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PRESERVING THE INTEGRITY OF THE ARBITRATION PROCESS: REQUIRING THE FULL AND FAIR APPLICATION OF THE CLAIM PRECLUSION DOCTRINE

I. INTRODUCTION

Arbitration is a well-established and widely used alternative method for resolving disputes that arise within the context of a commercial contractual relationship without resorting to formal litigation in court.¹ It is governed by the Federal Arbitration Act (“FAA”),² performed in accordance with independent administrator organization rules,³ and strictly enforced by Supreme Court jurisprudence across the nation.⁴ Since its nascence, arbitration has been considered a speedier, less formal, and more cost effective method for sophisticated parties to resolve conflict than would be available through the traditional litigation process.⁵ Indeed, this

¹ See, e.g., *Escobar-Noble v. Luxury Hotels Int’l*, 680 F.3d 118, 121 (1st Cir. 2012) (emphasizing arbitration clause is matter of contract); *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 998 (9th Cir. 2003) (“Arbitration is a dispute resolution process designed, at least in theory, to respond to the wishes of the parties more flexibly and expeditiously than the federal courts’ uniform rules of procedure allow.”); ABC’S OF ADR: A DISPUTE RESOLUTION GLOSSARY, 10 ALTERNATIVES TO HIGH COST LITIG. 115, 115 (1992) [hereinafter ABC’S OF ADR] (describing wide range of Alternative Dispute Resolution procedures with benefits). Arbitration offers quick resolution of disputes at modest cost and with minimal adverse impact on commercial relationships. *Id.*; see also *Arbitration*, BLACKS LAW DICTIONARY (10th ed. 2014) (providing brief overview of arbitration purpose and process).

² United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, 886 (1925) (codified at 9 U.S.C. §§ 1-16 (1947)).

³ See, e.g., *AAA Court- and Time-Tested Rules and Procedures*, AMERICAN ARBITRATION ASSOCIATION (“AAA”), https://www.adr.org/aaa/faces/rules.jspx?_afrcWindowId=null&_afrcLoop=2077059150767160&_afrcWindowMode=0&_afrcCtrl-state=h1hcs63qf_61#%40%3F_afrcWindowId%3Dnull%26_afrcLoop%3D2077059150767160%26_afrcWindowMode%3D0%26_afrcCtrl-state%3D19tzmzmzpb_4 (last visited Oct. 31, 2015) (detailing rules and procedures for “successful alternative dispute resolution”); *ADR Clauses, Rules, and Procedures*, JAMS (formerly the Judicial Arbitration and Mediation Servs.), <http://www.jamsadr.com/rules-clauses/> (last visited Oct. 31, 2015) (offering “clauses, rules and procedures designed to meet parties’ needs” in alternative dispute resolution); *Code of Procedure*, NATIONAL ARBITRATION FORUM 1, 8-16 (2008), <http://www.adrforum.com/rcontrol/resources/Arbitration/CodeofProcedure2008-print2.pdf> (listing arbitration rules and procedures).

⁴ See *infra* Part III.B (discussing expansion of FAA).

⁵ See Steven C. Bennett & Dean A. Calloway, *A Closer Look at the Raging Consumer*

same premise is what has bolstered the evolution and scope of the enforceable arbitration clause found within contracts across the nation.⁶

The process of arbitration has changed dramatically as its scope and complexity has grown.⁷ The typical arbitration clause requires the parties agree to submit any disputes arising out of the contract to a collectively selected neutral third party, known as an arbitrator, participate in a structured hearing at which both sides can present evidence, and agree in advance to comply with the arbitrator's final decision.⁸ Further, under the FAA, an arbitrator's final awards can only be challenged in limited circumstances, or alternatively be confirmed in the court, thereby gaining the force of a court's judgment.⁹

Over the last seventy years, the Supreme Court has both reinvigorated and redefined the scope of arbitration by granting an ever increasing deference to enforcement of such clauses, while simultaneously,

Arbitration Debate, 65 DISP. RESOL. J. 28, 31 (2010) (describing benefits of consumer arbitration). Arbitration is relatively informal and there is no need for consumers to familiarize themselves with jurisdictional rules and filing procedures. *Id.* Parties to arbitration have more control over scheduling and logistics of the process. *Id.* Often consumers will have the option to submit their case in person, over phone, or via writing directly to the arbitrator. *Id.* Additionally, there are general public benefits because arbitration reduces the work load on the over-burdened court system. *Id.*; see also Ronald L. Olson, *How to Achieve the Advertised Benefits of Arbitration*, 14A RMMLF-INST 8 (1984) (“[A]rbitration [is] . . . more informal, less harsh, less public, and it can be more flexible in presentation of the evidence and development of the remedy than the adjudicatory, judge-dominated system where the rules of evidence and the rules of procedure often tend to take over.”).

