arbitration sentiment swept through Washington, D.C. The prime example is the Ending Forced Arbitration Act, which, as mentioned, invalidates pre-dispute arbitration clauses in cases that feature allegations of sexual wrongdoing.[115] The bill was co-sponsored by eighteen Republicans,[116] passed the House by a comfortable 335-97,[117] and sailed through the Senate on a voice vote[118] (a process that is "generally reserved for uncontroversial matters").[119]

Of course, this consensus was largely a testament to the power of #MeToo. Lawmakers faced pressure to act after victims of sexual misconduct "spoke out about how they could not sue perpetrators because they had unwittingly signed [arbitration] clauses"[120] and several prominent law firms and technology companies exempted claims of sexual misconduct from their forced

113. Frankel, *supra* note 111.

114. Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order at 3, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2019) (No. 19-cv-07545) (emphasis omitted).

115. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 402(a), 136 Stat. 26, 27 (codified as amended at 9 U.S.C. §§ 401–402).

116. *Cosponsors: S.2342 — 117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/2342/cosponsors [https://perma.cc/4TR9-67HQ] (listing ten Republican senators as co-sponsors for the Senate version of the Ending Forced Arbitration Act); *Cosponsors: H.R.4445 — 117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/4445/cosponsors [https://perma.cc/LD98-QWQB] (listing eight Republican representatives as co-sponsors for House version of Ending Forced Arbitration Act).

117. *See* Carrie N. Baker, *Biden Signs Bill to End Forced Arbitration for Sexual Assault Harassment Claims, Protect Right to File Class Action Lawsuits*, MS. (Feb. 15, 2022), https://msmagazine.com/2022/02/15/congress-ends-arbitration-protects-right-to-file-class-action-lawsuits [https://perma.cc/2AFA-RECQ].

118. *Id.*

119. *E.g.*, Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 46 (2011).

120. Amy B Wang & Eugene Scott, *Biden Signs Bill Ending Forced Arbitration in Sexual Assault, Harassment Cases*, WASH. POST (Mar. 3, 2022), https://www.washingtonpost.com/politics/2022/03/03/biden-signs-new-law-ending-forced-arbitration-sex-assault-harassment [https://perma.cc/63TK-QHLA].

arbitration provisions.[121] Commentators also highlighted how arbitration's often confidential nature allowed "offender[s] to potentially evade accountability and continue the harassment."[122] In fact, even the bill's opponents called it "well-intentioned"[123] and stated that women "must have their claims heard."[124]

Yet there was also evidence of broader dissatisfaction with forced arbitration. Even some Republicans decried private dispute resolution as a tool for the elite. For instance, Senator Lindsay Graham explained his support for the Ending Forced Arbitration Act by quipping "[n]o more arbitration in the basement about misconduct up top."[125] And firebrand Florida former Republican Representative Matt Gaetz condemned America's "two-tier system of dispute resolution" that divides "[r]egular folks" from "big business."[126] In Gaetz's words, arbitration is "concierge justice."[127]

These developments emboldened the liberals, plaintiffs' attorneys, and public interest organizations that have long attempted to limit the domain of the FAA.[128] In March 2022, the House passed the Forced Arbitration Injustice Repeal (FAIR)

121. *See* Meagan Glynn, Note, *#TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1067–68 (2020) (highlighting the role of public pressure in companies' decisions to remove mandated arbitration provisions).

122. *Id.* at 1046–47.

123. 168 CONG. REC. H985 (daily ed. Feb. 7, 2022) (statement of Rep. Michelle Fischbach).

124. 168 CONG. REC. H990 (daily ed. Feb. 7, 2022) (statement of Rep. Jim Jordan).

125. Deirdre Walsh, *Congress Approves Bill to End Forced Arbitration in Sexual Assault Cases*, NPR (Feb. 10, 2022), https://www.npr.org/2022/02/10/1079843645/congress-approves-bill-to-end-forced-arbitration-in-sexual-assault-cases [https://perma.cc/R83B-72BT].

126. 168 CONG. REC. H3791 (daily ed. Mar. 17, 2022) (statement of Rep. Matt Gaetz).

127. 168 CONG. REC. H987 (daily ed. Feb. 7, 2022) (statement of Rep. Matt Gaetz).

128. *See, e.g.*, Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1332 (noting that between 1995 and 2010, arbitration opponents introduced 139 laws seeking "either to (a) eliminate mandatory arbitration for certain categories of disputes or (b) restrict the ways in which companies can use it"). Only a few narrow measures became law. *See, e.g.*, 15 U.S.C. § 1226(a)(2) (voiding pre-dispute arbitration clauses in motor vehicle franchise contracts); 7 U.S.C. § 197c (same for "livestock or poultry contract[s]"); 10 U.S.C. § 987(f)(4) (same for loans to active members of the military); 15 U.S.C. § 1639c(e)(1) (same for residential mortgages).

Act, which nullifies clauses "that force arbitration of future employment, consumer, antitrust, or civil rights disputes."[129] Although the FAIR Act died in the Senate, it has since been reintroduced in both chambers.[130] Congress is also considering the Arbitration Fairness for Consumers Act (AFCA): a narrower bill that voids pre-dispute arbitration clauses in contracts for "financial product or services dispute[s]."[131] To be sure, the FAIR Act and the AFCA need broader support on the right to survive a filibuster. Nevertheless, the prospect of forced arbitration reform is no longer unthinkable.

And more importantly for my purposes, the debate over these laws shows how little we know about the prevalence and content of forced arbitration agreements. For example, anti-arbitration activists contend that these terms are "pervasive,"[132] "ubiquitous,"[133] and have infiltrated "such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and even . . . nursing home admissions."[134] However, allies of the business community vigorously dispute these assertions.[135] Moreover, pro-arbitration voices argue that the

129. Forced Arbitration Injustice Repeal (FAIR) Act of 2022, H.R. 963, 117th Cong. § 2(1) (2022).

130. *See* Press Release, Rep. Hank Johnson, Rep. Johnson & Sen. Blumenthal Re-Introduce Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers (Apr. 28, 2023), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-re-introduce-legislation-end-forced [https://perma.cc/AR2E-WD8K] ("Congressman Hank Johnson (GA-04), . . . and U.S. Senator Richard Blumenthal (D-CT), announced that they re-introduced the FAIR Act: The Forced Arbitration Injustice Repeal Act."); *see also* Forced Arbitration Injustice Repeal (FAIR) Act of 2023, H.R. 2953, 118th Cong. (2023); Forced Arbitration Injustice Repeal (FAIR) Act of 2023, S. 1376, 118th Cong. (2023) (detailing House and Senate versions of reintroduced FAIR Act).

131. S. 3755, 117th Cong. § 2(1) (2022).

132. *Examining Mandatory Arbitration in Financial Service Products: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. 145 (2022) (statement of Myriam Gilles, Paul R. Verkuil Research Chair in Public Law, Benjamin N. Cardozo School of Law) [hereinafter *Examining Mandatory Arbitration Hearing*].

133. *Id.* at 52 (statement of Remington A. Gregg, Counsel for Civil Justice and Consumer Rights, Public Citizen).

134. *Id.*

135. *See id.* at 3–5 (statement of Sen. Pat Toomey, Ranking Member, S. Comm. on Banking, Hous., & Urb. Affs.) (arguing that arbitration agreements are not pervasive and help consumers); *id.* at 67 (statement of Todd J. Zywicki,

widespread use of clauses that give individuals the right to opt out of arbitration make the process voluntary:

> [C]onsumers [and employees] are not "forced" . . . to arbitrate merely because a standard form contract is involved. Most arbitration clauses offer consumers the right to opt out of the arbitration clause by sending a simple opt-out notice back to the company within 30, 45 or 60 days of entering into the contract.[136]

Similarly, these two sides are miles apart on whether forced provisions are fair. Arbitration skeptics argue that forced clauses are laden with rigged procedures. As Remington Gregg, a lawyer with left-leaning advocacy group Public Citizen put it: "Corporate entities write the contracts that contain forced arbitration clauses, so it is unsurprising that [the] terms are corporate friendly."[137] Former Ohio Democratic Senator Sherrod Brown echoed this sentiment, declaring that "when you write the rules, the system works great for you."[138] Conversely, lobbyists like the U.S. Chamber of Commerce contend that two factors disincentivize defendants from abusing their procedural rulemaking authority: The arbitration providers will not administer cases that flout their Due Process Protocols and Minimum Standards[139] and courts can invalidate harsh forced clauses

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Professor, Antonin Scalia Law School) ("[C]onsumers who are concerned about preserving their rights to sue can easily find a card that will provide them that option, even among larger card issuers.").

136. Alan S. Kaplinsky et al., Comment Letter on Petition for Rulemaking: To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services, No. CFPB-2023-0047, at 6 (Nov. 14, 2023), https://www.regulations.gov/comment/CFPB-2023-0047-0021 (choose "Download" located below "Comments Opposing Petition for Rulemaking") [https://perma.cc/GL96-P3C7].

137. *Examining Mandatory Arbitration Hearing*, *supra* note 132, at 52 (statement of Remington A. Gregg, Counsel for Civil Justice and Consumer Rights, Public Citizen).

138. *Id.* at 2 (statement of Sen. Sherrod Brown, Chairman, S. Comm. on Banking, Hous., & Urb. Affs.).

139. *See id.* at 11 (statement of Steven P. Lehotsky, Lehotsky Keller LLP, on behalf of the U.S. Chamber of Commerce) (describing minimum standards enforced by the AAA upon arbitration participants).

under section two of the FAA.[140] Thus, they conclude that this double-barreled oversight keeps drafters in line.[141]

In sum, much of the current debate over the FAA hinges on claims about the prevalence and fairness of forced arbitration agreements. But as I explain next, we know little about these topics.

### B. STUDIES OF FORCED ARBITRATION CLAUSES

There have been a handful of empirical studies of forced arbitration clauses.[142] This section explains why this literature is valuable but leaves many open questions.

In 2004, Linda Demaine and Deborah Hensler published a pathbreaking paper examining how often an average Los Angeles consumer would agree to arbitrate.[143] Demaine and Hensler identified 161 businesses that area residents likely patronized, ranging from hospitals to credit card issuers to department stores.[144] Then, using shoe-leather data-collection methods, Demaine and Hensler harvested these firms' contracts by buying their products or services or contacting their customers.[145] Demaine and Hensler found that fifty-seven (35%) of the documents required arbitration.[146] In addition, they reported that most of these provisions were benign: only 13.5% required confidentiality,[147] 7.7% limited damages,[148] and only three of the provisions that specified location chose a distant forum.[149] Thus, Demaine and Hensler observed that "businesses are placing

140. *Id.* at 11–12 ("If an arbitration provision is unfair or unconscionable, courts can and do step in to declare those arbitration agreements unconscionable and unenforceable under generally applicable contract law, and they can and do invalidate arbitration agreements that impose unfair procedures.").

141. *Id.* at 12 (noting that because of existing oversight over arbitration, "[e]mpirical studies show that consumers do well or better in arbitration as in litigation").

142. *See supra* note 31 and accompanying text (highlighting a number of empirical studies of forced arbitration clauses).

143. *See* Demaine & Hensler, *supra* note 31.

144. *See id.* at 58–60 (explaining the authors' methodology).

145. *See id.* at 60 (reporting that one of the authors "acquired four credit cards while conducting the study").

146. *Id.* at 64.

147. *Id.* at 69.

148. *Id.* at 71.

149. *Id.* at 70.

consumers on equal footing with themselves in resolving any future disputes."[150]

Similarly, in the early 2010s, Christopher Drahozal and Peter Rutledge wrote a series of myth-busting papers about arbitration clauses in credit card agreements.[151] Capitalizing on the Credit Card Accountability Responsibility and Disclosure Act, which required certain lenders to submit their contracts to the Federal Reserve,[152] Drahozal and Rutledge collected 298 credit card companies' arbitration clauses.[153] Although the consensus at the time was that "[n]early every credit card issuer includes an arbitration agreement in their terms,"[154] Drahozal and Rutledge found that 82.9% of these firms did *not* foreclose access to court.[155] Also, except for class arbitration waivers, which appeared in about 95% of forced clauses,[156] Drahozal and Rutledge noted that "other provisions asserted to be unfair to consumers are almost nonexistent."[157] Indeed, only 4% shortened the statute of limitations, 6% waived damages, and 4% named an

150. *Id.* at 72. At the same time, because few of the contracts explained what arbitration is or that it is binding, Demaine and Hensler voiced concern about whether "consumers are making informed decisions when they 'agree' to arbitrate." *Id.* at 73.

151. *See generally, e.g.*, Drahozal & Rutledge, *Contract and Procedure*, *supra* note 36; Drahozal & Rutledge, *Credit Card Agreements*, *supra* note 31; Rutledge & Drahozal, *Contract and Choice*, *supra* note 30.

152. Pub. L. No. 111-24, § 204(a), 123 Stat. 1734, 1746 (2009) (codified at 15 U.S.C. § 1632(d)(2)) ("Each creditor shall provide to the [Federal Reserve], in electronic format, the consumer credit card agreements that it publishes on its Internet site.").

153. Drahozal & Rutledge, *Credit Card Agreements*, *supra* note 31, at 551 ("Our sample consists of 298 credit card issuers that filed the credit card contracts they were using as of December 31, 2009, with the Federal Reserve.").

154. *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?: Hearing Before the H. Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 111th Cong. 1–2 (2009) (statement of Rep. Steve Cohen).

155. *See* Drahozal & Rutledge, *Credit Card Agreements*, *supra* note 31, at 565 ("[W]hile most credit card agreements included arbitration clauses as of December 31, 2009, the substantial majority of credit card issuers (247 of 298, or 82.9 percent) did not use arbitration clauses in their credit card agreements.").

156. Rutledge & Drahozal, *Contract and Choice*, *supra* note 30, at 38 ("Of the arbitration clauses in the sample, forty-four of forty-seven clauses (or 93.6%) . . . waived any right to class arbitration.").

157. *Id.* at 57.

inconvenient forum.[158] Accordingly, at least in the credit card industry, criticism of forced procedures seemed to miss the mark.[159]

However, in 2014, Thomas H. Koenig and Michael L. Rustad reached sharply different conclusions about the arbitration practices of social media companies.[160] Koenig and Rustad discovered that forced arbitration clauses were somewhat rare, appearing in just 94 of 329 (29%) of social media TOS.[161] Yet they described this parallel procedural universe as a "legal dystopia."[162] They determined that none of the fifty-nine TOS that selected the AAA or JAMS satisfied the Due Process Protocols or Minimum Standards.[163] Indeed, 98% disclaimed warranties,[164] 96% capped damages,[165] 48% required the hearing to be held in the drafter's home state,[166] 37% slashed the statute of limitations,[167] and 24% saddled users with arbitration fees.[168] Koenig and Rustad thus

158. *See id.* at 39 (displaying a table with these results).

159. Conversely, other studies found that forced arbitration clauses with one-sided terms were more common in different kinds of financial services contracts. *See CFPB Arbitration Study*, *supra* note 31, §§ 2.3–2.5.9 (identifying arbitration provisions in roughly eighty-five percent of contracts drafted by prepaid card issuers, storefront payday lenders, and private student lenders and finding that the incidence of unfair terms varied); *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution*, THE PEW CHARITABLE TRUSTS 3–6 (Nov. 2012), https://www.pewtrusts.org/-/media/assets/2012/11/27/pew_arbitration_report.pdf [https://perma.cc/AMK8-VBLR] (finding that 43% of a sample of ninety-two checking account agreements mandated arbitration and that 13% of these shortened the statute of limitations, 75% waived class action rights and 33% limited damages).

160. Koenig & Rustad, *supra* note 31, at 349 (arguing that these arbitration agreements were fundamentally unfair); *cf.* Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 653, 671–74 (2012) (sounding a similar note based on a smaller sample of social media TOS).

161. Koenig & Rustad, *supra* note 31, at 351.

162. *Id.* at 344.

163. *See id.* at 363 (describing how all the agreements were far from even handed, favoring the social media provider in nearly every respect).

164. *See id.* at 396 (noting that fifty-eight out of fifty-nine companies disclaimed warranties).

165. *Id.* at 367.

166. *Id.* at 392.

167. *Id.* at 399.

168. *Id.* at 388.

asserted that forced arbitration "creates a liability-free zone for an increasing number of social media providers."[169]

Other authors investigated whether forced arbitration provisions are "sticky." Some background can frame this discussion. Scholars once thought that drafters were "economically rational" and wrote "terms which [were] efficient in maximizing the parties' total wealth."[170] One corollary of this perspective was that contracts evolved like living creatures. Supposedly, businesses that repeatedly used the same contract were "quasi-Darwinian"[171]: As they received input from courts and markets, they added valuable provisions and deleted those had had proven to be defective.[172] But starting in the 2000s, a budding literature debunked this account by proving that even sophisticated companies "cling for decades" to the same template.[173] In fact, drafters sometimes failed to revise their contracts after some external shock, such as a watershed judicial opinion, changed the utility

169. *Id.* at 344. *But cf.* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 341 (2012) (reviewing cases filed with the AAA and finding that 76.6% of the underlying contracts "fully complied with the Consumer Due Process Protocol"). In addition, other studies also reached less alarming results. *See* James R. Bucilla II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 102, 112, 136, 126 (2014) (investigating the TOS of the 100 most-visited websites in the United States and determining that 30% mandated arbitration, 67% of these included class arbitration waivers, and 30% shortened the statute of limitations); Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion, 35 AM. J. TRIAL ADVOC. 87, 95–96 (2011) (reporting that 40% of 204 nursing homes in North Carolina placed arbitration clauses in their admissions paperwork and that 7.32% limited damages).

170. George W. Dent, Jr., *Venture Capital and the Future of Corporate Finance*, 70 WASH. U. L.Q. 1029, 1064 (1992).

171. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 278 (1985).

172. Clifford W. Smith, Jr. & Jerold B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 123 (1979) (arguing that commonly used provisions "have not arisen merely by chance; rather, they take their current form and have survived because they represent a contractual solution which is efficient").

173. Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1106 (2006) (indicating that this problem happens most in the insurance context).

or meaning of key terms.[174] Decisions like *Concepcion* and *Amex* seemed like a golden opportunity to investigate contractual inertia. How did corporations respond to these powerful new incentives to mandate arbitration and bar class actions?

The evidence was inconclusive. On the one hand, another paper by Rutledge and Drahozal discovered that franchise agreements remained largely unchanged.[175] Rutledge and Drahozal assembled a "panel sample" that tracked revisions to sixty-seven franchisors' contracts between 1999 and 2013 and a "cross-section sample" of 214 such agreements from the years before and after *Concepcion*.[176] They discovered that the incidence of arbitration provisions increased post-*Concepcion* by a meager 4.5% (from 40.3% to 44.8%) in the panel sample and just 1% (from 62.6% to 63.6%) in the cross-section sample.[177] Likewise, the uptick in class arbitration waivers following *Concepcion* in the panel sample was relatively modest, from 77.8% to 86.7%.[178] Thus, they declared that "it is simply not true that all or even most businesses are switching to arbitration clauses [and class arbitration waivers] after *Concepcion*."[179]

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174. *See* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 12–17 (2013) (observing that drafters of sovereign debt contracts continued to use *pari passu* clauses, which were widely believed to be meaningless, even after an aberrant judicial ruling made them dangerous); Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 B.Y.U. L. REV. 471, 480 (2020) ("[C]ertain sophisticated financial contracts are often resistant to change, even in the face of clearly relevant caselaw.").

175. *See* Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 1012 (2014) [hereinafter Rutledge & Drahozal, *Sticky Arbitration*] (finding the predicted increase of arbitration clauses in franchise agreements after *Concepcion* and *Amex* remains unsupported).

176. *See id.* at 988–89 (describing "panel sample" and "cross-section sample" of franchisors' contracts).

177. *See id.* at 990.

178. *See id.* at 990–91.

179. *Id.* at 963; *see also* Drahozal, *supra* note 31, at 115–16 (updating this data through 2020 and discovering that "almost ten years after *Concepcion* . . . almost half of the franchise agreements in the sample still did not include arbitration clauses").

