The Reality of International Commercial Arbitration in California

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California is one of the largest economies in the world. It is home to many of the most successful companies in all sectors, especially health and technology. In recent years arbitration agreements, which have already been around for almost 100 years, have become boilerplate in most agreements with large California-headquartered companies. The United States Supreme Court continues to issue decisions in support of arbitration, most recently in DIRECTV, Inc. v. Imburgia.[1] *The courts in California, however, have counterintuitively stayed on the side of consumers by repeatedly denying enforcement of arbitration clauses, which forces their companies to go to more friendly jurisdictions, such as New York.*

This Note looks at the history of the Federal Arbitration Act and major U.S. Supreme Court opinions in support of arbitration. That federal support will then be compared to California courts' hesitance to support arbitration and the resulting disagreements between the Supreme Court and California courts. New York law is used to illustrate what an "arbitration-friendly" jurisdiction looks like and what changes California would need to make in order to make it easier for companies to locate their arbitration proceedings in California.

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1. *See generally* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

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INTRODUCTION

The U.S. Supreme Court has set new precedent in recent years, establishing new and creative ways to find arbitration clauses in contracts enforceable.[2] While commercial parties are likely to rejoice, the State of California has continued to test the resolve of the Supreme Court and the presumed enforceability of such clauses as it attempts to rein in consumer arbitration. *American Express Co. v. Italian Colors Restaurant*[3] and *AT&T Mobility LLC v. Concepcion*[4] are examples of such attempts. Both cases originated in California and involved attempts by the state to limit the use of arbitration in commercial contracts. The Supreme Court granted certiorari in both cases.[5]

California has a distinct interest in the future of arbitration because of its effect on business in the state. Although the recent U.S. Supreme Court decisions did not involve commercial contracts, they may nonetheless influence commercial actors' willingness to participate in arbitration in California. The state is now, more than ever, the center of

2. David Lazarus, *Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights*, L.A. TIMES (Dec. 18, 2015, 4:00 AM), http://www.latimes.com/business/la-fi-lazarus-20151218-column.html; David G. Savage, *Supreme Court Says Binding Arbitration Clauses in Consumer Contracts Trump California Law*, L.A. TIMES (Dec. 14, 2015, 12:14 PM), http://www.latimes.com/business/la-na-supreme-court-california-arbitration-20151214-story.html.

3. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

4. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

5. *Am. Express Co.*, 130 S. Ct. 2401 (2010); *AT&T Mobility LLC*, 130 S. Ct. 3322 (2010).

both emerging businesses and thriving corporations.[6] Ironically, however, California has laws regulating ethics, disclosure, and the amount of involvement allowed by foreign attorneys,[7] making arbitration in the state unpredictable and unattractive to many commercial parties.

The arbitration process involves many different steps, each of which undoubtedly threatens to bring the process to a screeching halt. The process begins with the negotiation and signing of an arbitration agreement or a contract with an arbitration clause.[8] Once a dispute arises, if it is arbitrable or within the scope of the agreement and permitted by the laws of the relevant jurisdiction to go to arbitration, it will proceed to arbitration.[9] The stage whereby the threshold jurisdictional issues are resolved is known as the "gateway" stage.[10] This is the first chance for a court to get involved in the arbitration process and, thus, the first chance for it to take a stance in favor of, or against, arbitration.[11] If the dispute does make it to arbitration, the arbitrator(s) will hear the issue and decide the award.[12] If a party wants to contest the award in the jurisdiction where the arbitration took place, then the court will set aside procedures for doing so.[13] If a party then wants to have a court intervene again and assess the award, they can contest the issue in the jurisdiction where enforcement is being sought.[14] The bases for denying enforcement are enumerated in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which has been incorporated into the Federal Arbitration Act ("FAA").[15]

The consequences of California's restrictive approach to arbitration could be far-reaching. If there is a greater possibility that the arbitration clauses will not be upheld by courts in the gateway stages,[16] that the awards will be set aside or denied enforcement, or that the procedures called for are too extensive and costly, then parties, including state

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6. Cedric C. Chao & Steven L. Smith, *Becoming a Global Center for Arbitration*, L.A. DAILY J. (Sept. 20, 2013), http://files.dlapiper.com/files/Uploads/Documents/DLA-Piper-9-20-13-Daily-Journal.pdf.

7. Credit Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1135 (9th Cir. 2005); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394–95 (2004); Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2368 (2012).

8. TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 99–100 (5th ed. 2012).

9. *Id.* at 100–01.

10. *See generally* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012) (discussing U.S. courts' approach to achieving an efficient and legitimate arbitration regime).

11. *Id.* at 7; VÁRADY ET AL., *supra* note 8, at 103.

12. VÁRADY ET AL., *supra* note 8, at 738.

13. *Id.* at 815.

14. *Id.* at 911.

15. *Id.*

16. *See generally* Bermann, *supra* note 10, at 1.

actors, may choose to consciously draft their arbitration clauses to specify that the proceedings should take place elsewhere. California's restrictions on arbitration are intended to maintain justice in the process. For example, in one case California's restriction on class action waivers protected consumers by allowing them to group together to seek substantial relief that could only be secured in arbitration.[17] While California's stance on arbitration is risky and often detrimental to large commercial parties, it provides an advantage and safeguard for consumers and non-corporate actors.

This Note illustrates that, overall, California aims to protect its citizens throughout the arbitration process by regulating the process and focusing on the original contract.[18] The mechanisms used by California courts to regulate the process can be beneficial to commercial parties in certain situations—such as judicial review expansion—and harmful in others—such as the heightened ethics standards that apply as well as the level of scrutiny the court will employ when reviewing how the agreement was made. California's protectionist stance places it in opposition to the Supreme Court's expansive interpretation of the FAA and other pro-business, pro-arbitration jurisdictions.