⁶ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983) (enforcing arbitration provision within commercial construction contract).

The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25.

⁷ See *infra* Part III (highlighting complexity of modern arbitration). See generally Joseph M. Cox, *Clause and Effect, A Few Helpful Tips on Scope, Rules of Evidence, and Other Things You Should Know about Arbitration*, 77 TEX. B.J. 292, 293 (2014) (cautioning preparation for arbitration is equivalent to preparation for jury trial). Cox recommends business clients choose counsel experienced in arbitration for assistance in, “[preparing] trial briefs, exhibits and witnesses, findings of fact and conclusions of law, and a closing brief.” *Id.* See generally Raymond G. Bender, Jr., *Critical First Steps in Complex Commercial Arbitration*, 64 DISPUTE RES. J. 1, 3-5 (2009), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011424 (describing important strategies when selecting arbitrator).

⁸ See *Arbitration*, *supra* note 1 (defining standard procedure of arbitration process).

⁹ See 9 U.S.C. §§ 9-11 (2015) (detailing relevant sections of FAA used to confirm or challenge arbitration awards); see also *infra* notes 94-98 and accompanying text (detailing limited circumstances for challenging and rationale for confirming arbitration awards).

broadening the arbitrator's scope of review.¹⁰ In response, contract provisions compelling arbitration have grown exponentially across many commercial sectors.¹¹ Further, the Court's emphasis that the FAA preempts a state law aimed at limiting arbitration essentially deems parties to a contract who have a conflict involving commerce to have voluntarily waived their seventh amendment constitutional right to a jury trial.¹² The substantial growth of arbitration has led to an inevitable increase in case law concerning the application of the claim preclusion doctrine with regard to final awards in subsequent litigation or arbitration.¹³ The function of claim preclusion within the doctrine of res judicata developed in our court system to give a sense of reliance on the finality of a judgment while conserving judicial resources.¹⁴ Given that both the FAA and case law have traditionally functioned to sharply limit any subsequent judiciary review of a final arbitration award, there has been recent fragmentation

¹⁰ See *infra* Part III.B (discussing expansion of FAA).

¹¹ See *infra* Part III.B (discussing expansion of FAA); see also Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 83 (1992) ("[T]he explosive growth of arbitration into areas as diverse and unbalanced as medical malpractice, automobile insurance, small business loans, and opening of brokerage accounts[.]").

¹² See U.S. CONST. amend. VII (granting right of jury trial); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 670-75 (2001) (discussing implications of binding arbitration with Seventh Amendment); see also Brunet, *supra* note 11, at 83 ("[T]here exists a serious question whether inexperienced signatories to arbitration clauses truly consent to arbitration with any measure of understanding about the legal rights concomitant with such a proceeding.").

¹³ See, e.g., *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 594 (1st Cir. 2012) (applying res judicata effect from previous arbitration to subsequent litigation); *Shell Oil Co. v. Co2 Comm. Inc.*, 589 F.3d 1105, 1106 (10th Cir. 2009) (holding res judicata determination of previous arbitration on new arbitration is for new arbitrators); *Chiron Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1129-34 (9th Cir. 2000) (determining res judicata effect of previous arbitration award was for arbitrator not court). "[A] res judicata defense [to subsequent arbitration] is a 'component' of the merits of the dispute and is thus an arbitrable issue." *Chiron Corp.*, 207 F.3d at 1134; see, e.g., *Credit Control Servs. v. Noble Sys. Corp.*, No. 12-11321-JLT, 2013 WL 1180944, at *2 (D. Mass. Mar. 20, 2013) (holding res judicata barred subsequent litigation by affiliated entity of original party); *W. Md. Wireless Connection v. Zini*, 601 F. Supp. 2d 634, 647 (D. Md. 2009) (holding res judicata of arbitration award barred subsequent litigation); *Roderick v. Mazzetti & Assocs.*, No. C 04-2436 MHP, 2005 WL 3797122, at *7 (N.D. Cal. Oct. 27, 2005) (determining previous arbitration was effective bar to subsequent litigation); *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F. Supp. 1060, 1068 (N.D. Ill. 1998) (vacating court order by applying res judicata of previous unconfirmed arbitration award); *Centex-Rodgers Constr. Co. v. City of Roswell*, 449 S.E.2d 631, 631 (Ga. Ct. App. 1994) (holding subsequent arbitration after original arbitration was barred by res judicata); *U.K. Constr. Mgmt. v. Gore*, 20 A.3d 163, 172 (Md. Ct. Spec. App. 2011) (deeming previous arbitration is res judicata bar to subsequent litigation).