However, a piece by Ryan Miller detected a deeper impact.[180] Miller collected online agreements from 100 large companies that regularly deal with consumers.[181] He then used the Internet Archive's Wayback Machine to compare versions of each contract from roughly 2008 (three years before *Concepcion)* to 2018 (five years post-*Amex*).[182] He determined that the number of forced arbitration clauses had climbed in each period from twenty-one to forty-one to sixty-six, and that almost all of these provisions barred class actions.[183] Most interestingly, he also observed that several companies had tried to bolster the validity of their arbitration regimes by deleting potentially unconscionable terms:

> [A]n analysis of these agreements suggests that they have been reduced to their most necessary and dangerous terms, including only a "sword" in the form of a class action waiver to strike down even meritorious consumer claims and a "shield" of seemingly pro-consumer provisions to insulate the agreement from any lingering judicial scrutiny. As such, it's not that these agreements have become any friendlier after *Concepcion* and *American Express*, it's that they have become common, and more optimized for defeating customers' claims.[184]

This suggested that drafters increasingly saw forced arbitration clauses as a delivery device for class waivers.[185]

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180. Miller, *supra* note 31, at 794–809 (noting that binding arbitration agreements after *Concepcion* and *Amex* have become "common" and "more optimized for defeating customers' claims").

181. *Id.* at 794 ("This paper takes a first look at this 'next generation' of arbitration agreements by analyzing 100 arbitration agreements from prominent consumer-facing businesses as they existed before *Concepcion* and before and after *American Express*.").

182. *See id.* at 804.

183. *See id.* at 804–09 ("Over the entire course of the study, only 6 contracts that included an arbitration agreement lacked a class action waiver . . . ."); *cf.* Elizabeth C. Tippett & Bridget Schaaff, *How* Concepcion *and* Italian Colors *Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459, 503 (2018) (surveying the TOS of thirty-eight "gig economy" companies and finding that the number of forced arbitration clauses increased by thirty percent after *Concepcion* and that almost all of the provisions include class arbitration waivers).

184. Miller, *supra* note 31, at 795; *cf.* Gilles, *supra* note 90, at 850–54 (reviewing thirty-seven arbitration clauses in *Concepcion*'s aftermath and determining that companies had started to "promise to pick up the tab for all initiation fees, deposits, and costs of the arbitral proceeding").

185. *See* Miller, *supra* note 31, at 828 ("[B]usinesses across industries are increasingly binding their customers to arbitrate their claims, and whenever they do they are also forcing their customers to forego class action proceedings.").

Finally, in 2018 and 2019, Imre Szalai published a pair of short but influential essays that analyzed how many Fortune 100 firms or their subsidiaries and affiliates mandate arbitration.[186] He collected his data from court opinions and pleadings, as well as general Internet searches.[187] First, he found that 81% of Fortune 100 consumer agreements contain forced arbitration provisions.[188] Second, he reported that more than 50% of these companies require their non-unionized workers to pursue claims outside of the court system.[189] For good reason, Szalai's thoughtful papers have since become the go-to cite for the assertion that arbitration is omnipresent in briefs,[190] filings with

186. *See generally* Szalai, *Workplace Arbitration*, *supra* note 35; Szalai, *Consumer Arbitration*, *supra* note 31.

187. *See* Szalai, *Workplace Arbitration*, *supra* note 35, at 5 (describing methodology); Szalai, *Consumer Arbitration*, *supra* note 31, at 236 (same).

188. Szalai, *Consumer Arbitration*, *supra* note 31, at 238 ("The key finding is that eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions."). Seventy-eight of these Fortune 100 firms also used class arbitration waivers. *Id.*

189. *See* Szalai, *Workplace Arbitration*, *supra* note 35, at 4 ("Over half of the companies in the *Fortune* 100 appear to have imposed forced arbitration clauses on [non-unionized] workers."). Szalai defined "worker" to sweep beyond full-fledged employees to include individuals who performed tasks that benefitted the company, such as their agents and independent contractors. *Id.* at 7. In addition, he discovered that thirty-nine Fortune 100 businesses employed class waivers. *Id.*

190. *See, e.g.*, Brief of the DRI Center for Law and Public Policy as Amicus Curiae in Support of Petitioner at *11, Coinbase, Inc. v. Bielsky, 143 S. Ct. 1915 (2023) (No. 22-105), 2023 WL 2208812, at *11 ("In recent decades, the use of arbitration agreements has significantly increased in the United States." (citing Szalai, *Consumer Arbitration*, *supra* note 31, at 233)); Brief of Arbitrators, Arbitration Practitioners, and Arbitration Scholars as Amici Curiae in Support of Respondent at *30, Henry Schein, Inc. v. Archer & White Sales, Inc., 141 S. Ct. 656 (2021) (No. 19-963), 2020 WL 6273641, at *30 ("[T]he ruling in this case may impact hundreds of millions of arbitration agreements involving unsophisticated small businesses, consumers, and employees." (first citing Szalai, *Consumer Arbitration*, *supra* note 31, at 233; and then citing Szalai, *Workplace Arbitration*, *supra* note 35)).

administrative agencies,[191] law review articles,[192] congressional testimony,[193] and the media.[194] However, Szalai did not analyze the contents of forced clauses, and it remains to be seen whether his findings on forced clause prevalence are generalizable beyond the very largest companies.

In sum, research on forced arbitration provisions yields few definitive answers. Even the basic issue of how many companies use forced clauses remains unclear. Likewise, no commentator has taken a deep dive into the forced employment arena. Accordingly, the next Part reports the results of a study designed to plug these gaps.

## II. EMPIRICAL STUDY

This Part is the Article's centerpiece. It first describes my research parameters and then details my findings. Among other

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191. *See, e.g.*, Nancy S. Abramowitz et al., Comment Letter on Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services, No. CFPB-2023-0047-0001 (Nov. 14, 2023) (on file with the Minnesota Law Review) (mentioning Szalai's consumer findings as proof that "arbitration clauses in consumer financial agreements . . . are 'pervasive'" (citing Szalai, *Consumer Arbitration*, *supra* note 31)).

192. *See, e.g.*, Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 70–71 (2023) (arguing that Szalai's consumer arbitration study "confirm[s] the pervasiveness of mandated arbitration clauses" (citing Szalai, *Consumer Arbitration*, *supra* note 31)); Scott R. Thomas, *Pre-Dispute Mandatory Arbitration of Sexual Harassment Complaints: Bad for Business Too*, 16 BERKELEY BUS. L. J. 102, 119–20 (2019) (discussing Szalai's employment paper and asserting that "[t]he prevalence of [arbitration] agreements and their increased use in recent years forces us to examine their role in our society" (citing Szalai, *Workplace Arbitration*, *supra* note 35)).

193. *See, e.g.*, *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 25 (2021) (statement of Prof. Myriam Gilles, Paul R. Verkuil Research Chair in Public Law, Benjamin N. Cardozo School of Law) (relying on Szalai's statistics about consumer arbitration (citing Szalai, *Consumer Arbitration*, *supra* note 31)).

194. *See, e.g.*, Abigail Abrams, *81 of the Largest U.S. Companies Won't Let You Take Them to Court*, TIME (Feb. 27, 2019), https://time.com/5538028/consumer-arbitration-agreements [https://perma.cc/J86W-NUPT] (discussing Szalai's consumer arbitration article (citing Szalai, *Consumer Arbitration*, *supra* note 31)); Pamela Boykoff, *Use Amazon, Uber or Walmart.com? You've Probably Signed Away Your Right to Sue Them*, CNN (Feb. 13, 2020), https://www.cnn.com/2020/02/13/business/binding-arbitration-consumers/index.html [https://perma.cc/J86W-NUPT] (citing Szalai, *Consumer Arbitration*, *supra* note 31).

things, it shows that forced clauses (1) are especially common in consumer contracts, (2) almost always ban class actions and often include other one-sided measures, and (3) sometimes suffer from shocking drafting oversights.

### A. METHODOLOGY, DATA DESCRIPTION, AND LIMITATIONS

My research progressed in three stages. First, I identified Fortune 500 firms. Because this project began in 2022, I used that year's rankings.[195]

Second, I tried to find one consumer and one employment arbitration clause from each company. My primary tool was Bloomberg Law, which lets users run keyword searches on trial filings in all federal and many state courts.[196] My goal was to find motions to compel arbitration, which almost always contain the arbitration provision as an exhibit.[197] This allowed me to access more information than if I had relied on judicial opinions, which typically only quote a snippet from the clause.[198] When I could not locate a motion to compel for a particular business, I googled its name and "arbitration," read its TOS, and checked its entries in databases like the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) collection and Justia.[199] I ultimately collected arbitration

195. For a list of Fortune 500 companies from 2022, see *Fortune 500*, FORTUNE, https://fortune.com/ranking/fortune500 [https://perma.cc/RWK5-93PL].

196. For other empirical projects that use Bloomberg, see Sean J. Griffith & Dorothy S. Lund, *A Mission Statement for Mutual Funds in Shareholder Litigation*, 87 U. CHI. L. REV. 1149, 1178 (2020) (describing docket searches using Bloomberg Law); Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 HARV. L. REV. 1790, 1807 n.126 (2022) (same).

197. *See, e.g.*, Declaration of Adam Dodge in Support of Motion to Compel Arbitration Exhibit A, Shelton v. Delivery Drivers Inc., No. 22-cv-02135, 2023 WL 2629027 (C.D. Cal. Jan. 31, 2023) (requiring arbitration for any dispute between Walmart and delivery drivers).

198. *Cf.* Szalai, *Workplace Arbitration*, *supra* note 35, at 6 (noting the difficulty of analyzing terms within arbitration agreements based on judicial opinions when "the court and parties selectively quoted from a portion of the arbitration agreement instead of including the full terms of the arbitration agreement").

199. *See Search Filings*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/edgar/search-and-access [https://perma.cc/S9LC-MR8B] (describing EDGAR search tools); *Business Contracts*, JUSTIA, https://www.contracts.justia.com [https://perma.cc/X6RU-A5DT] (describing Justia search tools).

clauses (both forced and non-forced) from 440 motions to compel, 187 TOS, and 208 other online sources.

Third, I logged sixty-six variables from each arbitration agreement. These datapoints included the relevant industry, the contract's date, the presence or absence of a variety of terms, and anything else that stood out. Unfortunately, six clauses were either redacted, filed under seal, or inexplicably missing, which made them largely useless for my purposes.[200]

Labeling the data involved a few tough judgment calls. For one, I needed to distinguish "forced" arbitration provisions from their "non-forced" counterparts. It is not clear where to draw this line. For instance, *Black's Law Dictionary* declares that arbitration is "mandatory"—a synonym for "forced"—if it is "required by a predispute arbitration clause included in a contract of adhesion."[201] Yet because "contract of adhesion" is itself a slippery concept,[202] this definition is not helpful. Likewise, the FAIR Act treats all employment arbitration as "forced."[203] But judges and arbitration providers adopt a narrower view by differentiating between workers who enjoy the power to bargain over their contracts' terms and those who do not.[204] Ultimately, I followed the weight of authority and deemed a clause to be "forced" if it appears in a non-negotiable form that governs either (1) website

200. *See, e.g.*, Motion to Compel Arbitration at *1 n.2, Windom v. Borgwarner, Inc., No. 13-cv-00741, 2014 WL 10290888 (S.D. Miss. Oct. 17, 2014) (noting that the master settlement and releases in this case are confidential).

201. *Mandatory Arbitration*, BLACK'S LAW DICTIONARY 126 (10th ed. 2014).

202. *See, e.g.*, McKenzie L. Firm, P.A. v. Ruby Receptionists, Inc., 501 F. Supp. 3d 965, 973–74 (D. Or. 2020) (discussing the dissensus over the meaning of "contract of adhesion").

203. *See* Forced Arbitration Injustice Repeal (FAIR) Act of 2022, H.R. 963, 117th Cong. §§ 2(1), 501(4) (2022) (declaring lawmakers' intent to ban "force[d] arbitration" of "employment dispute[s]," which are lawsuits "between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them").

204. *See, e.g.*, Semcken v. Genesis Med. Interventional, Inc., 132 F. App'x 155, 156 (9th Cir. 2005) (holding that a plaintiff "failed to show the lack of a meaningful opportunity to negotiate the inclusion of the arbitration clause in his employment contract, and therefore cannot demonstrate procedural unconscionability"); *JAMS Employment Arbitration Policy*, *supra* note 85, at 5 ("These Minimum Standards do not apply if the agreement to arbitrate was individually negotiated by the employee and employer, or if the employee was represented or advised by counsel during the negotiations.").

users,[205] (2) the purchase or sale of goods, services, insurance, or health care by an individual,[206] or (3) an employment or independent contractor relationship.[207]

I also struggled with when to attribute an arbitration clause to a particular firm. Most Fortune 500 businesses have multiple subsidiaries; in fact, some are merely holding companies, which exist for the sole purpose of managing other entities.[208] How should I code Qurate Retail, which does not mandate arbitration, when its flagship brand, the QVC shopping channel, does?[209] Similarly, defendants often attempt to invoke arbitration clauses that appear in other businesses' contracts.[210] For example, when American Airlines faced a class action over its refund policies, it argued that it was a third party beneficiary of the arbitration provisions in the TOS of Expedia, the website on which

205. *Cf.* Gostev v. Skillz Platform, Inc., 305 Cal. Rptr. 3d 248, 262 (Cal. Ct. App. 2023) (observing that TOS are "offered on a take-it-or-leave-it basis, which, in itself, 'is sufficient to establish some degree of procedural unconscionability'" (quoting Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 751 (Cal. 2015))).

206. *See JAMS Consumer Arbitration Policy*, *supra* note 85 ("A consumer is defined as an individual who seeks or acquires any goods or services, primarily for personal, family or household purposes . . . .").

207. My definition thus excludes franchise agreements, where the weaker party is usually a small business, rather than a person. *See, e.g.*, George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 669 n.20 (2013) ("Often, franchise agreements are lumped together with employment agreements and consumer contracts as problematic areas of adhesive bargaining, because franchisees are often small businesses dealing with large corporations, and thus lack the bargaining strength to negotiate arbitration clauses in advance."). It also does not encompass executive employment contracts "where both parties have significant bargaining power and actively negotiate their agreements with the assistance of counsel." Erin O'Hara O'Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 138 (2012).

208. *See, e.g.*, Sheryar Siddiq, *20 Biggest Holding Companies in USA*, YAHOO! FIN. (May 4, 2023), https://finance.yahoo.com/news/20-biggest-holding-companies-usa-213759951.html [https://perma.cc/S83F-FLWT] (examining the twenty biggest holding companies in the United States).

209. *Compare Privacy Policy*, QURATE RETAIL INC., https://www.qurateretail.com/privacy-policy [https://perma.cc/69U3-D4EQ] (lacking an arbitration provision), *with General Terms of Use*, QVC GRP., https://www.qvc.com/content/information/general-terms-conditions.html?qq=ft [https://perma.cc/CL4J-5RQA] (containing a binding arbitration provision).

210. This was true of seventy-five cases in my dataset (eight percent). Almost all of them—sixty-nine—involved a firm trying to borrow another company's forced clause.

a named plaintiff had made reservations.[211] So did that mean that American Airlines forces passengers to arbitrate? I ended up ascribing a clause to a Fortune 500 firm if the firm tried to use it (or could have plausibly tried to use it) to compel arbitration.[212] This seemed consistent with the FAA, which generally permits non-signatories to enforce the arbitration clauses of related entities and litigation allies.[213]

In addition, I had to decide what to do with harsh clauses that were outside of the arbitration agreement. Under the FAA's separability doctrine, courts must treat every contract that contains an arbitration clause as two contracts: The overarching "container" transaction and the agreement to arbitrate, which is its own contract.[214] This formalistic dichotomy made it hard to code issues like liability waivers, which can either appear in the container contract[215] or the arbitration provision.[216]

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211. *See* Ward v. Am. Airlines, Inc., 498 F. Supp. 3d 909, 920 (N.D. Tex. 2020) ("American argues Saunders and Holloway should each be required to arbitrate his claims because, while not a signatory, it is a third-party beneficiary of the OTA's Term of Use."); *see also* Appendix to American Airlines, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint and Compel Arbitration Exhibit A, at ¶ 4, Exhibit I, *Ward*, 498 F. Supp. 3d 909 (No. 20-cv-00371) (describing Expedia's TOS).

212. *Cf.* Szalai, *Consumer Arbitration*, *supra* note 31, at 237 (including both companies "as well as their subsidiaries and related, affiliated entities" when calculating the prevalence of consumer arbitration clauses among Fortune 100 businesses).

213. *See* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (concluding that the FAA recognizes that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel' . . . ." (quoting 21 R. LORD, WILLISTON ON CONTRACTS § 57:19, Westlaw WILLSTN-CN (4th ed. database updated May 2024))).

214. *See* Moncrief v. Moncrief, 672 S.W.3d 156, 164 (Tex. Ct. App. 2023) ("[W]hen arbitration clauses appear in the context of a larger contract—often referred to as a 'container contract'—the arbitration clauses should be dealt with as though they are separate from the remainder of the agreement." (quoting Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P., 564 S.W.3d 105, 119 (Tex. Ct. App. 2018))).

215. *See, e.g.*, *Microsoft Services Agreement*, MICROSOFT (July 30, 2024), https://www.microsoft.com/en-us/servicesagreement [https://perma.cc/24BD-DG7N] ("[Y]our exclusive remedy is to recover[] from Microsoft . . . damages up to an amount equal to your [s]ervices fee . . . .").

216. *See, e.g.*, *Easy Coins Rewards Terms of Use*, SW. CONVENIENCE STORES, https://dk-easy.com/easy-coins-rewards-terms-of-use [https://perma.cc/PJ9L

For two reasons, I focused solely on language within the arbitration agreement. First, including terms from the container agreement would make my research less about the fairness of private dispute resolution and more about the fairness of Fortune 500 contracts *generally*.[217] Second, as I will discuss, one of my main interests is the relationship between forced arbitration provisions and unconscionability.[218] Although the case law is surprisingly embryonic, most courts hold that they cannot consider language from the container contract when analyzing unconscionability.[219] Thus, one-sided provisions from anywhere other than the arbitration clause are less germane for my purposes.

Finally, I should acknowledge factors that might limit the utility of my research. For starters, some of the forced clauses in my dataset are likely outmoded. As Table 1 showcases, thirty-seven percent of the contracts I uncovered were consummated before 2018 and thus might not reflect a firm's current procedural regime.[220] In turn, this means that I may underreport

-MVM4] ("[T]he arbitrators shall have no authority to award punitive, consequential, or liquidated damages of any kind.").

217. Recall that Koenig and Rustad found that the TOS of social media companies were riddled with one-sided terms. *See supra* notes 160–69 and accompanying text. Although their article does not directly address the issue, I have a strong suspicion that they considered any provision in a contract that mandated arbitration—even if it was located outside of the arbitration clause. One of their examples of unfair terms was disclaimers of Uniform Commercial Code (UCC) warranties, see Koenig & Rustad, *supra* note 31, at 396, which would be highly unusual within an arbitration agreement.

218. *See infra* Part III.B.

219. *See, e.g.*, Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 184 (4th Cir. 2013) ("[T]he scope of a motion to compel arbitration is restricted to consideration of challenges specific to the arbitration clause."); Crispin Porter & Bogusky LLC v. Watson, No. 18-MC-384, 2019 WL 5079916, at *4 (S.D.N.Y. Oct. 10, 2019) (reasoning that judges cannot entertain "attacks [on] the validity of the contract as a whole[,]" as opposed to "the validity of the Arbitration Provision itself" (quoting Damato v. Time Warner Cable, Inc., No. 13–CV–994, 2013 WL 3968765, at *8 (E.D.N.Y. July 31, 2013))). *But see* Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 726 (N.D. Cal. 2012) (explaining that the majority view "exalts form over substance"), *aff'd*, 549 F. App'x 692 (9th Cir. 2013); MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024, 1032 (N.D. Cal. 2022) (refusing to apply the majority view to terms from the container contract that "are functionally intertwined with the arbitration clause and thus were anticipated to affect the scope of arbitration").