Part I of this Note analyzes the recent Supreme Court decisions in order to lay the foundation of the conflict between California and the federal law. Part II explores whether the assertion that arbitration is more arduous in California than in other states is well-founded or exaggerated, as well as the effect recent Supreme Court decisions have had on commercial actors. Part III explores the possibility of federal preemption of conflicting California law. Part IV then discusses whether such preemption would be to the benefit or detriment of commercial parties hoping to arbitrate in California. Part V analyzes how California complies with the requirements set by the New York Convention,[19] and finally, Part VI contrasts the nature of the law in California with New York's law, as New York is a jurisdiction widely regarded as arbitration-friendly.[20]

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17. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 338 (2011).

18. Ben Feuer, *The Supreme Court Cases Californians Should Be Watching*, THE RECORDER (Sept. 17, 2015), http://www.therecorder.com/id=1202737530874/The-Supreme-Court-Cases-Californians-Should-Be-Watching.

19. *The New York Convention*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org (last visited Apr. 23, 2017).

20. N.Y. STATE BAR ASS'N, CHOOSE NEW YORK FOR INTERNATIONAL ARBITRATION 3 (2011).

I. Recent Supreme Court Decisions Regarding Consumer Arbitration and Their Possible Effect on Commercial Arbitration in California

The Supreme Court has issued several groundbreaking decisions related to arbitration in the last five years,[21] many of which directly overturn decisions of the California Supreme Court and Ninth Circuit.[22] The FAA, a "dusty 1925 law," was enacted to govern and facilitate arbitration in the United States.[23] Because the FAA is incomplete or silent on many issues,[24] the scope of the FAA within its plain meaning has always been uncertain.[25] Accordingly, application of the FAA today is largely based on judicial interpretation.[26] As Justice Kagan so eloquently stated in her dissent in *American Express Co.*: "The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires . . . ."[27] Many scholars and judges have joined Kagan in arguing that federal law and the FAA do not include a "general federal policy favoring arbitration."[28] Instead, it is the judicial pro-arbitration dicta of the Court that created this arbitration-friendly environment.[29]

While the FAA does not preempt state law entirely, the FAA is now the "dominant substantive law in a field (contracts) normally governed by state rules," which leads to tension in a federalist system.[30] Judges and scholars have questioned the intent of the legislature that enacted the FAA and what assumptions were made about its applications, especially in relation to the powers of states.[31] Although it took the Court twenty-eight years following the adoption of the FAA for the Court to issue an opinion concerning the Act, the last three decades have seen the Court embrace and drastically extend the reach of the FAA.[32] Legal scholars have criticized such expansion as too broad and "thinly reasoned" in light of the lack of evidence supporting the contention that the enacting Congress

21. *See, e.g.*, *AT&T Mobility LLC*, 563 U.S. at 333; Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

22. *AT&T Mobility LLC*, 563 U.S. at 333; *Am. Express Co.*, 133 S. Ct. at 2312; Lyra Haas, Note, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1420 (2014).

23. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0.

24. Peter Ashford, Handbook on International Commercial Arbitration 30–31 (2009).

25. Silver-Greenberg & Gebeloff, *supra* note 23.

26. *See, e.g.*, Haas, *supra* note 22, at 1419–20.

27. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

28. Steven Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 Rutgers L. Rev. 369, 392 (1999).

29. *Id.* at 400.

30. Ralph H. Folsom, Principles of International Litigation and Arbitration 92 (2016).

31. Frank Blechschmidt, Comment, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. Pa. L. Rev. 541, 546 (2012).

32. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 362.

intended this result.[33] Virtually every time an arbitration case comes before the Court, the majority rules in favor of arbitration[34] and consistently holds that the FAA preempts state law.[35]

Because the FAA does not specifically indicate that it applies to state courts,[36] there has been disagreement among judges as to whether it was intended to apply only to federal courts, or to both federal and state courts.[37] For the past twenty years, Justice Clarence Thomas has maintained the position that the FAA does not apply to state courts.[38] Similarly, Justice O'Connor has stated that "the Act is inapplicable to state court proceedings."[39] However, half a century after the FAA was passed, the majority came to the opposite conclusion in *Southland Corp. v. Keating*, holding that state courts are obligated to apply the core principles and central provisions of the FAA.[40] Previously, the FAA only applied in federal diversity cases dealing with interstate commerce per the Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.[41] Taken together, *Prima Paint* and *Southland Corp.* "federalized the law of arbitration by establishing the FAA as the generally applicable substantive law of arbitration in the United States."[42]

Section 2 of the FAA has garnered a great deal of attention from legal scholars and courts alike.[43] Section 2 states:

> A written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*[44]

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33. Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 227 (2014).

34. Blechschmidt, *supra* note 31, at 549–50.

35. Lauren Van Waardhuizen, Note, *The Evolution of Class Arbitration Waivers and the Courts*, 62 DRAKE L. REV. 1131, 1140 (2014).

36. Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 391 (1992).

37. Blechschmidt, *supra* note 31, at 550–51.

38. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285–97, (1995) (same); Preston v. Ferrer, 552 U.S. 346, 363 (2008) (same); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (same); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 460 (2003) (same); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 689 (1996) (same)).

39. Perry v. Thomas, 482 U.S. 483, 494 (1987) (O'Connor, J., dissenting); Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

40. Strickland, *supra* note 36, at 396.

41. *Id.*

42. *Id.*

43. *Id.*; Van Waardhuizen, *supra* note 35.