¹⁴ See 16 LEE S. KREINDLER ET AL., *RES JUDICATA AND COLLATERAL ESTOPPEL*, N.Y. PRAC., NEW YORK LAW OF TORTS § 19:40 (2014) (summarizing requirements for asserting defense of res judicata).

among the circuit courts concerning the doctrine's proper application.¹⁵

Part II of this note will provide a comprehensive overview of the historical origin and scope of the arbitration process and will trace the development of the current federal and state statutes that govern the modern American arbitration process.¹⁶ It will also discuss the rationale and elements of the doctrine of claim preclusion.¹⁷ Part III provides a chronology of key provisions of the FAA and will discuss the expansion of arbitration by the Supreme Court.¹⁸ It will further describe some of the key components of the modern arbitration proceeding.¹⁹ Part IV will analyze a recent circuit court split regarding claim preclusion and then identify how components within arbitration could be reconfigured to better support the application of the claim preclusion doctrine within the courts.²⁰ Part V will conclude by recommending a course of action, to both the legislature and the administration agencies, for providing the necessary tools to support claim preclusion as an affirmative defense to subsequent litigation where there exists a final arbitration award.²¹

II. HISTORY

A. Origin and Purpose of Arbitration

Since the dawn of commerce, arbitration has been utilized as the premiere and most honored method to resolve disputes civilly between parties.²² Historically, it was most extensively utilized in the context of commerce, offering quarreling commercial parties within a specialized industry quick resolution, while simultaneously preserving their ongoing business relationship.²³ The arbitrator was knowledgeable about the trade

¹⁵ See *W. J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 765 F.3d 625, 627-28 (6th Cir. 2014) (holding final arbitration award was not claim preclusion bar for subsequent litigation). But see *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 72 (1st Cir. 2011) (holding subsequent litigation was barred by final arbitration award when applying *res judicata*); see also *infra* Part IV (analyzing these specific cases).

¹⁶ See *infra* Parts II.A, II.B.

¹⁷ See *infra* Part II.C.

¹⁸ See *infra* Parts III.A, III.B.

¹⁹ See *infra* Part III.C.

²⁰ See *infra* Part IV.

²¹ See *infra* Part V.

²² See *Arbitration a Part of Judicial Administration*, 9 J. AM. JUDICATURE SOC'Y 69, 69 (1925) (explaining arbitration as "an ancient element of our law"). The article emphasizes that arbitration was encouraged at the early stage of common law formation, as business litigation was unknown at common law for centuries. See *id.* at 69-70 (discussing history of arbitration).

²³ See *id.* at 69 ("For, from time immemorial, merchants set up their own tribunals and

in which the dispute arose, respected by the parties, and focused on quick resolution.²⁴ The arbitration process flourished in Europe during the middle ages, resulting in a body of customary rules and principals relating to mercantile transactions that were adopted by traders for regulating their contractual transactions.²⁵ The rules were known as *lex mercatoria*, or Latin for “law merchant,” and continued to be utilized by English society to settle commercial contractual disputes.²⁶

Over time, many of these rules were incorporated into the English common law and administration was conducted by the English Courts.²⁷ However, the judicial process proved far too cumbersome and lengthy to be effective for merchants, which led to a period of vexation for commercial parties seeking a better solution.²⁸ Simultaneously, hostility in the English courts had permeated toward arbitration tribunals, with judges viewing such bodies as competition.²⁹ The conflict was eventually resolved upon a

administered justice in their own way to their entire satisfaction.”).

²⁴ See WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 10-14 (Cambridge Univ. Press 1904) (recounting Law Merchant rules adapted to requirements of commerce and expediency). The author notes its decisiveness was prompt, its process summary, and its procedures founded in equity and governed in all parts by plain justice and good faith. See *id.* at 10-17 (describing arbitration process). Because time spent resolving disputes meant lost profits, “merchants needed to solve their disputes rapidly, sometimes on the hour, with the least costs and by the most efficient means.” *Id.* This speed of resolution was not available in the public courts. *Id.*

²⁵ See *Commercial Arbitration Developed in Trade Courts*, 7 J. AM. JUDICATURE SOC’Y 7, 9 (1923) (describing how these rules were considered by courts for private international law).