220. This is especially true for employment contracts. The root of this discrepancy is that almost all my forced employment clauses come from motions to

recent corporate decisions to adopt or drop forced clauses and the incidence of bleeding-edge terms like mass arbitration defenses.

**Table 1: Forced Clauses by Year of Execution**

| Year | Consumer | Employment | Total |
|---|---|---|---|
| 2021–2023 | 201 (64%) | 23 (9%) | 224 (39%) |
| 2018–2020 | 47 (15%) | 88 (34%) | 135 (24%) |
| 2015–2017 | 32 (10%) | 67 (26%) | 99 (17%) |
| 2012–2014 | 7 (2%) | 36 (14%) | 43 (7%) |
| 2009–2011 | 8 (3%) | 15 (6%) | 23 (4%) |
| 2006–2008 | 6 (2%) | 17 (7%) | 23 (4%) |
| 2005 or Before | 13 (4%) | 14 (5%) | 27 (5%) |
| Total† | 314 | 260 | 574 |

† Three consumer and four employment contracts are missing dates.

compel. These pleadings often feature forced clauses embedded in paperwork that workers signed years ago, when they were hired. Conversely, as noted above, a plurality of my consumer agreements consists of TOS, which tend to be of more recent vintage.

Last and perhaps most crucially, many of the Fortune 500 forced clauses only govern a subset of a business' customers or workers.[221] Consider Hewlett Packard (HP). Because HP insists on arbitration for disputes arising out of at least one of its sweepstakes,[222] I coded it as having a forced consumer clause. Yet because HP does not seem to include a forced provision in its sales[223] or warranty terms,[224] its customers can sue for issues such as false advertising or faulty products in court. Similarly, Walmart's forced clause for Spark drivers only applies to a fraction of its 1.6 million U.S. employees.[225] I estimate that 20% of my consumer contracts regulate discrete interactions such as buying certain goods or visiting a website and 10% of my employment agreements apply to a narrowly defined class of workers.[226]

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221. Likewise, companies often exempt certain claims from arbitration. *See* Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1966 (2014) (examining the use of procedural unbundling by carve-outs in a wide range of contracts); *see also infra* notes 278–81 and accompanying text (describing carve-outs).

222. *See Enter Now for a Chance to Win a $500 Hotel Gift Card.*, HP, https://www.hp.com/h41268/live/index.aspx?qid=27369 [https://perma.cc/PWX5-SA8R] (describing terms of sweepstakes). HP also requires arbitration for claims stemming from its use of its patrons' social media content. *See HP/HyperX Visual Content Terms of Use*, HP, https://www.hp.com/us-en/shop/cv/hp-hyperx-visual-content-terms-of-use [https://perma.cc/P6QY-UE8P] (containing arbitration provision).

223. *See Terms and Conditions*, HP, https://www.hp.com/us-en/shop/cv/termsandconditions [https://perma.cc/35DZ-AKHF] (lacking an arbitration provision).

224. *See HP Worldwide Limited Warranty and Technical Support*, HP, https://www.hp.com/us-en/privacy/limited_warranty.html [https://perma.cc/NB99-4RHV] (lacking an arbitration provision).

225. *Compare How Many People Work at Walmart?*, WALMART, https://corporate.walmart.com/askwalmart/how-many-people-work-at-walmart [https://perma.cc/8224-ZUD2] ("As of the end of FY2024, Walmart employed approximately . . . 1.6 million associates in the U.S."), *with* Nav Chadha, *Delivering a World-Class Experience on the Spark Driver Platform*, WALMART (Oct. 24, 2023), https://corporate.walmart.com/news/2023/10/24/delivering-a-world-class-experience-on-the-spark-driver-platform [https://perma.cc/D3DL-46KY] (asserting that there are "hundreds of thousands" of Spark drivers).

226. One additional complication is that companies have started using "infinite" arbitration clauses that apply to any future dispute—even those that do not relate to the container contract. *See, e.g.*, David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 639 (2020) (describing rising numbers of infinite arbitration clauses). For example, in a widely reported story in the fall of 2024, Disney tried to compel arbitration of a wrongful death claim stemming

This patchwork coverage matters for two reasons. First, as I will discuss in further depth, it means that tallies of entities that use forced clauses in an industry can be misleading.[227] As HP illustrates, some of these companies generally do not require arbitration. Second, some of the forced clauses I discuss might not be representative. When a company had multiple forced provisions for various aspects of its operations, I tried to select the one that applied to the most people. But it is possible that these terms do not reflect a business' arbitration policies in other spheres. I will try to be sensitive to these nuances when I discuss the normative implications of my findings.

## B. FINDINGS

This section offers a guided tour of my data. It begins by examining how many Fortune 500 companies within certain industries use forced arbitration in some fashion. It then zooms in on the content of these provisions.

### 1. Prevalence

At the outset, my data shows that private dispute resolution is entrenched in contracts written by large firms. Every Fortune 500 company has used some species of pre-dispute arbitration clause. I found 835 such provisions: 450 in commercial or consumer deals and 385 in employment arrangements.

It would be difficult to exaggerate the diversity of the underlying transactions. Parties agree to arbitrate when they visit

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from an allergic reaction at a restaurant affiliated with the company based on the terms of a free trial of its Disney+ streaming service. *See* Tierney Sneed, *Disney's Not Alone in Saying Your Clicks Means You Can't Sue*, CNN (Aug. 16, 2024), https://www.cnn.com/2024/08/16/politics/arbitration-signing-away-rights-disney-plus-wrongful-death-lawsuit/index.html [https://perma.cc/X3AE-DFT3] ("In a current lawsuit, Walt Disney World is arguing that the contract a widower entered when signing up for the Disney+ streaming service several years ago means that a wrongful death suit he's brought against Disney and a restaurant not owned by Disney on the grounds of the expansive Florida resort cannot go forward in court."). Two hundred and eight (thirty-six percent) of the forced clauses in my data were infinite, which means that they may apply beyond their contexts.

227. *See infra* notes 246–47 and accompanying text (noting discrepancies in tallies of entities that use forced arbitration clauses).

websites,[228] send packages,[229] purchase cars,[230] sign leases,[231] book trips,[232] enter sweepstakes,[233] create easements,[234] sell crops,[235] buy insurance,[236] license patents,[237] hire real estate

228. *See, e.g.*, Memorandum of Law in Support of Chewy, Inc.'s Motion to Dismiss or Compel Arbitration at 3–5, Farst v. Chewy, Inc., No. 22-cv-01434 (M.D. Pa. dismissed Dec. 14, 2022) (describing arbitration provision in website's terms of use).

229. *See 2025 UPS Tariff/Terms & Conditions of Service*, UPS 3–4 (Dec. 23, 2024), https://www.ups.com/assets/resources/webcontent/en_US/claims_legal_action.pdf [https://perma.cc/F5TB-GULX] (mandating arbitration for any disputes with shipping company).

230. *See, e.g.*, Defendant's Motion to Compel Arbitration and Stay Proceedings Exhibit A, Brown v. Autonation Chrysler Dodge Jeep Ram Sw., No. 21-cv-00897, 2021 WL 2514524 (D. Colo. June 18, 2021) (mandating arbitration for any dispute with car dealership).

231. *See, e.g.*, Glacier Park Iron Ore Props., LLC v. U.S. Steel Corp., 961 N.W.2d 766, 768 (Minn. 2021) (describing arbitration clause in lease).

232. *See, e.g.*, Affidavit of David Coons in Support of Defendants' Motion to Compel Arbitration Exhibit 3, at 2–3, Rudolph v. United Airlines Holdings, Inc., 519 F. Supp. 3d 438 (N.D. Ill. 2021) (No. 20-cv-02142) (requiring arbitration for any dispute with travel website).

233. *See, e.g.*, *Enter Now for a Chance to Win a $500 Hotel Gift Card.*, *supra* note 222 (requiring arbitration for any claim by sweepstakes participants).

234. *See, e.g.*, Affidavit of Jeff Reynolds in Support of Kinder Morgan's Motion to Compel Arbitration Exhibit 1, at 4, N.M. Smelter & Refining, Inc. v. Union Pac. R.R., No. 15-cv-00514 (D.N.M. dismissed Apr. 30, 2018) (mandating arbitration in event of dispute related to easement).

235. *See, e.g.*, Defendant Archer-Daniels-Midland Co.'s Brief in Resistance to Plaintiff Brodal Farms, Ltd.'s Motion to Terminate Arbitration Proceedings and in Support of Its Cross Motion to Compel Arbitration at 3–4, Brodal Farms, LTD v. Archer-Daniels-Midland Co., No. 21-cv-00203, 2022 WL 3359280 (D.N.D. Aug. 15, 2022) (describing arbitration agreement between farm and food processing company).

236. *See, e.g.*, Defendant State Farm Mutual Automotive Insurance Co.'s and State Farm Fire and Casualty Co.'s Motion to Dismiss, or, in the Alternative, Compel Appraisal and Stay Exhibit A, at 13, Wiggins v. State Farm Mut. Auto. Ins. Co., No. 21-cv-03803, 2022 WL 2276556 (D.S.C. June 23, 2022) (requiring arbitration for any dispute between insurer and insured).

237. *See, e.g.*, Declaration of Gregory K. Sobolski in Support of AbbVie Inc.'s Opposition to Defendants' Motion Compel to Arbitration and to Stay Exhibit 1, at 15–18, AbbVie Inc. v. Novartis Vaccines & Diagnostics, Inc., No. 17-cv-01815, 2017 WL 3835340 (N.D. Cal. Aug. 31, 2017) (requiring alternative dispute resolution).

brokers,[238] order exercise equipment,[239] ship jet fuel,[240] help a country exploit its mineral deposits,[241] or take a job delivering groceries,[242] managing a big box store,[243] as a meteorologist on cable television,[244] or serving as an executive.[245]

More importantly for my purposes, I unearthed 582 forced arbitration clauses: 317 in the consumer context and 265 in the employment setting. This means that 63% of Fortune 500 firms compel at least some of their customers to arbitrate,[246] 53% do

238. *See, e.g.*, Supplemental Declaration of Scott Waldman Exhibit A ¶ 6, Moehrl v. Nat'l Ass'n of Realtors, No. 19-cv-01610 (N.D. Ill. Apr. 7, 2023) (mandating arbitration for any dispute with real estate broker).

239. *See, e.g.*, Defendant Tonal System, Inc.'s Motion to Dismiss Exhibit Terms of Sale, at 2–3, Palmer v. XPO Logistics Inc., No. 22-cv-00247, 2023 WL 4703330 (E.D. Ky. July 24, 2023) (mandating arbitration for any dispute with exercise equipment company).

240. *See, e.g.*, Declaration Exhibit 2, at 12, Hess Corp. v. Dorado Tankers Pool, Inc., No. 14-cv-06412, 2015 WL 915294 (S.D.N.Y. Mar. 4, 2015) (mandating arbitration for any dispute with a fuel company).

241. *See, e.g.*, Motion of Defendant, Halco (Mining) Inc., to Dismiss Third Amended Complaint Exhibit A, at 38–40, Nanko Shipping v. Alcoa, Inc., 330 F. Supp. 3d 439 (D.D.C. 2018) (No. 14-cv-01301) (mandating arbitration for any dispute with mining company).

242. *See, e.g.*, Defendant Costco Wholesale Corp.'s Motion to Compel Arbitration at 3, Patterson v. Costco Wholesale Corp., No. 22-cv-03634 (N.D. Cal. dismissed Aug. 10, 2023) (describing arbitration provision in employment agreement between wholesaler and employee).

243. *See, e.g.*, Best Buy Stores, L.P.'s Memorandum of Law in Support of Its Motion to Compel Arbitration and Dismiss Proceedings Exhibit A, Ledbetter v. Best Buy Stores, L.P., No. 20-cv-02816 (N.D. Ga. dismissed Sept. 30, 2020) (requiring arbitration between big-box store and manager); Complaint for Damages at *3, *Ledbetter*, No. 20-cv-02816 (describing plaintiff's employment status with defendant).

244. *See, e.g.*, Declaration of Sylvia Taylor at 2–3, Mitchell v. The Weather Channel, LLC, No. 11-cv-03039, 2012 WL 13013002 (N.D. Ga. Mar. 9, 2012) (describing arbitration provision in employment agreement between meteorologist and cable network).

245. *See, e.g.*, Memorandum of Points and Authorities in Support of Motion by Defendant, Caesars Enterprise Services, LLC, to Compel Binding Arbitration for Stay of the Proceedings Pending Arbitration at 1, Pilant v. Caesars Enter. Servs., LLC, No. 20-cv-02043, 2021 WL 4056813 (S.D. Cal. June 14, 2021) (describing arbitration provision in employment agreement between casino and executive).

246. Admittedly, it seems odd that I only discovered that 63% of Fortune 500 companies force consumers to arbitrate when Szalai concluded that 81% of Fortune 100 firms did so. *See* Szalai, *Consumer Arbitration*, *supra* note 31, at 238. One explanation may be that companies ranked between 101 and 500—which

the same for their non-unionized workers,[247] and 79% engage in at least one kind of forced arbitration.[248]

Figure 2 breaks down the incidence of forced consumer clauses by industry.[249] It shows that the prevalence of these provisions fluctuates. In the media, food/drug store, and hotel/restaurant/leisure spheres, 100% of companies impose arbitration. These entities are diverse, ranging from grocery chain Albertsons[250] to streaming service Netflix[251] to strip mall mainstays McDonalds[252] and Starbucks[253] to Yum Brands (which owns KFC, Pizza Hut, Taco Bell, and Habit Burger Grill).[254] Other markets lie at the opposite extreme. A mere 29% of

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appear in my research but not Szalai's—are less likely to insist that their customers settle disputes privately. For example, I found that the forced consumer rate was 71% among the Fortune 100 but only 61% among the remaining businesses.

247. This 53% figure is strikingly similar to the results of Alexander Colvin's 2017 telephone survey of 627 human resources departments, which determined that 54% mandated arbitration. *See* Colvin, *supra* note 35, at 1. However, it is not clear whether Colvin's dataset, like mine, excluded executive employment contracts. *Cf.* Szalai, *Workplace Arbitration*, *supra* note 35, at 4 (reporting that "over half" of Fortune 100 employers used forced arbitration).

248. In addition, 192 of Fortune 500 companies (thirty-eight percent) use both forced consumer and forced employment clauses.

249. To classify companies, I used *The Full Fortune Global 500 List*, FORTUNE, https://fortune.com/ranking/global500/2023 [https://perma.cc/56WV-JLFQ]. For simplicity's sake, I merged the "wholesaling" and "motor vehicles and parts" categories with "retailing" and combined the "industrials" and "materials" groups. *See id.*

250. *See Terms of Use*, ALBERTSONS § 24, https://www.albertsonscompanies.com/policies-and-disclosures/terms-of-use/default.aspx#section-24 [https://perma.cc/Z8RR-FRE6] (requiring arbitration to resolve disputes).

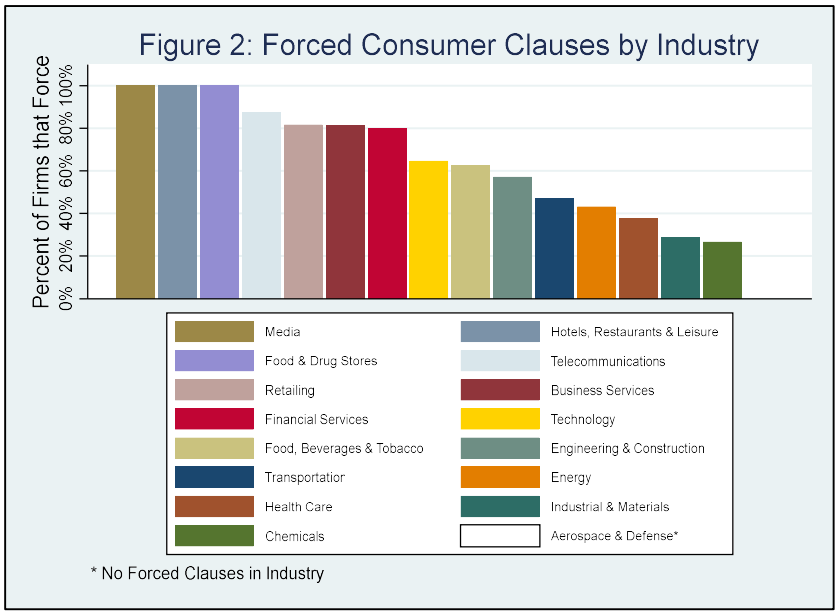
251. *See Netflix Terms of Use*, NETFLIX, https://help.netflix.com/legal/termsofuse [https://perma.cc/SVX2-9N7D] (requiring that members agree to arbitration).

252. *See Terms and Conditions for McDonald's Online Services (USA)*, MCDONALD'S [hereinafter *Terms and Conditions,* MCDONALD'S], https://www.mcdonalds.com/us/en-us/terms-and-conditions.html [https://perma.cc/8UVX-3LVX] (providing that claims will be resolved through arbitration).

253. *See Terms of Use*, STARBUCKS [hereinafter *Terms of Use,* STARBUCKS], https://www.starbucks.com/terms/starbucks-terms-of-use [https://perma.cc/NS6E-W2R6] (explaining that most disputes will be resolved through arbitration).

254. *See Company*, YUM!, https://www.yum.com/wps/portal/yumbrands/Yumbrands/company [https://perma.cc/54RC-RG83] (describing the companies owned by Yum Brands); *see also KFC Terms of Use*, KY. FRIED CHICKEN, https://www.kfc.com/terms-of-use [https://perma.cc/LY6L-L6T7] (explaining that disputes will be resolved through arbitration or in small claims court).

industrial/material suppliers (for example, U.S. Steel[255] and engine manufacturer, Cummins[256]), 27% of chemical companies (such as DuPont[257]), and no aerospace/defense firms require their clients to arbitrate. These entities tend not to sell to individuals and therefore do not engage in consumer contracting.[258]




255. *See* Glacier Park Iron Ore Props., LLC v. U.S. Steel Corp., 961 N.W.2d 766, 768 (Minn. 2021) (determining whether arbitration is required).

256. *See* FCA US LLC's Motion to Compel Arbitration as to Certain Plaintiffs and to Dismiss Plaintiffs' Second Amended Class Action Complaint Under Rules 12(b)(1) & 12(b)(6) Exhibit B, at 8, Sharp v. FCA US LLC, 637 F.Supp.3d 454 (E.D. Mich. 2022) (No. 21-cv-12497) (containing a voluntary arbitration provision, which contains the option to opt-out); Defendant Cummins Inc.'s Reply in Support of Its Motion to Dismiss Second Amended Complaint at 1–2, Sharp v. FCA US LLC, 637 F. Supp. 3d 454 (E.D. Mich. 2022) (No. 21-cv-12497) (asserting that the court does not have subject matter jurisdiction due to the arbitration agreement).

257. *See Terms*, LAIRD, https://www.laird.com/node/1033 [https://perma.cc/R5KY-7HCN] (containing a binding arbitration agreement).

258. *Cf.* Szalai, *Consumer Arbitration*, *supra* note 31, at 238–39 (observing that some companies "serve industrial or commercial clients" and thus "do not have a strong need for a consumer arbitration agreement").

Figure 3 presents a more accurate picture by weeding out companies that are not "forced-eligible." As I alluded to above, 112 Fortune 500 businesses only sell to other businesses. These companies are non-forced-eligible because they have no individual customers to shunt into arbitration.[259] For example, the "retailing" category includes vendors of bulk packaging,[260] supply chain services,[261] and wholesale auto parts.[262] Including them in calculations lowers the number of retailers who force arbitration but has no bearing on how easy is it for someone to find, say, an arbitration-free electronics store, hardware supplier, or online marketplace.

