



Summer 6-1-2012

“Waiving” Goodbye to Arbitration: A Contractual Approach

Paul Bennett IV

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Paul Bennett IV, *“Waiving” Goodbye to Arbitration: A Contractual Approach*, 69 Wash. & Lee L. Rev. 1609 (2012).

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“Waiving” Goodbye to Arbitration: A Contractual Approach

Paul Bennett IV*

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I. Introduction

Arbitration, as reflected through the Federal Arbitration Act (FAA),¹ is “simply a matter of contract between the parties.”² This oft-cited “fundamental principle”³ reflects an indisputable “axiom,”⁴ but one which the Circuit Courts of Appeals have failed to apply consistently. Courts diverge as to whether a party resisting arbitration must show prejudice in order to prove that its opponent waived its right to arbitrate.⁵ This Note demonstrates not only that prejudice is unnecessary, but that the waiver doctrine itself is conceptually flawed. In its place, this Note proposes a multifactor judicial framework derived from generally applicable contract law principles—a reasonableness test.

The standard conception is that “parties agree to use arbitration—to use private judges rather than public court judges to resolve their disputes—because arbitration is a process that improves upon the court system for dispute resolution.”⁶ Indeed, arbitration is a private,⁷ alternative adjudicatory forum to which one gains access by contract.⁸ Although the “default forum of dispute resolution is litigation,” parties can “override the

1. See 9 U.S.C. § 1 et seq. (2011).

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

3. Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010).

4. AT&T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 648 (1986).

5. Gary Born, *Implied Waiver of the Right to Arbitrate*, KLUWER ARBITRATION BLOG (Aug. 30, 2011), <http://kluwerarbitrationblog.com/blog/011/08/30/implied-waiver-of-the-right-to-arbitrate/> (last visited Sept. 24, 2011) (framing the issue as whether “prejudice on the part of a resisting party is necessary for an opposing party’s right to compel arbitration to be deemed waived”) (on file with the Washington and Lee Law Review).

6. Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163, 163 (2011) [hereinafter Drahozal, *Why Arbitrate*].

7. See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 816 (2008) [hereinafter Drahozal, *Arbitration Costs*] (“Arbitration is private dispute resolution.”).

8. See Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 76 (2008) (noting that parties can be compelled to arbitrate only “if they have agreed to do so . . . by entering into an arbitration agreement”).

litigation default rule” by contracting to do so.⁹ This notion, however, begs the question: Why would a party contractually relinquish its right to seek legal recourse in court? The justifications for doing so are ubiquitous,¹⁰ but can be reduced to a veritable cost–benefit analysis.¹¹ If the projected benefits of arbitration outweigh those of litigation in relation to the costs surrounding each regime, the parties will choose to arbitrate.¹² Herein lies the critical contractual freedom provided by arbitration. Parties attempting to curb the costs and diminish the risks appurtenant to their contractual arrangements¹³ can tailor arbitral procedures designed to accomplish those very objectives.¹⁴

Typically, the arbitration clause—a binding agreement entered into before a dispute arises—is the key which grants access to the arbitral forum and denotes the parties’ arbitral

9. See Drahozal, *Why Arbitrate*, *supra* note 6, at 165.

10. See, e.g., *id.* at 163 (“[A]rbitration may be preferred to litigation because it is cheaper and faster; because it enables parties to pick a decision maker (the arbitrator) who is an expert in the field; or because it provides a neutral forum . . . among other reasons.”); George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 2 (2012) (“[A]ll participants . . . have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora . . .”).

11. See Drahozal, *Arbitration Costs*, *supra* note 7, at 833 (noting the importance of “[c]omparing the costs of arbitration with the costs of litigation . . . in evaluating the efficiency of the two processes”).

12. See *infra* Part II (discussing the cost–benefit analysis conducted by parties in determining whether to arbitrate or litigate certain disputes).

13. This Note will not confront the numerous social issues surrounding consumer and employment arbitration clauses in contracts of adhesion. Such issues have been the subject of intense debate among scholars and commentators, and are outside the parameters of this Note. Avoiding this issue, however, has allowed this Note to focus squarely on the doctrinal underpinnings of arbitration in formulating an alternative to the waiver doctrine. Focusing on the doctrine surrounding this issue mirrors the Supreme Court’s approach in addressing other arbitral issues. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (finding a state law which held class arbitration waivers unconscionable preempted by the FAA, and stating that although the “rule is limited to adhesion contracts, . . . the times in which consumer contracts were anything other than adhesive are long past”).

14. See Drahozal, *Why Arbitrate*, *supra* note 6, at 177 (noting that parties can devise procedures to fit “the type of contract or perhaps even the type of dispute” they foresee as potentially arising from that contract).

rights.¹⁵ Title 9, § 2 of the United States Code governs the validity and enforcement of such agreements.¹⁶ The Supreme Court recently provided a concise articulation of § 2’s substantive mandate: “FAA [§ 2] . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms. Like other contracts, however, they may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.”¹⁷

The FAA also establishes procedural mechanisms by which federal courts implement § 2’s substantive mandate.¹⁸ Section 3 requires courts to stay litigation, pending arbitration of any claims falling within the scope of the parties’ arbitration agreement.¹⁹ Further, § 4 provides a coercive measure, allowing courts to compel arbitration on behalf of any party “aggrieved” by its opponent’s refusal to arbitrate.²⁰

Overall, the FAA embodies “a broad [c]ongressional expression of social policy and, in a barebones statute, a delegation of decisionmaking responsibility to the judiciary.”²¹ As such, courts play an essential role in “policing” the arbitral process, safeguarding the key benefits that arbitration provides and which parties expect to derive.²² This often entails ensuring that arbitral proceedings are initiated expediently and

15. See *id.* at 165–66 (explaining the difference between “pre-dispute” and “post-dispute” arbitration agreements). Although post-dispute arbitration agreements are possible, “the substantial majority of arbitration proceedings arise out of pre-dispute agreements” and, as such, are the sole focus of this Note. *Id.* at 165.

16. See 9 U.S.C. § 2 (2011) (“Validity, irrevocability, and enforcement of agreements to arbitrate.”).

17. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (internal quotation marks and citations omitted).

18. See *id.* (describing how, procedurally, FAA §§ 3 and 4 “implement § 2’s substantive rule”).

19. See 9 U.S.C. § 3 (2011) (stating that if a party files suit in court, the court “shall on application of one of the parties stay the trial of the action until arbitration has been had in accordance with the terms of the agreement”).

20. See 9 U.S.C. § 4 (2011) (stating that, upon the application of a party to a valid arbitration agreement, “the court shall make an order directing the parties to proceed to arbitration”).

21. Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 200 (2007).

22. See Bermann, *supra* note 10, at 2.

efficaciously, as challenges to the process frequently arise at the outset of a dispute.²³ Unfortunately, the procedural tools provided in FAA §§ 3 and 4 to assist the courts in fulfilling their role are simply that—procedural.²⁴ Neither section denotes the appropriate circumstances in which a stay of litigation, or an order compelling arbitration, should be granted.²⁵ Thus, devoid of statutory directives, courts have struggled to maintain juridical clarity in confronting complex issues which arise at the outset of disputes—in the grey area between litigation and arbitration.²⁶

One such issue has caused a significant split among the Circuit Courts of Appeals. Particularly, courts have struggled to discern whether a party resisting arbitration must show prejudice in order to prove that its opponent waived its right to arbitrate by engaging in pretrial conduct.²⁷ A majority of circuits

23. See *id.* (describing how one way in which courts fulfill their policing role is to ensure that “arbitral proceedings are initiated and pursued in a timely and effective manner,” as “courts are commonly asked . . . to intervene at the very outset” of a dispute).

24. See 9 U.S.C. §§ 3–4 (2011) (governing stays of litigation pending arbitration and motions to compel arbitration).

25. See Bermann, *supra* note 10, at 3 n.5 (noting that neither § 3 nor § 4 “addresses the issues that may specifically be raised” in order to secure an order to stay, or compel, arbitration under those sections).

26. See *id.* at 4 (stating that, in addressing issues which arise at the outset of disputes, courts have developed “disparate strands of analysis” which “have combined to produce a needlessly confusing case law to the detriment of clarity, coherence, and workability”); Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT’L ARB. 159, 159 (2009) (discussing the “significant confusion as to how a court is to decide which forum, the court or the arbitrator, has the jurisdiction to decide [a] threshold issue”).

27. See *The Federal Arbitration Act—Waiver*, APPELLATE.NET (Feb. 22, 2011), http://www.appellate.net/docketreports/html/2010/docketreport_22Feb11.asp#Case1 (last visited Sept. 24, 2012) [hereinafter *FAA Waiver*] (stating the issue as whether “a party opposing arbitration must demonstrate that it was prejudiced by the other party’s conduct in order to show that that party had waived its right to compel arbitration”) (on file with the Washington and Lee Law Review); Petition for Writ of Certiorari at 1, *Stok & Assocs., P.A. v. Citibank, N.A.*, No. 10-514 (11th Cir. 2010) (framing the issue as whether “a party [should] be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation”); see also Born, *supra* note 5 (describing the issue as whether “prejudice on the part of a resisting party is necessary for an opposing party’s right to compel arbitration to be deemed waived”).

do require a showing of prejudice, albeit at varying degrees.²⁸ Conversely, the minority does not require prejudice, but holds a presumption of waiver which may be rebutted in certain circumstances.²⁹

The circuit split recently prompted the Supreme Court to grant certiorari in order to resolve the matter in *Stok & Associates, P.A. v. Citibank, N.A.*³⁰ Although the parties settled their dispute before the Court ruled on the merits,³¹ its decision would have had a momentous impact on the business community and the arbitral process itself. Indeed, the issue is “of great interest to any business that makes use of arbitration agreements,” as the grounds invoked to resist arbitration often include waiver “through preliminary litigation conduct.”³² The Court’s decision, as described by one practicing arbitration attorney, would have “affect[ed] how quickly (or not) parties must determine whether arbitration clauses apply to their case and when arbitration rights must be asserted.”³³ In other words, the

28. See, e.g., *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007) (utilizing a three-pronged test for waiver which, in part, requires prejudice); *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003) (noting that a “modicum of prejudice” is necessary to find waiver); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (utilizing a three-pronged test for waiver which, in part, requires a showing of prejudice); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002) (requiring that one party somehow prejudice an opposing party in order to find waiver); *Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001) (stating that proof of prejudice is necessary to find waiver); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001) (requiring “actual prejudice” to find waiver); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991) (requiring an invocation of the judicial process by one party which prejudices the other party).

29. See, e.g., *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) ([W]e have deemed an election to proceed in court a waiver of a contractual right to arbitrate, without insisting on evidence of prejudice); *Nat’l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987) (“This circuit has never included prejudice as a separate . . . element of the showing necessary to demonstrate waiver of the right to arbitration.”).

30. See *Stok & Assocs., P.A. v. Citibank, N.A.*, 387 F. App’x 921 (11th Cir. 2011), cert. granted, 79 U.S.L.W. 3254 (U.S. Feb. 22, 2011) (No. 10-514).

31. See *Stok & Assocs., P.A. v. Citibank, N.A.*, 387 F. App’x 921 (11th Cir. 2011), cert. dismissed, 79 U.S.L.W. 3686 (U.S. June 2, 2011) (No. 10-514).

32. *FAA Waiver*, supra note 27.

33. American Arbitration Association, *Supreme Court Agrees to Hear*

opinion would have “provide[d] an analytical framework that parties and courts [could] apply to a broad range of arbitration issues that arise.”³⁴ Given the importance of this issue, commentators predict that the Court will address the matter in the near future.³⁵ In the meantime, this Note attempts to fill the doctrinal void recognized by the Supreme Court, and assuage the juridical strife by developing its own analytical framework to supplant the waiver doctrine.

This Note’s analysis of the waiver doctrine proceeds as follows: Part II of this Note discusses the key contractual benefits which attract parties to arbitration. Particularly, it discusses how arbitration agreements, as forum-selection and procedural-mapping devices, stabilize and optimize parties’ contractual relationships.³⁶ Further, Part II analyzes the Supreme Court’s FAA jurisprudence and concludes that contract law should govern the waiver by conduct analysis.³⁷ Part III provides an overview of the circuit split surrounding waiver doctrine. Particular attention is paid to the prejudice requirement and the discrepancies it perpetuates among the circuits.³⁸ Part IV provides the contractual background for the proposal advanced by this Note. It draws the distinction between waiver as defined by contract law, and waiver as applied by the Circuit Courts of Appeals in the arbitral context. It concludes that, in light of the Supreme Court’s recent FAA jurisprudence, a party cannot “waive” its right to arbitrate.³⁹ Therefore, it posits that an entirely new framework is required.

“*Waiver of Arbitration*” Case, 66 DISP. RESOL. J. 4, 21 (2011).

34. *Id.*

35. See Born, *supra* note 5 (“Now that the case has been dismissed, it seems likely that the Supreme Court will grant certiorari the next time it finds itself presented with an appropriate opportunity to address this issue.”).

36. See *infra* Part II (discussing the contractual benefits provided by arbitration).

37. See *infra* Part II (discussing how, under the severability doctrine, waiver is a gateway issue which must be resolved in accordance with contract law).

38. See *infra* Part III (describing the circuit split and discussing the divergence engendered by the prejudice requirement).

39. See *infra* Part IV (concluding that a party cannot, in accordance with contract law, waive its right to arbitrate).

Finally, Part V proposes a comprehensive contractual solution through a succinct judicial framework in order to discern whether a party has lost its right to arbitrate through pretrial conduct. Part V first proposes that the discharge-of-duty doctrine⁴⁰ is the appropriate contract-law defense for a party responding to excessive pretrial conduct.⁴¹ Next, Part V proposes that courts should read an implied term into all arbitration agreements. This term would require that parties demand arbitration within a reasonable time after one party files a claim in court.⁴² In order to discern what constitutes a reasonable time, this Note proposes the adoption of a reasonableness test, comprised of the four-factor framework promulgated by the New York courts. These courts consider “the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, . . . and the possibility of prejudice or hardship” to either party.⁴³ Part V concludes with a hypothetical illustrating the efficacy of the reasonableness test both doctrinally and from a policy perspective.

II. Arbitration: Objectives and Law

A. The Contractual Benefits of Arbitration: Forum and Procedural Freedom

Before discussing the current legal doctrine surrounding arbitration in the United States, it is crucial to consider what attracts parties to arbitration. What core benefits do parties derive through bargained-for arbitral procedures? In what

40. See RESTATEMENT (SECOND) OF CONTRACTS § 225(2) (1981) (“Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.”).

41. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (stating that arbitration agreements may only be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability”).

42. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981) (“When the parties to a bargain . . . have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is *reasonable* in the circumstances is supplied by the court.” (emphasis added)).

43. *Zev v. Merman*, 533 N.E.2d 669, 669 (N.Y. 1988).

circumstances does arbitration present a more appealing adjudicatory forum than litigation?

As a starting point, arbitration agreements are “in effect, a specialized kind of forum-selection clause.”⁴⁴ Parties who bargain for arbitration essentially contract for the choice between two legal regimes—litigation and arbitration.⁴⁵ Comparatively, parties might choose one forum over the other for any number of reasons. For example, arbitration may be more expedient, cost effective, and pose fewer risks of “aberrational” jury awards.⁴⁶ In other circumstances, parties might desire the full panoply of procedural protections and appellate review processes offered by the judicial system.⁴⁷ Particularly, high stakes disputes or issues concerning clearly delineated legal principles may prompt recourse to a judicial, rather than an arbitral forum.⁴⁸ In any event, arbitration provides a judicially accepted⁴⁹ alternative “structure,” or “basic set of parameters within which people are free to” resolve their disputes.⁵⁰

Additionally, parties acting within this alternative structure have the ability to establish procedures by which their disputes will be resolved.⁵¹ To be sure, parties could opt to include a

44. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); see Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1105 (2011) (stating that arbitration clauses are essentially “contractual forum selection devices”).

45. See Keith N. Hylton, *Arbitration: Governance Benefits and Enforcement Costs*, 80 NOTRE DAME L. REV. 489, 490 (2005) (stating that “parties who can choose to submit their disputes to arbitration . . . have a choice between two legal regimes,” litigation and arbitration).

46. See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451 (2010) (stating that “arbitration may be faster and cheaper than litigation, . . . may lessen the risk of punitive damages awards or aberrational jury verdicts[,] . . . [and] may decrease exposure to class actions”).

47. See *id.* at 453 (discussing the circumstances in which parties might choose to resolve their disputes through litigation rather than arbitration).

48. See *id.* at 436 (stating that parties may prefer litigation to arbitration in “high stakes disputes” and “disputes in areas with clear and well developed law,” as the “industry expertise” of arbitrators is less valuable in such cases).

49. See Drahozal & Rutledge, *supra* note 44, at 1105 (stating that “[c]ourts [have] largely accepted” arbitration clauses as forum-selection devices, subject only “to a narrow range of exceptions”).

50. See Hylton, *supra* note 45, at 489.

51. See Drahozal & Rutledge, *supra* note 44, at 1105 (noting that parties to

forum-selection clause in their contract to site potential disputes in a court with favorable procedural rules.⁵² Once invoked, however, most rules of civil procedure provide little, if any, opportunity to restrict their application.⁵³ Stated differently, “a party might pick from among several restaurants but could not control what would be on the menu.”⁵⁴

By contrast, “arbitration clauses have a more profound effect on the procedure by which disputes are resolved.”⁵⁵ In some cases, they incorporate the rules of arbitral institutions by reference,⁵⁶ which act as “mini-codes of civil procedure.”⁵⁷ These codes, however, merely provide default rules which give way in the wake of express terms in the parties’ arbitration agreement.⁵⁸ In other instances, parties construct their own arbitral framework, negotiating procedural rules in lieu of those offered by arbitral institutions.⁵⁹ In either case, however, parties may select any number of procedural measures, including restrictions on discovery, remedies, and limitations periods,⁶⁰ subject only to due

arbitration agreements have the ability to bargain “over procedural rights even before a dispute arises”).

52. *See id.* at 1114 (describing the operative purpose of forum-selection clauses).

53. *See id.* (noting that once the litigation forum is “fixed contractually . . . most rules of civil procedure limit[] the parties’ ability to contract around its provisions”).

54. *Id.*

55. *Id.*

56. *See id.* at 1106 (stating that arbitration agreements “may incorporate by reference the rules of arbitral institutions”).

57. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005).

58. *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 20 (2009) [hereinafter AAA RULES] (“The parties, by written agreement, may vary the procedures set forth in these rules.”); Drahozal & Rutledge, *supra* note 44, at 1106 (stating that the rules of arbitral institutions “can be overridden by the express terms of the parties’ arbitration agreement”).

59. *See* Drahozal & Rutledge, *supra* note 44, at 1106 (noting that procedural rules may be “explicit terms of the parties’ contract, decoupled from the rules of an administering institution”).