²⁶ See *id.* The article discusses the merchant’s courts, or Court Pepoudros, that existed from the time of the Saxons until the early nineteenth century in English market towns where foreign traders were frequent. *Id.* These courts were known as “dusty foot” courts because merchants would seek justice often by coming directly from the selling booth or stall. *Id.* Judgment was quickly rendered by a merchant judge. *Id.* The losing party’s property would be subjected to a levy, as necessary, immediately after judgment was rendered thereby guaranteeing swift justice. *Id.*

²⁷ See William E. Higgins, *English Courts and Procedure*, 7 J. AM. JUDICATURE SOC’Y 185, 199 (1924) (explaining one High Court judge strictly resolving commercial claims). The author notes that although called a Commercial Court, it was not a separate division of the English High Court of Justice. *Id.* He notes the separate disposition of these cases owes its origin to the decrease in commercial litigation as merchants refused to submit their disputes to the court because of delays. *Id.*

²⁸ See *Commercial Arbitrations Developed in Trade Courts*, 7 J. AM. JUDICATURE SOC’Y 7, 9 (1923) (explaining courts not admitting they could not serve needs of commercial litigants better than arbitrators). “Under Lord Mansfield the King’s Bench Court endeavored to meet the needs of commercial litigants, but never with great success.” *Id.* The author notes that when justice is served from the law courts to commercial entities, the consequence of exact justice is the destruction of amiable business relationships. *Id.* at 11.

²⁹ See *id.* at 13 (“The historic narrowness of this view arose from the fact that in olden times the judges were paid by fees, and it was due to this alone that the maxim was evolved that it was the duty of a court to extend its jurisdiction.”).

reunification of the English courts in the late nineteenth century and by their Parliament formally recognizing the value of arbitration through enacting the Arbitration Act of 1889.³⁰

B. Development of Federal and State Arbitration Laws

Our nation's nascent courts continued to harbor the distrust that our English judiciary roots held toward arbitration up until the first quarter of the twentieth century.³¹ American judges were hostile toward arbitration because it was considered both a threat to effective jurisprudence, and ultimately to job security.³² However, modern American arbitration was born by a movement in 1921, when the Chamber of Commerce of New

³⁰ See Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 154-55 (1921) ("The English courts, after a long struggle, however, came finally to a complete reversal of the old doctrine and, contrary to general supposition in this country, corrected the law, not because of the acts of Parliament, but as a matter of judicial development of the common law."); see also *Commercial Arbitrations Developed in Trade Courts*, *supra* note 28, at 9 (explaining development of arbitration in England). The author notes that American merchants were key to the development of Great Britain's arbitration system. See *Commercial Arbitrations Developed in Trade Courts*, *supra* note 28, at 9 (explaining development of arbitration in England). Their commercial exchanges of goods at the Liverpool Cotton exchanges, both during and after the Civil War, resulted in difficult and significant financial disputes. *Id.* Their success prompted the creation of similar arbitration bodies within every conceivable business, both foreign and domestic. *Id.* at 9-10. Parliament enacted the Arbitration Act of 1889, making all agreements to arbitrate non revocable. *Id.* See generally G. Ellenbogen, *English Arbitration Practice*, 17 LAW & CONTEMP. PROBS. 656, 658 (1952) (explaining significance of the English Arbitration Act of 1889). The author notes the date coincided with great mercantile associations' initial issuing of a standard contract form containing an arbitration clause. *Id.* He further states the Act was a result of the apparent need to improve the ancillary legal machinery to handle the increase in commercial arbitrations. *Id.*

³¹ See Roscoe Pound, *The Crisis in American Law*, 10 J. AM. JUDICATURE SOC'Y 5, 7 (1926) (describing origins of American law). The article explains that the English law inherited by the United States was under strain, for England was itself in transition from an agricultural-commercial to an industrial society. *Id.*; see also THOMAS H. OEHMKE & JOAN M. BROVINS, 1 COMMERCIAL ARBITRATION § 4:1 (2014) (identifying nexus of American jurisprudence, English common law, and arbitration law); Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 581 (1952), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4313&context=fss_papers ("Common law tradition has taught judges and lawyers alike to look askance upon arbitration agreements prior to award rendered."); Cohen, *supra* note 30, at 148 (describing motivation for Committee Against Unnecessary Litigation, co-drafter of nation's first arbitration law).