44. Federal Arbitration Act, 9 U.S.C. § 2 (1947) (emphasis added).

The first clause, requiring "a transaction involving commerce,"[45] sparked a heated debate among judges and scholars over whether Congress exercised its Article I power over interstate commerce or its Article III power to control federal courts when enacting the FAA. However, in *Erie Railroad v. Thompson*, the Court concluded that enactment of the FAA falls within Congress's Commerce Clause power.[46] Thus, the FAA is the law that should be applied in federal court because it involves the "substantive regulation of interstate commerce."[47] Accordingly, the FAA now enjoys a much broader application than it used to, because recent decisions by the Court have expanded the Commerce Clause to cover virtually every commercial transaction.[48]

The second clause of section 2, which states that an arbitration agreement will be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract,"[49] is widely referred to as "the Savings Clause."[50] The Savings Clause has become "a favorite haven for state courts wishing to apply state law rather than the FAA."[51] The judges of those state courts assert that the Savings Clause and its accompanying legislative history provide a clear indication that the enacting Congress intended to preserve the strong role of the states in judicial processes involving arbitration by permitting courts to apply common law.[52] Similarly minded scholars argue that Congress's purpose in enacting the FAA was to compel *federal* judges who were hostile toward arbitration by limiting the role of the judiciary, and was not intended to affect state court judges.[53] In fact, when the FAA was enacted, its proponents promised Congress that it would not create a "[f]ederal bludgeon to force an individual State into an unwilling submission to arbitration enforcement."[54]

The Court has utilized numerous California cases that applied state law to find arbitration clauses unenforceable in order to illustrate the minimized role of state judiciaries in the arbitration setting.[55] Notably,

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45. *Id.*
46. Strickland, *supra* note 36, at 395.
47. *Id.*
48. Aaron Blumenthal, *Circumventing* Concepcion*: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 705 (2015).
49. 9 U.S.C. § 2.
50. Van Waardhuizen, *supra* note 35, at 1132.
51. *Id.* at 1135.
52. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 360–61 (2011).
53. Blumenthal, *supra* note 48, at 702.
54. *Arbitration of Interstate Commercial Disputes: J. Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comm. on the Judiciary*, 68th Cong. 40 (1924) (statement of Julius Cohen, Member, Comm. on Commerce, Trade and Commercial Law; Gen. Counsel, New York State Chamber of Commerce).
55. Haas, *supra* note 22, at 1420.

the Court's most recent arbitration decision, *DirectTV v. Imburgia*, involved review of a case from the California Court of Appeal that earned the attention of neither the California Supreme Court nor the Ninth Circuit.[56] The biggest issues arise when states find arbitration agreements unenforceable due to public policy considerations, because decisions based on public policy allow individual state judges' attitudes toward arbitration to influence their ruling.[57] Therefore, while the text of the Savings Clause still stands, its effect and applicability is shrinking as the Court "eliminat[es] [the] escape routes" available for avoiding application of the FAA.[58]

California courts, like other state courts, have utilized the Savings Clause to apply state law in interpreting whether they could avoid enforcement of the FAA.[59] California courts specifically are also applying more stringent contractual standards in the arbitration context[60] by taking into account extra-legislative "interests of justice."[61] In previous years, California courts usually demonstrated a "general willingness" to enforce arbitration agreements, but have since shifted toward resisting the Court's recent expansion of the application of the FAA.[62] One scholar went so far as to claim that an "open revolt" among California courts has ensued.[63] Another warned, "as long as California courts maintain their distrust of arbitration as a dispute resolution mechanism, the [California Supreme Court] will continue to try to find new ways around the FAA."[64]

In 2013, the previously mentioned *Concepcion* case forced legal academics and commercial parties to take notice of the arbitration battle that was occurring. In *Concepcion*, a California court held a class action waiver in a consumer arbitration void on the basis of unconscionability.[65] On appeal, the U.S. Supreme Court held that the FAA preempted the state law prohibiting class action waivers in arbitration agreements.[66] The dissenting judges in *Concepcion* believed that California's method of applying state common law should have been allowed as it was not a

56. Feuer, *supra* note 18.

57. Strickland, *supra* note 36, at 401.

58. Haas, *supra* note 22, at 1425.

59. Blechschmidt, *supra* note 31, at 559.

60. *Id.*

61. Van Waardhuizen, *supra* note 35, at 1145 (quoting Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982)); Comerica Bank v. Howsam, 145 Cal. Rptr. 3d 795, 804 (2012).

62. Haas, *supra* note 22, at 1420–21.

63. Jose (Joe) Perez & Hal Brody, *U.S. Supreme Court Tires (for Now) of Playing "Whack-a-Mole" with California over Arbitration*, CAL. EMP. L. UPDATE (Jan. 21, 2015), http://calemploymentlawupdate.proskauer.com/2015/01/u-s-supreme-court-tires-for-now-of-playing-whack-a-mole-with-california-over-arbitration/.

64. Haas, *supra* note 22, at 1421.

65. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

66. *Id.*

blanket anti-arbitration policy.[67] California courts sidestepped application of the the Court's holding in future decisions through a narrow reading of that holding. Such sidestepping led the Supreme Court to address the issue again two years later in *American Express Co.*, this time in an antitrust context.[68]

While *Concepcion* concerned class action waivers in consumer arbitration clauses, the result of the case can also be seen as a continuation of the disagreement between the Supreme Court and California.[69] *Concepcion* held that states are preempted from invalidating class action waivers in arbitration agreements because the invalidations stood "as an obstacle to the purposes behind the FAA," and that holding has the potential to create far-reaching effects.[70]

The persistence of California courts' less than amiable attitude toward the enforcement of arbitration agreements in consumer cases could have serious carryover effects for international commercial arbitration. Commercial parties are not unsusceptible to a less sophisticated business asserting the unconscionability defense.[71] Luckily, however, it is difficult for businesses to successfully claim that they are an unsophisticated party, as discussed in *BaySand Inc. v. Toshiba Corp.*[72] There, the plaintiff owned a successful business that required them to frequently enter license agreements.[73] The plaintiff did not retain counsel and then claimed not to understand the magnitude of an arbitration clause.[74] The court held that the plaintiff could not qualify as an unsophisticated party because there was not a high level of requisite understanding for the type of contract that was at issue.[75]

California has proven to be fiercely protective of consumers, especially when they are facing a Goliath of a business.[76] Accordingly, commercial parties may feel inclined to move their arbitration proceedings with consumers and less sophisticated commercial parties to more arbitration-friendly jurisdictions, such as New York.[77] Once commercial parties establish relationships with arbitrators and attorneys in that jurisdiction, it would also be more pragmatic for those parties to take the