60. *See id.* at 1107 (stating that examples of potential arbitral procedures include “limits on the availability of discovery, contractually imposed limitations periods, . . . [and] limitations on remedies”).

process concerns.⁶¹ Thus, arbitration clauses serve as both forum-selection devices and “procedural contracts” in which parties construct dispute resolution mechanisms that best support their contractual arrangements.⁶²

Ultimately, parties spend substantial resources establishing arbitral procedures, in lieu of the no-cost regime provided by the judicial system, to optimize the “processes and outcomes” surrounding their disputes.⁶³ Indeed, “[a]rbitration provides an alternative forum in which parties can structure rules and enforcement methods so that the difference between governance benefits and enforcement costs is larger than in the default regime represented by ordinary courts.”⁶⁴ Governance benefits encompass the costs saved by having rules which limit the level of risk that one party can impose on the other (i.e., a rule against breaching the contract).⁶⁵ Conversely, enforcement costs include the costs of both writing the rules and arbitrating to enforce the rules which govern the contractual relationship in question.⁶⁶ After engaging in this cost-benefit analysis,⁶⁷ rational parties will adopt procedural rules that they expect “will provide them with a better process than litigation,” better “outcomes than litigation, or both.”⁶⁸ At its core, then, arbitration provides

61. See 9 U.S.C. § 10 (2011) (providing limited grounds, rooted in due process concerns, upon which a party may seek to modify or vacate an arbitral award); AAA RULES, *supra* note 58, at 32 (“[E]ach party has the right to be heard and . . . given a fair opportunity to present its case.”).

62. Drahozal & Rutledge, *supra* note 44, at 1106.

63. Drahozal & Ware, *supra* note 46, at 451.

64. Hylton, *supra* note 45, at 493.

65. See *id.* at 491 (describing governance benefits as “[a]ny set of rules governing interaction among private parties” which will “provide a benefit for which the parties are willing to pay,” such as rules which “govern the amount of risk that one can impose on others”).

66. See *id.* (stating that enforcement costs include the costs of both writing and enforcing “the rules governing private interaction”).

67. See *id.* at 492 (noting that parties “will waive a legal rule whenever the governance benefit from the rule is less than the enforcement cost”); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 531–32 (2005) [hereinafter Drahozal, *Contracting Out*] (stating that, in choosing an adjudicatory forum, parties consider whether “the process costs of arbitration” are “higher or lower than the process costs of litigation”).

68. Drahozal & Ware, *supra* note 46, at 451.

stability. It allows parties to mitigate risks and costs appurtenant to their contractual relationships by extending predictability to the dispute resolution process.⁶⁹ Thus, adequately enforced, post hoc arbitral procedures optimize the very contractual arrangements which impel their existence.⁷⁰ The key, however, is adequate enforcement.⁷¹ Therefore, the current FAA jurisprudence aims to preserve the stability derived through bargained-for arbitral procedures by protecting parties’ legitimate expectations.⁷²

69. See Antony W. Dnes, *Franchise Contracts, Opportunism and the Quality of Law*, 3 ENTREPRENEURIAL BUS. L.J. 257, 259 (2009) (noting that “private enforcement mechanisms,” such as arbitration, are “a means to stabilize contracts within a foreseeable range of variation of market conditions”); Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 550 (2003) (stating that predispute arbitration agreements are “designed to minimize the costs of [contracting parties’] relationship[s]”); Hylton, *supra* note 45, at 491 (stating that “[a] rule against breaching contracts, if complied with perfectly, provides an ex ante benefit” to the parties’ contractual relationship); Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 153 (2007) (“Prior dealings, personal relationships, and concern for maintaining good business reputations may compel players within a business community to comply with their contracts, or resolve disputes without the aid of the courts . . . because private dispute resolution often solves far more problems than rigid litigation . . .”); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 831–32 (stating that, through arbitration, lawyers have the opportunity to “limit or manage problems prospectively” by negotiating and drafting “suitable issue and conflict resolution mechanisms for contractual relationships” which “assur[e] control and reduc[e] uncertainty and risk”).

70. See Drahozal, *Contracting Out*, *supra* note 67, at 532–33 (finding that predispute choice of law provisions in contracts, “like the choice between arbitration and litigation,” lend certainty to parties’ contractual relationships which provides for adequate pricing of contract rights and duties and decreases the costs and frequency of litigation); Drahozal & Hylton, *supra* note 69, at 580, 582 (finding that parties bargain for arbitral procedures when that forum “provides the optimal level of deterrence against undesirable conduct,” thus increasing governance benefits and “the quality of output and level of effort” in parties’ contractual relationships); Hylton, *supra* note 45, at 500 (finding that because arbitration agreements “enhance governance benefits,” they promote “organizations working more effectively on a day-to-day basis”).

71. See Bermann, *supra* note 10, at 2 (noting that courts play an “important policing role” in assuring “that arbitration delivers the various advantages associated with it”).

72. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (“Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct.

*B. Arbitration Doctrine: The Supreme Court's Interpretation
of the FAA*

Because the benefits derived from arbitration are, in essence, contractual, it is appropriate that the FAA protects arbitration agreements as contracts.⁷³ The Supreme Court, however, has not always interpreted the FAA in a manner so conducive to parties' arbitral rights. Thus, a brief historical note will better frame the importance and implications of the Supreme Court's current FAA jurisprudence.

1. Early Twentieth Century Arbitration: Pre- and Post-FAA

Prior to the FAA, opportunities to bargain for arbitral procedures were severely constricted.⁷⁴ Considered nothing more than tools of oppression,⁷⁵ courts generally nullified arbitration agreements and assumed jurisdiction over the matter in question.⁷⁶ In 1925, however, Congress moved to quell the "judicial hostility" toward arbitration agreements by enacting the FAA.⁷⁷

The FAA's stated purpose is to place arbitration agreements "upon the same footing as other contracts."⁷⁸ It "declares simply that . . . agreements for arbitration shall be enforced, and

1758, 1773–74 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties." (internal quotation marks and citations omitted)).

73. See 9 U.S.C. § 2 (2011) (mandating the protection of arbitration agreements as contracts).

74. See Drahozal & Rutledge, *supra* note 44, at 1112 (noting how "opportunities to control procedure" through arbitration clauses "were largely non-existent" prior to the FAA).

75. *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904) (stating that arbitration agreements are used merely as tools to "oppress the weak").

76. See *W.H. Blodgett Co. v. Bebe Co.*, 214 P. 38, 40 (Cal. 1923) (stating that courts could simply "disregard [arbitration] agreements, assume jurisdiction, and determine the matters in dispute"); see also *Parsons*, 48 S.E. at 697 (finding that arbitration clauses "may be revoked by either party at any time before the award"); *Cocalis v. Nazlides*, 139 N.E. 95, 98 (Ill. 1923) (holding arbitration clauses "void").

77. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

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

provides a procedure in the federal courts for their enforcement.”⁷⁹ Despite this seemingly clear mandate, however, skepticism surrounding arbitrators’ motives and juridical prowess remained.⁸⁰ As such, federal courts continued to hold certain claims nonarbitrable, including alleged violations of federal securities⁸¹ and antitrust laws.⁸² As a result, claims arising under those laws remained in court, where the ability to bargain for optimal procedures remained limited.⁸³ Gradually, however, federal courts’ distrust of arbitration subsided.

Beginning with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁸⁴ in 1967, the Supreme Court became increasingly willing to enforce arbitration agreements.⁸⁵ Indeed, the *Prima Paint* Court devised one of the most doctrinally significant concepts in U.S. arbitration law to date—the severability doctrine.⁸⁶ It essentially “permits courts to entertain challenges specifically applicable to the arbitration agreement, and not to the contract as a whole.”⁸⁷ The Court devised the

79. *Id.* at 1–2.

80. See Peter B. Rutledge, *Whither Arbitration?*, 6 GEO J.L. & PUB. POL’Y 549, 553 (2008) (noting that “courts showed greater tolerance” for arbitration agreements after Congress passed the FAA, but that “there were still limits” to that tolerance).

81. See *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (refusing to allow the arbitration of federal securities claims because arbitral awards “may be made without explanation,” without a “record of their proceedings,” and “arbitrators’ conception of the legal meaning” of certain statutory requirements “cannot be examined”).

82. See *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968) (finding that antitrust cases should be resolved in court given their complexity and the fact that antitrust laws regulate the business community in which many arbitrators are a part).

83. See Drahozal & Rutledge, *supra* note 44, at 1112–13 (discussing how, under the “nonarbitrability doctrine,” claims which remained in federal court were subject to limited “opportunities to influence procedure by contract”).

84. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (recognizing arbitration clauses as separate, binding contracts).

85. See Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 702 (stating that “the Supreme Court’s decisions became more favorable to arbitration” beginning with *Prima Paint* in 1967).

86. See Bermann, *supra* note 10, at 24 (finding the severability doctrine “well-entrenched” in U.S. arbitration law).

87. *Id.* at 23; see *Prima Paint*, 388 U.S. at 403–04 (holding that if a claim is directed at “the arbitration clause itself . . . the federal court may proceed to adjudicate it,” but that claims directed at “the contract generally” must be

doctrine in accordance with the FAA's mandate to limit judicial obstruction and facilitate expedient access to the arbitral forum.⁸⁸

After *Prima Paint*, parties' rights to bargain for arbitral procedures continued to expand throughout the 1970s and 1980s in two critical ways.⁸⁹ First, the nonarbitrability doctrine dissipated,⁹⁰ as the Supreme Court held federal securities claims, RICO claims,⁹¹ and antitrust claims arbitrable.⁹² Second, the Court interpreted FAA § 2 as declaring a national federal policy favoring arbitration, thus withdrawing states' power to declare certain claims nonarbitrable.⁹³ In effect, state authority was supplanted by the "federal substantive law of arbitrability."⁹⁴ This body of law requires that "doubts concerning the scope of arbitrable issues" be resolved in favor of arbitration, including those regarding "the construction of the contract language itself or . . . allegation[s] of waiver, delay, or a like defense to arbitrability."⁹⁵ The Supreme Court thus came to embrace freedom of contract principles in the arbitral context, creating greater potential for parties to regulate the forum and procedures by which to resolve their disputes.⁹⁶

referred to the tribunal).

88. See *Prima Paint*, 388 U.S. at 404 (formulating the severability doctrine in order to "honor . . . the unmistakably clear congressional purpose that" arbitration "be speedy and not subject to delay and obstruction by the courts").

89. See Drahozal & Rutledge, *supra* note 44, at 1113 (noting that throughout the "1970s and 1980s," the "opportunities to control procedure by contract expanded").

90. See *id.* (noting that "as the nonarbitrability doctrine crumbled," parties "had an incentive . . . to use their new contractual freedom" to establish appropriate procedures).

91. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (finding agreements to arbitrate both Securities Exchange Act claims and RICO claims enforceable under the FAA).

92. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (finding antitrust claims arbitrable under the FAA).

93. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which . . . contracting parties agreed to resolve by arbitration.").

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

95. *Id.* at 24–25.

96. See Drahozal & Rutledge, *supra* note 44, at 1114 (noting that the Supreme Court's acceptance of "freedom of contract" raised a "newfound

2. *Current Arbitration Doctrine: Enforcing Arbitration Agreements as Contracts*

Judicial acceptance of arbitration agreements continues to expand today.⁹⁷ For example, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁹⁸ the Supreme Court found that a party cannot be forced to submit to class arbitration unless “there is a contractual basis for concluding that the party agreed to do so.”⁹⁹ Similarly, in *First Options of Chicago, Inc. v. Kaplan*,¹⁰⁰ the Court found that parties can empower tribunals to determine whether they have jurisdiction over certain disputes.¹⁰¹ Thus, courts will defer to an arbitrator’s decision regarding its own jurisdiction if the parties agreed to confer such power.¹⁰² If the parties did not confer such power, then the courts will decide.¹⁰³ Indeed, one of the only contractual measures invalidated by the Supreme Court involved an attempt to expand the grounds on which to vacate an arbitral award under the FAA.¹⁰⁴ The Court’s aim, however, was to limit post-proceeding contractual freedoms in order “to maintain arbitration’s essential virtue of resolving disputes straightaway.”¹⁰⁵ Thus, the Court

opportunity to control procedure by contract”).

97. See *id.* at 1165 (stating that “[t]he greater judicial solicitude [toward arbitration] that took root in the early 1970s . . . fully blossomed by the late 1980s” and continues to grow).

98. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010) (finding that contracting parties must explicitly agree to allow class arbitration).

99. *Id.*

100. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (finding that parties may empower arbitrators to determine their own jurisdiction over certain disputes).

101. See *id.*

102. See *id.* (finding that “court[s] should give considerable leeway to the arbitrator” to determine its own jurisdiction if the parties agreed to confer such power).

103. See *id.* (“If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question . . . independently.” (emphasis in original)).

104. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 583 (2008) (finding that the FAA provides the exclusive grounds for vacating and modifying arbitral awards).

105. *Id.* at 588.

sought to uphold the national policy favoring arbitration by preserving the key benefits that arbitration provides both before and during arbitral proceedings.¹⁰⁶

Recently, the FAA's limits on contractual freedom were tested yet again in *AT&T Mobility LLC v. Concepcion*.¹⁰⁷ In *Concepcion*, the issue was whether state laws which held class-arbitration waivers per se unconscionable conflicted with the FAA.¹⁰⁸ Answering in the affirmative, the Court stated that although the FAA "preserves generally applicable contract defenses," it does not protect state laws which "stand as an obstacle to the accomplishment of [its] objectives."¹⁰⁹ Thus, although California's *Discover Bank* rule sowed its roots in unconscionability, a generally applicable contract defense, it was nonetheless preempted for its "disproportionate" application to arbitration agreements.¹¹⁰

In arriving at its conclusion, the Court declared its latest interpretation of the FAA's core objectives. It stated that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."¹¹¹ The two goals inherent within this objective—enforcement of arbitration agreements and facilitation of expedient dispute resolution—should neither conflict nor rank in importance.¹¹² Rather, the Court alluded to

106. *See id.* at 583 (viewing FAA §§ 9–11 "as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's" expediency).

107. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (finding a state law that held class arbitration waivers unconscionable preempted by the FAA, as it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotation marks and citations omitted)).

108. *See id.* at 1744 (considering "whether the FAA prohibits [s]tates from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures").

109. *Id.* at 1748.

110. *Id.* at 1747, 1753.

111. *Id.* at 1748.

112. *See id.* at 1749 (describing the FAA's two underlying goals as "enforcement of private agreements and encouragement of efficient and speedy dispute resolution" (internal quotation marks and citations omitted)).

the possibility that an optimal rule would further both objectives in unison.¹¹³

But what role do courts play in enforcing the FAA’s overarching objective in relation to arbitrators? How is it that courts retain jurisdiction to decide certain disputes, but not others? Over which disputes do courts retain jurisdiction? The answer to these inquiries is governed by one of the most important doctrinal concepts in U.S. arbitration law—severability.¹¹⁴

3. Severability: A “Gateway” to Arbitration

The severability doctrine¹¹⁵ has become firmly ensconced in substantive federal arbitration law¹¹⁶ and performs two key functions.¹¹⁷ First, derived from FAA § 4,¹¹⁸ it reflects the fundamental principle that arbitrators derive their authority through party consent.¹¹⁹ In this regard, severability insulates

113. See *id.* (noting explicitly that “[i]n the present case . . . those ‘two goals’ do not conflict—and it is the dissent’s view that would frustrate *both* of them” (emphasis in original)).

114. See Bermann, *supra* note 10, at 22 (stating that severability “serves a highly salutary purpose” in arbitration law, in that it upholds “[p]arty expectations”).

115. See *supra* note 87 and accompanying text (describing the severability doctrine).

116. See *Rent-A-Ctr., W., Inc., v. Jackson*, 130 S. Ct. 2772, 2774 (2010) (noting that arbitration agreements are “severable from the remainder” of the underlying contract); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (promulgating the concept that arbitration clauses are severable from the remainder of the underlying agreement); Bermann, *supra* note 10, at 24 (noting that the severability doctrine is “well-entrenched in the case law”).

117. See Bermann, *supra* note 10, at 23 (finding that severability in U.S. arbitration law performs “twin functions”).

118. See 9 U.S.C. § 4 (2011) (providing parties the ability to petition a federal court to compel arbitration); *Prima Paint*, 388 U.S. at 403 (finding that the severability doctrine has its roots in FAA § 4, which requires federal courts to compel arbitration “once it is satisfied that the making of the agreement for arbitration . . . is not in issue” (internal quotation marks and citations omitted)).

119. See *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648–49 (1986) (finding the notion that arbitration requires consent an “axiom” which “recognizes the fact that arbitrators derive their authority to resolve disputes

the arbitral process from challenges directed toward the underlying contract, preserving the forum in which the parties agreed to resolve their disputes.¹²⁰ In effect, the doctrine ensures that parties' disputes are resolved according to their legitimate expectations, thus maintaining arbitration's stabilizing effect.¹²¹

Second, severability "permits courts to entertain challenges specifically applicable to the arbitration agreement, [but] not to the contract as a whole."¹²² This function implicates the critical "demarcation between gateway and non-gateway issues."¹²³ Indeed, some of the issues most salient to the "tradeoff between [the] efficacy and legitimacy" of the arbitral process occur at the outset of a dispute, before the tribunal is constituted.¹²⁴ The critical inquiry at this stage is whether a party is contractually obligated to arbitrate, notwithstanding its objections to the contrary.¹²⁵ The answer requires a delicate balancing between arbitration's consensual foundation and the costs and delays appurtenant to ensuring such consent.¹²⁶ Gateway issues thus

only because the parties have agreed in advance to submit such grievances to arbitration"); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) ("The law compels a party to submit his grievance to arbitration only if he has contracted to do so."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

120. See Bermann, *supra* note 10, at 22 (One purpose [of severability] . . . is to enable an arbitral tribunal to declare a contract invalid or unenforceable on the merits, without thereby necessarily destroying the basis of its authority to make that very ruling.").

121. See *id.* ("Party expectations concerning arbitration would clearly be disserved if arbitral tribunals were deemed, by virtue of deciding that a contract is invalid, to deprive themselves of the legal authority to make that very decision.").

122. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (instructing federal courts to "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue'"); Berman, *supra* note 10, at 23.

123. See Bermann, *supra* note 10, at 22.

124. *Id.* at 5.

125. See *id.* (noting that the critical question at the outset of a dispute "is whether a party unwilling to arbitrate is obligated, on the basis of a prior undertaking, to do so").

126. See *id.* ("[A] party cannot be bound by an agreement to arbitrate . . . unless it consented to be so bound. On the other hand, arbitration becomes a less effective means of dispute resolution to the extent that, prior to

encompass those “jurisdictional or threshold” issues, grounded in consent, which courts will resolve rather than leave for the tribunal.¹²⁷ By contrast, non-gateway issues, such as substantive claims arising from the parties’ underlying contract, are for tribunals to decide.¹²⁸ In this regard, severability acts as a “jurisdiction-allocating device” between challenges directed toward the underlying contract, and those directed toward the arbitration clause itself.¹²⁹ The former are non-gateway issues, as they encompass the very contractual issues which parties agree to arbitrate.¹³⁰ The latter, however, are gateway issues because they directly implicate “the tribunal’s authority to decide anything—including the validity and enforceability of the main contract.”¹³¹

Ultimately, the role of severability as a gatekeeper to the arbitral forum is critical. It remains the guidepost for allocating jurisdiction over certain issues between courts and arbitrators at the outset of a dispute.¹³² But once a gateway issue has been raised, how does severability impact a court’s decision to uphold, or deny, parties’ arbitral rights?

arbitration, parties may have recourse to courts to advance reasons why arbitration should not go forward . . .”).

127. *See id.* at 7. Professor Bermann notes that although the term “gateway issue” has been read broadly by the Supreme Court to encompass a variety of jurisdictional issues, the Court’s most recent interpretation, and the one adopted by both Professor Bermann and this Note, subscribe to the narrower meaning described above. *Id.* at 7–8. *See also* *Rent-A-Ctr., W., Inc., v. Jackson*, 130 S. Ct. 2772, 2777 (2010) (“[P]arties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”).