³² See Cohen, *supra* note 30, at 155 ("Our own courts, not having had brought to their attention heretofore this recent clarification of the law by the British courts, are still following English precedents long since reversed by English courts."); see also Allison Anderson, Note, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 54 B.C. L. REV. 1237, 1241 (2013) (citing rationale for hostility was lack of arbitrator's legal training whole also potential diminished case load).

York's Charles Bernheimer joined forces with the New York State Bar Association's Julius Cohen, to establish a committee focused on commercial arbitration law for the state of New York.³³ Their "Committee on the Prevention of Unnecessary Litigation" later became known as the "Committee on Arbitration" of the New York State Bar.³⁴ Their efforts were in response to the business community's urgent desire for a more flexible, focused, and expeditious forum to resolve disputes, and to encourage growth of international commerce.³⁵ They reasoned that commercial entities that voluntarily bind themselves to arbitrate disputes are sophisticated enough to understand the potential risk, limitations, and benefits of the process.³⁶ The New York Act emphasized that the contractual decision to arbitrate would be binding, effectively remedying the longstanding common law practice by courts of allowing revocation of arbitration clauses.³⁷ By creating a judicial role in the process of award

³³ See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted By Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006) (describing men credited with drafting first state arbitration statute). The impetus for change was Julius Cohen, who served as general counsel for the New York State Chamber of Commerce, and Charles Bernheimer, a cotton goods merchant, who chaired the Chamber's arbitration committee. *Id.* See generally Cohen, *supra* note 30, at 147 (describing process undertaken by these associations to remedy "judicial error"). They sought to reconcile the American court system view of arbitration to those embraced by the English courts. *Id.* Mr. Cohen recalled the impetus of the Act was essentially to remedy the inequity of the law between, "all other parts of the civilized world" and the law in New York. *Id.* at 149.

³⁴ See Cohen, *supra* note 30, at 148 (describing genesis of Committee on Arbitration). Mr. Cohen recounts how during the NY Bar session of 1916, the Committee negotiated with the Chamber of Commerce for the adoption of "Rules for the Prevention of Unnecessary Litigation" which later became NY's Arbitration Act. *Id.*

³⁵ See *id.* at 149 (explaining urgency behind New York's Arbitration Act).

[I]f . . . New York is to be the international commercial center it aspires to be, it must speedily set its house in order and not wait for the slow and tedious process of judicial correction of judicial error to be applied . . . It must promptly simplify its judicial procedure and must make available to business men the easy methods of commercial arbitration.

Id. at 149 (quoting N.Y. STATE BAR ASS'N, PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING 127-28 (1920)).

³⁶ See *id.* at 150 (arguing commercial parties could competently choose to waive right to jury trial by selecting arbitration). "Presumably men of commercial experience today need no guardianship for determining, at the time of making a contract, whether they prefer the opinion of their own trade upon technical questions, or the hazardous judgment of a jury of the vicinage." *Id.*

³⁷ See *id.* at 152 (explaining how arbitration clauses considered revocable was mistaken notion of arbitrator as agent by court). Mr. Cohen clarifies that when two parties of opposing interest agree to contract to be bound to the decision of a third party, then "the elements of a bilateral contract exist" rather than an agency relationship. *Id.* "Only in our own country is an

confirmation, and articulating the logical benefits gained by the courts in expeditious commercial arbitration, the Committee on Arbitration ultimately influenced the New York legislature.³⁸ Although successful in establishing our nation's first arbitration law,³⁹ it quickly became evident that a federal movement would be the necessary next step to ensure cohesiveness and enforceability.⁴⁰

Cohen and Bernheimer, working in conjunction with the American Bar Association, set out to convince the legislature that a federal arbitration statute was not only reasonable, but necessary.⁴¹ As a result of their efforts, Congress enacted the United States Arbitration Act, otherwise known as the FAA in 1925.⁴² Modeled after the New York Act, the FAA made an arbitration clause binding between commercial entities, regardless of a party's state citizenship, and arbitration compellable within the federal court system.⁴³

agreement to arbitrate differences treated as something against public policy, as a contract less sacred and binding than other commercial agreements." *Id.* at 149 (quoting N.Y. STATE BAR ASS'N, PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING 127-28 (1920)).