67. *Id.* at 358.
68. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2306 (2013); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. (SYMPOSIUM ISSUE) 161, 163 (2015).
69. Haas, *supra* note 22, at 1451.
70. Blechschmidt, *supra* note 31, at 542.
71. BaySand Inc. v. Toshiba Corp., No. 15-cv-02425-BLF, 2015 U.S. Dist. LEXIS 157442, at *2 (N.D. Cal. Nov. 19, 2015).
72. *Id.* at *14.
73. *Id.*
74. *Id.*
75. *Id.* at *16.
76. Feuer, *supra* note 18.
77. Chao & Smith, *supra* note 6.

rest of their international commercial arbitration disputes there as well. These cases demonstrate that California courts are standing firm in their view of state power over arbitration, which may force the Supreme Court to speak on the issue again before compliance with this new interpretation of the FAA's application is observed among California courts.[78]

II. California's Arbitration Laws

In addition to California's paternalistic attitude toward consumer disputes, the state's arbitration laws also create uncertainty, annoyance, and worry for commercial parties.[79] California has laws that apply to arbitration generally and laws that apply only in international cases.[80] If the dispute involves an intrastate contract, or if the parties explicitly contract to apply California law,[81] then the California Arbitration Act governs. California adopted its international arbitration law in 1988, the California International Arbitration and Conciliation Act ("CIACA"), based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration.[82] The CIACA does not speak to enforcement, so parties must revert to the California Arbitration Act for instruction in those instances.[83] California likely enacted this international arbitration statute to be more attractive to parties seeking international commercial arbitration,[84] however, since both the FAA and CIACA apply to international commercial arbitration it may actually create more uncertainty.

Ironically, uncertainty in the law is precisely what commercial parties try to avoid and why they prefer arbitration in the first place.[85] On the other hand, the fact that the CIACA is based on the UNCITRAL Model Law "should provide some comfort to parties choosing California as the venue for an international arbitration" since it may be more familiar to them when compared to the FAA, which is not based on the Model Law.[86] The CIACA does not even recognize the FAA's predominant role, stating that it "applies to international commercial

78. Haas, *supra* note 22, at 1458.

79. Chao & Smith, *supra* note 6.

80. Cal. Code Civ. Proc. §§ 1141.10–1141.32 (West 2004).

81. William E. Thomson et al., Note, *Enforcing Arbitration Awards in California*, Prac. L. (2015), http://www.gibsondunn.com/publications/Documents/Thomson-Jura-Craig-Kostecka-Enforcing-Arbitration-Awards-in-California-Practical-Law-2.2015.pdf.

82. Albert S. Golbert & Daniel M. Kolkey, *California's Adoption of a Code for International Commercial Arbitration and Conciliation*, 10 Loy. L.A. Int'l & Comp. L.J. 583, 583 (1988); Chao & Smith, *supra* note 6.

83. Thomson et al., *supra* note 81, at 1.

84. Daniel A. Zeft, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. Int'l L. & Com. Reg. 705, 709 (1997).

85. Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 Int'l Law. 209, 215 (1991).

86. Golbert & Kolkey, *supra* note 82, at 589.

arbitration 'subject to any agreement which is in force between the United States and any other state or states.'"[87] California state courts allow parties to partially opt out of the FAA and apply California law.[88]

Preemption issues aside, there are significant differences between the FAA and California's arbitration laws that parties take into consideration. For example, California laws have more avenues for setting aside arbitration awards than the FAA,[89] but California will only enforce final awards.[90] Further, the statute of limitations is longer under California law (four years) compared to the FAA (one year under Chapter One and three years under Chapter Two).[91]

There are numerous ways in which California creates an atmosphere that is inhospitable to international commercial arbitration, including its harsh, uncertain, and out of date laws regarding foreign attorneys and foreign arbitrators.[92] While not expressly stated, California law and jurisprudence on the matter seem to conclude that foreign counsel cannot represent their clients in arbitration proceedings that take place in California.[93] Therefore, even if a party also hires counsel in California, that party's foreign attorneys may still be subject to sanctions.[94] This could give serious pause to major foreign corporations that would not feel comfortable having a large amount of money on the line in an unknown jurisdictional territory without the guidance of their trusted advisors.

Not all of California's policies are adversarial to arbitration, however. Specifically, many commercial parties appreciate California's promotion of the expansion of judicial review in arbitration clauses.[95] California is only one of few jurisdictions in the United States that allows for that possibility through expansive judicial review, which may result in commercial parties moving their proceedings to other states because a primary appeal of arbitration is to have the courts as far removed from the process as possible. While the Supreme Court rejected such an expansion in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, California continues to allow arbitration clauses that contract for the expansion of

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87. Zeft, *supra* note 84, at 720 n.32 (citing CAL. CODE CIV. PROC. § 1297.11 (West 1996)).
88. Imburgia v. DIRECTV, Inc., 170 Cal. Rptr. 3d 190, 194 (2014) (noting that it is not possible to opt out of the FAA in its entirety).
89. Thomson et al., *supra* note 81, at 5.
90. *Id.* at 3. There are three types of awards: interim, partial, and final. A final award is one that resolves all issues between the two parties and leaves nothing else to be arbitrated. *See generally* James M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 AM. REV. INT'L ARB. 1 (2005).
91. Thomson et al., *supra* note 81, at 2.
92. Chao & Smith, *supra* note 6.
93. *See* ASHFORD, *supra* note 24, at 59–60.
94. *Id.* at 60.
95. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 606–07 (Cal. 2008).