128. *See* Bermann, *supra* note 10, at 8 (describing non-gateway issues as “those that courts reserve for initial determination, along with the merits, to the tribunal itself”).

129. *Id.* at 24.

130. *See id.* at 23 (“The question whether a contract on which a claim in arbitration is predicated exists and is valid . . . clearly forms part of the merits of a case, and as such falls . . . within the arbitrators’ province to resolve.”).

131. *Id.*

132. *See id.* at 24 (noting that severability is “the touchstone for determining whether courts should initially entertain challenges to the enforceability of an arbitration agreement or refrain from doing so”).

4. *The Impact of Severability on Parties' Arbitral Rights in the Courts*

The Supreme Court has solidified the severability doctrine's place in federal arbitration law in three key cases. First, in *Prima Paint*, the Court applied the doctrine in light of a claim that because the overall contract was fraudulently induced, the arbitration clause within the contract was invalid as well.¹³³ After finding that claims for fraud fell within the scope of the parties' arbitration agreement, the Court affirmed the trial court's decision to stay judicial proceedings pending arbitration.¹³⁴ In doing so, it found that FAA § 4 instructs courts to compel arbitration if a challenge is not directed toward the arbitration clause itself.¹³⁵ As such, the severability doctrine was conceived.

Almost forty years after *Prima Paint*, the Supreme Court revisited the severability doctrine¹³⁶ in *Buckeye Check Cashing, Inc. v. Cardegna*.¹³⁷ In *Buckeye*, however, the Florida Supreme Court refused to enforce an otherwise valid arbitration agreement on grounds that the underlying contract was illegal, rather than fraudulent.¹³⁸ Rejecting this distinction, the Supreme Court found that state courts must apply the severability doctrine in the same manner as federal courts.¹³⁹ Further, after *Buckeye*, the Court

133. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (finding that the claim in question alleged "fraud in the inducement of the contract generally").

134. See *id.* at 399–400, 406 (finding the language "(a)ny controversy or claim arising out of or relating to this Agreement" sufficiently broad to encompass *Prima Paint's* claim for fraud).

135. See *id.* at 403 (finding that a court must "order arbitration to proceed once it is satisfied that the making of the agreement for arbitration . . . is not in issue" (internal quotation marks and citations omitted)).

136. See Steven J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 107 (2008) (noting that *Buckeye* "is only the second Supreme Court decision applying the separability doctrine and it comes nearly forty years after" *Prima Paint*).

137. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006) (finding claims against an entire agreement under state usury and consumer protection laws arbitrable under FAA § 2).

138. See *id.* (noting that the Florida Supreme Court declined "to apply *Prima Paint's* rule of severability" on grounds that severability cannot apply to contracts found illegal or void).

139. See *id.* at 449 ("[R]egardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and

made clear that challenges directed toward the underlying contract are “irrelevant” for severability purposes.¹⁴⁰ Thus, an otherwise severable arbitration agreement will be upheld, even if claims for fraud, illegality, or breach of contract permeate the underlying agreement.¹⁴¹

Finally, in *Rent-A-Center, West, Inc. v. Jackson*,¹⁴² the Supreme Court upheld a provision, as part of a stand-alone arbitration agreement, which delegated all disputes arising out of the parties’ employment contract to arbitration.¹⁴³ In doing so, it affirmed the notion established in *Buckeye*, finding that the “[a]pplication of the severability rule does not depend on the substance of the remainder of the contract.”¹⁴⁴ Thus, even if “the underlying contract is itself an arbitration agreement,” the severability doctrine protects the delegation provision unless challenged directly.¹⁴⁵

Ultimately, the severability doctrine protects arbitration clauses as binding, autonomous contracts within contracts.¹⁴⁶ It supplements FAA § 2 in ensuring that arbitration agreements are afforded the full spectrum of contract-law protections, regardless of any challenges directed toward the underlying contract.¹⁴⁷ In

not specifically to the arbitration clause, must go to the arbitrator.”).

140. *Id.* at 446.

141. *See id.* (stating that a valid arbitration agreement will be upheld, regardless of whether claims for “fraud, misrepresentation, breach of contract, breach of fiduciary duty,” or public policy are directed at the overall contract).

142. *Rent-A-Ctr., W., Inc., v. Jackson*, 130 S. Ct. 2772, 2781 (2010) (finding that an unconscionability claim directed at an autonomous arbitration agreement is arbitrable).

143. *See id.* at 2775 (describing the parties’ employment relationship and arbitration agreement).

144. *Id.* at 2779.

145. *Id.*

146. *See* Bermann, *supra* note 10, at 22 (noting that the severability doctrine “basically posits that an arbitration agreement constitutes an agreement separate and apart from the main contract”); Ware, *supra* note 136, at 109 (stating that the severability doctrine treats an “arbitration clause as if it is a separate contract from the contract containing the arbitration clause”).

147. *See Jackson*, 130 S. Ct. at 2777–78 (finding that an arbitration agreement “is simply an additional, antecedent agreement” which is “valid under [FAA] § 2 ‘save upon such grounds as exist at law or in equity for the revocation of any contract’” (quoting 9 U.S.C. § 2 (2011))); *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745–46 (2011) (stating that FAA § 2 reflects “the fundamental principle that arbitration is a matter of contract”

this regard, the doctrine isolates and magnifies the discrete benefits derived through arbitration. These benefits do not stem from the parties' underlying agreement, but from the arbitration clause itself—the ex ante stability and predictability which promote parties' contractual arrangements.¹⁴⁸ As such, gateway issues involving direct challenges to an arbitration agreement must be resolved in accordance with contract law¹⁴⁹—no more, no less.¹⁵⁰ In this regard, it is next critical to discern whether waiver is a gateway issue to which contract law must apply.

*5. The Origins of the “Waiver” Doctrine in the Arbitral Context:
Correctly Applied?*

In the arbitral context, waiver refers to whether a party, through words or conduct, has somehow lost its right to arbitrate.¹⁵¹ Federal courts construe the term waiver from FAA § 3, finding the word “default”¹⁵² in that provision analogous “to waiver or laches or estoppel.”¹⁵³ In application, the courts distinguish “between contract-based waiver and conduct-based

and, as such, may only be invalidated by “generally applicable contract defenses” (internal quotation marks and citations omitted)).

148. See *supra* Part II (discussing the benefits that parties derive from arbitration).

149. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] § 2.”); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that which it otherwise construes nonarbitration agreements under state [contract] law.”).

150. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (“As the ‘saving clause’ in [FAA] § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”).

151. See *supra* Part I (explaining that the concept of waiver which this Note addresses is waiver through pretrial conduct, not express waiver).

152. See 9 U.S.C. § 3 (2011) (stating that courts must stay litigation pending arbitration, provided that the party applying for the stay is “not in default in proceeding with such arbitration”).

153. *In re Mercury Constr. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981); see *Morewitz v. W. of Eng. Ship Owners Mut. Prot. and Indem. Ass’n*, 62 F.2d 1356, 1365 n.16 (11th Cir. 1995) (“Although the Arbitration Act uses the term ‘default’ . . . the case law on this subject employs the term ‘waiver.’”).

waiver, holding that the former is for the arbitral tribunal to decide, while the latter may be determined at the threshold by a court.”¹⁵⁴ Contract-based waiver, for example, occurs when a party waives its right to arbitrate a certain claim arising out of the underlying contract.¹⁵⁵ Conduct-based waiver, however, occurs when a party waives its right to invoke the arbitration agreement by, for example, litigating disputes which the parties agreed to arbitrate.¹⁵⁶

The Supreme Court has yet to address conduct-based waiver, or to define “default” under FAA § 3. Indeed, the Court’s only reference to waiver occurred in the contract-based context—in discerning the scope of arbitrable claims.¹⁵⁷ Critically, however, the Court has found that FAA “§ 3 adds no substantive restriction to § 2’s enforceability mandate.”¹⁵⁸ Rather, § 2 creates

154. Bermann, *supra* note 10, at 42.

155. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 7, 29 (1983) (finding that the question as to whether a party has “lost any right to arbitrat[e]” the “underlying contractual dispute” due to “waiver, laches, estoppel, [or] failure to make a timely demand for arbitration” is for the arbitrator to decide); see also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (finding disputes “about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute relating to this [underlying] contract and the resulting ‘relationships’” and is for “an arbitrator, not a judge” (internal quotation marks and citations omitted)); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (finding that “procedural questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide” (emphasis in original) (citations omitted)).

156. See, e.g., *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011) (“It is presumptively for the courts to adjudicate disputes about whether a party, by earlier litigating in court, has waived the right to arbitrate.”); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393 (6th Cir. 2008) (holding that “the court, not the arbitrator, presumptively evaluates whether a defendant should be barred from seeking a referral to arbitration because it has acted inconsistently with reliance on an arbitration agreement”); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 219 (3d Cir. 2007) (finding that issues surrounding waiver by pretrial conduct are for the “court to decide itself”); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) (finding that the Supreme Court “did not intend to disturb the traditional rule that waiver by conduct, at least when due to litigation-related activity, is presumptively an issue for the court”).

157. See *Moses H. Cone*, 460 U.S. at 24 (“The basic issue presented in Mercury’s federal suit was the arbitrability of the [underlying] dispute between Mercury and the Hospital.”).

158. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (internal quotation marks omitted).

“substantive federal law” which incorporates traditional state contract law principles in governing “the enforceability of arbitration agreements.”¹⁵⁹ Therefore, neither § 3 nor § 4 alter the “background principles of state contract law” for determining the validity and enforceability of arbitration agreements.¹⁶⁰

Ultimately, the current doctrine illuminates how courts should approach the conduct-based waiver analysis. First, conduct-based waiver implicates the “obligation to arbitrate, rather than the contract’s substantive obligations.”¹⁶¹ Thus, although courts and commentators have criticized this approach,¹⁶² conduct-based waiver is properly considered a gateway issue under the severability doctrine.¹⁶³ Second, FAA § 2 requires that courts enforce arbitration agreements in accordance with generally applicable contract law principles.¹⁶⁴ Finally, as § 3 adds no substantive element to § 2’s enforceability mandate, waiver, as derived from § 3, must meet the definition of waiver prescribed by contract law.¹⁶⁵ Before turning to contract law,

159. *Id.* at 1901–02.

160. *Id.* at 1902.

161. Bermann, *supra* note 10, at 42.

162. *See, e.g.*, Clyde Bergemann, Inc. v. Sullivan, Higgins & Brion, PPE LLC, No. 08-162-KI, 2008 WL 4279632, at *1, *1 (D. Or. Sept. 18, 2008) (criticizing the notion, in light of prior Supreme Court jurisprudence, that waiver of any kind is for the court to decide); Bermann, *supra* note 10, at 43 (“More general considerations of efficacy and legitimacy suggest that all claims of waiver should be determined initially by the arbitrators.”). Professor Bermann explains that the conduct-based, contract-based waiver distinction is another issue currently arising among federal courts. *Id.* Namely, the issue concerns whether conduct-based waiver is, in fact, a gateway issue. This Note does not address this issue. Rather, it adopts Professor Bermann’s notion that, from a purely doctrinal perspective, waiver by conduct should be considered a gateway issue under the severability doctrine and, thus, for the courts to decide. *Id.* at 42.

163. *See* Bermann, *supra* note 10, at 42 (stating that, for severability purposes, waiver “should be treated as a gateway issue”).

164. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (stating that a court may not “in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it . . . construes nonarbitration agreements under state law”).

165. *See* Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1902 (2009)

however, it is first appropriate to address the circuit split surrounding this issue. Doing so will better frame the doctrinal conflict between arbitration and contract law engendered by the circuits’ waiver analyses; a conflict which clearly contravenes the FAA’s overarching objective and the Supreme Court’s interpretation of its provisions.¹⁶⁶

III. *The Circuit Split*

The Supreme Court’s gradual acceptance of arbitration agreements as contracts¹⁶⁷ has caused “several oddities” to develop within the lower courts’ FAA jurisprudence.¹⁶⁸ Particularly, a circuit split has formed regarding the following question: Must a party resisting arbitration (nonmovant) show prejudice in order to prove that the party demanding arbitration (movant) waived its right to arbitrate by engaging in pretrial conduct?¹⁶⁹ The divergence between the circuits denies predictability as to when, and in what forum—litigation or arbitration—parties’ claims will be adjudicated.¹⁷⁰ As unpredictability begets instability, the current split denies contracting parties the key benefits derived through bargained-for arbitral procedures.¹⁷¹ A succinct overview of the circuits’

(finding that FAA “§ 3 adds no substantive restriction to § 2’s enforceability mandate” and, as such, “traditional principles” of state contract law must govern courts’ analyses in construing parties’ arbitral rights).

166. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

167. See *supra* Part II (discussing the evolution of the Supreme Court’s FAA jurisprudence over the last half-century).

168. Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 261.

169. See *supra* Part I (framing the issues surrounding conduct-based waiver).

170. See *supra* Part I (describing the problems created by the inconsistency among the circuits for parties attempting to bargain for optimal arbitral procedures).

171. See *supra* Part II (describing the benefits derived through arbitration).

waiver analyses aptly illustrates how ineffective and doctrinally inaccurate the waiver doctrine truly is.

A. The Majority: Circuits Requiring Prejudice

1. Strict Enforcement: Circuits Imposing Burdensome Prejudice Requirements

An overview of the circuits which impose burdensome prejudice requirements illustrates that the circuit split does not consist of a simple dichotomy—minority versus majority. Rather, it clearly conveys that no circuits' standards are exactly the same.

a. The Second Circuit

The Second Circuit carries a strong presumption in favor of arbitration, and waiver will not be lightly inferred.¹⁷² In order to determine whether a party has waived its right to arbitrate, the court considers the time elapsed in litigation, the total amount of litigation conduct, and the degree of prejudice inflicted by the movant through such conduct.¹⁷³ To find prejudice, the court considers the amount of discovery conducted which was not available in arbitration, delay, expense,¹⁷⁴ and attempts to arbitrate motions that were previously lost on the merits in court.¹⁷⁵ Prejudice is the critical component to the Second Circuit's waiver analysis.¹⁷⁶ Thus, courts will find waiver only if

172. See *Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001) (describing the waiver standard).

173. See *id.* (noting that its test considers “the time elapsed from the commencement of litigation to the request for arbitration; . . . the amount of litigation (including exchanges of pleadings, any substantive motions, and discovery); and . . . proof of prejudice”).

174. See *id.* (stating that proof of prejudice includes “taking advantage of pre-trial discovery not available in arbitration, delay, and expense”).

175. See *Thyssen, Inc. v. Calypso Shipping Corp. S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (“Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration . . .” (internal quotation marks and citations omitted)).

176. See *id.* (stating that “[t]he key to the waiver analysis is prejudice”).

the nonmovant proves adequate prejudice.¹⁷⁷ For example, in *Rush v. Oppenheimer & Co.*,¹⁷⁸ the court found that Oppenheimer & Co.’s pretrial conduct did not cause sufficient prejudice to warrant a finding of waiver.¹⁷⁹

In *Rush*, Rush opened an options trading account with Oppenheimer that required him to sign an arbitration agreement.¹⁸⁰ After disputes arose concerning his account, however, Rush filed claims in federal court.¹⁸¹ After nearly eight months of pretrial activity, Oppenheimer moved to compel arbitration.¹⁸² During that time, Oppenheimer engaged in extensive discovery, brought a motion to dismiss, and raised numerous affirmative defenses to Rush’s complaint, all without demanding arbitration.¹⁸³

On appeal, the Second Circuit reversed the district court’s finding of waiver for three key reasons.¹⁸⁴ First, it found that expense, delay, and motions to dismiss, standing alone, cannot cause sufficient prejudice to warrant a finding of waiver.¹⁸⁵ Second, it found that Oppenheimer’s demand for arbitration only

177. See *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985) (stating that waiver will be found “only when prejudice to the other party is demonstrated”).

178. See *id.* (summarizing the Second Circuit’s burdensome waiver standard).

179. See *id.* at 890 (“As indicated herein we think that . . . [movant’s] right to arbitrate has not been waived.”).

180. See *id.* at 886 (referencing the arbitration agreement as stating “that any controversy between the parties would be settled by arbitration”).

181. See *id.* (noting that Rush “alleged improper and excessive trading in his account”).

182. See *id.* at 885 (stating that “[a]fter approximately eight months of pretrial proceedings in the district court,” Oppenheimer moved to compel arbitration).

183. See *id.* at 887 (stating that Oppenheimer engaged in “rather extensive discovery, [brought] a motion to dismiss, and pos[ed] thirteen affirmative defenses to [Rush’s] amended complaint, all without raising the right to arbitration”).

184. See *id.* (reversing the district court, stating that its findings were insufficient to establish waiver).

185. See *id.* at 887–88 (noting that “delay in seeking arbitration” for eight months “is insufficient by itself to constitute” waiver, and that motions to dismiss are to be expected when “a plaintiff files an intricate complaint, setting forth numerous claims . . . partially related to, the arbitrable claims” (citations omitted)).

after the district court allowed Rush's claim for punitive damages was not prejudicial.¹⁸⁶ Indeed, the court rejected the notion that such conduct amounted to forum shopping.¹⁸⁷ Rather, it found that Rush was "no worse off" than if Oppenheimer moved to compel arbitration at the outset of the dispute, as Rush could not claim punitive damages in arbitration at any time.¹⁸⁸ Third, the court invoked precedent, and declined to repudiate prior Second Circuit decisions which refused to find prejudice in more egregious factual circumstances.¹⁸⁹ Ultimately, the court found that Oppenheimer did not cause sufficient prejudice to warrant a finding of waiver.¹⁹⁰ In another case, however, the court found waiver where a party delayed for eight months before demanding arbitration; submitted numerous answers, defenses, and counterclaims, none of which mentioned arbitration; actively pursued discovery; waited until just before trial to compel arbitration; and offered what the court considered a "disingenuous" excuse for delay.¹⁹¹

b. The Fourth Circuit

In the Fourth Circuit, waiver will be found if a movant so "substantially utilizes the litigation machinery" that compelling arbitration would prejudice the nonmovant.¹⁹² The critical inquiry

186. *See id.* at 890 (explaining why Oppenheimer's attempts to change forums was not prejudicial).

187. *See id.* ("This is not an instance in which a party sensing an adverse court decision [is, in effect, allowed] a second chance in another forum." (internal quotation marks and citations omitted)).

188. *See id.* (finding that Rush "is no worse off proceeding now to arbitration than had [Oppenheimer] moved for arbitration immediately after being served with the . . . complaint" (internal quotation marks and citations omitted)).

189. *See id.* (reasoning that "[s]ince [Rush] would not have been prejudiced by a later motion to arbitrate had [Oppenheimer's] motion to dismiss been completely denied, [its] motion to compel arbitration following reversal . . . of [its] initial, partial success" could not have prejudiced "Rush either" (citing *Sweater Bee By Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 466 (2d Cir. 1985))).

190. *See id.* (finding that Oppenheimer's "right to arbitrate has not been waived").

191. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995).

192. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001).

is whether the nonmovant has satisfied its “heavy burden” to prove prejudice.¹⁹³ To find prejudice, the court considers the totality of the movant’s delay and pretrial conduct.¹⁹⁴ For example, in *MicroStrategy, Inc. v. Lauricia*,¹⁹⁵ the court found that Lauricia failed to prove the degree of prejudice necessary to establish waiver.¹⁹⁶

In *MicroStrategy*, MicroStrategy responded to Lauricia’s employment discrimination charges by filing three separate claims against her in state and federal court, despite the arbitration clause in her employment contract.¹⁹⁷ Six months after its initial filing, MicroStrategy moved to compel arbitration.¹⁹⁸ On appeal, the Fourth Circuit reversed the district court’s finding of waiver on two key grounds.¹⁹⁹ First, it refused to find prejudice when most of the claims adjudicated in court were unrelated to those subject to arbitration.²⁰⁰ Second, it found that Lauricia failed to prove whether MicroStrategy used pretrial discovery procedures to obtain information which would have been unavailable in arbitration.²⁰¹ Thus, the court concluded that Lauricia failed to prove a sufficient degree of prejudice to establish waiver.²⁰² Similarly, the Fourth Circuit has refused to

193. *Id.* (internal quotation marks and citations omitted).

194. *See id.* (finding that “delay and the extent of the moving party’s trial-oriented activity are material factors in assessing a plea of prejudice”).

195. *See id.* at 254 (reversing the “district court’s conclusion that MicroStrategy waived its right to arbitration”).

196. *See id.* (finding that Lauricia failed to prove “that she suffered the kind of prejudice necessary to support a finding that MicroStrategy waived its right” to arbitrate).

197. *See id.* at 246 (noting that the clause required the parties “to arbitrate [a]ny controversy or claim arising out of or relating to [the] . . . employment relationship”).

198. *See id.* at 250 (“[T]he time between the filing of the first action and the arbitration request was . . . six months.”).

199. *See id.* at 248 (reversing the district court’s determination that MicroStrategy waived its right to arbitrate).

200. *See id.* at 251 (refusing to find prejudice where most of the litigation was “directed to claims unrelated to those” subject to arbitration).

201. *See id.* at 254 (refusing to “conclude that Lauricia was prejudiced by the minimal amount of information obtained by MicroStrategy that” was likely obtainable in arbitration).

202. *See id.* (“Because Lauricia has failed to establish that she suffered the kind of prejudice necessary to support a finding that MicroStrategy waived its

find prejudice where a movant delayed its demand for arbitration for eight months; filed “affirmative defenses, engaged in discovery, and responded to motions”; moved for arbitration three months before trial; and inflicted undue costs because of its conduct.²⁰³

c. The Fifth Circuit

Similarly, the Fifth Circuit finds waiver “when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.”²⁰⁴ The court holds a presumption against finding waiver, and places a heavy burden on nonmovants to prove that waiver is appropriate.²⁰⁵ Finally, prejudice results when a movant inflicts delay, expense, or forces the nonmovant to arbitrate issues already disputed in court.²⁰⁶ Applying its test, the court in *Walker v. J.C. Bradford & Co.*²⁰⁷ found that Plaintiffs failed to show a sufficient degree of prejudice to warrant a finding of waiver.²⁰⁸

In *Walker*, Plaintiffs filed suit in state court, alleging various state securities law violations, despite the arbitration agreement in their contract with Bradford.²⁰⁹ Thirteen months after Plaintiffs’ initial filing, Bradford removed the case to federal

right to insist on arbitration, the district court erred by denying MicroStrategy’s motion to compel arbitration.”).

203. *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 205–08 (4th Cir. 2004).

204. *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991) (internal quotation marks and citations omitted).

205. *See id.* (holding “a presumption against finding waiver” and placing “a heavy burden of proof” on nonmovants attempting to establish waiver).

206. *See Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004) (finding prejudice when a movant inflicts “delay, expense, or damage to a [nonmovant’s] legal position,” which occurs when the nonmovant is forced to arbitrate an issue which was previously litigated (internal quotation marks and citations omitted)).

207. *See Walker*, 938 F.2d at 578 (finding that Bradford’s “actions in federal court were not so substantial as to mandate that we overcome the legal presumption” against waiver).

208. *See id.* (finding that Plaintiffs did not present “enough evidence” that Bradford’s conduct “materially prejudiced them”).

209. *See id.* at 576 (describing the pretrial process in which the parties engaged before Bradford moved to compel arbitration).

court and subsequently moved to compel arbitration.²¹⁰ On appeal, the Fifth Circuit reversed the district court’s finding of waiver on three grounds.²¹¹ First, the court cast Plaintiffs’ claims of cost and delay as “generalized protestations,” insufficient to “overcome the strong federal presumption in favor of arbitration.”²¹² Second, the court found Bradford’s pretrial conduct—its removal to federal court, preliminary interrogatories, document requests, and answer—insufficient, in light of prior precedent, to establish prejudice.²¹³ Finally, the court refused to find discovery prejudicial without proof that Bradford obtained information which was unavailable in arbitration.²¹⁴ Ultimately, the court found that Plaintiffs failed to satisfy their heavy burden to prove prejudice and, thus, establish waiver.²¹⁵ Similarly, the Fifth Circuit has refused to find prejudice where a movant delayed for eight months before demanding arbitration; filed an answer, interrogatories, and document production requests; moved for protective orders; and agreed to a joint motion to extend the discovery period.²¹⁶

210. *See id.* (“Thirteen months after plaintiffs filed suit, defendant filed a motion to compel arbitration and to stay proceedings.”).

211. *See id.* at 577 (reversing the district court’s finding of waiver).

212. *Id.* at 578.

213. *See id.* at 576–77 (discussing Bradford’s pretrial conduct and citing prior decisions in which the court refused to find prejudice where parties “invoked the judicial process to approximately the same extent as Bradford” (citing *Tenneco Resins, Inc. v. Davy Int’l, A.G.*, 770 F.2d 416, 420–21 (5th Cir. 1985))).

214. *See id.* at 578 n.3 (stating that that if Bradford’s discovery conduct “revealed items that would not be discoverable in arbitration proceedings,” it would “be more likely to find that plaintiffs were prejudiced”); *see also* *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 251 (4th Cir. 2001) (finding that if “the same information could have been obtained in an arbitration proceeding,” then the nonmovant suffers no prejudice).

215. *See Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991) (finding Plaintiffs’ evidence “insufficient to overcome the strong federal presumption in favor of arbitration” (citations omitted)).

216. *See Tenneco Resins, Inc. v. Davy Int’l, A.G.*, 770 F.2d 416, 420 (5th Cir. 1985) (describing the movant’s pretrial conduct).

d. The Sixth Circuit

The Sixth Circuit addresses arbitral issues “in light of the strong federal policy” favoring arbitration.²¹⁷ The court holds a presumption in favor of arbitration under its two-pronged test, and waiver will not be lightly inferred.²¹⁸ Indeed, the court will find waiver only where a movant takes actions that are inconsistent with any reliance on the arbitration agreement, and where it delays demanding arbitration to an extent which prejudices the nonmovant.²¹⁹ Prejudice may be found when a movant inflicts undue delay and expense.²²⁰ For example, in *Hurley v. Deutsche Bank Trust Co. Americas*,²²¹ the court found waiver where Defendants’ conduct satisfied both elements of its test.²²²

In *Hurley*, the Hurleys filed federal statutory and state law claims in federal court against Defendants, despite the arbitration clause in their mortgage documents.²²³ After two years of pretrial activity, Defendants moved to compel arbitration.²²⁴ On appeal, the Sixth Circuit affirmed the district

217. *Hurley v. Deutsche Bank Trust Co. Ams.*, 610 F.3d 334, 338 (6th Cir. 2010) (internal quotation marks and citations omitted).

218. *See id.* (“Because of the presumption in favor of arbitration under the Federal Arbitration Act, we will not lightly infer a party’s waiver” (citations omitted)).

219. *See id.* (finding waiver where a party takes “actions that are completely inconsistent with any reliance on an arbitration agreement,” and “delay[s] its assertion to such an extent that the opposing party incurs actual prejudice”) (internal quotation marks and citations omitted).

220. *Gen. Star Nat’l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) (stating that prejudice will be found when a party incurs “unnecessary delay or expense” (internal quotation marks and citations omitted)).

221. *See Hurley*, 610 F.3d at 338 (concluding that Defendants’ conduct satisfied “both factors indicating waiver”).

222. *See id.* at 340 (finding Defendant’s actions “completely inconsistent with any reliance on an arbitration agreement,” and that Defendants “delayed asserting their right to arbitrate to such an extent that they . . . actually prejudiced” the Hurleys).

223. *See id.* at 336 (quoting the arbitration clause in the mortgage documents as requiring “[a]ll disputes, claims, or controversies arising from or related to the loan . . . be resolved by binding arbitration, and not by court action”).

224. *See id.* at 338 (noting that Defendants failed to demand arbitration for over two years from the time the Hurleys “initiated this lawsuit”).

court’s finding of waiver under its two-pronged test.²²⁵ First, it found Defendants’ persistent and active pretrial activity over the course of two years inconsistent with any reliance on the parties’ arbitration agreement.²²⁶ Second, the court found that because the Hurleys conducted substantial discovery, argued numerous summary judgment motions, and changed venue at Defendants’ request, they suffered prejudice as a result of Defendants’ delay.²²⁷ Thus, in light of such conduct, the court found that Defendants waived their right to arbitrate.²²⁸ Similarly, the Sixth Circuit has found waiver where a movant delayed demanding arbitration for one year, during which time it engaged in extensive discovery and filed numerous pretrial motions.²²⁹

e. The Ninth Circuit

The Ninth Circuit also applies its test in light of the liberal federal policy favoring arbitration agreements.²³⁰ Furthermore, nonmovants bear a heavy burden of proof in establishing each element of its three-pronged test.²³¹ Particularly, a nonmovant must show that the movant knew of its right to compel arbitration; that the movant acted inconsistently with that right;

225. See *id.* at 340 (finding Defendants’ actions both completely inconsistent with any reliance on the arbitration agreement and prejudicial).

226. See *id.* at 338–39 (finding that Defendants’ numerous “dispositive and nondispositive motions,” including “motions to dismiss, motions for summary judgment, and a motion to change venue,” indicated little, if any, reliance).

227. See *id.* at 340 (finding prejudice where Defendants’ delay caused the Hurleys to incur “the costs of active litigation in two federal courts,” employ “four attorneys, undergo[] extensive discovery, argue[] four summary judgment motions,” and change “venue at Defendants’ request”).

228. See *id.* (concluding that “Defendants have waived their right to arbitrate” and affirming the district court’s order “denying Defendants’ motion to compel arbitration”).

229. See *Manasher v. NECC Telecom*, 310 F. App’x 804, 805–06 (6th Cir. 2009) (finding that the movant waived its right to arbitrate where it delayed demanding arbitration for one year, “engaged in discovery[,] and participated in . . . motions to certify [a] class and to amend the complaint”).

230. See *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (stating that “waiver must be resolved in light of the FAA’s preference for arbitration” (citations omitted)).

231. See *id.* (finding that nonmovants bear a “heavy burden of proof in showing” that its test is met (internal quotation marks and citations omitted)).

and that it suffered prejudice because of the movant's delayed demand for arbitration.²³² For example, in *Fisher v. A.G. Becker Paribas, Inc.*,²³³ the court refused to find waiver when the Fishers failed to prove each element of its test.²³⁴

In *Fisher*, the Fishers filed claims in federal court alleging violations of various federal securities and state common laws.²³⁵ Three-and-one-half years after the Fishers filed their claims, Becker moved to compel arbitration.²³⁶ During that time, both parties "filed pretrial motions and engaged in extensive discovery."²³⁷ On appeal, the Ninth Circuit reversed the district court's finding of waiver on two key grounds.²³⁸ First, it found that Becker did not act inconsistently with its right to arbitrate because, under the intertwining doctrine, the Fishers' arbitrable claims could not be separated from their nonarbitrable securities claims, making the entire dispute nonarbitrable.²³⁹ The Supreme Court has since rejected both the intertwining doctrine and the notion that federal securities claims are not arbitrable.²⁴⁰ Second,

232. *See id.* (finding waiver where the nonmovant shows that "(1) [the movant] had knowledge of its existing right to compel arbitration; (2) [the movant] acted inconsistently with that existing right; and (3) [the nonmovant] suffered prejudice from [the movant's] delay in moving to compel arbitration").

233. *See Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 694–98 (9th Cir. 1986) (describing extensive pretrial conduct by a movant that did not amount to a waiver of the right to arbitrate).

234. *See id.* at 698 ("The Fishers have failed to support their contention that Becker acted inconsistently with an existing right to compel arbitration . . . [or] to demonstrate any prejudice resulting from the alleged inconsistent acts.").

235. *See id.* at 693 (noting that the Fishers alleged violations of "federal securities laws as well as . . . [state] common law claims").

236. *See id.* (finding that Becker delayed demanding arbitration for three and one-half years).

237. *Id.*

238. *See id.* at 698 (reversing the district court's finding of waiver and ordering that "any arbitrable claims be submitted to arbitration immediately").

239. *See id.* at 694–95 (noting that the intertwining doctrine "holds that when it is impractical if not impossible to separate out nonarbitrable from arbitrable claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over federal securities claims" (internal quotation marks and citations omitted)).

240. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 220–21 (1987) ("Exchange Act claims are arbitrable under the provisions of the Arbitration Act."); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("[T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims . . . even where the result would be possibly inefficient

the court found that Becker’s failure to raise arbitration as an affirmative defense, the possibility that there may be some duplication of efforts in litigation and arbitration, and the Fishers’ own failure to demand arbitration by filing claims in court, were factors in concluding that the Fishers failed to establish prejudice and, thus, waiver.²⁴¹

Although *Fisher* may simply be a product of its time,²⁴² the Ninth Circuit continues to require a strong showing of prejudice. For example, it has found prejudice only where a movant’s actions caused “staleness of [a] claim” and subjected the nonmovant to litigation in state court, including discovery, the costs of litigation, and a judgment on the merits.²⁴³ The court also refused to find prejudice when a nonmovant incurred significant costs in the pretrial stages of litigation, but expressed more of a willingness to find prejudice had the case proceeded through discovery and a trial.²⁴⁴

f. The Eleventh Circuit

Finally, the Eleventh Circuit applies its two-pronged test in light of the strong federal policy favoring arbitration.²⁴⁵ It foists a heavy burden upon parties attempting to satisfy its test and invoke waiver.²⁴⁶ To meet its test, a nonmovant must prove that

maintenance of separate proceedings in different forums.”).

241. See *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 697–98 (9th Cir. 1986) (discussing the grounds on which the court refused to find prejudice).

242. See *supra* note 240 and accompanying text (describing the Supreme Court’s refutation of the intertwining doctrine and the notion that federal securities claims are not arbitrable).

243. *Hoffman Constr. Co. of Or. v. Active Erectors and Installers, Inc.*, 969 F.2d 796, 799 (9th Cir. 1992).

244. See *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002) (stating that if the “defendants permitted the case to proceed to discovery and to a trial, an argument of prejudice . . . would be much more compelling”); *but see Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1093 (8th Cir. 2007) (finding that a motion to dismiss can cause sufficient prejudice to warrant a finding of waiver).

245. See *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App’x 921, 923 (11th Cir. 2010) (stating that “federal law favors arbitration” (internal quotation marks and citations omitted)).

246. See *id.* (“[A]ny party arguing waiver of arbitration bears a heavy burden of proof.” (internal quotation marks and citations omitted)).

the movant acted inconsistently with its right to arbitrate, and that it was prejudiced by the movant's acts.²⁴⁷ A movant acts inconsistently with its right to arbitrate when its conduct, including pretrial activity, indicates an intent to avoid arbitration.²⁴⁸ To find prejudice, the court considers the length of delay, expense, and damage to the nonmovant's legal position incurred through discovery.²⁴⁹ For example, in *Stone v. E.F. Hutton & Co., Inc.*,²⁵⁰ the court found Hutton's delay and pretrial conduct sufficiently prejudicial to warrant a finding of waiver.²⁵¹

In *Stone*, Plaintiff filed claims in federal court despite its arbitration agreement with Hutton.²⁵² It alleged various federal and Florida securities law violations, as well as common law claims.²⁵³ On appeal, the Eleventh Circuit affirmed the district court's finding of waiver under its two-pronged test.²⁵⁴ First, the court found that Hutton's one-year-and-eight-month delay rendered its motion "untimely."²⁵⁵ Second, the court found

247. See *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002) (articulating its test as a means to determine whether, "under the totality of the circumstances, a party has acted inconsistently with the arbitration right and, second . . . whether, by doing so, that party has in some way prejudiced the other party" (internal quotation marks and citations omitted)).

248. See *Stok*, 387 F. App'x at 924 (stating that a party acts inconsistently with the right to arbitrate when its conduct, "including [substantial] participation in litigation . . . manifests an intent to avoid or waive arbitration" (citations omitted)).

249. See *id.* (evaluating "the prejudice prong by considering the length of delay in demanding arbitration," expenses incurred, and the extent to which pretrial discovery damaged the nonmovant's legal position (internal quotation marks and citations omitted)).

250. See *Stone v. E.F. Hutton & Co., Inc.*, 898 F.2d 1542, 1544 (11th Cir. 1990) (describing how the movant's conduct caused a sufficient degree of prejudice to warrant a finding of waiver).

251. See *id.* (finding both the "extent of discovery conducted" and the extent of Hutton's delay sufficient to warrant a finding of waiver).

252. See *id.* at 1543 (noting that the arbitration agreement required "any controversy arising out of" Plaintiff's account to be "settled by arbitration").

253. See *id.* at 1542 (noting that plaintiff's complaint alleged a violation of "section 10(b)" of the "Securities Exchange Act of 1934," Florida securities law violations, and "common law fraud, negligence, and breach of fiduciary obligations").

254. See *id.* (affirming the "district court's order denying [Hutton's] motion to compel arbitration").

255. *Id.* at 1544.

Hutton’s conduct prejudicial because it engaged in discovery typically conducted by parties preparing for trial.²⁵⁶ Particularly, Hutton deposed Plaintiff twice and responded to document production requests, while Plaintiff submitted four sets of interrogatories, three document production requests, and scheduled numerous depositions.²⁵⁷ As such, the court concluded that Hutton waived its right to arbitrate.²⁵⁸ Similarly, the Eleventh Circuit has found waiver where a movant delayed for eight months before demanding arbitration.²⁵⁹ During that time, the movant deposed five of the nonmovant’s “employees (totaling approximately 430 pages),” and the nonmovant filed both a motion to dismiss and a motion to oppose discovery.²⁶⁰

g. A Brief Summary: The Strict Enforcement Divergence

A comparative analysis of the circuits which impose burdensome prejudice requirements illustrates three significant problems. First, and most importantly, their onerous standards conflict with the FAA’s overarching objective.²⁶¹ Each approach sacrifices procedural expedience and efficiency in the name of strict contractual enforcement.²⁶² The Supreme Court, however,

256. *See id.* (finding Hutton’s conduct prejudicial because it engaged in “discovery typical of a party preparing for trial”).

257. *See id.* at 1543 (describing the parties’ pretrial conduct).

258. *See id.* at 1544 (concluding that Hutton “waived its right to compel arbitration”).

259. *See S&H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (“In this case, S&H waited eight months from the time it filed its complaint to the time it demanded arbitration.”).