³⁸ *See id.* at 148-49 (detailing process by which proposal became law). Mr. Cohen highlights that "supervision of arbitrations by the court is preserved" and that "[i]nstead of being ousted of jurisdiction over arbitrations, the courts are given jurisdiction over them." *See id.* at 149-50 (explaining judiciary's limited but important role in modern arbitration). He further states that if an award is made, "based upon an incomplete submission, or affected by fraud, corruption, partiality, mistake, or any similar misconduct, or if the arbitrators have exceeded their jurisdiction or made an imperfect award, the award may be vacated or modified [by the court] as the circumstances dictate" under the New York Code of Civil Procedure. *Id.* at 149.

³⁹ *See* N.Y. Arbitration Act, 2010 N.Y. Laws 803-04 (current version at N.Y. C.P.L.R. §§ 7501-14 (McKinney 1962)) (showcasing first arbitration law in United States).

⁴⁰ *See* Moses, *supra* note 33, at 101-02 (explaining significant limitations of New York's new statute). Moses describes how a contractual agreement to arbitrate by a party in New York could not be enforced against a party of another state since there were no similar laws requiring enforcement by the courts of other states. *Id.* at 101. Further, any enforcement attempt in federal court under diversity jurisdiction would fail because, similarly, no federal law existed to enforce the agreement. *Id.* at 101-02.

⁴¹ *See id.* at 102-12 (detailing Cohen and Bernheimer's efforts to convince Congress of legitimacy of national arbitration act). Moses notes Bernheimer functioned as the representative of commercial interests, while Cohen, the principle drafter, sought to promote the legal argument. *Id.* *See generally* Cohen, *supra* note 30, at 147 ("And now the American Bar Association, through its Committee on Commerce, Trade and Commercial Law, is taking up the work of nationalizing the movement.").

⁴² *See* United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, 886 (1925) (codified at 9 U.S.C. §§ 1-16 (1947)) (illustrating arbitration requirements).

⁴³ *See* Moses, *supra* note 33, at 110-12 (describing intent of Congress upon enacting FAA). There were strict limits to instances where the FAA would be applicable:

[T]he legislation was to apply to disputes involving facts and simple questions of law, not statutory or constitutional issues, since arbitration was simply not a proper method for deciding points of law of major importance. The legislation would not apply to

Despite federal efforts to make arbitration into a respected forum for commercial dispute resolution, state courts continued to be hostile toward the FAA.⁴⁴ Although interest in a uniform code of arbitration among the states was debated, it was not formally realized for another two decades.⁴⁵ Following a renewed interest in a uniform arbitration law among the states, the Uniform Law Commission (“ULC”) promulgated the Uniform Arbitration Act (“UAA”) in 1955.⁴⁶ Due to the exponential growth of arbitration, in 2000 the ULC appointed a Drafting Committee to address many procedural issues unanticipated by the original drafters, resulting in the Revised Uniform Arbitration Act (“RUAA”).⁴⁷ Presently, “forty-nine jurisdictions have arbitration statutes; thirty-five have adopted the UAA or RUAA, and fourteen have adopted substantively similar legislation.”⁴⁸

C. Doctrine of Claim Preclusion

The function of claim preclusion within the doctrine of res judicata has been developed in our judicial system to give a sense of reliance on the finality of a judgment while conserving judicial resources.⁴⁹ As with other judge-made doctrines, the expansion of claim preclusion rules under

workers or labor disputes. Because the statute dealt with enforcement and therefore simply ensured a remedy, it was a procedural statute and only applied in federal courts. It would not affect state law or state courts in any way.

Id. at 112.

⁴⁴ See *Opinions on Arbitration Clash*, 9 J. AM. JUDICATURE SOC’Y 76, 77-79 (1925) (contrasting broad versus narrow view of arbitration). The author notes the Commissioner of Uniform Laws reflected the states’ concerns about the danger of “permitting persons to contract away their rights to go to court[.]” *Id.* at 78.

⁴⁵ See MARTIN DOMKE, GABRIEL WILNER & LARRY E. EDMONSON, 1 DOMKE ON COMMERCIAL ARBITRATION § 7:2 (3rd ed. 2015) (explaining rationale behind substantial delay in passage of Uniform Arbitration Act). The authors explain the Conference of Commissioners on Uniform State Laws 1924 draft of a Uniform Act did not enforce future arbitration clauses, “an essential feature of modern arbitration statutes.” *Id.* They explain “[the] renewed interest in a modern uniform arbitration act” among the states resulted in a draft that was approved by the House of Delegates of the American Bar Association in 1955. *Id.*

⁴⁶ UNIF. ARBITRATION ACT § 1-33 (amended 2000).