259. Fifty have collective bargaining agreements (CBAs) with unions that call for arbitration. Because CBAs stem from negotiation between unions and employers, they are generally considered less troubling than forced clauses. *See, e.g.*, Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 19–21 (2014) (contrasting "[f]orced arbitration of workplace disputes" with "labor arbitration" under CBAs). Because it is possible that some firms with CBAs also use forced clauses for other kinds of workers, I did not exclude them for the purposes of calculating the prevalence of forced employment clauses.

260. *See, e.g.*, *Packaging Solutions*, VERITIV, https://www.veritiv.com/solutions/packaging-solutions [https://perma.cc/RF2V-F39C] (showing different packaging Veritiv sells).

261. *See, e.g.*, *Supply Chain Services*, WESCO, https://www.wesco.com/us/en/services/supply-chain-services.html [https://perma.cc/S6CA-RVDW] (describing supply chain services Wesco offers).

262. *See, e.g.*, *Lear Named One of Fortune's 2022 Most Admired Companies*, LEAR (Feb. 3, 2022), https://www.lear.com/newsroom/lear-named-one-of-fortunes-2022-most-admired-companies [https://perma.cc/H7DC-CSSP] (categorizing Lear in the motor vehicle parts category).

Cutting non-forced-eligible companies makes a big difference. First, the overall prevalence of forced consumer provisions skyrockets nineteen percentage points, to 82%. Second, the ratio in business services, engineering/construction, food/drug stores, telecommunications, and transportation soars to 100%. Third, the numbers also climb to 93% in retailing, 88% in financial services, and 84% in technology.

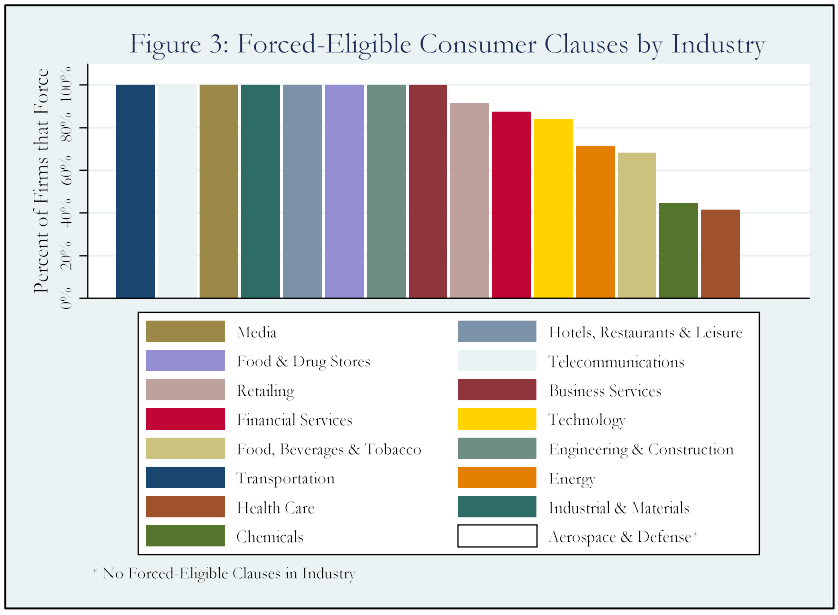
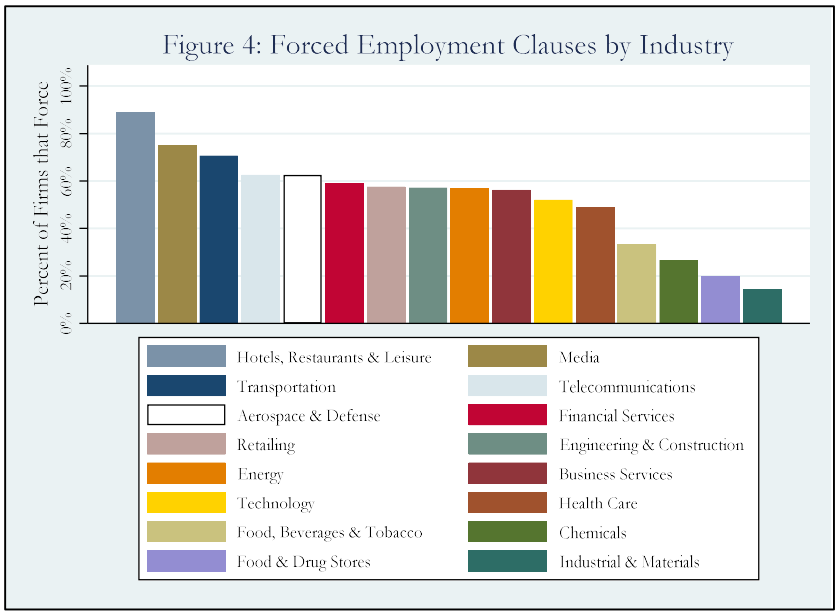



Figure 4 shows the percentage of forced employment provisions in each area. As in the consumer milieu, forced clauses are rampant in workers' contracts in the hotels/restaurants/leisure and media spaces (89% and 75%, respectively) and lower among chemical (27%) and industrial/material (14%) dealers. Most sectors have a forced clause rate of about 60%, including telecommunications, aerospace/defense, financial services, retail, engineering/construction, energy, and business services.[263]

263. This is likely an undercount. Not every employer that uses a forced clause has had a dispute that left a paper trail in the judicial system. This is less of a problem in the consumer setting because forced provisions can appear in TOS even if the firm has never litigated.




2. Terms

What do forced clauses say? The next subsections explore key dimensions of these provisions, ranging from the choice of arbitration providers to the nascent use of anti-mass arbitration terms.

*a. Providers*

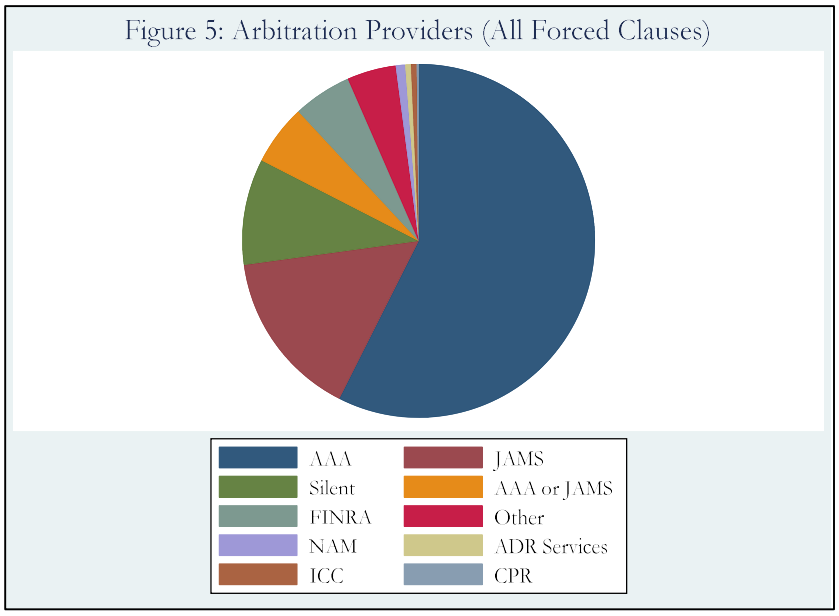
Most forced clauses name an arbitration provider.[264] Figure 5 reveals that the AAA dominates this market, appearing 332 times (57%). JAMS finished second with eighty-nine nominations (15%),[265] the Financial Industry Regulatory Authority, Inc. (FINRA) was next with thirty-one selections (5%),[266] and NAM

264. Only fifty-six forced provisions (ten percent) did not name a provider.

265. Thirty-two forced clauses (six percent) gave the parties the option of either the AAA or JAMS.

266. FINRA regulates broker-dealers in the securities industry. *See About FINRA*, FINRA, https://www.finra.org/about [https://perma.cc/RPD2-T3YA]. It was created in 2007 when lawmakers merged two similar entities, the NYSE and the NASD. *See generally* Order Approving Consolidation of NASD and

(five, 1%), ADR Services (three, 0.5%), and CPR (one, 0.2%) lagged far behind. These ratios were nearly identical in both the consumer and employment spheres.[267]




*b. Class Arbitration*

Three aspects of the way Fortune 500 drafters use class arbitration waivers stand out. First, as one would expect, these companies go out of their way to avoid aggregate liability. Four hundred and forty (77%) of their contracts require plaintiffs to resolve claims on an individual basis.

Second, the persistent use of class arbitration waivers is slightly curious given the Court's recent FAA opinions. As noted, the Justices determined in 2019 that the mere existence of an

NYSE, 72 Fed. Reg. 42,169 (Aug. 1, 2007). Thus, I treated any provision that selected either of these predecessors as if it named FINRA.

267. For example, 56% of consumer contracts chose the AAA, 15% selected JAMS, and 9% were silent. The corresponding numbers for employment agreements were 58%, 15%, and 10%.

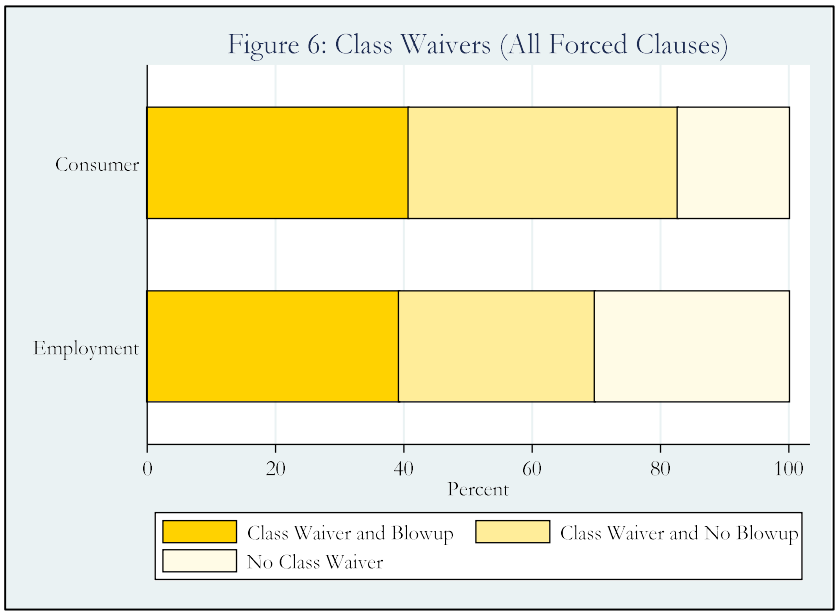
arbitration provision is the equivalent of such a waiver.[268] This seems to make anti-class arbitration language superfluous. Apparently, though, arbitrators occasionally flout the Court's instructions by interpreting a forced clause that does not expressly prohibit class arbitrations to allow them.[269] In turn, because an arbitrator's reading of the contract governs "however good, bad, or ugly," these rulings are insulated from judicial review.[270] Thus, perhaps to foreclose the possibility of a rogue arbitral decision, a whopping eighty-seven percent of the forced clauses executed in 2020 or later expressly delete a plaintiff's class action rights.

Third, many companies add a prophylactic layer around their class waivers. Thirty-one percent of forced agreements that have both delegation provisions and class waivers declare that judges—not arbitrators—must hear claims that the class waiver is invalid. Similarly, as Figure 6 displays, more than half of class waivers have "blowup" components that nullify the entire arbitration agreement if the crown jewel of their dispute resolution schemes does not apply.

268. *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.").

269. *See* Pilgrim's Pride Corp. v. Diaz, No. 22-cv-04413, 2024 WL 1051320, at *3 (D.S.C. Mar. 11, 2024) (explaining the arbitrator's determination that the agreement included an implicit agreement to class arbitration); Consol. Wealth Holdings Inc. v. Vincent, No. CV 19-4437, 2021 WL 4167293, at *2 (S.D. Tex. July 29, 2021) (explaining how the arbitrators looked at the express language of the arbitration clause to determine if the parties implicitly agreed to class arbitration); Rd. Runner Sports, Inc. v. McCoy, No. 20-CV-1539 W, 2021 WL 3439421, at *2 (S.D. Cal. June 2, 2021) (arguing that the award should be vacated because the arbitrator did not apply Court precedent).

270. Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 573 (2013); *see also Diaz*, 2024 WL 1051320, at *8 (refusing to vacate an arbitral award allowing class arbitration even though the contract did not mention such procedures); *Vincent*, 2021 WL 4167293, at *2–3 (refusing to vacate an arbitral award allowing class arbitration because "even [a] grave error—is not enough").




## C. PROBLEMATIC TERMS

One of the most important issues about forced arbitration clauses is also one of the least understood: whether they are even-handed or riddled with harsh terms. The Fortune 500 agreements fall somewhere between these extremes.

Table 2 reports the frequency of problematic terms. It demonstrates that there is a steady drumbeat of such clauses, including those that insist on confidentiality (25% of forced agreements), require plaintiffs to pay arbitration expenses (22%), choose a potentially inconvenient forum (20%), shorten statutes of limitation (11%), allow the prevailing party to recover either attorneys' or arbitrators' fees (8%), or waive special, consequential, punitive, treble, or exemplary damages (8%).

**Table 2: Problematic Terms**

| Clause and Definition | Consumer | Employment | Total |
|---|---|---|---|
| *Confidentiality*: bars disclosure of the facts, claims, or results of the arbitration. | 57 (18%) | 84 (32%) | 141 (25%) |
| *Plaintiff Pays Fees*: mandates that plaintiffs pay a share of the arbitrator's fees.† | 87 (28%) | 42 (16%) | 129 (22%) |
| *Forum Selection*: requires the hearing to take place in a particular city or state that may not be the plaintiff's domicile.†† | 78 (25%) | 38 (15%) | 116 (20%) |
| *Statute of Limitations*: shortens timeline by which plaintiffs must file claims. | 45 (14%) | 17 (7%) | 62 (11%) |
| *Fee-Shifting*: winner in arbitration gets either attorneys' or arbitrators' fees (or both). | 35 (11%) | 9 (3%) | 44 (8%) |
| *Damage Waiver*: forbids arbitrators from awarding specific kinds of damages. | 35 (11%) | 9 (3%) | 44 (8%) |
| *Carveout*: exempts claims from arbitration that drafter is likely to bring. | ††† | 55 (21%) | 55 (21%) |

† Only 109 consumer contracts (34%) and 167 employment agreements (64%) *expressly* mandate that the defendant pay the arbitration fees. However, many are (1) silent and (2) select a provider that saddles companies with these costs. The figures in the Table count these as non-problematic "defendant pays" provisions.

†† I excluded forum selection clauses that did not name a particular city or state, but instead provided that the arbitration would take place in a location that was presumably convenient for the plaintiff, such as their judicial district or the region in which they had worked.

††† Because courts typically uphold carveouts in consumer contracts, *see infra* note 280 and accompanying text, I did not collect data about them.

Table 3 displays the number of problematic terms in each contract. It shows that 313 forced clauses (54%) contain at least one such term. In addition, eighty (14%) include two, twenty-nine (5%) feature three, and three (1%) have four.

**Table 3: Problematic Terms Per Contract**

| Number in Contract | Consumer | Employment | Total |
|---|---|---|---|
| 0 | 154 (49%) | 109 (42%) | 263 (46%) |
| 1 | 95 (30%) | 106 (41%) | 201 (34%) |
| 2 | 47 (15%) | 33 (13%) | 80 (14%) |
| 3 | 19 (6%) | 10 (4%) | 29 (5%) |
| 4 | 1 (< 1%) | 2 (1%) | 3 (1%) |
| Total | 316 (100%) | 260 (100%) | 576 (100%) |

Notably, these provisions could be substantively unconscionable under certain circumstances. To be sure, the unconscionability doctrine does not lend itself to generalizations, and states police arbitration clauses with different levels of rigor.[271] A term thus might be valid in Texas or when applied to a consumer with a breach of contract claim but not enforceable in Arizona or in a case featuring an alleged violation of a federal statute.[272] Yet in at least some cases, the procedures mentioned here would cross the line.

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271. *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 129 (2013) (criticizing unconscionability as a "wild card"); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011) ("California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.").

272. Some of the problematic terms I have identified vividly illustrate this indeterminacy. Consider forum selection clauses. The test for what makes such a provision substantively unconscionable is unclear. *Compare* Aguila v. Becton & Dickinson, No. 22-CV-06670, 2023 WL 5988601, at *3 (N.D. Cal. Sept. 13, 2023) ("[A]greements requiring employees to pursue arbitration in a distant forum often 'impose too great a burden' and are substantively unconscionable." (quoting Bernstein v. PayReel, Inc., No. CV 23-2575, 2023 WL 5505872, at *3 (C.D. Cal. July 5, 2023))), *with* Copper Bend Pharmacy, Inc. v. OptumRx, No. 5-22-0211, 2023 WL 2964485, at *21 (Ill. App. Ct. Apr. 14, 2023) (synthesizing cases and concluding that "[p]arties opposing a forum selection clause must now show that the forum is 'unavailable or unable to accomplish substantial justice' in order to demonstrate substantive unconscionability" (quoting Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1029 (9th Cir. 2016))). Moreover, under either standard, the same forum selection clause might be extremely unfair in one case (for instance, if the plaintiff is poor and lives on a different coast than the chosen city) and totally irrelevant in another (for example, if the plaintiff lives near the relevant location).

Likewise, it is hard to predict how a court would view shortened limitations statutes. *Compare* McLaughlin v. Advanced Commc'ns, Inc., No. CV 09-2311, 2010 WL 11626961, at *5 (E.D.N.Y. Mar. 25, 2010) (surveying opinions invalidating abbreviated statutes of limitation), *report and recommendation adopted*, No. CV-09-2311, 2010 WL 11626962 (E.D.N.Y. Apr. 15, 2010), *and* Gostev v. Skillz Platform, Inc., 305 Cal. Rptr. 3d 248, 266 (Cal. Ct. App. 2023) ("[T]he shortened limitations period (reducing the applicable limitations period by up to 75 percent of the statutory limitations period) is another factor supporting our conclusion that the arbitration provision is substantively unconscionable."), *and* Brown v. MHN Gov't Servs., Inc., 306 P.3d 948, 956 (Wash. 2013) ("[A] six-month statute of limitations clause in an arbitration agreement is substantively unconscionable where the underlying statute . . . provides a much longer period of time within which to assert a claim."), *with* Randolph v. RRR Bowie, LLC, No. 22-cv-2150, 2023 WL 7110516, at *3 (D. Md. Oct. 27, 2023) ("Simply because the abbreviated notice-of-claim deadline is a 'drastic

Consider confidentiality mandates. Several courts have nullified these gag orders, reasoning that they prevent plaintiffs from locating witnesses,[273] "prov[ing] a pattern of discrimination"[274] or "build[ing] a case of intentional misconduct."[275] In addition, Congress passed the Ending Forced Arbitration Act partially due to concern about arbitration secrecy:

> The rules [in forced clauses] also protect the company by keeping the records of an arbitration secret. Because the records in arbitration are protected, employers that use arbitration clauses in their employment contracts can retaliate against a victim—rather than confront the harasser or the attacker—without fear of their actions becoming public through the courts.[276]

Despite these concerns, 141 (twenty-five percent) forced provisions insisted on confidentiality. Many were draconian, such as Fox's, which required all court filings related to the arbitration to be under seal and warned employees that that "[b]reach

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reduction' from the otherwise applicable statutory limitations period . . . does not render the contract unreasonably unfair.").

The same is even true for damage waivers. *Compare* Brown v. Union Pac. R.R., 703 F. Supp. 3d 1256, 1267 (D. Or. Nov. 21, 2023) ("Restricting plaintiff from pursuing punitive damages . . . prevents him from vindicating statutory rights."), *and* Washington v. Freedom Expression LLC, No. CV-21-01318, 2023 WL 7048942, at *5 (D. Ariz. Sept. 28, 2023) (invalidating waiver of compensatory damages), *with* Cook v. Richard T. Kiko Agency, Inc., 209 N.E.3d 148, 160 (Ohio Ct. App. 2023) ("Because the elimination of consequential or incidental damages did not unreasonably favor one side, it was not substantively unconscionable.").