judicial review.[96] In apparent reliance on dicta in *Hall Street*,[97] California requires a case to be in state court, applying state law,[98] and that the arbitration clause must be written in precise language with considerable care in order for the expansion of judicial review to be allowed.[99] In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court read *Hall Street* to hold that "the FAA does not pre-empt state arbitration law" that allows for the expansion of judicial review.[100] "[T]he state law is fundamentally consistent with the FAA goal of ensuring the enforceability of agreements to arbitrate."[101] The Court has stated that arbitration agreements are products of consent and contract and should therefore be enforced on their terms.[102] California enforces arbitration terms by allowing parties to get exactly what they contract for as long as the agreements are conscientiously drafted.[103]

Many scholars believe that this was an outright dismissal of the Supreme Court's rationale in *Hall Street*.[104] Although the Supreme Court sees expansion of judicial review as conflicting with the fundamental principles of arbitration,[105] it is also true that "sometimes . . . parties would actually prefer a more thorough and intrusive court review of an award's merits."[106] This is especially true for commercial actors who often have enormous sums of money at stake.[107] Expansion of judicial review may, in cases like these, encourage arbitration in California to continue despite its many drawbacks.

III. Preemption

A. Are There Preemption Concerns with Respect to California's Arbitration Laws?

Because "'[s]tates cannot require a procedure that is inconsistent with the FAA,' no matter how desirable,"[108] some may question if any of California's arduous procedures for commercial parties may be preempted by federal law. This possibility of preemption could either lead a commercial

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96. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586–87 (2008).

97. Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. Disp. Resol. 101, 117 (citing *Hall Street Assocs., L.L.C.*, 552 U.S. at 590).

98. Thomson et al., *supra* note 81, at 4.

99. John J. Barceló III, *Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective* 7 (Cornell Law Faculty Working Papers, Working Paper No. 67, 2009).

100. *Id.* at 6.

101. *Id.*

102. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58 (1995).

103. *Id.*

104. Folsom, *supra* note 30, at 96.

105. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008).

106. Barceló III, *supra* note 99 (emphasis omitted).

107. *See* Seagate Tech., LLC. v. W. Dig. Corp., 854 N.W.2d 750, 753 (Minn. 2013).

108. Van Waardhuizen, *supra* note 35, at 1133.

party to fight the California law on appeal or provide hope that the arbitration landscape in California will change to reflect current federal jurisprudence. According to settled federal law, California's arbitration laws and procedures cannot "impermissibly burden arbitration agreements"[109] or provide for disproportionate treatment in arbitration contracts as compared to regular contracts.[110] However, there is disagreement as to the effect of explicitly agreeing to arbitration in California.[111]

Some commentators say that procedural state rules are not preempted if the parties have agreed to arbitration in California, even if the underlying transaction involves interstate commerce.[112] Other evidence points to the fact that "if the transaction or contract in question involves interstate commerce, even if it was not contemplated by the parties, it is subject to FAA preemption."[113] The Ninth Circuit maintains ambiguity by not speaking directly to the procedural law.[114] Instead, the Ninth Circuit stated that there is a "strong default presumption that [federal law], not state law, supplies the rules for arbitration," but that this can be overturned by a showing of the parties' "clear intent to incorporate state law rules for arbitration."[115] The motivations of the California Legislature in passing these arbitration laws and procedures are not relevant to the analysis. Rather, the test focuses on the burden placed upon the arbitration process and the conflict with the FAA.[116]

The Supremacy Clause in the U.S. Constitution states that federal law is supreme to state law.[117] In a practical sense, this means that in certain situations the FAA may preempt state arbitration laws.[118] Historically, the Court would apply the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[119] Slowly, the Court has shaped FAA policy through its jurisprudence, bulldozing contrary state policies and finding the FAA applicable even in cases where state remedies or

109. William G. Phelps, *Pre-Emption by Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, *4; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67–70 (2010).

110. Phelps, *supra* note 109, at *2.

111. *Id.* at *3; Van Waardhuizen, *supra* note 35, at 1141.

112. Phelps, *supra* note 109, at *3.

113. Van Waardhuizen, *supra* note 35, at 1141.

114. Metzler Contracting Co. LLC. v. Stephens, 479 F.App'x 783, 785 (9th Cir. 2012) (citing Johnson v. Gruma Corp., 614 F.3d 1062, 1066–67 (9th Cir. 2010)).

115. *Id.* (quoting *Johnson*, 614 F.3d at 1066–67).

116. Phelps, *supra* note 109, at *3.

117. U.S. CONST. art. XI; Credit Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1128 (9th Cir. 2003).

118. *See generally* Phelps, *supra* note 109 (explaining how the FAA interacts—that is, preempts—state law).

119. Perry v. Thomas, 482 U.S. 483, 489 (1987).

procedures would be undermined or interfered with.[120] Justice Stevens' dissent in *Perry v. Thomas* highlights the effect of the Court's interpretation of the FAA:

> Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.[121]

Much of the uncertainty concerning the battle between the FAA and state laws is derived from the fact that the FAA "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[122] *Concepcion* made it clear that the FAA preempts outright prohibitions on arbitration, since the prohibition goes directly against the intent of the FAA—reducing barriers to the alternative dispute resolution method.[123] However, previous case law has held that in certain circumstances state laws, including traditional contract common law, may be preempted.[124] One such circumstance involves a state giving disproportionate, unfavorable treatment to arbitration contracts in relation to non-arbitration clauses.[125] This can be accomplished either by applying a stricter standard of normal contract law principles when analyzing arbitration contracts or by treating arbitration contracts differently in practice.[126] If the FAA is broader than state law, then it will apply even if the parties have agreed to arbitration in California and have a choice of laws clause that designates California law.[127]

In preemption analysis, the Court generally "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"[128] in order to protect values of federalism.[129] As the dissent in *Concepcion* acknowledges, the Court has now strayed from the

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120. Michael A. Rosenhouse, *Construction and Application of Federal Arbitration Act—Supreme Court Cases*, 28 A.L.R. FED. 2d 1, *8 (2016).

121. *Perry*, 482 U.S. at 493 (Stevens, J., dissenting).

122. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

123. AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 339–44 (2011).

124. *Id.*

125. Phelps, *supra* note 109, at *26.

126. *Id.*; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 77 (2010) (Stevens, J., dissenting).

127. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995).

128. *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1607 (2007) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) [hereinafter *New Evidence on the Presumption Against Preemption*]; *see* Scott R. Swier, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner:* Allied-Bruce Terminix Companies, Inc. v. Dobson, 41 S.D. L. REV. 131, 159–63 (1996).

129. *New Evidence on the Presumption Against Preemption:*, *supra* note 128, at 1605.

traditional constitutional law principle that was a presumption against preemption.[130] The FAA now preempts more than previously foreseen, lessening the impact of states rules, which may contradict the legislative history illustrating the drafters' intent.[131]

Scholars like Professor Christopher Drahozal see the Court's recitation of FAA preemption as divided into two generations.[132] The first generation, which began in 1984 with the previously mentioned case of *Southland Corp.*, concerned state laws that invalidated arbitration agreements.[133] The second generation, which began in 2003 with the case of *Green Tree Financial Corp. v. Bazzle*, involves states using their laws to modify and regulate parties' agreements.[134] California's ethics and disclosure rules, as well as their regulations on arbitral institutions, are examples of such state laws.[135] California standards are intended "to promote public confidence in the arbitration process."[136] California state judges lack confidence in the arbitration process, many of whom doubt that the process is as valid as the normal judicial avenues.[137]

For example, the California Ethics Standards for Neutral Arbitrators ("California Ethics Standards") are more stringent than many federal requirements.[138] There are parties that dislike the strict state requirements because of the burden they put on the process, while others argue that the standards still fall short, and that California should be doing more to ensure fairness in arbitration.[139] California also has a broad liability statute that can hold both a biased arbitration provider and their employer accountable.[140] Not only does California law require more than is necessary for compliance with the FAA, some of the regulations are "significantly more stringent than are those of mainstream arbitration organizations such as the American Arbitration Association . . . ."[141]

While the California Ethics Standards are not completely preempted because they have been found to comport with the FAA's section 10 requirement mandating disclosure of possible bias,[142] there are certain instances where the Standards will be preempted. For example, in the case of *Credit Suisse First Boston Corp. v. Grunwald*, the Ninth Circuit

130. AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 366 (2011).

131. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 400–01 (1998).

132. Drahozal, *supra* note 7, at 393–95.

133. *Id.*

134. *Id.*

135. *Id.* at 394–95.

136. Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097, 1116 (N.D. Cal. 2003).

137. Farmer, *supra* note 7, at 2367.

138. *Id.* at 2368.

139. *Id.* at 2377.

140. *Id.* at 2370.

141. *Id.* at 2373.

142. Phelps, *supra* note 109, at *15.

found that California's high standards make complying with both the California Ethic Standards and the Securities and Exchange Act of 1934 almost impossible.[143] Accordingly, the court found the California law to be preempted by the FAA.[144] The California Legislature intended for the state's standards to apply n *Grunwald*, though the Ninth Circuit found that those standards stood in the way of Congress's objectives.[145]

Additionally, California's expansive disclosure requirements add to the cost of conducting an arbitration proceeding, which academics argue deters parties from arbitrating in California.[146] If the Court finds that normal contracts in California are not similarly regulated, the Court may find that the regulations contradict the rule that states "may not impose on arbitration requirements inapplicable to other contracts."[147] As seen in *Volt Information Sciences v. Stanford University*, the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[148]

B. It Is Uncertain Whether Preemption Will Help or Hurt Commercial Actors

The Court appears to be setting a trend in recent case law of preempting any law that contradicts its pro-arbitration policy, even if that requires expanding the FAA.[149] This apparent preference will be helpful to commercial parties who want the FAA to apply over California law. Justice Breyer's dissent in *Concepcion* demonstrates that Congress intended the FAA to apply to sophisticated businesses.[150] The Court's statement in *Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth*, "that federal policy applies with special force in the field of international commerce" has been reiterated in other international commercial arbitration cases[151] and has now become a foundational principle.[152] This is unsurprising since commercial interests played a large part in lobbying

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143. Credit Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1128–30 (9th Cir. 2005).

144. *Id.* at 1137.

145. *Id.* at 1133.

146. *Id.* at 1135.

147. William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 Transnat'l L. & Contemp. Probs. (Symposium Issue) 19, 40 (1998).

148. Phelps, *supra* note 109, at *16 (quoting Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478 (1989)).

149. Haas, *supra* note 22, at 1455; Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. Kan. L. Rev. 795, 795 (2012).

150. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 360–62 (2011).

151. TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 933 (D.C. Cir. 2007); Asahi Glass Co. v. Toledo Eng'g Co., Inc., 262 F. Supp. 2d 839, 841 (N.D. Ohio 2003); FR. 8 Sing. Pte. Ltd. Albacore Mar. Inc., 794 F. Supp. 2d 449, 458 (S.D.N.Y. 2011); Sural (Barb.) Ltd. v. Gov't of the Republic of Trinidad & Tobago, No. 1:15-cv-22825-KMM, 2016 U.S. Dist. LEXIS 107041, at *7 (S.D. Fla. Aug. 12, 2016); Shilmann Rocbit, LLC v. Am. Blasting Consumables, Inc., No. 2:16-cv-06745, 2016 U.S. Dist. LEXIS 137412, at *13 (S.D. W. Va. Oct. 4, 2016).

152. Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

for the passage of the FAA.[153] Moreover, it is less costly for parties if federal law applies to international commercial arbitration since complying with California's ethics and disclosure laws is complicated and drastically increases administrative costs.[154]

This strict standard applied in commercial cases may dissuade individuals and companies from arbitrating in California. As previously discussed, there are various reasons why commercial parties would push for the expansion of judicial review of their arbitration agreements and awards, which is not permitted under the FAA.[155] In *First Options of Chicago, Inc. v. Kaplan*, the Court required that, in addition to applying regular rules of contract formation, courts should only assume that the parties agreed to arbitration if there is "clear and unmistakable evidence" that they meant to do so.[156] California law, however, contradicts the *First Options* rule on arbitrability by requiring mandatory delegation of arbitration questions to the arbitrator, regardless of whether there is explicit evidence of intent to arbitrate.[157] This law understandably raises preemption concerns but could be supplemented by the expansion of judicial review, thereby making it less risky. Also, the longer statute of limitations provided for by California law[158] could benefit commercial parties who want to ensure that no claim goes unpursued. However, other commercial parties may prefer a shorter statute of limitations if they expect disagreements where they are the party at fault. In that scenario, they would want the process to be more difficult and time-constrained for the party bringing a case against them.

Arbitrating in California is a gamble. Large corporations who have vast amounts of money at stake may want to think seriously and strategically about their interests. They must balance the benefits of flexible and predictable laws on who may serve as their attorneys and arbitrators against the ability to contractually expand the judicial review of their arbitration awards. It is important to note that the same California courts that are tough on arbitration will review the arbitration awards if the parties contract for expansion of judicial review.[159] Additionally, many academics argue that if California revises the totality of its contract law, rather than just areas pertaining to arbitration, then preemption should not apply because "the FAA guarantees that arbitration agreements will

153. Harding, *supra* note 131, at 400–01.
154. *See* Credit Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1135 (9th Cir. 2003).
155. *See supra* Part II.
156. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
157. Zeft, *supra* note 84, at 773–75 (citing *First Options of Chi., Inc.*, 514 U.S. at 938).
158. Thomson et al., *supra* note 81, at 4.
159. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008).

be treated on an equal footing as compared to other contracts; it does not guarantee that they will be treated better."[160]

IV. Enforcement of Awards Under the New York Convention in California

Thus far, this Note has detailed the concerns regarding how California's laws interact with the FAA. However, California's laws are not the only examples of legislation ripe for analysis. The New York Convention also deserves consideration. Chapter Two of the FAA codifies the New York Convention[161] and stops "far short of being a full faith and credit clause for foreign awards."[162] The Supremacy Clause, which allows the FAA, a federal law, to enjoy supremacy over state law, also extends to the New York Convention, which is a treaty. In addition to preemption concerns, the fact that the United States is party to the New York Convention[163] makes it imperative that California does not impede the main goals and promises of the treaty. Therefore, California must aim "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[164]

The issues of enforcement discussed thus far mostly revolve around arbitration proceedings that take place within the jurisdiction of California.[165] However, the New York Convention and FAA also envision situations in which the proceedings are held in other jurisdictions but California courts are called upon to enforce the award.[166] A party with an award to enforce will normally go to the location where their adversary has the most assets. A foreign party seeking to enforce an award is highly likely to come to California since it is the world's ninth largest economy and home to fifty-three Fortune 500 companies.[167] Therefore, if a company's assets are largely held in California, it may not be an option for a party to seek enforcement in a more arbitration-friendly jurisdiction, such as New York.

The California International Arbitration and Conciliation Act accounts for and acknowledges that the New York Convention, unlike the FAA, has a predominant role.[168] However, there are differences between

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160. Bermann, *supra* note 10, at 568; Harding, *supra* note 131, at 476.
161. Pedro J. Martinez-Fraga, The American Influence on International Commercial Arbitration: Doctrinal Developments and Discovery Methods 160 (2009).
162. Carrington & Haagen, *supra* note 32, at 363.
163. *The New York Convention*, *supra* note 19.
164. Gueyffier v. Ann Summers, Ltd., 50 Cal. Rptr. 3d 294, 301 (2006).
165. *See supra* Part III.
166. Martinez-Fraga, *supra* note 161, at 160–66.
167. Chao & Smith, *supra* note 6.
168. Thomson et al., *supra* note 81.

California's application of the New York Convention and its application in other states. Moreover, there are some issues of interpretation regarding when the New York Convention applies and when California law applies. For example, California is the only state that does not require the entire contract containing an arbitration agreement to be supplied in enforcement proceedings.[169] This demonstrates how California courts scrutinize arbitration agreements apart from the whole contract. Analyzing the contract this way is more protective of California's citizens because it allows for a finding of unfairness based on the arbitration clause alone, rather than weighing the fairness of the contract as a whole.

In one proceeding, a California Court of Appeal found that the New York Convention does not preempt California law on vacating awards and therefore applied state law to set aside an award between a British and French party.[170] However, in general, awards in disputes between international parties tend to be upheld more often than in cases between two American parties.[171] Some legal scholars see this as an overly amiable attitude towards international cases. Justice Stevens feared this result in his dissent in *Mitsubishi,* which he dubbed "superinternationalism."[172] Some cases suggest that California will maintain a protectionist view, but it will do so to a lesser extent in the international context where the circumstances are normally much more extreme.[173] For example, in the international case *Changzhou AMEC Eastern Tools & Equipment Co., Ltd. v. Eastern Tools & Equipment, Inc.*, enforcement of the arbitration award was denied because one party did not in fact consent to the contract, but only complied due to fear of imprisonment.[174]

V. A Comparison of California and New York Law

New York is one of the most preferred venues in which to hold an international commercial arbitration proceeding, and it is the number one location in the United States.[175] Michael Bloomberg, former Mayor of New York City, described New York as "offer[ing] an arbitration venue that cannot be matched anywhere else in the world."[176] Some authors have argued that New York is a model that California should

169. ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention, Int'l Chamber of Com., http://www.iccdrl.com/enforcementguide.aspx (last visited Apr. 23, 2017).

170. Gueyffier v. Ann Summers, Ltd., 50 Cal. Rptr. 3d 294, 308 (2006).

171. Peter S. Selvin, *The Enforcement of International Arbitration Agreements in U.S. Courts*, TroyGould PC, June 2015, at 2, http://troygould.com/wp-content/uploads/2015/06/Pub-121.pdf.