⁴⁷ See *Uniform Arbitration Act*, UNIFORM L. COMMISSION 1, 1 (2000), http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf (describing rationale for UAA revision to provide state legislatures with modern arbitration statute model). The Drafting Committee lists fourteen new issues addressed within the RUAA. *Id.*

⁴⁸ *Id.*; see DOMKE, *supra* note 45, at §7:2 (discussing adoption of UAA or RUAA among states). The author notes that the UAA or the RUAA has been adopted in forty-nine states, either in its entirety or with some modifications. *Id.*

⁴⁹ See *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (describing benefits afforded by judicial recognition of res judicata).

common law results from both judges' perceptions of new purposes to be served by precluding further costly litigation, and from their recognition of a need to adapt to procedural and institutional settings.⁵⁰ As the Supreme Court articulated, "[claim preclusion] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."⁵¹ Typically, to successfully assert the affirmative defense of claim preclusion, "the defendant must show there has been '(1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privies; and (3) a subsequent suit based on the same causes of action.'"⁵²

III. FACTS

A. Key Provisions of the FAA

Despite the original intent of both the FAA and UAA to limit commercial arbitration to sophisticated business parties, the scope has changed and broadened to include derivatives of commercial business never anticipated by its drafters.⁵³ In order to comprehend the significant expansion of the statute, it is vital to review a few of the key provisions of the FAA. Section 1 of the FAA defines commerce and limits applicability as follows:

"[C]ommerce", . . . means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, . . . , *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers*

⁵⁰ See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 2014) (explaining res judicata implementation into courts without referencing statutory or constitutional directives).

⁵¹ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

⁵² See *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 260 (3d Cir. 2010) (quoting *United States v. Athlone Indus.*, 746 F.2d 977, 983 (3d Cir. 1984)) (discussing elements of claim preclusion).

⁵³ See *Moses*, *supra* note 33, at 99-100 (characterizing growth and transformation of arbitration). *Moses* explains the current exercise of the FAA "affects statutory rights, consumer rights, and employee rights, as well as state police powers to protect those rights," and is one that was not anticipated by the Congress of 1925. *Id.*

*engaged in foreign or interstate commerce.*⁵⁴

Section 2 defines the scope of the FAA as:

A written provision in any . . . 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.⁵⁵

The third section of the FAA requires a federal court, in which a suit has been brought, “upon any issue referable to arbitration under an agreement in writing for such arbitration” to “stay the trial of the action” until conclusion of the arbitration.⁵⁶ Section four articulates a federal remedy for “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,” and directs the federal court to compel arbitration once it has been satisfied that an agreement to arbitrate exists.⁵⁷

B. United States Supreme Court’s Expansion of the FAA

Beginning in the late 1950’s, the Supreme Court began a liberal policy of expanding the applicability of the FAA to arbitration clauses across several classes of commercially-related contracts.⁵⁸ Within the

⁵⁴ 9 U.S.C. § 1 (1947) (emphasis added).

⁵⁵ *Id.* at § 2.

⁵⁶ *Id.* at § 3 (1947); *see* *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 405-06 (1967) (holding fraud in inducement claim to original contract was arbitral dispute).

We hold, therefore, that in passing upon a s 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Prima Paint Corp., 388 U.S. at 404.

⁵⁷ 9 U.S.C. § 4 (1947).

⁵⁸ *See* *Moses*, *supra* note 33, at 99-100 (highlighting several key Supreme Court decisions which have shaped modern scope of FAA).

statutory purview of the National Labor Relations Act,⁵⁹ the Court expanded the FAA to apply to the enforcement of an arbitration clause between an employer and the union within a collective bargaining agreement (“CBA”).⁶⁰ Although the Court continued to enforce arbitration clauses within a CBA, they held federal statutory claims were essentially severable and that a previous arbitration would not bar subsequent litigation of those same claims by the same parties.⁶¹ The Court articulated several reasons why arbitration was an improper forum for resolving federal statutory claims encompassed within an employee’s grievance claim.⁶² The Court also expressed concern regarding the lack of congressional intent for federal statutory claims to be waived under a CBA.⁶³

⁵⁹ 29 U.S.C. §§ 151-69 (1935).