273. *See* Ramos v. Superior Ct., 239 Cal. Rptr. 3d 679, 701 (Cal. Ct. App. 2018) (stating that the language of the confidentiality clause is so broad that it would be difficult to contact witnesses without violating it); Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 555 (Haw. 2017) (reasoning that because of a confidentiality provision "the plaintiff may be deprived of the ability to adequately discover material information about his or her claim").

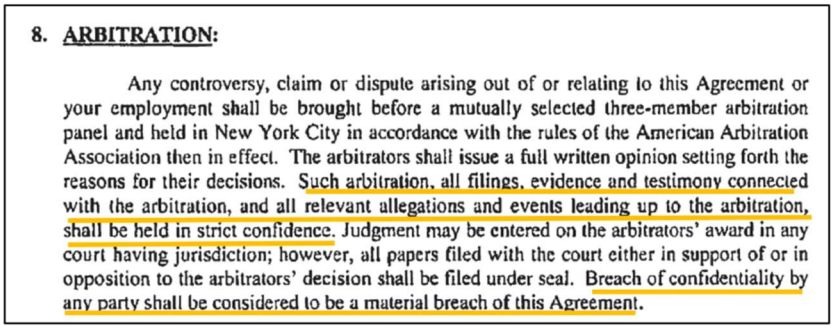
274. Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004).

275. Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003); *cf.* Longnecker v. Am. Express Co., 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014) ("[T]he confidentiality provision in the arbitration agreements keep only plaintiffs in the dark regarding prior arbitration decisions and only defendants would benefit from this provision."); Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 578 (Ky. 2012) ("[A]s a repeat participant in the arbitration proceedings, the company is able to gather a body of information relating to precedent and rulings arising from within the dispute resolution process, to which customers involved in separate proceedings would have no access.").

276. JERRY NADLER, ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021, H.R. REP. NO. 117-234, at 4 (2022).

of confidentiality . . . shall be considered to be a material breach of this [a]greement."[277]

**Figure 7: Excerpt from Fox's Employment Contract (Emphasis Added)**



8. **ARBITRATION:**

Any controversy, claim or dispute arising out of or relating to this Agreement or your employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association then in effect. The arbitrators shall issue a full written opinion setting forth the reasons for their decisions. Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence. Judgment may be entered on the arbitrators' award in any court having jurisdiction; however, all papers filed with the court either in support of or in opposition to the arbitrators' decision shall be filed under seal. Breach of confidentiality by any party shall be considered to be a material breach of this Agreement.

Likewise, a non-negligible number of employers violated at least one of two bright line rules. First, courts generally frown upon non-mutual arbitration clauses: those in which an employer exempts "claims that the[y] . . . will likely bring."[278] For example, companies cannot insist on arbitration and yet keep the courthouse door open for non-competition, non-solicitation, or intellectual property complaints.[279] But fifty-five forced

277. Notice of Removal Exhibit B, at 52, Tantaros v. Fox News Network, LLC, 465 F. Supp. 3d 385 (S.D.N.Y. 2020) (No. 19-cv-07131).

278. Patterson v. Nine Energy Serv., LLC, 330 F. Supp. 3d 1280, 1310 (D.N.M. 2018).

279. *See, e.g.*, Erives v. Regenesis Biomedical, Inc., No. EDCV 23-64, 2023 WL 5444263, at *5 (C.D. Cal. June 22, 2023) (finding an arbitration provision to be substantively unconscionable because it requires claims more likely to be brought by the employee to be arbitrated while allowing exemptions for claims more likely to be brought by the employer); Palm Beach Motor Cars Ltd., Inc. v. Jeffries, 885 So. 2d 990, 992 (Fla. Dist. Ct. App. 2004) ("Where one party is bound to arbitration of its claims but the other is not, there can be substantive unconscionability."). Likewise, employers cannot exclude their own complaints for *permanent* injunctions. *See* Jimenez v. Cintas Corp., 475 S.W.3d 679, 686–89 (Mo. Ct. App. 2015) (finding lack of mutuality of promise because the arbitration agreement only bound one party to arbitrate certain claims, such as those for injunctive relief, while the other is exempt). Conversely, terms preserving the parties' rights to seek *temporary* equitable relief pending the outcome of arbitration are both common and unproblematic. *See, e.g.*, Young v. Refined Techs., Inc., No. SACV 22-01032, 2022 WL 3012536, at *6 (C.D. Cal. June 17, 2022) ("[S]ome disputes come with exigencies that do not lend themselves to

employment clauses (21%) included one of these illicit carve-outs.[280] Second, businesses cannot ask workers to "bear any type of expense that [they] would not be required to bear if [they] were free to bring the action in court."[281] Nevertheless, forty-two forced provisions (16%) required employees to pay a portion of the arbitrator's fees—the paradigmatic arbitration-specific expense. Accordingly, the scales of private justice may not be completely lopsided, but they are also not entirely even.

1. Sloppy Clauses

As mentioned, contracts scholars traditionally thought of drafters as rational.[282] In fact, innovations such as AT&T Mobility's rewards-laden class waiver and the delegation clause have earned authors of forced arbitration clauses a reputation as Machiavellian geniuses.[283] But my most surprising discovery cuts violently against this grain. Several Fortune 500 forced provisions are marred by egregious mistakes.

A few forced clauses contain unfortunate typos. For instance, the TOS on two firms' websites warn readers at the top of the page that they contain arbitration clauses and class

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arbitration, requiring instead quick action from a court (i.e., a TRO or preliminary injunction)."); Supplemental Declaration of Michael Frye Exhibit B2, at 14, Lindsey v. Oneok, Inc., No. 19-cv-00284 (W.D. Tex. dismissed Apr. 11, 2022) (creating exceptions to arbitration for certain claims, such as "claims for injunctive relief pending the outcome of arbitration by either the Employee or the Company").

280. Only a slim minority of courts object to carve outs in the consumer setting. *Compare* Noohi v. Toll Bros., 708 F.3d 599, 610 (4th Cir. 2013) (applying Maryland law to affirm trial court's determination that non-mutual arbitration clause in consumer agreement suffered from a fatal lack of consideration), *with* Abraham v. JetSmarter Inc., No. 18-CV-1647, 2019 WL 1459056, at *7 (E.D. Wis. Apr. 2, 2019) (rejecting unconscionability challenge to consumer contract that exempted claims for "injunctive or other equitable relief . . . to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights"). As a result, I did not include consumer contracts in my tally.

281. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal. 2000); *see also* Goldstein v. Forcepoint, LLC, No. 17-CV-1194, 2018 WL 11339663, at *3 (W.D. Tex. Oct. 22, 2018) (finding the fee provision to be substantively unconscionable and unenforceable, as it required the employee to arbitrate and bear such costs).

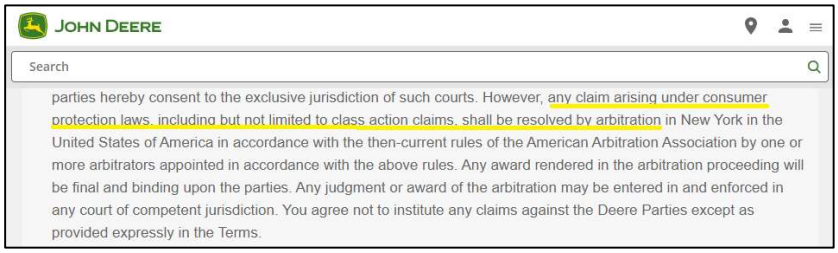
282. *See supra* text accompanying note 170.

283. *See supra* text accompanying notes 90–91 (describing corporate forced arbitration clauses such as the one drafted by AT&T Mobility).

arbitration waivers and then never mention these topics again.[284] Spherion Staffing's employment contract states that one of the parties will pay "costs uniquely attributable to arbitration" but does not say who.[285]

Other errors betray confusion about the law. The most striking example is the TOS of heavy equipment manufacturer John Deere. As noted, the Court has held that a contract that does not mention class arbitration does not allow the process.[286] Thus, to bar class actions, a corporation's task is simple: say nothing about them. The only way to commit an own-goal and override this default arrangement is to expressly agree to submit class actions to arbitration.[287] And that is precisely what John Deere does. It mandates the arbitration of "any claim arising under consumer protection laws, *including . . . class action claims*."[288]

**Figure 8: Excerpt from John Deere's TOS (Emphasis Added)**




Similarly, some companies seemed to be asleep at the wheel with respect to "pro-consumer" bounties. Recall that AT&T Mobility helped catalyze *Concepcion* by creating bells and whistles

284. *See Terms of Use*, DREYER'S GRAND ICE CREAM (July 24, 2023) [hereinafter *Terms of Use,* DREYER'S], https://www.icecream.com/us/en/terms-conditions [https://perma.cc/RQ2E-TZJX]; *Terms of Use*, GLOB. PARTNERS, https://www.globalp.com/terms-of-use [https://perma.cc/MKL7-84TE].

285. *See* Declaration of Francine Hande in Support of Defendant's Motion Exhibit A, at 2, Walker v. Walgreens Specialty Pharmacy, LLC, No. 21-cv-05780, 2023 WL 5334609 (N.D. Ill. Aug. 18, 2023) (on file with the Minnesota Law Review).

286. 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.").

287. *Id.*

288. *Terms of Use*, JOHN DEERE (emphasis added), https://www.deere.com/en/privacy-and-data/terms [https://perma.cc/XWX2-7KZZ].

for plaintiffs to engage in individualized arbitration.[289] As also noted, the Court obviated the need for these rewards in 2019 by interpreting the FAA to contain a default rule banning class proceedings.[290] But oddly, twenty-two forced clauses that post-date this sea change contain incentives to pursue claims.[291] For instance, Western Digital promises to pay anyone who recovers more than its last written settlement offer $1,000 and double their attorneys' fees.[292] That kind of largesse is not just unnecessary—in the age of mass arbitration, it invites disaster.

A final example of inartful drafting concerned FAA choice-of-law clauses. These terms appeared in 251 forced clauses (forty-four percent). Drafters likely believe that FAA choice-of-law provisions prevent courts from applying state arbitration statutes, which tend to be more protective of vulnerable parties.[293] But businesses almost certainly do not need FAA choice-of-law provisions to exclude state arbitration law. To be sure, a Supreme Court decision from 1989, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, spawned confusion by deferring to a state court's holding that a contract that included a state choice-of-law clause incorporated state arbitration procedures.[294] But since then, the Court has recognized a strong presumption that state choice-of-law clauses only pertain to the parties' substantive rights and duties—not to arbitration.[295] This means that the FAA applies to the

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

290. *Lamps Plus*, 139 S. Ct. at 1419.

291. Admittedly, many of them are less generous than AT&T Mobility's clause. *See, e.g.*, Declaration of Jeffrey Held in Support of Defendants' Motion to Compel Arbitration Exhibit B, at 7, Yale v. The Gap, Inc., No. 20-cv-07575 (N.D. Cal. dismissed Aug. 24, 2021) (offering to reimburse prevailing plaintiffs with small claims for their attorneys' fees).

292. *See Terms of Sale (Consumer) (United States)*, W. DIGIT. (Oct. 28, 2022), https://www.westerndigital.com/legal/terms-and-conditions-of-sale-consumer [https://perma.cc/KBM6-9VZ7].

293. *See, e.g.*, CAL. LAB. CODE § 229 (West 2024) (making claims for lost wages non-arbitrable); MONT. CODE ANN. § 27-5-114(2)(a) (West 2024) (same for personal injury claims).

294. *See* 489 U.S. 468, 470 (1989) (holding that a California law staying arbitration pending related litigation is not pre-empted by the FAA if the parties had chosen to be governed by California law).

295. *See* Preston v. Ferrer, 552 U.S. 346, 363 (2008) (reading a California choice-of-law clause to "encompass prescriptions governing the substantive rights and obligations of the parties, but not the [s]tate's 'special rules limiting

arbitration clause in virtually every contract and an FAA choice-of-law clause accomplishes nothing.[296]

Moreover, one variety of FAA choice-of-law clause recently began to backfire. As noted, section one of the FAA excludes "contracts of employment of . . . any . . . class of workers engaged in . . . interstate commerce."[297] In January 2019, the Court expanded the exemption to cover independent contractors, making it more likely that an employment dispute would not fall under the FAA.[298] Afterwards, a string of decisions involved the following two facts: (1) a forced clause contained an FAA choice-of-law provision and then (2) a judge found that the contract qualified for the newly-enlarged section one exception to the FAA.[299] Several courts, including the Ninth Circuit, held that these drafters had created a contractual abyss in which "no law . . . governs the

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the authority of arbitrators'" (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63–64 (1995))).

296. *See* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 662–63 (2017) (collecting cases and observing that "parties generally intend to select the federal arbitration rule when they select the law of a particular U.S. state"). To be fair, there are a few older decisions that find state choice-of-law clauses to opt into state arbitration procedures, but they are hard to square with the Court's latest pronouncements on the issue. *See* Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 328 (2d Cir. 2004) (following *Volt* when a state choice-of-law clause is "broad and all encompassing"). *But see* Protostorm, LLC v. Antonelli, No. 08-CV-931, 2010 WL 2195679, at *8 (E.D.N.Y. May 28, 2010) (concluding that *Sec. Ins. Co. of Hartford* is no longer good law (quoting *Sec. Ins. Co. of Hartford,* 360 F.3d at 327)).

297. 9 U.S.C. § 1; *see also supra* text accompanying notes 62–63 (citing the same).

298. *See* New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 533–45 (2019) (holding that FAA section one covers both full-fledged employees and independent contractors). The Court has continued to enlarge FAA section one. *See* Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1788–90 (2022) (finding a "ramp supervisor" who loaded cargo onto airplanes exempt from the FAA); Bissonnette v. LePage Bakeries Park St., LLC, 144 S. Ct. 905, 910 (2024) (rejecting the argument that "a transportation worker must work for a company in the transportation industry to be exempt under § 1").

299. *See, e.g.*, Rittmann v. Amazon.com, Inc., 971 F.3d 904, 919 (9th Cir. 2020) (holding a contract's required application of the FAA included the FAA's exemptions); *see also* Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 295 (3d Cir. 2021) (noting the district court's finding of exemption from the FAA and the presence of an FAA choice-of-law clause); Arafa v. Health Express Corp., 233 A.3d 495, 507 n.2 (N.J. 2020) (noting a contract required applying the FAA, and concluding that this would include its exemptions).

arbitration provision" and therefore had not formed a valid arbitration agreement.[300]

Some employers recognized that they could easily amend their FAA choice-of-law clauses to avoid this perverse result. They did so by announcing that the FAA governs but that state law applies if the FAA does not.[301] The leader of this pack was Walmart. As I mentioned in the Introduction, its agreement with Spark delivery drivers opted into the FAA but included no fewer than fifty-one state choice-of-law clauses as a fallback.[302]

Oddly, though, other firms did nothing. For example, some workers in the retail industry deal with goods that travel between the states and thus may be exempt from the FAA under section one.[303] Yet thirteen of the twenty-six employment

300. *Rittman*, 971 F.3d at 921; *see also* Brock v. Flowers Food, Inc., 673 F. Supp. 3d 1180, 1181–90 (D.C. Cir. 2023) (noting an arbitration agreement could not apply state law if it exclusively required applying the FAA and its exemptions); Rivera v. Ryno Trucking, Inc., No. 21-CV-2085, 2021 WL 5114490, at *2 (M.D. Fla. Nov. 3, 2021) (noting a contract electing to apply the FAA would also be subject to its exemptions). *But see* Ortiz v. Randstad Inhouse Servs., LLC, No. 23-55147, 2024 WL 1070823, at *1–2 (9th Cir. Mar. 12, 2024) (enforcing an arbitration provision that fell under the section one exemption, contained an FAA choice-of-law clause, but also stated that "[a]ny federal, state or local laws preempted by the FAA shall not apply to this Agreement or its interpretation"); *Harper*, 12 F.4th at 295 (rejecting the argument that an FAA choice-of-law clause in an arbitration agreement that is subject to FAA section one is "a hole that defeats the parties' bargain").

301. Some pushed the envelope even further, stating that the parties agree to be "governed by the Federal Arbitration Act" even if they "are otherwise exempted from the FAA." Declaration of Jerica Sunga Exhibit A, at 9, Patterson v. Costco Wholesale Corp., No. 22-cv-03634 (N.D. Cal. dismissed Aug. 10, 2023); *see also* Declaration of Marie Neely Exhibit B-1, at 9, Zheng v. Halliburton Energy Servs. Inc., No. 23-cv-00098, 2023 WL 7538331 (D. Wyo. Oct. 30, 2023) (stating that the FAA applies even if the FAA's jurisdictional predicates are not satisfied).

302. *See supra* text accompanying note 21 (noting Walmart includes choice-of-law provisions for all fifty states and the District of Columbia).

303. Although the scope of FAA section one remains hazy, some courts have construed it very broadly. *See, e.g.*, Fraga v. Premium Retail Servs., Inc., 61 F.4th 228, 242 (1st Cir. 2023) (holding that section one might apply to "merchandiser" whose duties included delivering marketing and promotional materials that had traveled in interstate commerce from their homes to stores); Palcko v. Airborne Express, Inc., 372 F.3d 588, 593 (3d Cir. 2004) (finding that FAA section one applied to a package company's "'management employee' with no close contact with channels of interstate commerce"); Waithaka v. Amazon.com, Inc., 966 F.3d 10, 26 (1st Cir. 2020) (same for "last-mile delivery workers who haul goods on the final legs of interstate journeys").

agreements in that niche executed after 2019 contained potentially self-defeating FAA choice-of-law provisions with no state law safety net.[304] In fact, some of these firms even specified that arbitration-related issues would be "governed by . . . the F[AA], and not any state law"[305]—language that spells certain doom for any forced clause that triggers section one.[306]

2. Mass Arbitration

Mass filings are an existential challenge for companies. Indeed, in the span of a few years, businesses went from viewing arbitration as a foolproof shield against class liability to being "scared to death" of the process.[307] Not surprisingly, then, mass arbitration is starting to leave a footprint in the Fortune 500 contracts.[308]

Businesses have adopted three defenses against waves of identical arbitrations. One is burdensome pre-filing

304. *See, e.g.*, Declaration of April Hutchins Exhibit D, at 4, Young v. Shipt, Inc., 563 F. Supp. 3d 832 (N.D. Ill. 2021) (No. 20-cv-05858) [hereinafter Hutchins Declaration] ("The parties understand and agree that this Arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act.").

305. Defendants' Motion to Compel Arbitration Exhibit 2, at 1, Nguyen v. Echopark Auto. Inc., No. 22-cv-02381, 2022 WL 18107093 (N.D. Ga. Nov. 17, 2022); *see also* Declaration of Harvey H.H. Homsey in Support of Defendant Express Services, Inc.'s Motion to Compel Arbitration of Plaintiffs' Individual Claims and Dismiss Plaintiff's Proposed Class Claims Exhibit A, at 1, Storm v. O'Reilly Auto Enters., LLC, No. 23-cv-00597, 2024 WL 1930786 (C.D. Cal. May 2, 2024) (same).

306. Courts that have upheld an arbitration clause that both selects the FAA and is exempt from the FAA have cited the fact that the contract does not rule out the possibility of enforcement under state law. *See* Ortiz v. Randstad Inhouse Servs., LLC, No. 23-55147, 2024 WL 1070823, at *4 (9th Cir. Mar. 12, 2024) ("[T]he choice-of-law clause clearly expresses the parties' intent for non-preempted state law to continue to apply."); Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 295 (3d Cir. 2021) (reaching the same conclusion for a contract Washington choice-of-law clause). That logic does not apply to an arbitration provision that expressly disavows state law.

307. Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html [https://perma.cc/NY4N-P6TP].