172. Carrington & Haagen, *supra* note 32, at 365–66.

173. Changzhou AMEC E. Tools & Equip. Co., Ltd. v. E. Tools & Equip., Inc., No. EDCV 11-00354 VAP (DTBx), 2012 WL 3106620, at *9 (C.D. Cal. July 30, 2012).

174. *Id.* at *19.

175. N.Y. State Bar Ass'n, *supra* note 20, at 1.

176. *Id.* at 3.

follow,[177] and for this reason, this Note offers a brief overview of the structure and laws that New York has in place for arbitrations as a means of comparison.

New York is generally seen as reluctant to disturb arbitration proceedings.[178] In fact, New York was the first state to adopt a law on enforcing arbitration agreements and awards in response to the needs of a large number of businesses for quick, efficient enforcement of an alternative dispute resolution process.[179] Prior to the existence of arbitration laws, it was onerous to compel judges to enforce arbitration because it was seen as an encroachment on their jurisdiction.[180] Considered somewhat of a trailblazer, the state took action in favor of arbitration in 1920, five years before Congress passed the FAA, seven years before California passed the California Arbitration Act, and sixty-eight years before California enacted the CIACA.[181] In fact, the FAA was largely based on the New York statute.[182] New York courts are described as being "neutral, experienced and deferential to arbitration and the parties' agreed process."[183] New York laws and courts thus help maintain a key feature of arbitration: predictability.

New York's success and prominence as an arbitration hub has often been attributed to its clear, well-reasoned laws that manifest a willingness to invest in arbitration.[184] Unlike California, New York's rules unambiguously allow foreign attorneys and arbitrators to appear without paying a fee to the New York State Bar.[185] New York is also a more stable destination because the courts are not in constant battle with the Supreme Court over the FAA's jurisdiction. There is inherent agreement among New York courts and the Supreme Court because the FAA is largely based on the New York statute, which minimizes many of the conflicts that may lead to preemption. All of these features reflect New York's long history of enforcing arbitration awards and supporting arbitration proceedings.

177. *See* Chao & Smith, *supra* note 6.

178. Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 SEATTLE U. L. REV. 659, 701 (2004).

179. Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP. RESOL. J., Nov. 2006, at 18.

180. *Id.*

181. *Id.*; Golbert & Kolkey, *supra* note 82; *The Federal Arbitration Act, the U.S. Supreme Court, and the Impact of Mandatory Arbitration on California Consumers and Employees: An Informational Hearing Before the S. Comm. on the Judiciary*, 2016 Leg., 2015–16 Sess. (Cal. 2016).

182. N.Y. STATE BAR ASS'N, CHOOSE NEW YORK LAW FOR INTERNATIONAL COMMERCIAL TRANSACTIONS (2014), https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Choose_New_York_Law_For_International_Commercial_Transactions.html.

183. N.Y. STATE BAR ASS'N, *supra* note 20, at 5.

184. Chao & Smith, *supra* note 6.

185. *Id.*; ASHFORD, *supra* note 24, at 30–31.

Notably, New York no longer allows the expansion of judicial review because the New York courts and legislatures did not oppose the *Hall Street* opinion as California courts did.[186] New York's acquiescence in the Court's decision in *Hall Street* suggests that New York will not fight the Court on arbitration in the future. It is also further evidence that California is stricter on its approach, requiring adherence to the explicit terms of the contracts.[187] Furthermore, because New York applies an ethics code promulgated by national associations rather than their own state legislature, parties can engage in arbitration without the additional costs of rigorous ethics and disclosure requirements.[188] It is said that New York courts and the Second Circuit often "stretch the limits of the New York Convention in order to uphold an arbitration clause."[189] Taken together, it becomes clear why New York continues to be an ideal state for international commercial arbitration almost one hundred years after its arbitration statute's enactment.

Conclusion

There are understandable reasons why a commercial party in California may decide not to hold an arbitration proceeding, whether against a consumer or another international commercial entity. The continuous battle in California with the Supreme Court, ethics laws, disclosure rules, limitations on international arbitration and foreign attorneys—in addition to issues of preemption—contribute to the reasonable conclusion that California is less desirable for arbitration proceedings than other more arbitration-friendly jurisdictions, such as New York. If California wants to foster a larger arbitration industry, the legislature should follow New York's lead and make California's laws clearer and easier to apply.

In an article in the Review of International Arbitral Awards, Justice Breyer stated that he has detected "a growing hostility in the United States towards international tribunals and international arbitration in particular."[190] He went on to question whether it was distrust towards the forum or, rather, a distrust of international affairs in general that led to this hostility.[191] Scholars should question whether hostility in California is

186. Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 76 St. John's L. Rev. 633, 650 (2002); Pranas Mykolas Mickus, Possibility of Expanding Judicial Review Mechanism in Arbitration by Party Agreement 21 (Mar. 31, 2014) (unpublished L.L.M. short thesis), http://www.etd.ceu.hu/2014/mickus_pranas.pdf.

187. This is true so long as it is not unconscionable, but in the case that it is, the California Legislature and courts will take a protectionist approach. *See* Feuer, *supra* note 18.

188. N.Y. State Bar Ass'n, *supra* note 20, at 10, 12.

189. Folsom, *supra* note 30, at 95.

190. Justice Stephen G. Breyer, *The United States*, *in* The Review of International Arbitral Awards 117 (Emmanuel Gaillard ed., 2008).

191. *Id.*

due to true notions of justice in contracts, or if in reality California courts are still uneasy about relinquishing their power to an arbitrator. A role traditionally held by the state has been severely and increasingly limited by the Court's interpretation of federal law, so the hostility could be traced to a disturbance in the balance of federalism.

Perhaps the answer is a mixture of contractual justice, uneasiness about relinquishing power, and federalism. Or maybe each judge who analyzes this issue has a different rationale. Whatever the case may be, California courts must become more accepting of arbitration if parties are to feel more secure in holding their arbitration proceedings in California.