260. *Id.*

261. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

262. *See, e.g., Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991) (refusing to find waiver in light of the strong federal policy favoring arbitration agreements, but conceding that movant’s conduct wasted both the court’s and the parties’ time); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 891 (2d Cir. 1985) (“Although granting defendants’ demand for arbitration . . . may be sanctioning a less efficient means of resolving this dispute, we reemphasize that neither efficiency nor judicial economy is the primary goal behind the arbitration act.”).

has expressed a desire to avoid such conflict where possible.²⁶³ Second, the divergence between each circuit's analysis detracts from the predictive power and stability that parties expect through bargained-for arbitral procedures.²⁶⁴ Compounding this problem is that courts within the same circuit often arrive at discrepant outcomes in similar factual circumstances.²⁶⁵

Finally, a number of circuits which propagate burdensome prejudice requirements have regarded their holdings with disdain. For example, in *MicroStrategy*, the Fourth Circuit recognized that MicroStrategy took an aggressive "course of litigation for the sole purpose of wearing [Lauricia] out, both emotionally and financially."²⁶⁶ Similarly, in *Walker*, the Fifth Circuit "sympathized with [P]laintiffs' exasperation," conceding that Bradford's attempts "to switch judicial horses in midstream" wasted both the courts' and the parties' time.²⁶⁷ Further, the Second Circuit stated that it would refuse to find waiver without a strong showing of prejudice, no matter how "unjustifiable" a movant's conduct.²⁶⁸ Ultimately, burdensome prejudice requirements both flout parties' legitimate expectations of stability and contravene the FAA's overarching objective.²⁶⁹ A more concrete, contractual approach is needed to unify the circuits' analyses within the scope of the FAA.

263. See *Concepcion*, 131 S. Ct. at 1749 (discussing how the FAA's two underlying goals need not, and should not, conflict).

264. See *supra* Part II (describing the benefits that parties expect through arbitration).

265. For example, district courts within the Sixth Circuit have applied its waiver standard in an inconsistent manner. Compare *U.S. Enrichment Corp. v. Sw. Elec. Co., Inc.*, No. 5:07CV-36-R, 2008 WL 199881, at *1, *5 (W.D. Ky. Jan. 23, 2008) (refusing to find waiver after two years of negotiations, pretrial activity, and costs because the nonmovant reserved its right to arbitrate at the outset of negotiations and there was no "bad faith"), with *Johnson Assocs. Corp. v. HL Operating Corp.*, No. 3:09-CV-01206, 2010 WL 4942788, at *1, *5 (M.D. Tenn. Nov. 30, 2010) (finding waiver where "the right to arbitrate was not asserted for eight months, during which" time the parties engaged in pretrial conduct).

266. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 254 (4th Cir. 2001).

267. *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577-78 (5th Cir. 1991).

268. *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995).

269. See *supra* Part II (discussing the benefits that parties expect through bargained-for arbitral procedures).

2. Circuits Imposing Lenient Prejudice Requirements

a. The First Circuit

The First Circuit holds that the key factors to finding waiver are undue delay and a “modicum of prejudice to the other side.”²⁷⁰ Although some showing is required, its prejudice standard is “tame at best.”²⁷¹ To avoid waiver, the First Circuit requires that parties demand arbitration at the earliest opportunity in order to ensure that courts’ and parties’ “resources are not needlessly deployed.”²⁷² For example, in *Rankin v. Allstate Insurance Co.*,²⁷³ the court found Allstate’s conduct sufficiently prejudicial to warrant a finding of waiver.²⁷⁴

In *Rankin*, the Rankins filed suit against Allstate in federal district court, alleging breach of contract.²⁷⁵ Nine months after the Rankins filed their claim, Allstate moved to compel arbitration.²⁷⁶ On appeal, the First Circuit first found Allstate’s nine-month delay unacceptable, as it knew of the coming dispute with the Rankins as early as one month before they filed their claim in court.²⁷⁷ Second, the court found prejudice “inherent in wasted trial preparation” when a party demands arbitration after months of delay and a short time before trial.²⁷⁸ Therefore, the

270. *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003).

271. *Id.* at 14 (citations omitted).

272. *Id.* at 13 (citations omitted).

273. *See id.* at 14 (finding that Allstate waived its right to arbitrate by inflicting prejudice through undue delay).

274. *See id.*

275. *See id.* at 11 (noting that the dispute between the Rankins and Allstate concerned “[w]hether Allstate unreasonably delayed payment of what was due [under the Rankins’ insurance contract], whether it still owe[d] money, and whether it lost its right to invoke the arbitration provision”).

276. *See id.* at 10. (noting that although litigation began on March 2, 2001, Allstate did not demand arbitration until nine months later on December 19, 2001, less than two months before the trial date set for February 11, 2002).

277. *See id.* at 12–13 (noting that “by February 2001 the parties were in disagreement” about numerous issues, approximately two months before Allstate filed “its April 2001 answer to the complaint filed in March 2001” by the Rankins).

278. *See id.* at 14 (finding prejudice where “an arbitration demand is made . . . after many months of delay and only six weeks before . . . trial”).

court concluded that Allstate's delay, standing alone, was sufficient to fulfill the modicum of prejudice necessary to establish waiver.²⁷⁹ Similarly, the First Circuit has found expenses incurred as a result of dilatory behavior sufficient to warrant a finding of prejudice, even when no useful information was acquired through discovery.²⁸⁰

b. The Eighth Circuit

The Eighth Circuit, by contrast, employs a three-pronged test which mirrors the Ninth Circuit's. Particularly, a party may waive its right to arbitrate if it: "(1) knew of an existing right to arbitrat[e]; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts."²⁸¹ A party acts inconsistently with its right to arbitrate if it attempts to litigate arbitrable claims, conducts substantial discovery, or delays its demand for arbitration.²⁸² The prejudice threshold is not "onerous,"²⁸³ and may be met when a movant inflicts unnecessary delay, expense, or when compelling arbitration would require a "duplication of efforts" in multiple forums to resolve the dispute.²⁸⁴ For example, in *Lewallen v. Green Tree*

279. See *id.* (finding that Allstate waived "its right to arbitration").

280. See *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995) (finding prejudice when the nonmovant incurred unnecessary costs through pretrial discovery, even when no "information useful to the resolution of the dispute was . . . procured").

281. *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007) (internal quotation marks and citations omitted); see also *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) ("Sovak must show (1) Cook had knowledge of its existing right to compel arbitration; (2) Cook acted inconsistently with that existing right; and (3) he suffered prejudice from Cook's delay in moving to compel arbitration.").

282. See *Lewallen*, 487 F.3d at 1090 (finding that a party acts inconsistently with its right to arbitrate by "fil[ing] a lawsuit on arbitrable claims, engag[ing] in extensive discovery, or fail[ing] to move to compel arbitration and stay litigation in a timely manner").

283. *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 923 (8th Cir. 2009).

284. *Lewallen*, 487 F.3d at 1093 (internal quotation marks and citations omitted).

Servicing, LLC,²⁸⁵ the court found Green Tree’s delay and pretrial conduct sufficiently prejudicial to warrant a finding of waiver.²⁸⁶

In *Lewallen*, Lewallen filed for bankruptcy due to arrearages on a home loan that was purchased, and serviced, by Green Tree.²⁸⁷ In response to Green Tree’s proof of claim, Lewallen filed two rounds of discovery requests and counterclaimed for various violations of state and federal lending laws.²⁸⁸ Sixteen months later, Green Tree moved to compel arbitration pursuant to the arbitration clause in the parties’ loan agreement.²⁸⁹ Applying its test, the Eighth Circuit affirmed both the bankruptcy court’s and the district courts’ findings of waiver.²⁹⁰

First, the Eighth Circuit found that Green Tree’s pretrial conduct—its lengthy delay, interrogatories, document production requests, and motion to dismiss—was inconsistent with its right to arbitrate.²⁹¹ The court found Green Tree’s motion to dismiss particularly egregious, noting that it pressed the bankruptcy court to resolve Lewallen’s claims on the merits, while preserving arbitration as an alternative forum in case of an adverse

285. *See id.* (finding Green Tree’s conduct both inconsistent with its right to compel arbitration and prejudicial).

286. *See id.* at 1094 (concluding “that Green Tree waived its right to arbitrate Lewallen’s claims,” and denying Green Tree’s motion to compel arbitration).

287. *See id.* at 1088–89 (noting that Green Tree purchased the right to service Lewallen’s home loan, which was in default at the time of transfer, in 2002 and attempted to foreclose on her home in 2004).

288. *See id.* at 1089 (stating that Lewallen objected to Green Tree’s proof of claim and “alleged that Green Tree’s conduct violated the Real Estate Settlement Procedures Act, . . . the Fair Debt Collection Practices Act . . . and the Missouri Merchandising Practices Act”).

289. *See id.* at 1091 (quoting the arbitration agreement which “provided that [Green Tree] retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the collateral secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation or to foreclose on the collateral”).

290. *See id.* at 1090, 1094 (discussing and affirming both the bankruptcy and the district courts’ findings that Green Tree waived its right to arbitrate).

291. *See id.* at 1092–93 (finding that Green Tree’s merits-based motion to dismiss, discovery requests, “lengthy interrogatories,” requests for the “production of documents after adversary proceeding[s] commenced,” and motions to extend the “time to respond to Lewallen’s discovery requests” were inconsistent with its right to arbitrate).

ruling.²⁹² Turning to prejudice, the court found Green Tree's motion to dismiss and inexplicable delay prejudicial in light of Lewallen's precarious financial situation.²⁹³ As such, the court concluded that Green Tree's conduct was sufficiently prejudicial to warrant a finding of waiver.²⁹⁴ Similarly, the Eighth Circuit has found waiver when a movant delayed for four and one-half months before demanding arbitration; filed a motion to dismiss which required the nonmovants to litigate a number of substantive claims; and the movant would have sought to reargue any adverse rulings in arbitration.²⁹⁵

c. Lenient Prejudice Requirements: A Brief Comparison

It is first important to note the obvious doctrinal divergence between the First and Eighth Circuits' lenient prejudice requirements, and the burdensome requirements imposed by other circuits within the majority. The discrepancy between the Eighth and Ninth Circuits' prejudice standards is particularly illustrative, given their virtually identical three-pronged waiver tests.²⁹⁶

The First and Eighth Circuits' prejudice standards diverge as well. The Eighth Circuit, conscious of the current circuit split regarding the prejudice requirement,²⁹⁷ has abandoned prejudice

292. See *id.* at 1092 (finding that Green Tree's motion to dismiss essentially "urg[ed] the bankruptcy court to dispose of Lewallen's claims on the merits, reserving arbitration as an alternative avenue to resolve the dispute").

293. See *id.* at 1093 (finding the totality of Green Tree's conduct prejudicial, particularly because any wasted "time and expense" would prejudice Lewallen at a time "when she [could] ill afford to waste resources"—in bankruptcy).

294. See *id.* at 1094 (concluding that "Green Tree waived its right to arbitrate Lewallen's claims").

295. *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 922–23 (8th Cir. 2009) (finding waiver when the movant "waited over four-and-a-half months before filing its motion for arbitration"; when the movant's "motion to dismiss forced Plaintiffs to brief fully a number of substantive issues"; and when the movant "would presumably . . . reargue in arbitration issues it lost" in its motion to dismiss).

296. See *supra* note 281 and accompanying text (describing the virtually identical waiver tests shared by the Eighth and Ninth Circuits).

297. See *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118–19 (8th Cir. 2011) ("There is a circuit split over whether the party asserting waiver must show prejudice . . . [on which] [t]he Supreme Court in

altogether in certain circumstances.²⁹⁸ By contrast, the First Circuit requires some showing of prejudice in all circumstances to find waiver, although a small degree is sufficient.²⁹⁹

To be sure, both circuits’ lenient requirements have prevented manipulation³⁰⁰ and delay³⁰¹ much more effectively than the strict-enforcement regimes.³⁰² The chaotic state of the current waiver doctrine, however, deprives contracting parties of any jurisprudential predictability. Rather, a uniform, contractual approach would stabilize the current doctrine and realign the circuits’ analyses within the scope of the FAA.

3. *The Third and Tenth Circuits: Multifactor Tests*

Both the Third and Tenth Circuits require some showing of prejudice to find waiver. A separate analysis, however, provides an illustrative microcosm of the overall inconsistencies caused by the waiver doctrine. Despite both circuits’ facially similar multifactor waiver regimes, each differs significantly in application.

the Term just ended granted a petition for a writ of certiorari . . .” (citations omitted)).

298. See *id.* at 1120 (finding the prejudice requirement unnecessary “[i]n the realm of construction industry disputes”).

299. See *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 13 (1st Cir. 2003) (“[T]he components of waiver of an arbitration clause are undue delay and a modicum of prejudice to the other side.”).

300. See, e.g., *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 222–23 (1st Cir. 1995) (refusing to allow the use of arbitration agreements for purposes of “manipulation and mischief”).

301. See, e.g., *Erdman*, 650 F.3d at 1120 (finding that “it makes little sense to litigate endlessly over the details of prejudice” in certain circumstances); *Rankin*, 336 F.3d at 13 (stating that its particular concern when evaluating prejudice is “when a timely demand for arbitration must be made” in order to facilitate “efficient planning by the court” and adequate protection of “the opponent”).

302. See *supra* notes 266–68 and accompanying text (discussing the Second, Fourth, and Fifth Circuits’ awareness of the delay and manipulation facilitated by their burdensome prejudice requirements).

a. The Third Circuit

The Third Circuit's "nonexclusive list of factors relevant to the prejudice inquiry" includes the timeliness of the motion to compel arbitration; the extent to which the movant has contested the merits of the nonmovant's claims; whether the movant has informed the nonmovant of its intent to seek arbitration; the number of "nonmerits" motions submitted by the movant; the movant's assent to the court's pretrial orders; and the extent to which both parties conducted discovery.³⁰³ The court applies its test contextually, and not all of the factors need be present to establish a finding of prejudice.³⁰⁴ For example, in *Nino v. Jewelry Exchange, Inc.*,³⁰⁵ the court found waiver where only four of the six factors weighed in favor of finding prejudice.³⁰⁶

In *Nino*, Nino brought an employment discrimination suit in federal court against DI, his former employer.³⁰⁷ After fifteen months, DI moved to compel arbitration pursuant to the arbitration clause in Nino's employment contract.³⁰⁸ Applying its test, the Third Circuit reversed the district court's refusal to find waiver.³⁰⁹ Particularly, it found DI's delay; the "substantial amounts of time, effort, and money" Nino spent prosecuting the action; DI's participation in numerous pretrial conferences; and the significant amount of discovery conducted by the parties sufficient to cause four of the six factors to weigh in favor of prejudice.³¹⁰ As such, the court found DI's conduct sufficiently

303. See *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 208–09 (3d Cir. 2010) (internal quotation marks and citations omitted).

304. See *id.* at 209 (characterizing its factors as comprising "a nonexclusive list" which need not all be present to justify a finding of waiver, and which must be applied "based on the circumstances and the context of the particular case" (internal quotation marks and citations omitted)).

305. See *id.* at 209–13 (applying and discussing each of its six factors).

306. See *id.* at 213–14 (finding waiver where four of the six factors heavily indicated prejudice).

307. See *id.* at 196 (noting that Nino alleged "he was discriminated against on account of his gender and national origin").

308. See *id.* ("After litigating the matter before the District Court for fifteen months, the employer invoked an arbitration provision . . . and moved . . . to compel the parties to arbitrate their dispute.").

309. See *id.* (reversing "the District Court's order compelling the parties to arbitrate").

310. See *id.* at 213–14 (analyzing DI's pretrial conduct and concluding that

prejudicial to warrant a finding of waiver.³¹¹ Similarly, the Third Circuit has found waiver where a movant’s ten-month delay and extensive depositions, discovery requests, and document production requests caused four of the six factors to weigh in favor of finding prejudice.³¹²

b. The Tenth Circuit

The Tenth Circuit’s waiver test encompasses six factors which largely mirror the Third Circuit’s, including whether the movant: acted inconsistently with its right to arbitrate; substantially invoked the litigation machinery before notifying the nonmovant of its intent to arbitrate; either demanded arbitration close to trial, or delayed its demand for a long period of time; filed a counterclaim without demanding arbitration therein; took advantage of pretrial procedures which are unavailable in arbitration; and whether its delay “affected, misled, or prejudiced” the nonmovant.³¹³ The court applies these factors to supplement three considerations regarding the movant’s conduct. First, the court considers the extent to which the nonmovant was prejudiced by the movant’s conduct.³¹⁴ Prejudice may be shown if the movant inflicted expense, delay, or injury to the nonmovant’s legal position.³¹⁵ Second, the court

“four . . . factors—the untimeliness of DI’s motion, the extent of nonmerits motion practice, DI’s assent to the magistrate judge’s pretrial orders, and the extent of the parties’ discovery—weigh firmly in favor of a finding of waiver”).

311. See *id.* at 214 (refusing to compel arbitration where DI’s “demand . . . came long after the suit commenced and when both parties had engaged in extensive discovery” (internal quotation marks and citations omitted)).

312. See *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 454, 458–61 (3d Cir. 2011) (considering the movant’s “litigation conduct as a whole” and finding that its “motion for a preliminary injunction,” ten-month delay, engagement in “three pre-trial conferences,” court-ordered mediation, and numerous “discovery reports” was sufficient to warrant a finding of waiver).

313. See *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 772–73 (10th Cir. 2010) (internal quotation marks and citations omitted).

314. See *id.* at 775.

315. See *id.* (stating that the relevant considerations for finding prejudice include the “delay and costs” incurred by the nonmovant, and the degree of prejudice to the nonmovant’s legal position which “may be inferred from the extent of discovery conducted in the case” (internal quotation marks and

considers whether the movant is attempting to manipulate the judicial process.³¹⁶ Finally, the court considers whether the movant is attempting to hinder the “combined efficiency of the public and private dispute-resolution systems.”³¹⁷ For example, in *Hill v. Ricoh Americas Corp.*,³¹⁸ the court refused to find waiver because Ricoh’s pretrial conduct implicated none of these three concerns.³¹⁹

In *Hill*, Hill sued Ricoh Americas Corp. in federal court, alleging that he was wrongfully terminated.³²⁰ After four months, Ricoh moved to compel arbitration pursuant to the arbitration clause in Hill’s employment contract.³²¹ Applying its factors, the Tenth Circuit reversed the district court’s finding of waiver on three key grounds.³²² First, it found that Ricoh’s delay alone was insufficient to establish waiver.³²³ Second, the court found that because the trial was five months away and minimal litigation activity occurred, granting Ricoh’s motion would neither cause inefficiency nor facilitate manipulation.³²⁴ Finally, the court found that Hill failed to prove prejudice in light of Ricoh’s minor delay and pretrial conduct.³²⁵ As a result, the court refused to find

citations omitted)).

316. *See id.* at 773 (“An important consideration in assessing waiver is whether the party now seeking arbitration is improperly manipulating the judicial process.”).

317. *Id.* at 774.

318. *See id.* at 775–76 (applying its six-factor waiver test).

319. *See id.* at 776 (refusing to find waiver because Ricoh’s “minimal litigation activity” did not cause prejudice, inefficiency, or “improper manipulation of the judicial process”).

320. *See id.* at 769 (noting that Hill filed a claim alleging that he was “terminated from his position at Ricoh in violation of the Sarbanes-Oxley Act”).

321. *See id.* at 769 n.2 (noting that the arbitration clause required “the parties [to] voluntarily agree to settle the dispute by binding arbitration”).

322. *See id.* at 776 (“[T]he circumstances of this case, particularly in light of the federal policy favoring arbitration, convince us that the district court should not have found waiver . . .”).

323. *See id.* at 775 (“[L]ength of time in itself does not establish waiver.”).

324. *See id.* (noting that the only important pretrial activities shown on the record were “the magistrate judge’s setting the schedule for litigation,” which was not to begin for eleven months, and the only discovery conducted was “Hill’s request for production of documents”).