308. For more detail on the mass arbitration protocols adopted by eighty-two large consumer-facing firms, see Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and its Implications for the Federal Arbitration Act*, 78 VAND. L. REV 133, 154–55 (2025).

requirements. These terms, which appear in twenty-six (five percent) of forced clauses,[309] make plaintiffs jump through hoops before initiating a case. Some demand that aggrieved parties furnish a signed notice that summarizes the dispute, specifies the relief sought, and contains their contact information and account and product serial numbers.[310] Others, like Intuit's TurboTax TOS, also condition the right to arbitrate on meeting and conferring:

> You and Intuit agree that good-faith informal efforts to resolve disputes often can result in a prompt, low-cost and mutually beneficial outcome. You and Intuit therefore agree that, after a Notice of Claim is sent but before either you or Intuit commence arbitration . . . , we will personally meet, via telephone or videoconference . . . . If you are represented by counsel, your counsel may participate in the conference as well, but you agree to fully participate in the conference.[311]

The objective here is straightforward: Insisting on a consumer or employee's *personal* participation in these steps creates administrative headaches for plaintiffs' attorneys juggling thousands of cases.[312]

Second, companies are abandoning the AAA and JAMS. For instance, Boeing and Warner Brothers Discovery selected fledgling provider National Arbitration and Mediation (NAM).[313]

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309. The number of these anti-mass arbitration clauses is low, in part, because mass filings began around 2019, and forty-five percent of the forced clauses in my data are from before that date.

310. *Microsoft Services Agreement*, MICROSOFT, https://www.microsoft.com/en-us/servicesagreement [https://perma.cc/24BD-DG7N] (requiring customers to send a notice of dispute); *Notice of Dispute*, MICROSOFT, https://cdn-dynmedia-1.microsoft.com/is/content/microsoftcorp/microsoft/mscle/documents/presentations/Notice-of-Dispute.pdf [https://perma.cc/7GVL-79GK] (requiring the information stated above).

311. *Intuit Website Terms of Service*, INTUIT TURBOTAX, https://turbotax.intuit.com/corp/terms-of-use [https://perma.cc/L82Y-Z6LN]; *see also* Declaration of Peter Sauerwein at 27, Adegboyega v. Uber Techs., Inc., No. 22-cv-01724 (S.D. Ind. Nov. 14, 2022) [hereinafter Sauerwein Declaration] ("All informal dispute resolution conferences shall be individualized such that a separate conference must be held each time either party intends to commence individual arbitration; multiple individuals initiating claims cannot participate in the same informal dispute resolution conference.").

312. *See* Glover, *Winners and Losers*, *supra* note 23, at 1642 (explaining that pre-arbitration mandates aim to jack up the already-hefty transaction costs of pursuing mass arbitrations).

313. *See* Declaration of Keila Gonzalez at 6, Taylor v. Boeing Co., No. 21-cv-04257, 2022 WL 580455 (E.D. Pa. Feb. 25, 2022) ("The arbitration shall be arbitrated . . . in accordance with the National Rules for the Resolution of

Uber and Sonic Automotive chose relative newcomer ADR Services, Inc.[314] This is no accident: ADR Services offers reduced fees for mass cases.[315] Similarly, Dollar General and Kohl's take the unprecedented step of naming which providers they do *not* want, declaring that "neither the [AAA] nor JAMS will be permitted to administer any aspect of any arbitration."[316]

Third, twenty-six (five percent) forced clauses include batching provisions. These clauses kick in when the same law firm or firms bring a certain number of related arbitrations.[317] They call for the parties to arbitrate a few bellwether matters and then engage in mediation or negotiation while the rest of the cases go into limbo.[318] Crucially, batching provisions excuse the

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Employment Disputes of the National Arbitration and Mediation."); *Terms of Use*, WARNER BROS. (Jan. 30, 2023), https://policies.warnerbros.com/terms/en-us/html/terms_en-us_1.3.0.html [perma.cc/9VHZ-TFLH] ("The arbitration will be governed by applicable rules of National Arbitration & Mediation.").

314. *See* Sauerwein Declaration, *supra* note 311, at 26 ("The ADR Services, Inc. Arbitration Rules . . . will apply to arbitration under this Arbitration Provision."); *Privacy Statement*, SONIC AUTOMOTIVE (Dec. 18, 2019), https://www.sonicautomotive.com/privacy.htm [https://perma.cc/RC6P-ZRT9] ("All such disputes shall be exclusively submitted to ADR Services, Inc. . . . for binding arbitration.").

315. *Compare Mass Consumer Non-Employment Arbitration Fee Schedule*, ADR SERVS. (Noc. 5, 2021), https://www.adrservices.com/wp-content/uploads/2021/11/ADR-Mass-Consumer-Non-Employment-Fee-Schedule-Eff-11-5-21.pdf [https://perma.cc/LB6U-HJ9Y] (requiring an administrative fee of $295 per claimant for mass arbitration claims), *with Fee Schedule*, ADR SERVS., https://www.adrservices.com/rate-fee-schedule [https://perma.cc/2BKV-6VAS] (requiring an administrative fee of $425 per party).

316. *Kohl's Dispute Resolution Policy*, KOHL'S CAREERS, https://careers.kohls.com/dispute-resolution-policy [https://perma.cc/7QAC-LFPZ]; *Terms and Conditions*, DOLLAR GENERAL, https://www.dollargeneral.com/terms-and-conditions [https://perma.cc/3DCT-9QAY] (featuring the same language).

317. *See, e.g.*, *Terms and Conditions*, WILLIAMS SONOMA (Jan. 24, 2025) [hereinafter *Terms*, WILLIAMS SONOMA], https://www.williams-sonoma.com/customer-service/legal-statement.html [https://perma.cc/DW7W-Q9QA] (detailing special rules "[i]f twenty-five (25) or more similar claims are asserted against Williams-Sonoma at or around the same time by the same or coordinated counsel").

318. *See, e.g.*, Declaration in Support of Defendants' Motion to Compel Arbitration attach. A, at 3, Johnson v. Club Demonstration Servs., Inc., No. 23-cv-00232 (W.D. Mo. dismissed Sept. 29, 2023) (creating a system of "bellwether . . . procedures similar to those that courts use in mass-tort cases").

defendant from paying filing fees for pending cases, which eliminates the settlement leverage that mass claimants once enjoyed.[319]

* * *

Three points stand out about forced arbitration agreements in the Fortune 500. First, these clauses are fixtures in some markets (especially in the consumer setting). Second, they practically ban class actions in lockstep, routinely include delegation provisions, and, to a lesser extent, feature at least one component that may be substantively unconscionable. Third, they run the gamut from masterpieces of procedural malware to examples of drafting malpractice. Next, I consider the policy and doctrinal takeaways of these discoveries.

## III. IMPLICATIONS

This Part discusses the implications that can be drawn from my research. Its first audience is policymakers. It explains why my data provides some support for either a wholesale or a limited ban on forced arbitration. Second, this Part addresses courts. It shows that corporations are waging a multi-pronged campaign to insulate forced clauses from judicial review. It then urges courts to push back by resolving unsettled doctrinal questions in ways that preserve their jurisdiction.

### A. POLICYMAKERS

As discussed, Congress is weighing various arbitration bans.[320] This section makes three contributions to these debates. First, it explains why my research suggests that forced arbitration is widespread but does not substantiate the bold claim that consumers and employees lack meaningful non-arbitration options. Second, it offers evidence that forced arbitration favors

319. *See, e.g.*, *Terms of Use (Comprehensive)*, FOOT LOCKER (Apr. 2023), https://help.footlocker.com/hc/en-us/articles/360034292814-Terms-of-Use-Comprehensive [https://perma.cc/68R4-HLMV] ("Any remaining claims shall not be filed or deemed filed in arbitration, *nor shall any arbitration fees be assessed or collected in connection with those claims* unless and until they are selected to be filed in individual arbitration proceedings as part of a staged process." (emphasis added)).

320. *See supra* text accompanying notes 121–24 (noting multiple debates in Congress surrounding a ban on enforcing arbitration of sexual assault claims).

corporations. Third, it reveals that outlawing forced arbitration might have a silver lining for *defendants*.

1. Prevalence Revisited

Is the prevalence of forced arbitration problematic? This section explains that the answer is likely in the eye of the beholder.

A handful of critics urge regulators to restrict forced arbitration simply because it is common.[321] The logic is that agreeing to arbitrate means waiving important rights, and it happens all the time.[322]

My data bears out the descriptive part of this assertion. Indeed, every forced-eligible Fortune 500 entity in seven sectors—business services, engineering/construction, food/drug stores, hotel/restaurants/leisure, media, telecommunications, and transportation—requires at least some of their customers to arbitrate.[323] And although forced clauses are less prevalent among Fortune 500 employers, they hover at about 60% in most niches and range as high as 89% in the hospitality industry.[324] To put these numbers in perspective, I obtained employment statistics for 171 of the 265 businesses in my dataset that use forced procedures. This sliver of the larger universe of employers boasts 12,099,019 workers (although, as noted above, not every firm mandates arbitration for everyone on its payroll).[325] Thus, there is little doubt that forced arbitration "affects millions of Americans, impacts much of the national economy, and implicates core dispute resolution values."[326]

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321. *See* 168 CONG. REC. H986 (daily ed. Feb. 7, 2022) (statement of Rep. Cheri Bustos) (arguing that forced arbitration is a "incredibly common pitfall" affecting over sixty million Americans in the workplace alone).

322. *See, e.g.*, Szalai, *Consumer Arbitration*, *supra* note 31, at 246 ("As a result of the proliferation of consumer arbitration clauses, it has become increasingly difficult for American consumers to access the public justice system.").

323. *See supra* Part II.B.1 (providing data related to arbitration clauses in a range of industries).

324. *See supra* text accompanying note 263; *see also supra* Part II.B.1 (providing data in Figure 4 reflecting the forced clause rate in the hospitality industry).

325. *See supra* text accompanying notes 213–17 (identifying various situations where arbitration may be sought against parties not explicitly on a "payroll").

326. Ronald G. Aronovsky, *Starting Over: Letting States Regulate Adhesion Arbitration Agreements*, 71 SYRACUSE L. REV. 1019, 1020 (2021).

However, there is also a bolder version of this claim. Some lawmakers, commentators, and activists assert that forced arbitration is "unavoidable"[327] and that "[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration."[328]

The Fortune 500 clauses lend little support to this claim. To be sure, in a few industries, lackluster competition may make forced arbitration "virtually inescapable."[329] Consider residential broadband. Every Fortune 500 firm—AT&T,[330] Altice USA,[331] Charter Communications,[332] Comcast,[333] DISH

327. *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm on the Judiciary*, 116th Cong. 21 (2019) (statement of Depak Gupta, Founding Principal, Gupta Wessler PLLC).

328. Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2(3) (2011); *see also* Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2360 (2012) ("[C]onsumers often have no choice but to sign mandatory arbitration agreements because no alternatives are available."); James Dawson, Comment, *Contract After* Concepcion*: Some Lessons from the State Courts*, 124 YALE L.J. 233, 245 (2014) ("Consumers often find that they have a choice of suppliers but no choice whether to arbitrate."); Fabio Núñez del Prado, *The Fallacy of Consent: Should Arbitration Be a Creature of Contract?*, 35 EMORY INT'L L. REV. 219, 225 (2021) ("[V]irtually all American adhesion contracts include arbitration clauses.").

329. *Urge the CFPB to Stop Forced Arbitration Fine Print Traps Now*, NAT'L CONSUMER L. CTR. (Sept. 20, 2023), https://www.nclc.org/urge-the-cfpb-to-stop-forced-arbitration-fine-print-traps-now [https://perma.cc/XZ4Z-8MXH] (arguing that forced arbitration clauses are virtually inescapable "fine print traps").

330. *See AT&T Consumer Service Agreement*, AT&T, https://www.att.com/legal/terms.consumerServiceAgreement.html [https://perma.cc/KV7W-V5W7] (requiring that consumers and AT&T "resolve disputes through arbitration").

331. *See* Defendant's Memorandum of Law in Support of its Motion to Compel Individual Arbitration Proceedings and Stay Litigation at 3–8, McFarlane v. Altice USA, Inc., 524 F. Supp. 3d 264 (S.D.N.Y. 2021) (No. 20-cv-01297) (arguing to attempt enforcement of Altice's arbitration clause).

332. *See* Defendant Charter Communications, Inc. D/B/A Spectrum's Notice of Motion and Motion to Compel Arbitration; Memorandum of Points and Authorities at 2–7, Mendieta v. Credit Mgmt., LP, No. 23-cv-02512, 2023 WL 6786844 (C.D. Cal. Sept. 19, 2023) (arguing that all customer of Charter's service are subject to binding arbitration).

333. *See* Declaration of Colin M. Padgett in Support of Defendant Comcast Cable Communications' Motion to Compel Arbitration and Stay Litigation Exhibit B, at 15–17, Cavaliere v. Comcast Cable Commc'ns., LLC, No. 21-cv-00323, 2022 WL 824246 (M.D. Fla. Mar. 18, 2022) (providing arbitration provisions which apply to Comcast customers).

Network,[334] Frontier Communications,[335] and Verizon—insists that their customers arbitrate.[336] Moreover, almost forty percent of U.S. households have access to only two residential broadband providers, and 70,000,000 Americans are restricted to just one.[337] Thus, many subscribers probably cannot avoid surrendering their procedural rights.

In addition, there is a colorable argument that forced clauses are especially coercive for workers. A consumer who does not want to arbitrate may be able to forgo the purchase. But as the California Supreme Court has remarked, the calculus is different for jobseekers:

> [I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.[338]

Accordingly, one might conclude that forced provisions in the employment setting inherently deprive people of choice.

Yet overall, my research sheds little light on the availability of non-arbitration options. For one, Fortune 500 businesses are often the tip of the economic iceberg. Take new home construction. As with residential broadband, all Fortune 500 builders—

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334. *See DishNET High Speed Internet Agreement*, DISH (July 11, 2019), https://wwwprod.dish.com/content/dam/dish/pdfs/service-agreements/data-plan-agreements/dishNET-customer-agreement-English.pdf [https://perma.cc/FRJ7-2BWE] (providing that an agreement to purchase Dish services includes an agreement to arbitrate any disputes).

335. *See Residential Internet Service Agreement Terms and Conditions*, FRONTIER (Mar. 2023), https://content.frontier.com/-/jssmedia/documents/corporate/terms/residential-internet-service-2022.pdf [https://perma.cc/3UL4-Q237] (providing that receiving service from Frontier requires arbitration of any disputes).

336. *See Verizon Customer Agreement*, VERIZON (Sept. 1, 2023), https://www.verizon.com/about/terms-conditions/verizon-customer-agreement [https://perma.cc/C32S-HXUY] (including a binding arbitration clause in Verizon's contract for services).

337. *See* Andrew L. Yarrow, *The Scandalous Cost of Internet in America*, MILKEN INST. REV. (June 17, 2021), https://www.milkenreview.org/articles/the-scandalous-cost-of-internet-in-america [https://perma.cc/LVW7-7P9Y].

338. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000). *But see* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 160 (1996) (arguing that employment arbitration is generally "consensual" as contract law defines that phrase).

D.R. Horton,[339] Lennar,[340] NVR,[341] PulteGroup,[342] Taylor Morrison,[343] and Toll Brothers[344]—mandate arbitration. Yet because there are at least 194 other companies in the trade,[345] the lockstep embrace of forced clauses by the six entities I named only proves so much. Moreover, as mentioned, the contracts in my sample frequently do not cover all an enterprise's transactions.[346] The fact that McDonald's and Starbucks place forced clauses in their TOS does not mean that a customer who orders a Big Mac or a Frappuccino at the cash register has agreed to arbitrate.[347] Thus, bare tallies of the number of participants in a

339. *See* Defendant D.R. Horton, Inc.'s Memorandum of Points and Authorities in Support of its Motion to Compel Arbitration Exhibit 1, at 5–6, Brooks v. D.R. Horton, Inc., No. 22-cv-01067 (D. Md. Dec. 27, 2022) (arguing that a contract to build includes a binding arbitration clause).

340. *See* Defendant's Memorandum of Law in Support of Motion to Compel Arbitration and to Stay the Case Exhibit B, at 9, Tinsley v. Lennar Carolinas, LLC, No. 22-cv-00432 (D.S.C. dismissed Mar. 30, 2022) (noting that any dispute shall be subject to arbitration after mediation is attempted).

341. *See* Defendant NVR, Inc.'s Memorandum of Law in Support of its Motion to Stay Litigation and Compel Arbitration Exhibit A, at 20–21, Miller v. NVR, Inc., No. 13-cv-04624 (E.D. Pa. dismissed June 25, 2014) (noting that any dispute arising from construction be submitted to arbitration).

342. *See New Home Limited Warranty and Performance Standards*, PULTE HOMES 18–20 (Sept. 1, 2024), https://digitalbrochure.pulte.com/view/184636/20 [https://perma.cc/9N8L-38FS] (providing that all warranty disputes are subject to binding arbitration).

343. *See* Plaintiffs, Vikas and Rupal Patel's Default Motion to Confirm Arbitration Final Award Exhibit 1, Patel v. Taylor Morrison of Tex., Inc., No. 15-cv-00517 (S.D. Tex. dismissed Apr. 9, 2015) (including an arbitration clause with a purchase agreement to buy a house).

344. *See User Agreement*, TOLL BROTHERS (Aug 15, 2019), https://homecare.tollbrothers.com/hc/en-us/articles/360028620114-User-Agreement [https://perma.cc/8UFS-8GLH] (noting any dispute regarding the home is subject to binding arbitration).

345. *See 2024 Builder 100*, BUILDER, https://www.builderonline.com/builder-100/builder-100-list/2024/?next=false [https://perma.cc/4M3K-GL2V] (providing a list of other major builders in the industry).

346. *See supra* text accompanying note 213–217 (noting multiple scenarios where binding arbitration may not apply to all company transactions).

347. *See, e.g. Terms and Conditions*, MCDONALD'S, *supra* note 252; *Terms of Use*, STARBUCKS, *supra* note 253 (providing that arbitration provisions in these terms of service only apply after acceptance of online services). Likewise, forced clauses that are merely floating under the "terms and conditions" tab on websites—a variety of contract known as "browsewrap"—are only binding if a consumer saw or should have seen them. *See, e.g.*, Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014) ("Because no affirmative action is required

market that require arbitration can overstate the process' real-world impact.

In sum, if policymakers conclude that forced arbitration is pernicious merely because it is widespread, the Fortune 500 clauses tip the scales towards measures like the FAIR Act, the ACFA. Yet these provisions do not demonstrate that people generally lack arbitration-free alternatives.

2. Opt Outs

This tees up one of the business community's marquee counterarguments: that the widespread use of opt out provisions assuages concerns about the ubiquity of forced clauses.[348] This assertion rings hollow.

Perhaps the most powerful rejoinder to the opt out theory is the simplest. Corporate lobbyists contend that "[m]ost arbitration clauses offer . . . the right to opt out."[349] But only twenty percent of the forced clauses I examined contained such a term. Accordingly, opt outs may be too rare to make a difference.

I also found no evidence that opt outs are meaningful. Some scholars believe that individuals ignore opt outs (just as they fail to read other boilerplate terms).[350] For whatever it is worth, no

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by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." (quoting Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011))).

348. *See, e.g.*, *Examining Mandatory Arbitration Hearing*, *supra* note 132, at 4 (arguing that many companies provide out-out clauses, allowing competition to remain strong).

349. Kaplinsky et al., *supra* note 136, at 6.

350. *See* Jeff Sovern, *Opaque (Formerly Dark) Patterns and Arbitration Opt Outs*, CONSUMER L. & POL'Y BLOG (June 2, 2023), https://clpblog.citizen.org/opaque-formerly-dark-patterns-and-arbitration-opt-outs [https://perma.cc/BKP3-3NG3] (arguing consumers are unlikely to take advantage of opt-out provisions in part because they are unlikely to read them). There is little data on point. A case from 2014 mentioned that fewer than 0.1% of people opted out of Discover Bank's forced clause. *See* Ross v. Am. Exp. Co., 35 F. Supp. 3d 407, 435 n.28 (S.D.N.Y. 2014), *aff'd sub nom.* Ross v. Citigroup, Inc., 630 F. App'x 79 (2d Cir. 2015). Studies also find little awareness of opt outs. *See* Roseanna Sommers, What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation 22 (July 27, 2023) (unpublished manuscript) (on file with the Minnesota Law Review) (reporting that 18% of survey participants who were shown forced arbitration provisions realized that they could opt out and only 1.5% remembered how to do so); *CFPB Arbitration Study*, *supra*

plaintiff in the hundreds of motions to compel I read argued that they had opted out. Of course, this only proves so much: If a company knows that someone has opted out, it might not seek arbitration, and the matter would never show up on my radar. Yet the two times opt outs surfaced in my data hardly inspire confidence that the clauses are salient to consumers and employees. First, in one matter, Uber asserted that "numerous drivers in Florida have . . . opted out."[351] Given the aggressive imprecision of this statement, it would not be surprising if "numerous" was a small number. Second, in another dispute, Meta admitted that none of its 252 employees of a certain rank hired between 2014 and 2018 had invoked their right not to be bound by its class waiver.[352] If these cases are indicative, opt outs "create the illusion of consent."[353]

Admittedly, one critique of opt outs seems off-base. Some progressives argue that drafters place "roadblocks in the path of consumers trying to opt out."[354] I did not find that to be true. Although opt out procedures vary, most are user-friendly. Many entities accept opt out notices by email, and most merely ask for a person's name, address, signature, and account number.[355] In

note 31, at 33 (finding that 0.3% of consumers in the financial services industry were aware that they could reject the arbitration clause). But more recently, Uber estimated that up to 4,828 (2%) of its drivers in California between February 28, 2019, and August 31, 2020, may have rejected its arbitration provision. *See* Declaration of Justin McCrary in Support of Defendant's Opposition to Plaintiff's Motion for Class Certification at 3, James v. Uber Techs. Inc., 338 F.R.D. 123 (N.D. Cal. 2021) (No.19-cv-06462) (acknowledging that this figure is likely inflated since not all drivers who attempted to opt out did so successfully); *see also* James v. Uber Techs. Inc., 338 F.R.D. 123, 130 & n.1 (N.D. Cal. 2021) (granting in part and denying in part a motion to certify a class of these drivers on the basis that the number of potential opt-outs was inflated).

351. Declaration of Michael Colman in Support of Defendant's Motion to Compel Arbitration at 4, Suarez v. Uber Techs., Inc., No. 16-cv-00166, 2016 WL 2348706 (M.D. Fla. May 4, 2016).

352. *See* Declaration of Nicolle Hickman at 3–4, Bigger v. Facebook, Inc., 375 F. Supp. 3d 1007 (N.D. Ill. 2019) (No. 17-cv-07753) [hereinafter Hickman Declaration] ("Based on Facebook's records, none of the at least 252 CSMs employed . . . have opted out of the 'class, collective, or representative action waiver.'").

353. Sovern, *supra* note 350.

354. *Id.*

355. *See, e.g.*, *Terms of Use*, VISTRA (June 13, 2023), https://vistracorp.com/terms-of-use [https://perma.cc/HZ8Q-WJJB] ("To be effective, the Opt-Out Notice must contain your name, address, and signature."); *Terms and Conditions*,

fact, one firm, Compass, even offers to reimburse employees for the postage required to mail its opt out notice.[356] Thus, the formalities required to decline to arbitrate seem minimal.

Nevertheless, there are other ways in which opt outs are designed not to be exercised. For one, they often appear near passages that extol arbitration's benefits. For example, Penske Automotive Group devotes a paragraph of its employment contract to explaining why private dispute resolution is superior to litigation:

> [T]he court system often is not a very effective or satisfactory way to resolve problems between employers and their employees. So many lawsuits are being filed that the courts have become terribly backlogged. A lawsuit filed today may not go to trial for years, and legal fees frequently are in excess of any judgment ultimately collected by the claimant . . . . We believe that it is in the best interest of our employees as well as the [c]ompany to resolve legal problems in a quick, effective, and fair way.[357]

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HERTZ, https://www.hertz.com/rentacar/member/enrollment/displayTermsAndConditions [https://perma.cc/B9DS-X65X] ("Include Your name, address, reservation ID number or Rental Agreement number (if provided), and a clear statement that You do not agree to this Arbitration Provision."). Then again, not every company makes it easy. For example, Salesforce and Shipt state that an opt out only becomes effective once *they* have acknowledged it and saddle plaintiffs with following up and obtaining an acknowledgement. *See* Declaration of Kimberly Strashovskiy in Support of Defendant Salesforce.com, Inc.'s Motion to Compel Arbitration Exhibit A, at 6, Anderson v. Salesforce.com, Inc., No. 18-cv-06712, 2018 WL 6728015 (N.D. Cal. Dec. 21, 2018) ("Your request to opt-out of the Arbitration Agreement will not be effective until the Company has acknowledged receipt of a timely submitted Opt-Out Form."); Hutchins Declaration, *supra* note 304 Exhibit D, at 4 (noting Shipt's opt-out is only effective upon "written confirmation of receipt"). Likewise, Kohl's and Mastec state that plaintiffs have the burden of proof in any dispute over whether they opted out—a potential landmine for individuals who do not retain their notice or evidence that they submitted it. *See Kohl's Dispute Resolution Policy*, KOHL'S CAREERS, https://careers.kohls.com/dispute-resolution-policy [https://perma.cc/7QAC-LFPZ] (noting that the "individual will have the burden" of showing notice); Defendant's Motion to Dismiss or, Alternatively, to Stay Action and Compel Arbitration Exhibit C, at 9–10, Rivera v. Mastec Servs. Co., No. 22-cv-20726, 2023 WL 6160857 (S.D. Fla. Sept. 21, 2023) (providing a nearly identical provision).

356. *See* Agreed Motion to Compel Arbitration & Stay Case Exhibit 1, Panchoo v. Compass Grp. USA, Inc., No. 23-cv-23395 (S.D. Fla. Sept. 8, 2023) (stating in Compass' arbitration clause that employees "will be reimbursed" for costs and postage required to give notice of an opt-out).

357. Defendant's Motion to Compel Arbitration and Stay Judicial Proceedings &, if Arbitration is Denied, for an Enlargement of Time to Respond to Complaint Exhibit B, at 1–2, Zahi v. Penske Automotive Grp., Inc., No. 16-cv-80273

Although few people may read these types of passages—and those that do might not take them at face value—others might think twice before rejecting a process that is supposedly "fast, fair, and inexpensive" and "in [our] mutual interest."[358]

Finally, the sloppiness that plagues some arbitration clauses also extends to opt outs. For example, the TOS on Dreyer's Grand Ice Cream's website announces that users can decline the arbitration provision but provides no instructions on how to do so.[359] Similarly Duke Energy's TOS declares, confusingly: "If you opt out of the arbitration provision, all other parts of this Arbitration Agreement will continue to apply."[360] Intentionally or accidentally, some opt outs make it hard for consumers and employees to exercise their right to reject arbitration.

**Figure 9: Excerpt from Duke Energy's Terms of Service (Emphasis Added)**

> *The opt-out notice must state that you do not agree to this Arbitration Agreement and must include the name, address, phone number and email address associated with your account with us. This procedure is the only way you can opt out of this Arbitration Agreement, and failure to comply strictly with this procedure and the applicable deadline automatically will render the opt-out notice null and void. If you opt out of the arbitration provision, all other parts of this Arbitration Agreement will continue to apply.*

3. Providers Revisited

Corporate lobbyists argue arbitration administrators like the AAA and JAMS help ensure that forced arbitration is fair.[361] My research renders a mixed verdict on this proposition.

I found some evidence that providers can be a normalizing influence. Consider one downside of arbitration: the fact that

(S.D. Fla. Mar. 23, 2016); *see also* Hickman Declaration, *supra* note 352, at 17 ("[A]rbitration is a speedy, cost-effective procedure for resolving disputes.").

358. Declaration of Angela Bottorf in Support of Defendant International Paper Co.'s Motion to Compel Arbitration Exhibit C, at 1, Veley v. Int'l Paper Co., No. 14-cv-01217 (C.D. Cal. Jun. 2, 2014); *see also* Declaration of Quyen Clifton Exhibit A, at 3, Bachan v. Genuine Parts Co., No. 22-cv-07674 (S.D.N.Y. dismissed Feb. 6, 2023) (calling arbitration "streamlined and efficient").

359. *See Terms of Use*, DREYER'S, *supra* note 284 (noting that arbitration is binding "unless you opt-out" but providing no other instruction).

360. *Terms of Use*, DUKE ENERGY (Apr. 3, 2023), https://www.duke-energy.com/legal/terms-of-use [https://perma.cc/D3AZ-5PGW].

361. *See supra* text accompanying note 139.

awards need not be written.[362] Arguably, oral rulings encourage rash judgments, impair appellate review, and stunt the growth of precedent.[363] Upon first glance, my data suggests that arbitrators face little pressure to put pen to paper: Only 19% of consumer transactions and 53% of employment contracts mandate written awards. Yet that is not the end of the story. Although the rest of the agreements are silent on the topic, most of them select an arbitration provider, and these institutions fill the gap by insisting that the decision-maker use a writing.[364] Thanks to providers, then, 93% of the forced clauses in my sample require written awards.

Likewise, rules promulgated by arbitration administrators limit plaintiffs' costs. Two hundred and twenty-eight forced clauses (thirty-nine percent) say nothing about who pays the arbitrators' fees. Yet the Consumer and Employment Rules of the AAA, JAMS, and their competitors usually shift the lion's share of these expenses to firms.[365]

But in other contexts, providers may not serve the best interests of plaintiffs. For starters, their codes are susceptible to gamesmanship. For example, nineteen forced employment

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362. *See, e.g.*, United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) (observing that arbitrators need not write opinions); Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 200 (2011) (explaining "arbitrators do not always write opinions" and are "not legally required to do so").

363. *See, e.g.*, Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required in All Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 AM. U. L. REV. 151, 157 (1995) (arguing that requiring written opinions in arbitration would work towards "reducing bias, . . . promoting meaningful renew of arbitration awards, [and] stimulating the development of consistent federal common law" (footnotes omitted)).

364. *See AAA Consumer Rules*, *supra* note 79, r. 43(b) ("The award shall provide the concise written reasons for the decision unless the parties all agree otherwise."); *CPR Rules*, *supra* note 81, r. 15.2 ("All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise."); *JAMS Streamlined Arbitration Rules & Procedures*, JAMS r. 19(g) (2022) [hereinafter *JAMS Streamlined Rules*], https://www.jamsadr.com/rules-streamlined-arbitration/#Rule-19 [https://perma.cc/TSC6-JN8Y] ("Unless all Parties agree otherwise, the Award shall . . . contain a concise written statement of the reasons for the Award."); *NAM Standard Rules and Procedures*, NAT'L ARB. & MEDIATION r. 16(A) (Oct. 6, 2017), https://www.namadr.com/content/uploads/2016/07/S-Rules_and_Proced.pdf [https://perma.cc/4K3C-DUA9] (mandating written awards).

365. *See supra* text accompanying notes 84–85 (highlighting AAA and JAMS' Due Process Protocols and Minimum Standards).

clauses select the AAA Commercial Rules and thirteen forced consumer provisions choose JAMS' Comprehensive Rules. These principles are designed for disputes between economic equals and therefore require the parties to split arbitration costs equally.[366]

In addition, almost every provider has adopted the principle that arbitrators can decide whether a case must be arbitrated.[367] As the AAA puts it, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."[368] In deals between sophisticated parties, all of the federal appellate courts that have addressed the issue have held that merely naming such an institution serves as an implicit delegation clause.[369] And although courts are split—a point to

366. *See Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 29 (July 1, 2016), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/326N-8QVK] (stating that all expenses of the arbitration, other than those associated with a party's witnesses, "shall be borne equally by the parties"); *JAMS Streamlined Rules*, *supra* note 364, r. 26(a) ("Each Party shall pay its *pro rata* share of JAMS fees and expenses . . . ."). Admittedly, it is unclear whether either the AAA or JAMS will administer these cases under the clauses as written. *See, e.g.*, Lang v. PTC, Inc., Civ. No. 21-04451, 2021 WL 5277190, at *4–5 (D.N.J. Nov. 12, 2021) (featuring a matter in which JAMS refused to apply the fee-sharing provisions of its Comprehensive Rules to an employment dispute). Likewise, although forty-one forced consumer clauses select the AAA Commercial Rules, the AAA's pro-plaintiff Consumer Rules apply when "the arbitration agreement is contained within a consumer agreement . . . that specifies a particular set of rules *other than* the *Consumer Arbitration Rules*." *AAA Consumer Rules*, *supra* note 79, at 9 (emphasis added).

367. *See JAMS Streamlined Rules*, *supra* note 364, r. 8(b) ("Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator."); *CPR Rules*, *supra* note 81, r. 8.1 ("The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement.").

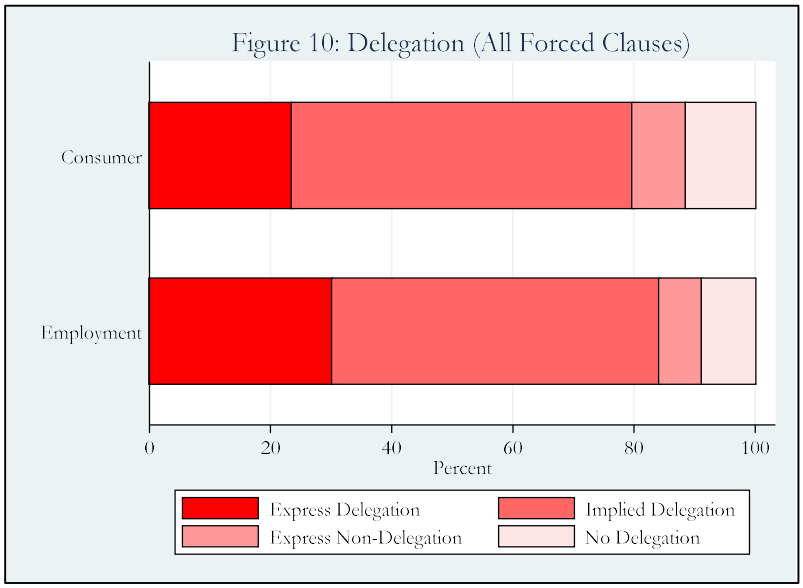
368. *See AAA Consumer Rules*, *supra* note 79, at 17.

369. *See* Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009) ("[T]his court has said expressly that the validity of an arbitration clause is itself a matter for the arbitrator where the agreement so provides."); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005) ("We have held that when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir.

which I will return—most extend this logic to consumer and employment contracts.[370] Thus, as Figure 10 elucidates, more than three-quarters of forced clauses entrust arbitrators with deciding whether the arbitration should proceed. For reasons like this, it is difficult to generalize about the impact that providers have on the fairness of forced arbitration.

2012) ("We agree with most of our sister circuits that the express adoption of [the AAA Rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); McGee v. Armstrong, 941 F.3d 859, 866 (6th Cir. 2019) (concluding that courts must respect parties' decisions to refer "all arbitrability questions to arbitrators"); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009) ("Most of our sister circuits that have considered this issue agree with our conclusion that an arbitration provision's incorporation of the AAA Rules—or other rules giving arbitrators the authority to determine their own jurisdiction—is a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court."); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1075 (9th Cir. 2013) (explaining that when "rules clearly and unmistakably delegate questions of arbitrability to an arbitrator," such delegation holds); Belnap v. Iasis Healthcare, 844 F.3d 1272, 1281–82 (10th Cir. 2017) ("Having concluded that the parties incorporated the JAMS Rules into their Agreement, [the parties] clearly and unmistakably intended for an arbitrator to decide issues of arbitrability."); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA Rules . . . into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006) (concluding that an agreement incorporating the AAA Rules "clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator").

370. *See infra* text accompanying notes 400–04.




4. Fairness

A crucial question is whether forced arbitration favors businesses relative to litigation. My data suggests that it does.

Most obviously, agreeing to arbitrate means surrendering the right to bring or participate in a class action. Indeed, except for John Deere's misguided TOS, every Fortune 500 forced provision bans class arbitration either by expressly waiving it or simply remaining mum about it.[371] To be sure, the social value of class actions is debatable, and companies have been arguing for decades that plaintiffs are better off arbitrating individually than recovering pennies on the dollar as part of a class.[372] But traditionally, almost no plaintiffs pursued low value complaints in arbitration.[373] Admittedly, the rise of mass arbitration has

371. *See supra* Part II.B.2.b.

372. *See, e.g.*, Brief of the Chamber of Commerce of the United States and Business Roundtable as Amici Curiae in Support of Petitioners at 31, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (No. 12-133), 2012 WL 6759408, at *31 (arguing that plaintiffs often achieve better results by pursuing their own claims in arbitration than they would by joining a class).

373. *See, e.g.*, Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 52–53 (2019) (finding that there was only a modest uptick in arbitral filings after *Concepcion*); Judith Resnik et al., *Collective Preclusion and Inaccessible Arbitration: Data, Non-*

injected new uncertainty into this topic (and unmasked how insincere corporations are when they sing the praises of single-file proceedings). But setting aside this still-evolving issue, forced arbitration's impact on small claims is akin to a large meteor's effect on the dinosaurs.

Forced arbitration also allows entities to make nuanced decisions about forum. The most engaged Fortune 500 drafters mandate arbitration for questions about the arbitration unless it involves the permissibility of class proceedings.[374] Likewise, they do not allow arbitrators to hear the merits of class actions or efforts to enjoin former workers from misusing intellectual property or violating confidentiality or non-competition clauses.[375] This tendency to pass the baton back to courts speaks volumes. It shows that businesses do not believe the Court's sunny pronouncement that arbitration and litigation are fungible.[376] To the contrary, businesses recognize that each mode has its payoffs and drawbacks. For example, they may not trust arbitrators to decide whether a contract allows plaintiffs to aggregate grievances because they worry that private judges who charge by the hour will bend over backwards to exercise jurisdiction over a lucrative class proceeding.[377] And they probably prefer to litigate bet-the-company class actions and cases that feature trade secrets due to the chance for error correction that comes with robust appellate review.[378] In short, the choice between venues matters, and corporations get to call the shots.

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*Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 675 (2020) (reporting that between 2017 and 2019, an average of 172 of AT&T's roughly 150,000,000 wireless customers filed arbitrations); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018) (estimating that only two percent of employees with viable claims pursue them in arbitration).

374. *See supra* Part II.B.2.b.

375. *See supra* Part II.B.2.b; *see also supra* text accompanying notes 273–77 (highlight circumstances where arbitration has been deemed inappropriate).

376. *See* Richard Frankel, *Corporate Hostility to Arbitration*, 50 SETON HALL L. REV. 707, 711 (2020) (calling this phenomenon "'corporate hostility' to arbitration").

377. *See* David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1331 (2019) (demonstrating that arbitrators are far more likely than judges to interpret an arbitration clause that does not mention class actions to permit those procedures).

378. *Cf.* Rutledge & Drahozal, *Sticky Arbitration*, *supra* note 175, at 973 ("For franchisors, the lack of an appeals process is a very serious cost of using an arbitration clause . . . .").

Pro-drafter provisions exacerbate these problems. As discussed, 54% of forced clauses have at least one self-serving attempt to rewrite the rules of the judicial system: restricting the flow of information, creating financial hurdles for plaintiffs, and capping their recoveries.[379] True, only 6% of forced provisions feature three or more troubling terms.[380] Yet the fact remains that most forced clauses contain a bespoke, defendant-friendly procedure.

A skeptical reader might spin this finding in the opposite direction. So what if roughly every other forced clause has at least one suspect term? Does this mild problem justify the Thor's hammer of a forced arbitration ban? Arguably, the status quo—in which courts scrutinize forced clauses for unconscionability under section two of the FAA—is sufficient. Drahozal and Rutledge make this point elegantly while opposing the passage of the Arbitration Fairness Act (a precursor to the FAIR Act):

> Whereas wholesale prohibitions like the Arbitration Fairness Act declare entire areas of contract off limits to arbitration regardless of the terms of the agreement, the section 2 model enables courts to test particular clauses in light of their impact in a certain context, both with respect to the nature of the contractual relationship and with respect to the claim affected by the clause.[381]

However, the predominance of contracts with only one suspect attribute is also insidious in a way—it gives companies the maximum permissible advantage. The key to this point is understanding the relationship between unconscionability and severance. Judges presumptively strike substantively unconscionable language but enforce the remaining arbitration agreement.[382] They will only go a step further and nullify the entire arbitration clause if "it contains more than one unconscionable provision."[383]

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379. *See supra* Part II.C.