325. *See id.* at 775–76 (finding that Hill “failed to show any substantial prejudice” in light of Ricoh’s minimal pretrial conduct).

waiver.³²⁶ In another case, however, the Tenth Circuit found a movant’s one year delay; participation in hearings, motions, pleadings, and depositions; and failure to demand arbitration immediately after the claim was filed sufficiently prejudicial to warrant a finding of waiver.³²⁷

c. The Third and Tenth Circuits Compared

The Third and Tenth Circuits’ waiver analyses encompass analogous sets of factors which supplement divergent considerations. The Third Circuit’s test amounts to a multifactor “prejudice inquiry.”³²⁸ Its unitary focus on prejudice could potentially aid parties in predicting what degree of pretrial conduct might trigger a waiver of arbitral rights. The test’s nonexclusive, contextual nature, however, undercuts any such potential.³²⁹ Thus, although the court recognizes that “arbitration is meant to streamline the proceedings, lower costs, and conserve private and judicial resources,” it has refused to adopt any consistent, doctrinally accurate method to accomplish these objectives.³³⁰

326. *See id.* at 776 (reversing the district court’s finding of waiver).

327. *See Reid Burton Constr., Inc. v. Carpenters Dist. Council of S. Colo.*, 614 F.2d 698, 703 (10th Cir. 1980) (finding the one-year delay at trial; the movant’s “participation in numerous hearings, pretrial conferences, motions and other pleadings, and the deposing of witnesses”; and the movant’s failure to insist upon arbitration immediately sufficient to warrant a finding of waiver).

328. *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 208 (3d Cir. 2010) (internal quotation marks and citations omitted).

329. *See id.* at 209 (noting that its list of factors is nonexclusive, “not all the factors need be present to justify a finding of waiver, and [t]he waiver determination . . . [is] based on the circumstances and context of [a] particular case” (internal quotation marks and citations omitted)); *see also Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 452 (3d Cir. 2011) (affirming the district court’s judgment, but disagreeing with its finding as to how many factors indicated prejudice); *Quilloin v. Tenet Healthsystem Phila., Inc.*, 763 F. Supp. 2d 707, 721–22 (E.D. Pa. 2011) (refusing to find waiver when three factors weighed in favor of finding prejudice and three weighed against finding prejudice, but when those in favor were not implicated as strongly); *Opalinski v. Robert Half Int’l, Inc.*, No. 10-2069, 2011 WL 4729009, at *1, *7 (D.N.J. Oct. 6, 2011) (refusing to find waiver when two factors weighed in favor, one only “slightly” in favor, and three against finding prejudice).

330. *Nino*, 609 F.3d at 209.

By contrast, the Tenth Circuit's test encompasses three disparate considerations.³³¹ Furthermore, it openly eschews any "mechanical" balancing or exhaustive application of its factors.³³² As a result, the Tenth Circuit's scattershot approach only compounds the divergent outcomes engendered by the Third Circuit's regime.³³³ A uniform, contractual approach, however, would instill consistency among the circuits, stability for contracting parties, and doctrinal accuracy in accordance with the FAA.³³⁴

B. The Minority: Circuits Not Requiring Prejudice

The Seventh and D.C. Circuits comprise a small minority which eschews prejudice as a necessary element of waiver.³³⁵ Its dissent from the majority, however, has been influential.

331. See *supra* notes 314–17 and accompanying text (describing the various considerations inherent in the Tenth Circuit's waiver test).

332. See *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 773 (10th Cir. 2010) ("Of course, our listing these factors . . . was not intended to suggest a mechanical process in which each factor is assessed and the side with the greater number of factors prevails. Nor were we even suggesting that the list . . . is exclusive.").

333. Compare *Lamkin v. Morinda Props. Weight Parcel, LLC*, 440 F. App'x 604, 609 (10th Cir. 2011) (finding that all six factors weighed against finding prejudice, but failing to consider whether the movant's conduct caused manipulation of the judicial process or inefficient maintenance of disputes), with *GVL Pipe & Demolition, Inc. v. Adams Cole & Dalton Rail Serv., LLC*, No. CIV-10-846-M, 2010 WL 4806900, at *1, *3 (W.D. Okla. Nov. 18, 2010) (refusing to find waiver when one factor indicated that waiver was appropriate, but conflicting with *Hill* by first engaging in a mechanical balancing of factors before considering how those factors indicated prejudice, manipulation, and efficiency). There is not a significant amount of case law which addresses waiver by conduct subsequent to *Hill*. However, the opinions cited above, coupled with the inconsistencies caused by Third Circuit's unitary approach, strongly indicate that the Tenth Circuit's multifaceted regime will not yield consistent results.

334. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.").

335. See, e.g., *Zuckerman Spaeder, LLP v. Auffmanberg*, 646 F.3d 919, 923 (D.C. Cir. 2011) (holding that a party "presumptively forfeit[s]" its right to arbitrate if it fails to invoke that right at the "earliest opportunity on the record"); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (finding that merely electing to file a claim in court "is a presumptive waiver of the right to arbitrate").

Particularly, Judge Posner’s opinion in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*³³⁶ is often cited by the majority circuits as either the counterpoint to a burdensome prejudice requirement³³⁷ or by those justifying a lenient prejudice standard.³³⁸

1. The Seventh Circuit

The Seventh Circuit interprets the liberal federal policy favoring arbitration agreements as “merely a policy of treating such clauses no less hospitably” than other contracts.³³⁹ A party need not show prejudice to establish waiver.³⁴⁰ Rather, simply electing to litigate operates as a “presumptive waiver” of the right to arbitrate, which may be rebutted only in “extraordinary circumstances.”³⁴¹ For example, in *Cabinetree*, the court found that a movant waived its right to arbitrate by proceeding judicially rather than demanding arbitration at the outset of the dispute.³⁴²

In *Cabinetree*, Cabinetree filed suit against Kraftmaid in state court, alleging breach of contract.³⁴³ Shortly thereafter, Kraftmaid removed the case to federal court and, six months

336. See *Cabinetree*, 50 F.3d at 391 (finding that a party waived its right to arbitrate by electing to “proceed in a judicial forum,” rather than demanding arbitration at the outset of the dispute).

337. See, e.g., *Joseph Chris Pers. Servs., Inc. v. Rossi*, 249 F. App’x 988, 993 (5th Cir. 2007) (citing *Cabinetree* as propounding a view of prejudice contrary to its own); *Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (disagreeing with *Cabinetree* and refusing to find waiver without first finding prejudice).

338. See, e.g., *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) (citing *Cabinetree* to support its lenient prejudice requirement); *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 13 (1st Cir. 2003) (citing *Cabinetree* for the notion that arbitration should “be invoked at the earliest opportunity”).

339. *Cabinetree*, 50 F.3d at 390.

340. See *id.* (finding that “a party need not show that it would be prejudiced if [a] stay were granted and arbitration ensued” in order to establish waiver).

341. *Id.* at 390–91.

342. See *id.* at 391 (affirming the district court’s finding of waiver).

343. See *id.* at 389 (noting that Cabinetree brought a “breach of contract suit . . . in Wisconsin state court against Kraftmaid”).

later, moved to compel arbitration.³⁴⁴ On appeal, the Seventh Circuit affirmed the district court's finding of waiver, reasoning that Kraftmaid failed to rebut the presumption that it waived its right to arbitrate.³⁴⁵ The court found Kraftmaid's explanation for its removal and subsequent pretrial activity—that it needed “time to weigh its options,”—the “worst possible reason for delay.”³⁴⁶ Rather, it found that parties must select a forum in which to resolve their disputes at the earliest opportunity.³⁴⁷ Therefore, merely electing to proceed judicially is considered “powerful evidence” that the parties agreed to forego arbitration.³⁴⁸ In a subsequent case, the Seventh Circuit found that the movant did not trigger the presumption of waiver when it removed the dispute to federal court six weeks after the complaint was filed; demanded arbitration thirty days after removal; and refrained from engaging in pretrial conduct before demanding arbitration.³⁴⁹

2. *The D.C. Circuit*

Similarly, the D.C. Circuit recently adopted a bright-line approach to determine whether a party has lost its right to arbitrate through pretrial conduct.³⁵⁰ In *Zuckerman Spaeder, LLP v. Auffenberg*,³⁵¹ the court found that a movant who fails to

344. *See id.* (noting that six months after removal, Kraftmaid “moved the district court under 9 U.S.C. § 3 to stay further proceedings pending arbitration of the parties’ dispute”).

345. *See id.* at 391 (“The presumption that an election to proceed judicially constitutes a waiver of the right to arbitrate has not been rebutted.”).

346. *Id.*

347. *See id.* (“Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity . . .”).

348. *Id.*

349. *See Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 562 (7th Cir. 2008) (discussing the movant’s conduct and affirming the district court’s refusal to find waiver).

350. *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011) (stating that, in considering whether a movant has lost its right to arbitrate through pretrial conduct, the court has “established a few bright-line rules”).

351. *See id.* at 922–23 (adopting a new standard for determining whether a party has lost its right to arbitrate through pretrial conduct).

invoke arbitration “on the record at the first available opportunity . . . presumptively forfeit[s]” its right to arbitrate.³⁵² Thus, the court replaced the waiver doctrine with forfeiture, reasoning that intent is irrelevant for determining whether a party has lost its right to arbitrate through pretrial conduct.³⁵³ Rather, simply failing to demand arbitration in a timely manner will trigger forfeiture.³⁵⁴ To be timely, the movant’s demand must come in its “first responsive pleading or motion to dismiss.”³⁵⁵ If the movant fails this requirement, it may still access the arbitral forum if it proves that its delay did not prejudice the opponent or the court.³⁵⁶ Only a minimal amount of undue expense or delay need be shown to establish prejudice.³⁵⁷ Applying this standard, the *Auffenberg* court found that Auffenberg forfeited his right to arbitrate.³⁵⁸

In *Auffenberg*, Zuckerman filed claims against Auffenberg in the D.C. Superior Court for unpaid attorneys’ fees.³⁵⁹ Auffenberg subsequently removed the case to federal court, answered Zuckerman’s complaint, and filed counterclaims.³⁶⁰ After several months of engaging in pretrial motions and court-ordered mediation, Auffenberg moved to compel arbitration.³⁶¹ The D.C.

352. *Id.* at 922.

353. *See id.* (abandoning waiver, which “refers to a party’s intentional relinquishment . . . of a known right,” and adopting forfeiture, which simply refers to a “failure to make a timely assertion of a right” (internal quotation marks and citations omitted)).

354. *See id.* (finding that “forfeiture, not waiver, is the appropriate standard”).

355. *Id.*

356. *See id.* at 923 (“A defendant who delays seeking a stay pending arbitration until after his first available opportunity might still prevail on a later stay motion provided his delay did not prejudice his opponent or the court.”).

357. *See id.* (allowing access to arbitration only if a movant’s delay inflicts “no or little cost upon opposing counsel and the courts”).

358. *See id.* (affirming the district court and finding that Auffenberg forfeited its right to arbitrate).

359. *See id.* at 920 (noting that “Zuckerman sued Auffenberg in the District of Columbia Superior Court to recover the [attorneys’] fees plus interest”).

360. *See id.* (“Auffenberg removed the case to federal court, answered the complaint, and counterclaimed for legal malpractice.”).

361. *See id.* at 921 (noting that “a client may invoke mandatory arbitration of any fee dispute” with its lawyer under “D.C. Bar Rule XIII”).

Circuit affirmed the district court's refusal to grant Auffenberg's motion on two key grounds.³⁶² First, it found Auffenberg's failure to demand arbitration in his original answer sufficient to invoke the presumption of forfeiture.³⁶³ Second, the court found that Auffenberg's pretrial conduct "imposed substantial costs upon both Zuckerman and the district court."³⁶⁴ Particularly, Zuckerman was forced to conduct internal investigations, engage in discovery, and prepare depositions.³⁶⁵ Auffenberg's conduct also consumed "inherently limited" judicial resources, including the court's time.³⁶⁶ Ultimately, because the court found Auffenberg's conduct prejudicial, it concluded that he failed to rebut the presumption of forfeiture.³⁶⁷

3. *The Seventh and D.C. Circuits Compared*

Notably, both the Seventh and the D.C. Circuits have broken with the majority to facilitate doctrinal accuracy. The Seventh Circuit refuses to require prejudice on contractual grounds, noting that prejudice is not required to find waiver under contract law.³⁶⁸ Similarly, the D.C. Circuit repudiated the waiver doctrine in favor of forfeiture in order to "realign litigants' incentives . . . with the FAA."³⁶⁹ Finally, both circuits seek to prevent dilatory, manipulative strategies that impose unnecessary costs on both nonmovants and the judicial system.³⁷⁰

362. *See id.* at 923.

363. *See id.* (finding Auffenberg's failure "to invoke arbitration in (or before filing) his original answer" sufficient to trigger the presumption of forfeiture).

364. *Id.*

365. *See id.* ("Zuckerman . . . had commenced an internal investigation, responded to and filed discovery requests, and begun preparing for depositions . . .").

366. *Id.*

367. *See id.* (affirming the "district court's denial of the stay").

368. *See* *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (stating that, under contract law, waiver is "normally effective without . . . detrimental reliance," or prejudice (citing E. ALLAN FARNSWORTH, *CONTRACTS* § 8.5 (2d ed. 1990))).

369. *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 924 (D.C. Cir. 2011).

370. *See id.* at 922 (recognizing that its failure to articulate a concrete standard encouraged dilatory, strategic lawsuits that "imposed . . . cost[s] upon

Yet, although their analyses have moved toward alignment with the FAA, the efficacy of each circuit’s presumptive regime is questionable. Particularly, the Seventh Circuit has failed to uphold its presumption consistently since *Cabinetree*, allowing movants to affect rebuttal in divergent³⁷¹ and even manipulative factual circumstances.³⁷² This Note, however, proposes a uniform framework which would instill consistency and prevent unscrupulous pretrial conduct.³⁷³

IV. “Waiving” the Right to Arbitrate: A Contractual Approach

A. The Need for a Uniform Standard

The divergent, ill-defined waiver standards propagated by the Circuit Courts of Appeals present three significant problems. First, their juridical inconsistencies deny contracting parties the

both litigants and the district court[s]”); *Cabinetree*, 50 F.3d at 391 (introducing a presumption of waiver in order to “economize on the resources, both public and private, consumed in dispute resolution” by stifling dilatory “heads I win, tails you lose” strategies).

371. *Compare* Sharif v. Wellness Int’l Network, Ltd., 376 F.3d 720, 722–23 (7th Cir. 2004) (refusing to find waiver when the movant delayed for nine months before moving to compel arbitration, and filed motions to dismiss on the merits and for improper venue, which were “briefed fully” in the district court), and Benjamin-Coleman v. Praxair, Inc., 216 F. Supp. 2d 750, 752, 754 (N.D. Ill. 2002) (refusing to find waiver where the movant delayed for four months, during which time it filed three merits-based motions to dismiss), with Grumhaus v. Comerica Sec., Inc., 223 F.3d 648, 651 (7th Cir. 2000) (finding waiver after a movant delayed demanding arbitration for one year after its complaint was filed and, subsequently, dismissed), and Pa. Chiropractic Ass’n v. Blue Cross Blue Shield Ass’n, No. 09 C 5619, 2011 WL 210805, at *1, *1 (N.D. Ill. Jan. 20, 2011) (finding waiver where the movants delayed for eight months and filed three motions to dismiss).

372. See N. Cent. Constr., Inc. v. Siouxland Energy & Livestock Coop., 232 F. Supp. 2d 959, 968 (N.D. Iowa 2002) (refusing to find waiver, yet acknowledging that the movant may have engaged in a “limited form of forum shopping” by delaying its demand for arbitration); *Benjamin-Coleman*, 216 F. Supp. 2d at 753 (refusing to find waiver although the movant engaged in a “limited form of forum shopping, which the waiver doctrine is designed to prevent”).

373. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

predictability that they expect through bargained-for arbitral procedures, thus destabilizing the arbitral process.³⁷⁴ For example, parties subjected to onerous prejudice requirements³⁷⁵ often spend months consuming judicial and personal resources pretrial, only to be forced to arbitrate according to procedures that have lost their initial value.³⁷⁶ The minority's presumptive regime proves similarly unavailing, as it merely shifts the unpredictability post hoc towards rebuttal.³⁷⁷

Second, the waiver doctrine contravenes the FAA's overarching objective: to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."³⁷⁸ Indeed, the two goals inherent within this objective—contractual enforcement and facilitation of streamlined proceedings—should coincide.³⁷⁹ As to the former, the FAA reflects the fundamental notion that arbitration agreements, as contracts, should be enforced in accordance with parties' legitimate expectations.³⁸⁰ The circuits, however, often subordinate these expectations in the name of the oft-cited federal policy favoring arbitration agreements.³⁸¹ Unfortunately, this reasoning misconstrues the policy's true objective—to ensure the "enforcement of private contractual arrangements" according

374. See *supra* Part III (discussing the inconsistencies among the circuits regarding proper waiver standard).

375. See *supra* Part III (describing a number of circuits which impose burdensome prejudice requirements in their waiver analyses).

376. See *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011) (describing the costs imposed on both litigants and the courts in the absence of a clear standard); *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 13 (1st Cir. 2003) (noting the importance of choosing between arbitration and litigation early in the dispute resolution process to avoid the needless deployment of both individual and judicial resources).

377. See *supra* note 371 and accompanying text (describing the doctrinal inconsistencies permeating the Seventh Circuit since *Cabinetree*).

378. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

379. See *id.* at 1749 (alluding to the notion that, where possible, the FAA's underlying goals should not conflict).

380. See *supra* note 72 and accompanying text (discussing the FAA's contractual goal of enforcing arbitration agreements in accordance with parties' legitimate expectations).

381. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *supra* Part III (discussing numerous cases in which courts justify their respective waiver analyses by citing the liberal federal policy favoring arbitration agreements).

to their terms.³⁸² Indeed, it merely reflects FAA § 2’s substantive mandate,³⁸³ which “requires courts to honor parties’ expectations.”³⁸⁴ Thus, the ill-defined waiver and rebuttal standards imposed by the circuits clearly fail this requirement because both undercut the key benefits that parties expect to derive through bargained-for arbitral procedures—predictability and stability.³⁸⁵

Further, requiring parties to prove either prejudice or rebuttal inhibits procedural efficiency—the FAA’s second underlying goal. Indeed, the Supreme Court has eschewed burdensome procedural obstacles that impede a clear path to the arbitral forum. For example, the Court has refused to require parties to obtain an order compelling arbitration in federal court after securing a stay of judicial proceedings in state court.³⁸⁶ Similarly, the Court has invalidated state laws requiring administrative exhaustion before granting access to arbitration.³⁸⁷ To be sure, strong prejudice requirements ensure that parties’ arbitral rights will be enforced much deeper into the pretrial process. Long delays, however, contravene “Congress’s intent to move the parties . . . out of court and into arbitration as quickly and easily as possible.”³⁸⁸ Indeed, requiring endless

382. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (emphasis added); see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (stating that FAA § 2 “embodies the national policy favoring arbitration and places arbitration agreements on *equal footing* with *all other contracts*” (emphasis added) (citing 9 U.S.C. § 2 (2011))).

383. See *Moses H. Cone*, 460 U.S. at 24 (stating that FAA § 2 is “a congressional declaration of a liberal federal policy favoring arbitration agreements”).

384. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

385. See *supra* Part II (discussing the benefits derived through arbitration).

386. See *Moses H. Cone*, 460 U.S. at 27 (noting that a movant who first obtained a stay in state court “would have no sure way to proceed with its claims [in arbitration] except to return to federal court to obtain a § 4 order—a pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act”).

387. See *Preston v. Ferrer*, 552 U.S. 346, 347 (2008) (finding that state-mandated administrative exhaustion conflicts with the FAA’s mandate to facilitate expedient access to the arbitral forum); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29 (1991) (“[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.”).

388. *Preston*, 552 U.S. at 327 (internal quotation marks and citations

litigation over the details of prejudice,³⁸⁹ or rebuttal,³⁹⁰ flouts the judiciary's responsibility to facilitate expedient access to the arbitral forum.³⁹¹

Finally, parties face the distinct possibility that their arbitral rights will be turned against them to inflict undue delay and expense.³⁹² Indeed, arbitration agreements designed to protect parties' interests may turn from a shield to a sword in the hands of recalcitrant parties whose contractual relationships have gone awry.³⁹³ Such conduct inflicts unnecessary costs on both parties and the judicial system.³⁹⁴ Furthermore, it strips the arbitral process of any predictability, destabilizing parties' contractually established dispute resolution mechanisms.³⁹⁵ The circuits

omitted).

389. See *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1120 (8th Cir. 2011) (finding that requiring parties "to litigate endlessly over the details of prejudice" makes little sense in certain circumstances).

390. See *North Cent. Constr., Inc. v. Siouxland Energy & Livestock Coop.*, 232 F. Supp. 2d 959, 969 (N.D. Iowa 2002) (recognizing that its finding of waiver would be sanctioning a less efficient means of resolving disputes, but that "neither efficiency nor judicial economy is the primary goal behind the" FAA (citations and internal quotation marks omitted)); *Benjamin-Coleman v. Praxair, Inc.*, 216 F. Supp. 2d 750, 754 (N.D. Ill 2002) (same).

391. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983) (stating that, through the FAA, Congress required "summary and speedy disposition of motions [and] petitions to enforce arbitration clauses").

392. See, e.g., *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (noting that no matter how "unjustifiable" a movant's conduct, it would not find waiver without first finding prejudice); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218, 222–23 (1st Cir. 1995) (noting the tendency of parties to use arbitration clauses to manipulate the dispute resolution process); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991) (recognizing the movant's delay and attempts to forum shop, but refusing to find waiver).

393. See, e.g., *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (refusing to find waiver where a party sought to "play heads I win, tails you lose" by seeing "how the case was going in federal district court before deciding whether it would be better off there or in arbitration").

394. See *id.* ("Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution."); see also *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 13 (1st Cir. 2003) (requiring that arbitration be "invoked at the earliest opportunity" so that courts' and parties' "resources are not needlessly deployed").

395. See *supra* Part II (describing the benefits parties seek through arbitration).

reluctantly condone such conduct, citing the liberal federal policy favoring arbitration as if their hands are tied.³⁹⁶ This Note proposes, however, that they are not so bound. A contractual approach would prevent unscrupulous strategies employed by obstinate parties in accordance with the FAA’s text and overarching objective.³⁹⁷ Before discussing this approach, however, it is important to note the fundamental doctrinal inaccuracies of applying the waiver doctrine, as prescribed by contract law, in the context of parties’ arbitral rights.

B. “Waiver” as a Generally Applicable Contract Law Defense

Recall that waiver by conduct implicates the obligation to arbitrate.³⁹⁸ Therefore, it is a gateway issue that must be resolved by the courts in accordance with contract law.³⁹⁹ In this regard, the waiver doctrine’s legitimacy should be tested against the Restatement (Second) of Contracts. Applying the Restatement would comply with the FAA,⁴⁰⁰ as it sets the general conceptual

396. See, e.g., *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 254 (4th Cir. 2001) (refusing to find waiver under the liberal federal policy favoring arbitration, but recognizing that the movant’s “aggressive” course of litigation was seemingly taken to wear the nonmovant out “both emotionally and financially”); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 889–91 (2d Cir. 1985) (citing the liberal federal policy favoring arbitration agreements in refusing to find waiver where a movant demanded arbitration only after it lost a merits-based motion to dismiss in court); *North Cent. Constr., Inc. v. Siouxland Energy & Livestock Coop.*, 232 F. Supp. 2d 959, 968 (N.D. Iowa 2002) (citing the liberal federal policy favoring arbitration agreements and refusing to find waiver, even after acknowledging that the movant’s conduct constituted “a limited form of forum shopping”); *Benjamin-Coleman v. Praxair, Inc.*, 216 F. Supp. 2d 750, 753 (N.D. Ill. 2002) (refusing to find waiver due to the liberal federal policy favoring arbitration agreements, even after acknowledging that the movant engaged in forum shopping as exhibited by its pretrial activity).

397. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

398. See *supra* Part II (discussing the connection between conduct-based waiver, severability, and contract law).

399. See *supra* Part II (discussing how gateway issues must be decided by the courts in accordance with contract law).

400. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (stating that, under FAA § 2, arbitration agreements may be validated only by “generally applicable contract defenses”).

foundation upon which states have constructed their contract law.⁴⁰¹

Under the Restatement, waiver occurs when a party promises to perform a conditional duty under an antecedent contract, despite the condition's nonoccurrence.⁴⁰² A condition is "an event, not certain to occur, which must occur . . . before performance [of one's duty] under a contract becomes due."⁴⁰³ Thus, a party that waives a condition precedent to its duty to perform a contractual obligation must still perform that duty, even if the condition has not occurred.

A critical corollary to the waiver doctrine, however, is that a condition's occurrence must not be "a material part of the agreed exchange for the performance of the duty."⁴⁰⁴ Thus, the waiver doctrine presumes that a condition is being waived, not a contract, and that the condition was not a material part of the underlying agreement. For example, if Promisor contracts to sell her car to Promisee in exchange for \$500, Promisor need not tender the car until Promisee tenders the money.⁴⁰⁵ Promisor cannot waive the purchase price, however, because she cannot waive a condition that materially affects the value to be received under the contract—payment in exchange for her car.⁴⁰⁶

401. See E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 5 (1981) (noting that the drafters of the Restatement felt "obliged in [their] deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs" (internal quotation marks and citations omitted)); Herbert Wechsler, *The Course of Restatements*, 55 A.B.A. J. 147, 147 (1969) (stating that restatements generally have "enormous influence on the development of our law").

402. See RESTATEMENT (SECOND) OF CONTRACTS § 84(1) (1981) ("[A] promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur . . .").

403. *Id.* § 224.

404. *Id.* § 84(1)(a).

405. See *id.* § 84 cmt. c (noting that in a contractual arrangement to "sell a horse for \$500," a "waiver of the price of a horse is not within this Section" and, thus, is not waiver).

406. See *id.* ("[W]here a promise to disregard the nonoccurrence of the condition materially affects the value received by the promisor . . . the promise [to waive the condition] is not binding . . .").

Drawing from the Restatement, it is clear that the circuits’ analyses fundamentally conflict with contract law and, as such, the FAA. First, under the severability doctrine, an arbitration clause is neither immaterial, nor a condition precedent to performance of the underlying contract. Rather, when pretrial conduct implicates the obligation to arbitrate,⁴⁰⁷ the severability doctrine separates the arbitration clause from the underlying agreement.⁴⁰⁸ This severance results in a wholly autonomous arbitration clause, fully enforceable in accordance with generally applicable contract law principles.⁴⁰⁹ It therefore becomes clear, under the Restatement, that a party can neither waive an independent arbitration agreement nor the sole material benefit derived from that agreement—access to the arbitral forum.⁴¹⁰ Furthermore, neither prejudice nor rebuttal is necessary to establish waiver under contract law.⁴¹¹

Ultimately, waiver cannot be the proper standard for determining whether a party has lost its right to arbitrate through pretrial conduct. The Supreme Court has interpreted FAA § 3, from which the waiver doctrine was derived, as purely procedural.⁴¹² It does not alter “background principles of state contract law” in enforcing obligations to arbitrate under § 2.⁴¹³ Thus, as both the majority and the minority’s standards alter the waiver doctrine as prescribed by contract law, they clearly contravene the FAA. In this regard, the D.C. Circuit’s forfeiture standard proves equally unavailing. The Restatement limits forfeiture to circumstances in which the “occurrence of the

407. See *supra* note 161 and accompanying text (discussing how issues concerning waiver, as a gateway issue, must be considered under the auspices of contract law).

408. See *supra* Part II (discussing the severability doctrine).

409. See *supra* Part II (describing how FAA § 2 requires the enforcement of arbitration agreements as contracts).

410. See *supra* notes 404–06 and accompanying text (discussing how, under contract law, a party cannot waive a contract or the material value for which it bargained).

411. See RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1981) (stating when “waiver is reinforced by [detrimental] reliance, enforcement is often said to rest on estoppel,” not waiver).

412. See *supra* note 153 and accompanying text (discussing the origins of the waiver doctrine).

413. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009).

condition [is] not a *material* part of the agreed exchange.”⁴¹⁴ Therefore, forfeiture falls prey to the same conceptual barriers as waiver. Indeed, an entirely new contractual framework must be devised in order to realign the circuits’ analyses with one another, and with the FAA.

V. *The Proposal*

A. *A Contractual Approach*

This Note proposes a comprehensive contractual solution through a succinct judicial framework to discern whether a party has lost its right to arbitrate through pretrial conduct. The reasonableness test comprises the core of this solution and requires courts to discern what constitutes a reasonable time to demand arbitration.⁴¹⁵ First, this Note identifies the key contractual components which drive the operative function of arbitration agreements and, through those components, sets the proper standard. Next, this Note proposes a multifactor reasonableness test to determine whether a party demanded arbitration within a reasonable time after engaging in pretrial conduct. Finally, this Note employs a useful hypothetical, based on the Fourth Circuit’s decision in *MicroStrategy, Inc. v. Lauricia*, to illustrate the efficacy of this approach.⁴¹⁶

1. *The Groundwork: A Duty to Arbitrate Subject to Conditions*

The reasonableness test begins with the premise that an arbitration clause is an autonomous contract, the performance of which hinges upon the occurrence of “constructive (or ‘implied in law’)” conditions.⁴¹⁷ The FAA does not impose an affirmative duty

414. RESTATEMENT (SECOND) OF CONTRACTS § 229 cmt. c (1981) (emphasis added).

415. See *Zev v. Merman*, 533 N.E.2d 669, 669 (N.Y. 1988) (noting that courts must determine “[w]hat constitutes a reasonable time for performance” on a “case-by-case basis”).

416. See *supra* Part II (discussing the Fourth Circuit’s decision in *MicroStrategy*, which was decided under a burdensome prejudice requirement).

417. RESTATEMENT (SECOND) OF CONTRACTS § 226 cmt. c (1981).

to demand arbitration under a private agreement once a dispute arises. Rather, given parties’ ability to stay judicial proceedings under § 3,⁴¹⁸ the FAA provides parties the opportunity to resolve their disputes through different mediums before resorting to arbitration (i.e., mediation, negotiation, or litigation).⁴¹⁹ Therefore, each party’s respective duty to arbitrate is conditioned upon the other’s demand. If neither party invokes its right to arbitrate, then neither party’s duty to arbitrate becomes due.⁴²⁰ In contract law, this nonoccurrence eventually discharges each party’s duty to perform its contractual obligation, i.e., to arbitrate, “when the condition can no longer occur.”⁴²¹ Thus, the discharge principle provides a conceptually accurate contract law defense for parties attempting to avoid arbitration after litigation has commenced.

Providing a defense, however, does not end the inquiry. The presence of FAA § 3 and the pervasiveness of the liberal federal policy favoring arbitration beg the question: At what point in the pretrial process does a party’s duty to arbitrate become discharged? Under contract law, it is first essential to consider the language of the parties’ arbitration agreement.⁴²² If the parties specified time limits on their right to demand arbitration, that should certainly end the inquiry. The Supreme Court, however, has recently found that procedural issues, such as time

418. See 9 U.S.C. § 3 (2011) (providing parties to an otherwise enforceable arbitration agreement the opportunity to stay judicial proceedings pending arbitration).

419. See, e.g., *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1901–02 (2009) (“Section 3 . . . allows litigants already in federal court to invoke agreements made enforceable by § 2.”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (noting the “unmistakably clear congressional purpose” that arbitration be facilitated by the courts “when selected by the parties”).

420. See RESTATEMENT (SECOND) OF CONTRACTS § 225(1) (1981) (“Performance of a duty subject to a condition cannot become due unless the condition occurs . . .”).

421. *Id.* § 225(2).

422. See, e.g., Richard D. Brown & Mara E. Fortin, *An Introduction to Interpretation of Express Contractual Indemnity Provisions in Construction Contracts Under California and Nevada Law*, 32 MCGEORGE L. REV. 1019, 1021 (2001) (stating that, under general “rules governing contract interpretation . . . courts will first look to the ‘plan language’ of the contract in order “to ascertain the parties’ intent”).

limits, are presumptively for arbitrators to decide.⁴²³ By contrast, disputes regarding “whether the parties are bound by a given arbitration clause” are for the courts to decide.⁴²⁴ The circuits have largely interpreted this decision as leaving conduct-based waiver within the courts’ purview.⁴²⁵

Consequently, however, judges will not have recourse to concrete time limits in parties’ arbitration agreements for determining discharge. Furthermore, it is highly unlikely that parties would bargain for procedural contingencies in case of litigation while attempting to establish proper arbitral procedures. Such uncertainty presents a significant quandary for courts because one party must demand arbitration at some point in order to trigger its opponent’s duty to arbitrate. The Restatement, however, provides that in the absence of a “fixed term” in the parties’ agreement setting “[t]he time within which the condition can occur,”⁴²⁶ a term “which is reasonable in the circumstances is supplied by the court.”⁴²⁷ Thus, to facilitate the arbitral process, “a term calling for performance within a reasonable time” should be “supplied.”⁴²⁸

2. The Reasonableness Test: What Constitutes a “Reasonable Time” for Performance?

An inherently fact-based analysis, standards for determining what constitutes a reasonable time for performance vary not only from state to state, but also case by case.⁴²⁹ New York courts,

423. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (“[W]e find that the applicability of the . . . time limit rule is a matter presumptively for the arbitrator, not the judge.”).

424. *Id.* at 84.

425. See *supra* note 156 and accompanying text (citing and describing the numerous circuit court decisions which hold waiver by conduct an issue for the courts to decide).

426. RESTATEMENT (SECOND) OF CONTRACTS § 225 cmt. a (1981).

427. *Id.* § 204.

428. *Id.* § 204 cmt. d.

429. See *Zev v. Merman*, 533 N.E.2d 669, 669 (N.Y. 1988) (“What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case.”); see also *1700 Rhinehart LLC v. Advance Am.*, 51 So.3d 535, 540 (Fla. Dist. Ct. App. 2010) (“[W]hen a contract fails to specify a particular period, the law implies a reasonable time under the circumstances.”);

however, have compiled a comprehensive list of factors in order to provide a uniform, predictable approach to this inquiry.⁴³⁰ Particularly, the courts consider “the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith,” and the “possibility of prejudice or hardship” to either party.⁴³¹

First, the courts contemplate the nature and the object of the contract in question by looking to its operative purpose, including “all of the rules and procedures thereunder.”⁴³² For example, the delayed provision of “ministerial” services which bear little significance on a party’s operations⁴³³ will be found much more reasonable than delayed payments of property taxes required under an option contract to purchase real property.⁴³⁴ Second, courts will look to the parties’ prior conduct in order to determine whether they were fulfilling their “contractual duties as intended.”⁴³⁵ For example, one court found a two-week closing period, set abruptly by a seller of real property after it delayed closing for five years, unreasonable.⁴³⁶ Critical to its finding was

German v. Ford, 300 S.W.3d 692, 706 (Tenn. Ct. App. 2009) (“The court will usually imply a term requiring performance within a reasonable time under the circumstances.”); O’Farrill Avila v. Gonzalez, 974 S.W.2d 237, 245 (Tex. App. 1998) (“Upon finding an essential term is missing, the trial judge, in implying that term, is only to consider what was reasonable to the parties in light of the circumstances . . .”).

430. See *Zev*, 533 N.E.2d at 669.

431. *Id.*

432. *Smith Barney, Harris Upham & Co., Inc. v. Liechtensteinische Landesbank*, 866 F. Supp. 114, 117 (S.D.N.Y. 1994) (considering the “deposit rejection procedure” under the parties’ agreement); see *Schober v. Hudson Valley Humane Soc’y for Prevention of Cruelty to Animals, Inc.*, 933 N.Y.S.2d 58, 59 (N.Y. App. Div. 2011) (considering “the unambiguous terms of the stipulation settlement” between the parties); *Bilotto v. Webber*, 568 N.Y.S.2d 438, 439 (N.Y. App. Div. 1991) (considering the terms of a construction contract between a builder and homeowners).

433. *Smith Barney*, 866 F. Supp. at 117.

434. See *Parker v. Booker*, 822 N.Y.S.2d 156, 158 (N.Y. App. Div. 2006) (“Since real property taxes by their nature are due on a particular day, the reasonable date on which they were required to be paid is the date on which they were due.”).

435. *Smith Barney*, 866 F. Supp. at 118.

436. See *Knight v. McClean*, 566 N.Y.S.2d 952, 954 (N.Y. App. Div. 1991) (describing the seller’s conduct which made the time that it set for performance unreasonable).

that the seller's actions exhibited nothing more than a "desire to avoid" performance of the contract as the parties intended.⁴³⁷

Third, courts consider the extent to which each party performed its contractual obligations in good faith; that is, whether each is acting in "consideration" of the other's interests.⁴³⁸ Indeed, a "covenant of good faith and fair dealing is implied in all contracts,"⁴³⁹ and its meaning varies with the circumstances.⁴⁴⁰ Generally, however, "good faith performance . . . emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."⁴⁴¹ Although particular acts of bad faith vary, two notable instances are evading the "spirit" of the bargain and willfully rendering "imperfect performance."⁴⁴² In the arbitral context, for example, one court ordered a labor union to arbitrate with an employer pursuant to an arbitration clause in the parties' collective bargaining agreement.⁴⁴³ When the union attempted to contest the tribunal's jurisdiction, the court stated that parties to an arbitration agreement "must live up to the spirit of their agreement."⁴⁴⁴ They "will not be permitted to take refuge in subtle and adroit evasions in order to defeat the purposes of the agreement."⁴⁴⁵

Finally, the reasonableness inquiry will be affected by the extent to which the delay in question prejudiced each party.⁴⁴⁶ For example, when a finding of unreasonable delay would cause

437. *Id.*

438. *Smith Barney, Harris Upham & Co., Inc. v. Liechtensteinische Landesbank*, 866 F. Supp. 114, 118 (S.D.N.Y. 1994).

439. *Smith v. Gen. Accident Ins. Co.*, 697 N.E.2d 168, 170 (N.Y. 1998).

440. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context.").

441. *Id.*

442. *Id.* § 205 cmt. d.

443. *Publishers' Ass'n of N.Y. City v. N.Y. Newspaper Printing Pressmen's Union No. Two*, 145 N.Y.S.2d 93, 96 (N.Y. Sup. Ct. 1955) (noting that the union contested the arbitrators' jurisdiction "because the [employee's] grievance . . . was ambiguous").

444. *Id.* at 96.

445. *Id.* at 97.