380. *See supra* Part II.C.

381. Rutledge & Drahozal, *Contract and Choice*, *supra* note 30, at 60. I should also reiterate that Rutledge and Drahozal's sample of credit card agreements had far fewer potentially substantively unconscionable terms than my data. *See supra* text accompanying note 149.

382. *See, e.g.*, Curtis v. JPMorgan Chase Bank, N.A., No. 22 CIV. 10286, 2024 WL 283474, at *5 (S.D.N.Y. Jan. 25, 2024) ("Even if [] provisions were unconscionable, an unconscionable provision can be severed from the agreement and the remaining portions upheld if the provision is isolated and does not go to the core of the agreement.").

383. Magno v. Coll. Network, Inc., 204 Cal. Rptr. 3d 829, 841 (Cal. Ct. App. 2016).

Under this rubric, companies have little to lose by picking a single arrow from the quiver of confidentiality mandates, fee-shifting clauses, and damage waivers. The best scenario is that the plaintiff does not challenge the term or does so and loses. The worst is that a judge will void the tainted procedure—but even then, the dispute will still end up in arbitration and the firm will be in the same position as if it never tried to gain the upper hand.[384] Seen through this lens, drafters that use one possibly-illicit term have found the sweet spot in procedural design.[385]

5. Effect on Companies

Believe it or not, prohibiting forced arbitration might not be the Armageddon some corporations fear. Some will be no worse off and others, paradoxically, may even come out ahead.

As noted, not all businesses are up to the task of making their own mini codes of civil procedure.[386] There are two kind of defective forced provisions in my data. One is the ticking time bomb: the arbitration agreement that does not mandate arbitration or the purported class arbitration waiver that allows class arbitration.[387] These terms are few and far between in the

384. This phenomenon of courts failing to adequately deter drafter overreaching exists outside of arbitration as well. *See, e.g.*, Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1129–30 (2009) (discussing "unenforceable-as-written clauses" in employment contacts, releases, leases, and waivers of tort liability); David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 J. EMPIRICAL LEGAL STUD. 90, 99 (2022) (finding that illegal terms are common in a large sample of leases from eviction proceedings in Philadelphia).

385. Some drafters also make little secret of their desire to go right up to the limit of what courts will tolerate by specifying that "if any provision of this [a]greement is held to be overbroad or unreasonable, such provision shall be given effect to the maximum extent possible under the law." Declaration of Sean P. Lynch Exhibit A, at 2, Jemiri v. Pub. Serv. Enter. Grp. Corp., No. 17-cv-04518, 2018 WL 1115152 (E.D.N.Y. Feb. 27, 2018); *see also* Defendant's Motion to Dismiss or, Alternatively, to Stay Action and Compel Arbitration Exhibit C, at 7, Rivera v. Mastec Servs. Co., No. 22-cv-20726, 2023 WL 6160856 (S.D. Fla. Sept. 20, 2023) (mandating confidentiality and creating exceptions "only to the extent [they] may be otherwise required by applicable law").

386. *See supra* Parts II.C–II.C.1

387. *See supra* text accompanying notes 274–75, 286–88. It is probably no accident that most of the ticking time bombs appear in TOS. *Cf.* David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1371 (2023) (arguing that electronic contracts "are nearly zero-cost products, thrown into commerce without real thought about the benefits they bring firms").

rarified air of the Fortune 500.[388] But their mere existence suggests that they may be more common among less wealthy firms. A company with a ticking time bomb has inadvertently passed its own arbitration ban and will not be affected by the FAIR Act or the ACFA.

The second variety of sloppy provision is symptomatic of a deeper pathology. Arbitration law has become almost comic in its complexity. Every year brings new guidance from the Court and countless opinions from trial and appellate judges.[389] As the problems of unnecessary "pro-consumer" bounties and self-defeating FAA choice-of-law provisions illustrates, even firms that are willing to sink resources into keeping up may not be able to do so.[390] These businesses have the worst of both worlds: they incur transaction costs and end up with the functional equivalent of a ticking time bomb.

Mass arbitration threatens to magnify this problem. The search for a weapon against bulk filings is going to require an extended period of trial and error. Drafters will need to convince courts that anti-mass arbitration provisions are enforceable and revamp these procedures when they fail. This dialogue is going to be expensive. And if the Fortune 500 clauses are any

388. *See supra* text accompanying note 38; *see also supra* Part II.B.1.

389. *See, e.g.*, Coinbase, Inc. v. Bielski, 143 S. Ct. 1915, 1931 (2023) (holding that a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is ongoing); Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1924–25 (2022) (holding that under the FAA, a former employee is entitled to enforce an arbitration agreement to the extent that it mandated arbitration of a former employee's claim under California's Labor Code Private Attorneys General Act of 2004); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1793 (2022) (holding that an airline ramp supervisor was "engaged in foreign or interstate commerce," and, thus, exempted from the FAA); Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022) (holding that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA); Badgerow v. Walters, 142 S. Ct. 1310, 1314 (2022) (holding that a federal court, in determining whether it has jurisdiction to decide an application to confirm, vacate, or modify an arbitral award, looks only to the application actually submitted to the court, and it does not look through the application to the underlying substantive controversy between the parties). Likewise, a Westlaw search for opinions from 2023 involving the words "Federal Arbitration Act" generates 2,002 hits. *See Westlaw Precision*, THOMSON RETUERS, https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default) (select "All State & Federal" under "Jurisdiction" next to the search bar, then select the search bar and type: "adv: "federal arbitration act" & DA(bef 2024) & DA(aft 2022)," then press enter).

390. *See supra* text accompanying notes 276–88.

indication, some businesses will fall behind and learn the hard way that they have paid for obsolete procedures.

To some extent, this phenomenon has already begun. In 2022, a federal court held that Verizon's batching provision was "substantively unconscionable."[391] About 2,700 customers had sued the wireless goliath for consumer protection violations.[392] However, Verizon's batching clause required ten bellwether arbitrations to proceed while the rest were deemed to be "not filed."[393] The court noted that the trickle of cases through the narrow funnel of the batching clause meant that some plaintiffs would need to wait for 156 years before being able to arbitrate.[394] Even worse, there was no tolling mechanism, which ensured that most claims would be barred by the statute of limitations.[395]

Companies' reactions diverged. Some capitalized on their ability to amend their websites in real time by immediately curing the deficiencies the court had identified. For instance, in 2023, Foot Locker revised its TOS to give plaintiffs the chance to exclude themselves from the batching process after a certain number of bellwether arbitrations occur and to clarify that

391. MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024, 1042 (N.D. Cal. 2022). A New Jersey appellate court later reached the same result. *See* Achey v. Cellco P'ship, 293 A.3d 551, 558 (N.J. Super. Ct. App. Div. 2023) (calling *MacClelland*'s "reasoning sound and [its] result equitable").

392. *See MacClelland*, 609 F. Supp. 3d at 1028, 1040 (indicating that, in addition to the twenty-seven plaintiffs who were parties in the instant case, plaintiffs' firm represented another 2,685 customers also bringing claims).

393. *Id.* at 1040 (explaining that counsel for plaintiffs and counsel for Verizon were each to select five cases, and "all remaining cases 'shall not be filed in arbitration until the first ten [were] resolved").

394. *See id.* ("According to statistics from the American Arbitration Association showing that the average disposition time for an arbitration takes a little under seven months, Plaintiffs calculate that it would take approximately 156 years to resolve the claims of all of Plaintiffs' counsel's clients.").

395. *See id.* at 1042 ("In addition to the length of delay, the provision is pregnant with the risk that claims will be effectively barred when coupled with the statute of limitations.").

"limitations period[s] . . . shall be tolled."[396] However, others with Verizon-style regimes have yet to act.[397]

Eliminating forced arbitration might not be a net loss for these corporations. It would spare them from finding out (perhaps repeatedly) that they have paid their lawyers handsomely to develop batching clauses that accomplish nothing. Indeed, as Amazon and TikTok realized, the time may have come to step off the procedural rulemaking treadmill.[398]

* * *

The wisdom of banning forced arbitration is a complex equation. This section has examined two of its key variables: how common forced arbitration clauses are and the way in which big businesses wield their procedural rulemaking authority. My research shows that federal anti-arbitration rules would level the playing field for millions upon millions of plaintiffs. In addition, it would liberate drafters from having to navigate the increasingly tangled thicket of the FAA.

### B. COURTS

A common corporate talking point is that judicial review under section two of the FAA ensures that forced arbitration clauses are fair.[399] This Section exposes the hypocrisy in this

396. *See* FOOT LOCKER, *supra* note 319; *see also Terms of Use*, MGM REWARDS (Sept. 8, 2023), https://www.mgmresorts.com/en/terms-of-use.html [https://perma.cc/P7DN-DAK4] (adopting similar safeguards in stating "[t]he period of any applicable statute of limitations will be tolled"); *KFC Terms of Use*, *supra* note 254 (adopting similar safeguards in stating "any relevant limitations period . . . shall be tolled").

397. *See, e.g.*, *Frequently Asked Questions*, DILLARD'S, https://www.dillards.com/c/faqs-notices-policies [https://perma.cc/YH42-8AEJ] ("Any applicable statutes of limitations shall be tolled from the time the first demands for arbitration are selected for the first set of bellwether proceedings until a demand for arbitration is selected as part of a set of bellwether proceedings, withdrawn, or otherwise resolved."); *cf. Terms of Use*, PUBLIX WEBSITE POLICIES (Mar. 14, 2024), https://www.publix.com/publix-website-policies [https://perma.cc/7EHD-S77Z] (tolling the statute of limitations but not addressing the potential for delay); *Terms*, WILLIAMS SONOMA, *supra* note 317 (same).

398. *See supra* text accompanying note 24 (noting that Amazon and TikTok have dropped their arbitration clauses); Gilles, *supra* note 25, at 1069 (predicting that companies will delete arbitration clauses and instead use standalone class waivers).

399. *See supra* text accompanying note 135–136 (outlining pro-arbitration arguments).

argument. It shows that businesses are trying to cut courts out of the loop, and it urges judges to push back.

Drafters have cultivated three techniques to evade judicial review. The first is delegation clauses, which, as mentioned, the Court has all but made bulletproof.[400] But the matter of *whether* a contract contains a delegation clause remains unsettled. In bargained-for deals, the incorporation of the rules of an arbitration provider that delegates functions as an implicit delegation clause.[401] In addition, most courts have blithely extended these holdings to adhesion contracts.[402] But others have balked, reasoning that a delegation clause cannot be both "clear and unmistakable" and implied through fine print.[403] My data illustrates that the stakes here are high: under the majority approach, 78% of Fortune 500 forced clauses delegate, but under the minority view, just 32% do.[404]

Second, businesses use opt outs to try to defuse unconscionability challenges. Unconscionability generally requires both

400. *See supra* text accompanying notes 101–04.

401. *See supra* text accompanying note 369.

402. *See, e.g.*, McKoy v. ACN Opportunity, LLC, No. 22-cv-00320, 2022 WL 4088620, at *5 (W.D.N.C. Sept. 6, 2022) ("The parties' sophistication does not change the plain language of the contract . . . ."); Collins v. Discover Fin. Servs., Civ. Action No. PX-17-03011, 2018 WL 6434503, at *3 (D. Md. Dec. 7, 2018) ("As a general principle, parties to a contract are to be bound by its plain terms.").

403. *See, e.g.*, Tompkins v. 23andMe, Inc., No. 13-CV-05682, 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014) ("[A] bare reference to the AAA rules in [a defendant's] online contract does not show that the parties clearly and unmistakably intended to delegate arbitrability."); Allstate Ins. Co. v. Toll Bros., Inc., 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016) ("[T]he incorporation of . . . sets of arbitration rules by reference cannot serve as clear and unmistakable evidence of the parties' intent to arbitrate arbitrability."); Eiess v. USAA Fed. Sav. Bank, 404 F. Supp. 3d 1240, 1252 (N.D. Cal. 2019) ("[T]here was not clear and unmistakable delegation, based on incorporation by reference of the JAMS and/or AAA rules, where the consumer who is a party to the [defendant's] agreement is not sophisticated."); Stone v. Wells Fargo Bank, N.A., 361 F. Supp. 3d 539, 555 (D. Md. 2019) ("It strains credulity to believe that the consumer knew—much less intended—that the cross-reference directed an arbitrator to decide arbitrability."); MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024, 1031 (N.D. Cal. 2022) ("Where at least one party is unsophisticated, courts in this district and elsewhere have routinely found that the incorporation of the AAA rules is insufficient to establish a clear and unmistakable agreement to arbitrate arbitrability.").

404. *See supra* Part II.B.2.a.

procedural and substantive unfairness.[405] Over the past decade, corporations have been arguing with increasing success that a forced provision with an opt out clause cannot be procedurally unconscionable.[406] These opinions, which rarely spend more than a sentence analyzing the topic, treat opt out provisions as talismans:

> [The plaintiff] was given the option to say "no" to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave-it basis.[407]

In turn, this conclusion means that the arbitration clause is enforceable no matter how many grossly unfair terms it contains.[408]

Third, businesses have a new trick: stating that they are entitled to recover their attorneys' fees and costs incurred while

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405. *See, e.g.*, Bielski v. Coinbase, Inc., 87 F.4th 1003, 1013 (9th Cir. 2023) ("For a court to refuse to enforce a provision due to unconscionability, a party must show the provision has elements of both procedural and substantive unconscionability."); Horizon Ventures of W. Va., Inc. v. Am. Bituminous Power Partners, L.P., 857 S.E.2d 33, 40 (W. Va. 2021) (holding that the lower court mistakenly invalidated the contract "without finding even a sliver of procedural unconscionability").

406. *See, e.g.*, Bennett v. T-Mobile USA, Inc., No. 22-cv-01805, 2024 WL 229580, at *15 (W.D. Wash. Jan. 22, 2024) (stating that "[p]laintiffs fail[ed] to support their assertion that the 30-day opt-out window is procedurally unconscionable" and collecting authority); Stephenson v. AT&T Servs., Inc., No. 21-0709, 2021 WL 3603322, at *7 & n.10 (E.D. Pa. Aug. 13, 2021) ("Because the Arbitration Agreement contained an opt-out provision, it was not presented to [p]laintiff on a take-it-or-leave-it basis . . . ."). *But see* Gentry v. Superior Ct., 165 P.3d 556, 573 (Cal. 2007) (finding that an employment contract with an opt out provision was procedurally unconscionable when there were "several indications that [the plaintiff's] failure to opt out of the arbitration agreement did not represent an authentic informed choice").

407. Fluke v. Cashcall, Inc., Civil Action No. 08-5776, 2009 WL 1437593, at *8 (E.D. Pa. May 21, 2009).

408. A good example is *Shelton v. Delivery Drivers*, which I mentioned at the beginning of the Article. No. 22-cv-02135, 2023 WL 2629027 (C.D. Cal. Jan. 31, 2023); *see supra* text accompanying notes 1–9 (describing the circumstances in *Shelton*). The court refused to even consider whether Walmart's forced clause was fair because the opt out clause rendered the provision "procedurally sound." *Shelton*, 2023 WL 2629027 at *3. For an even more dramatic illustration, compare Cir. City Stores, Inc. v. Adams, 279 F.3d 889, 893–94 (9th Cir. 2002) (finding an employer's forced clause to be riddled with substantive unconscionability terms), with Cir. City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002) (upholding the same provision simply because it gave a different employee a thirty-day window to reject arbitration).

litigating a motion to compel arbitration.[409] One can see the appeal to drafters. Even plaintiffs with meritorious arguments that all or part of a forced provision is unconscionable might decide to fly the white flag rather than risk being ordered to subsidize the defendant's legal team. The handful of trial court decisions grappling with these provisions point in different directions. Some take the expense-shifting language at face value,[410] but others refuse to do so when a consumer or employee resisted arbitration in "good[]faith."[411]

These topics share a common thread: They involve efforts by businesses to prevent courts from asking whether forced provisions are fair. My data suggests that courts should resist these attempts to get them to abdicate their duties. Indeed, the fact that half the Fortune 500 forced clauses include a term that could be substantively unconscionable underscores the need for continued judicial oversight. Without this buffer, these one-sided terms may go unremedied. Moreover, there is a risk that savvy drafters will start making their arbitral regimes even less

409. These terms appear in twenty-three forced clauses (four percent). Of course, that makes them rare. Alarmingly, though, some of the forced provisions in which they appeared featured multiple components that could have been substantively unconscionable. *See, e.g.*, Brief in Support of Southwest Energy Co.'s Motion to Compel Arbitration Exhibit A, at 6–7, Polis v. Sw. Energy Co., No. 2-cv-00048, 2022 WL 19403581 (N.D. W. Va. Dec. 5, 2022) (waiving punitive damages, allowing the employer to recover fees if it prevails, and naming Travis County, Texas as the place of arbitration even though the plaintiff worked in West Virginia); *see also* Original Complaint at 4, *Polis*, 2022 WL 19403581 (No. 22-cv-00048) (stating that the plaintiff worked in West Virginia). This makes them seem like deliberate attempts to smuggle unfair arbitral procedures past trial courts.

410. *See* Kaba v. Aerotek, Inc., No. 23-cv-00084, 2023 WL 2787958, at *3 (S.D. Ind. Apr. 4, 2023) (finding that the defendant was able to "recover reasonable attorneys' fees" given the written agreement's clause permitting such recovery); Anderson v. Fischer Single Fam. Homes, IV, LLC, No. 20-cv-845, 2021 WL 4033142, at *5 (S.D. Ohio Sept. 3, 2021) (finding that the defendant's request for attorneys' fees should be granted due to the agreement's written provision allowing as much); E.W. Bank v. Shanker, No. 20-cv-07364, 2021 WL 6049912, at *5 (N.D. Cal. Dec. 20, 2021) (finding that the court would "allow[] for the recovery of attorneys' fees per the terms of [the] arbitration agreement").

411. TVT 2.0 LLC v. Frontiere, No. 23-cv-211, 2023 WL 5596320, at *4 (D. Utah Aug. 29, 2023) (declining to award attorneys' fees because the plaintiff filed the action in court in good faith); *cf.* Morrissette v. Pinnacle Asset Grp., LLC, No. 14-10259, 2014 WL 7792548, at *4 n.1 (E.D. Mich. Nov. 5, 2014) (declining to award fees when the plaintiff "did not act unreasonably in initially declining to agree to arbitration"), *report and recommendation adopted in part*, No. 14-10259, 2015 WL 540689 (E.D. Mich. Feb. 10, 2015).

equitable. It would be bad policy to allow companies to implicitly delegate the substantive unconscionability question, short circuit it with an opt out clause, or bully plaintiffs into never raising it.

## CONCLUSION

About a decade ago, the *New York Times* published a front-page story entitled *Arbitration Everywhere, Stacking the Deck of Justice*.[412] But is arbitration "[e]verywhere," and does it force plaintiffs onto hostile terrain? These questions have become flashpoints in discussions over the future of the FAA.[413] By analyzing forced arbitration clauses written by Fortune 500 firms, this Article has demonstrated that individuals transacting with corporations often (albeit not always) relinquish their rights to access the judicial system. It has also shown that this alternative procedural universe tilts towards its creators in ways that are both subtle (the high percentage of contracts with at least one unfair term) and not (the eradication of the class device). Finally, the Article has urged courts to reject corporate efforts to preclude judicial review of whether a forced clause is substantively unconscionable.

412. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/BKH8-7LH2] (highlighting the decision by corporations to "insert[] individual arbitration clauses into a soaring number of consumer and employment contracts").

413. *See supra* text accompanying notes 126–34.

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