446. See *Zev v. Merman*, 533 N.E.2d 669, 669 (N.Y. 1988) (noting prejudice as a part of the multifactor reasonableness test).

one party to suffer substantial losses while benefitting the other, a court will be much less likely to find the delay unreasonable.⁴⁴⁷

Ultimately, New York’s reasonableness analysis provides a stable, yet flexible framework to determine whether a party has demanded arbitration within a reasonable time. Not all of the factors need weigh in favor of unreasonableness to warrant such a finding, and a strong implication of one factor often implicates another.⁴⁴⁸ Furthermore, the test’s flexibility renders it applicable to a myriad of contractual arrangements and circumstances.⁴⁴⁹ Therefore, this Note proposes that federal courts abandon the waiver–forfeiture doctrine, and incorporate instead, through FAA § 2, New York courts’ multifactor approach as a reasonableness test.⁴⁵⁰ Doing so will establish a uniform, predictable, doctrinally accurate method to determine whether a party has lost its right to arbitrate through pretrial conduct.

447. See *Miller v. Almquist*, 671 N.Y.S.2d 746, 750 (N.Y. App. Div. 1998) (refusing to find unreasonable delay where the buyers would have lost “their opportunity to purchase” an apartment and their “\$54,000 deposit,” while the sellers would “have received the all-cash deal they had bargained for”).

448. See, e.g., *Malley v. Malley*, 861 N.Y.S.2d 149, 152 (N.Y. App. Div. 2008) (finding that the defendant was given an unreasonable time in which to perform where a finding of reasonableness would have left the plaintiff’s “financial position . . . the same,” but prejudiced the defendant severely); *Parker v. Booker*, 822 N.Y.S.2d 156, 158 (N.Y. App. Div. 2006) (finding unreasonable delay but no bad faith); *Knight v. McClean*, 566 N.Y.S.2d 952, 954 (N.Y. App. Div. 1991) (finding that buyers were presented with an unreasonable time to perform where “the previous conduct of the parties” was “[o]f significant importance”).

449. See, e.g., *Malley*, 861 N.Y.S.2d at 152 (applying the reasonableness test to a real estate agreement entered as part of a judgment of divorce); *Smith Barney, Harris Upham & Co., Inc. v. Liechtensteinische Landesbank*, 866 F. Supp. 114, 118 (S.D.N.Y. 1994) (applying the reasonableness test to an agreement established to “facilitate the settlement of securities transactions”); *Schober v. Hudson Valley Soc’y for Prevention of Cruelty to Animals, Inc.*, 89 A.D.3d 715, 716 (N.Y. App. Div. 2011) (applying the reasonableness test to a stipulation agreement entered in lieu of foreclosure).

450. See *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1901 (2009) (stating that FAA § 2 “creates substantive federal law regarding the enforceability of arbitration agreements,” in which traditional state principles of contract law govern the analysis).

3. A “Reasonable Time” to Demand Arbitration:
MicroStrategy, Inc. v. Lauricia

The Fourth Circuit’s decision in *MicroStrategy, Inc. v. Lauricia* presents a useful paradigm to illustrate the efficacy of the reasonableness test. Indeed, the impact of this approach is best exemplified when compared against the strong prejudice requirements propounded by the majority. Recall that in *MicroStrategy*, Lauricia was terminated from her position as the head of MicroStrategy’s Human Resources Department.⁴⁵¹ Within six months of her firing, MicroStrategy filed three separate claims against Lauricia before demanding arbitration—one in state court and two in federal court.⁴⁵² Finally, although we are told only that the parties “agreed” to the arbitral procedures in question,⁴⁵³ let us assume that Lauricia, as a high level employee, negotiated these procedures. At trial, the district court held that MicroStrategy waived its right to arbitrate, finding that its “remarkably aggressive” pretrial conduct and extensive discovery prejudiced Lauricia.⁴⁵⁴

On appeal, let us assume the Fourth Circuit has replaced the waiver doctrine with the reasonableness test. Thus, the question before the court is whether MicroStrategy’s six-month delay in demanding arbitration was unreasonable. If so, the court will consider Lauricia’s duty to arbitrate discharged and continue litigation; if not, then the court will stay further proceedings and compel arbitration.

First, the relevant period in which to consider delay should begin when a party files a claim in court because any delay should coincide with pretrial conduct.⁴⁵⁵ Once that point is identified, the court should begin its analysis by considering the

451. See *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 246 (4th Cir. 2001) (discussing Lauricia’s employment at MicroStrategy).

452. See *id.* at 247–50 (discussing the claims and the time frame within which MicroStrategy filed its claims against Lauricia).

453. *Id.* at 251.

454. *Lauricia v. MicroStrategy, Inc.*, 114 F. Supp. 2d 489, 492–93 (E.D. Va. 2000).

455. See *supra* Part II (discussing how conduct-based waiver has been the focus of the circuits and the issue upon which the Supreme Court granted certiorari).

nature and object of the parties’ arbitration agreement. It should do so, however, in light of the discrete benefits derived through arbitration, and the inherent destabilizing effect of judicial involvement.⁴⁵⁶ Further, the court should consider the nature of the arbitral procedures for which the parties contracted. For example, if the parties’ arbitration agreement provides for expedited procedures, whether ad hoc or institutional,⁴⁵⁷ the court should be far less willing to tolerate delay. In this hypothetical, the arbitration clause requires only that the parties arbitrate “any controversy or claim arising out of . . . th[e] Employee Handbook.”⁴⁵⁸ Thus, although expedited arbitral review is not in question, the inherent destabilization caused by the judicial forum is important to keep in mind moving forward in the analysis.

Next, the court should consider whether the parties’ prior conduct manifests a desire to carry out the arbitration agreement as intended. As the period for consideration begins when one party files a claim, the court should consider which party first filed the claim, the extent of the parties’ litigation activity, and the nature of the parties’ relationship (i.e., whether they were attempting to ameliorate their differences throughout the pretrial process). First, it is particularly significant that MicroStrategy filed three separate complaints after it learned of Lauricia’s employment discrimination charges.⁴⁵⁹ Such conduct shows a clear intent to avoid the arbitral forum, or perhaps that more suspect motives are in play. Second, MicroStrategy engaged in “remarkably aggressive” litigation conduct, as it deposed Lauricia, seized a number of documents, obtained numerous responses to interrogatories, and obtained Lauricia’s personal information, all before demanding arbitration.⁴⁶⁰ Third, after MicroStrategy filed

456. See *supra* Part II (describing the benefits of arbitration).

457. For a useful example of expedited arbitral procedures, see AAA RULES, *supra* note 58, at 42.

458. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 246 (4th Cir. 2001) (internal quotation marks omitted).

459. See *id.* at 246–48 (describing the complaints filed by MicroStrategy).

460. See *id.* at 254 (noting that “MicroStrategy deposed Lauricia, successfully sought the seizure of documents, . . . received responses from Lauricia to interrogatories and requests to produce, and obtained Lauricia’s employment records from her former employers”).

its first two claims, the Equal Employment Opportunity Commission invited the parties to participate in a “conciliation process.”⁴⁶¹ Lauricia, however, declined the invitation and requested that she be issued her “right-to-sue letter” immediately.⁴⁶² Thus, it is apparent that the parties’ relationship had completely deteriorated by the time MicroStrategy demanded arbitration. Ultimately, the above considerations show that MicroStrategy had no desire to exercise the arbitration agreement as intended—that is, to curb the costs and delays appurtenant to litigation through mutually beneficial arbitral procedures.⁴⁶³ Rather, it sought to exhaust Lauricia’s emotional and economic reserves by manipulating the arbitral process.⁴⁶⁴ As it is unlikely that Lauricia intended, or expected, this result, MicroStrategy’s conduct drives the analysis toward unreasonableness.

Third, the court should consider the extent to which Lauricia would suffer prejudice if MicroStrategy’s delay were found reasonable. Conceptually, it is appropriate to maintain the circuits’ notions of prejudice (i.e., costs, delay, and damage to a party’s legal position through pretrial activity), as the other factors in the reasonableness test inform these considerations.⁴⁶⁵ Critically, however, the court should consider expense and delay alone, the very harms sought to be avoided through arbitration,⁴⁶⁶ sufficient to warrant a finding of prejudice.⁴⁶⁷ Therefore, it is much more likely that Lauricia would be found prejudiced under the reasonableness test. Although MicroStrategy’s six-month delay was not particularly egregious, Lauricia was forced to engage in substantial pretrial activity at great personal

461. *Id.* at 247.

462. *Id.*

463. *See supra* Part II (discussing the benefits derived, and expected, through bargained-for arbitral procedures).

464. *See* *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 254 (4th Cir. 2001) (describing how MicroStrategy, through its aggressive litigation conduct, sought to “wear[] [Lauricia] out, both emotionally and financially”).

465. *See supra* Part III (discussing the various considerations encompassed within each circuit’s prejudice analysis).

466. *See supra* Part II (discussing the benefits of arbitration).

467. *See supra* notes 279–80 and accompanying text (discussing the First Circuit’s rationale for finding undue delay and costs, in and of themselves, sufficient to warrant a finding of prejudice).

expense.⁴⁶⁸ Despite the presence of prejudice under the reasonableness test, however, let us assume that the court refused to find prejudice for illustrative purposes.

The final step in the reasonableness test is to consider whether a movant is attempting to exercise the arbitration agreement in bad faith. In doing so, the court should keep in mind that FAA § 3 allows recourse to the judicial forum.⁴⁶⁹ As such, merely filing a claim should not trigger a finding of bad faith. Rather, the court should deny only those demands which contradict the “spirit,” or “defeat the purposes,” of the parties’ arbitration agreement.⁴⁷⁰ Other factors, such as the parties’ prior conduct and the degree of prejudice suffered by the nonmovant, should be informative. In this hypothetical, MicroStrategy’s “remarkably aggressive” pretrial conduct is strongly indicative of bad faith.⁴⁷¹ It moved to compel arbitration only after inflicting significant costs.⁴⁷² Further, its aggressive use of pretrial discovery evinced a willful desire to evade the arbitral framework in favor of one more propitious to its cause.⁴⁷³ Therefore, the court should find that MicroStrategy willfully evaded the spirit of the parties’ agreement and, thus, exercised its arbitral rights in bad faith. Indeed, such a finding should be strongly indicative, if not dispositive, of unreasonable delay.⁴⁷⁴

468. See *Lauricia*, 268 F.3d at 250–51 (finding “no doubt” that MicroStrategy’s pretrial conduct “involved the expenditure of substantial sums of money by all involved”).

469. See 9 U.S.C. § 3 (2011) (permitting parties to stay judicial proceedings pending arbitration, implying that some recourse to a judicial forum before exercising arbitral rights is permissible).

470. *Publishers’ Ass’n of N.Y. City v. N.Y. Newspaper Printing Pressmen’s Union Number Two*, 145 N.Y.S.2d 93, 96–97 (N.Y. Sup. Ct. 1955).

471. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 248 (4th Cir. 2001) (internal quotation marks and citations omitted); see RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981) (citing “evasion of the spirit of the bargain” and “willful rendering of imperfect performance” as particular examples of bad faith).

472. See *Lauricia*, 268 F.3d at 250–51 (finding that *Lauricia* was forced to pay “substantial sums of money” engaging in pretrial conduct).

473. See *id.* at 250, 254 (noting that, “[u]nder the rules by which the parties agreed to arbitrate,” discovery was available but “under standards different from those governing discovery in federal court,” particularly because the arbitrator had more discretion to determine what materials were discoverable).

474. See, e.g., *Smith v. Gen. Accident Ins. Co.*, 697 N.E.2d 168, 170 (N.Y. 1998) (finding per se liability for insurers who refuse settlement offers in bad

Overall, although there was neither any prejudice nor significant temporal delay, the court should find MicroStrategy's delayed performance unreasonable. Focusing squarely on the parties' pretrial conduct, it was clear that MicroStrategy did not attempt to exercise its arbitral rights as intended. Further, its conduct rose to the level of bad faith performance, as it willfully turned cost-effective, stabilizing procedures into weapons of financial malaise and delay. Therefore, the court should hold Lauricia's duty to arbitrate discharged under the reasonableness test.

4. *The Efficacy of the "Reasonableness Test" as Compared to Waiver*

The above paradigm illustrates how the reasonableness test would improve upon the waiver doctrine in three key respects. First, the reasonableness test would unify and standardize the method for determining at what point a party, through pretrial conduct, has lost its right to arbitrate. The test is fundamentally aimed toward protecting parties' legitimate, contractual expectations. This unitary focus, coupled with the severability doctrine's magnifying effect, would center the analysis on preserving the discrete benefits derived through arbitral procedures—stability and predictability.⁴⁷⁵ The resulting approach thus provides an analytic framework,⁴⁷⁶ capable of uniform federal application,⁴⁷⁷ to which parties can look for

faith); *Goodstein Constr. Corp. v. City of N.Y.*, 604 N.E.2d 1356, 1358–59 (N.Y. 1992) (finding that a cause of action based upon allegations of bad faith in the real estate context are sufficient to entitle recovery for damages); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983) (stating that, generally, “an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be *enforced*” (emphasis added)).

475. See *supra* Part II (describing how arbitration benefits parties' underlying contractual arrangements).

476. See *supra* note 34 and accompanying text (describing how businesses which use arbitration clauses in their contractual arrangements desire a stable, “analytical framework” in order to facilitate both dispute resolution planning and establishing arbitral procedures).

477. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (stating that FAA § 2 creates “substantive federal law” which incorporates traditional state contract law principles).

certainty when establishing arbitral procedures. Further, both the prejudice and the rebuttal standards instill a complete lack of focus, hinging parties’ arbitral rights on undefined standards of pretrial conduct.⁴⁷⁸ Conversely, the reasonableness test subordinates prejudice, making it a mere factor in a larger analysis geared toward preserving parties’ expectations. Because parties expect stability, courts would be far less likely to tolerate dilatory “heads I win, tails you lose” pretrial strategies.⁴⁷⁹ If courts effectively police such strategies, parties would be far less likely to attempt them from the outset. Thus, by preventing dilatory pretrial conduct, the reasonableness test would further stabilize the arbitral process.

Second, the reasonableness test would realign the standard for assessing parties’ pretrial conduct with FAA’s overarching objective.⁴⁸⁰ First, its purely contractual methodology comports with the notion that arbitration is simply a matter of contract.⁴⁸¹ Both the discharge and the reasonableness concepts stem from generally applicable contract law principles.⁴⁸² Furthermore, the reasonableness test is aimed directly toward upholding parties’ legitimate expectations, a “fundamental principal” of contract law.⁴⁸³ To be sure, fewer disputes in all may be referred to arbitration, at least in the short term. This would not, however, contravene the liberal federal policy favoring arbitration agreements. Rather, as the policy merely reflects FAA § 2’s substantive mandate—enforcement of arbitration agreements as contracts—the reasonableness test falls directly within its confines.⁴⁸⁴ The circuits’ current analyses, however, do not.

478. See *supra* Part III (describing the circuit split and each circuit’s ill-defined prejudice requirement).

479. See *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995).

480. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

481. See *id.* at 1752 (“Arbitration is a matter of contract . . .”).

482. See *supra* notes 421, 427–28 and accompanying text (discussing the discharge and reasonableness principles under contract law).

483. Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 506 (1984).

484. See *Concepcion*, 131 S. Ct. at 1746 (“The FAA . . . places arbitration

Indeed, parties can neither waive nor forfeit an autonomous contract, the very regard in which arbitration agreements are held under the severability doctrine. Thus, both standards propound approaches clearly rejected by contract law and, as a result, the FAA.⁴⁸⁵

Furthermore, endless litigation over the details of prejudice,⁴⁸⁶ or rebuttal, impugns the FAA's second underlying goal—to “facilitate streamlined proceedings.”⁴⁸⁷ Under the reasonableness test, however, disputes deemed referable to arbitration would be both contractually legitimate (i.e., tested against bad faith) and consigned expeditiously under a predictable framework. Thus, the reasonableness test would unite the FAA's two goals, rather than frustrate both of them—a result clearly favored by the Supreme Court.⁴⁸⁸ Ultimately, the reasonableness framework accomplishes the FAA's overarching objective to a greater extent than waiver both doctrinally and efficaciously.

Third and finally, the reasonableness test would prevent bad faith manipulation of the arbitral process. Indeed, bargained-for arbitral procedures confer significant benefits upon parties' contractual relationships.⁴⁸⁹ Ensuring that parties exercise their arbitral rights in good faith, a requirement of all contractual arrangements,⁴⁹⁰ will ensure that they receive the benefit of their

agreements on an equal footing with other contracts . . .” (citations omitted)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (“The liberal federal policy favoring arbitration agreements . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements . . .”).

485. See *supra* Part IV (discussing the doctrinal inaccuracies of applying the waiver doctrine and forfeiture in the context of analyzing a party's arbitral rights).

486. See *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1120 (8th Cir. 2011) (finding that requiring parties to “litigate endlessly over the details of prejudice” makes little sense in certain circumstances).

487. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

488. See *id.* at 1749 (stating explicitly that its holding causes the FAA's two goals to coincide, but eschewing the dissent's approach in that it “would frustrate *both* of them” (emphasis in original)).

489. See *supra* Part II (discussing the benefits derived through established arbitral procedures).

490. See *supra* note 439 and accompanying text (noting that a covenant of good faith and fair dealing is implied in all contractual arrangements).

bargain in accordance with contract law.⁴⁹¹ Thus, the reasonableness test provides not only a doctrinally accurate approach, but an equitable approach.

VI. Conclusion

Arbitration is, quite simply, a matter of contract.⁴⁹² It is “a private process to which the parties have agreed, and the courts’ only obligation is to uphold that agreement pursuant to established arbitration and contract law.”⁴⁹³ Despite this obligation’s intrinsic simplicity, the Circuit Courts of Appeals have consistently failed to uphold arbitration agreements as contracts, often to the detriment of parties’ arbitral rights. They have yanked the liberal federal policy favoring arbitration from its contractual roots,⁴⁹⁴ and use it to justify doctrinally inaccurate,⁴⁹⁵ manipulative results.⁴⁹⁶

The Supreme Court has recently stated that the FAA’s overarching objective is “to enforce arbitration agreements according to their terms so as to facilitate streamlined proceedings.”⁴⁹⁷ The reasonableness test proposed by this Note is precisely what the Supreme Court requires—a purely contractual approach which accomplishes the FAA’s objective. Further, it provides a comprehensive framework which would unify the circuit courts’ analyses and stabilize the arbitral process in

491. See Burton, *supra* note 483, at 506 (stating that ensuring parties’ legitimate expectations is a fundamental aspect of contract law).

492. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (noting that arbitration is “simply a matter of contract between the parties”).

493. Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages—Where is State Action?*, 2007 J. DISP. RESOL. 417, 419.

494. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (noting that the liberal federal policy favoring arbitration agreements “is at bottom a policy guaranteeing the enforcement of private contractual arrangements”).

495. See *supra* Part IV (describing why waiver, under contract law, is the incorrect approach to determine when a party has, through pretrial conduct, lost its right to arbitrate).

496. See *supra* notes 266–68 and accompanying text (describing how the circuits which impose burdensome prejudice requirements consciously acknowledge the manipulative strategies perpetuated by those requirements).

497. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

accordance with parties' legitimate expectations.⁴⁹⁸ Under this approach, arbitration will remain, simply, a matter of contract.

498. See *supra* Part II (discussing how the stabilizing effect provided by bargained-for arbitral procedures is lost without a predictable legal framework).