⁶⁰ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454 (1957) (implying binding arbitration clause between sophisticated parties was valid). The Court found the union’s agreement not to strike was in exchange for the Mill’s agreement to arbitrate grievance disputes. *Id.* at 455. It concluded that if unions can break contractual agreements with near immunity, then labor relations will never be stable. *Id.* at 454. “Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of, or against labor organizations and that industrial peace can be best obtained only in that way.” *Id.* at 455.

⁶¹ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974) (holding Title VII anti-discrimination statutory claims were not barred by previous arbitration). “The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.” *Id.* at 50. See generally *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 292-93 (1984) (holding §1983 claims were not barred by previous arbitration).

⁶² See *McDonald*, 466 U.S. at 290-92 (articulating four reasons arbitration was improper forum for statutory claims). The Court pointed out that the “arbitrator’s expertise ‘pertains primarily to the law of the shop, not the law of the land.’” *Id.* at 290 (quoting *Gardner-Denver Co.*, 415 U.S. at 57). They deemed the arbitrator’s authority was derived only through contract and “no general authority to invoke public laws that conflict with the bargain between the parties[.]” *Id.* (quoting *Gardner-Denver Co.*, 415 U.S. at 53). The Court determined since the individual could not challenge the union’s defense of their claim against the employer, their collective objectives were likely incompatible. *Id.* at 291. The Court also noted “[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.” *Id.* (quoting *Gardner-Denver Co.*, 415 U.S. at 57-58). Therefore, the Court held resolution of this type of statutory claim inappropriate for binding arbitration. *Id.* at 292.

⁶³ See *Gardner-Denver Co.*, 415 U.S. at 51 (discussing congressional intent regarding Title VII federal statutory claim relief).

Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities. Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances,

However, in *Penn Plaza L.L.C v. Pyett*⁶⁴ the Court dramatically increased the scope of the FAA by holding a CBA provision expressly requiring both contractual and federal statutory Age Discrimination in Employment Act (“ADEA”)⁶⁵ claims to be resolved in arbitration as valid.⁶⁶ The Court held that its previous “misconceptions” regarding the ability of an arbitral tribunal to handle complex legal issues was abolished by subsequent case law.⁶⁷ Further, it placed the burden of imposing restrictions that would prevent federal statutory claim resolution within arbitration, upon Congress.⁶⁸ Even within simple employment contracts, the Court held binding arbitration clauses were subject to enforcement by the FAA, with the very narrow exception of seamen and railroad employees.⁶⁹

an employee’s rights under Title VII are not susceptible of prospective waiver.

Id. at 51-52.

⁶⁴ 556 U.S. 247 (2009).

⁶⁵ 29 U.S.C. §§ 621-34 (1967).

⁶⁶ See 14 *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) (upholding CBA’s express provision requiring arbitration of ADEA claims). The Court explained the Union and Realty Advisory Board on Labor Relations had statutory authority to negotiate the content of their arbitration clause within their CBA, under the authority of the NLRA. *Id.* at 260. “Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.” *Id.* See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (upholding New York Stock Exchange arbitration requirement for statutory claims). The Court supported its position by noting three recent decisions where it held federal statutory claim violations of antitrust, securities, and civil racketeering enforceable under the FAA. *Id.* at 26. “In this regard, we note that the burden is on *Gilmer* to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims.” *Id.*

⁶⁷ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40 (1985) (holding federal antitrust law violation claims regarding international commercial transaction suitable for arbitration).

⁶⁸ See *Penn Plaza*, 556 U.S. at 270 (“Until Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta . . . there is ‘no reason to color the lens through which the arbitration clause is read’ simply because of an alleged conflict of interest between a union and its members.” (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628)); see also *Gilmer*, 500 U.S. at 26 (“[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628)).

⁶⁹ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-24 (2001) (rejecting employee’s argument that his employment contract’s arbitration clause was outside scope of FAA). The Court held the exemption clause of § 1 of the FAA only applied to the employment contracts of railroad employees and seamen, and no other class of employee engaged in interstate commerce. *Id.* at 114. The Court explained that Congress

... excluded “seamen” and “railroad employees” from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers. As for the residual exclusion of “any other class of workers engaged in foreign or interstate commerce,” Congress’ demonstrated concern with transportation workers and their necessary role in the free flow of goods explains

In *Southland Corp. v. Keating*,⁷⁰ the Court continued expanding the power of the FAA by eviscerating state statutes that attempted to limit arbitration of state law claims under the authority of the Supremacy Clause.⁷¹ Additionally, the Court utilized the Commerce Clause to expand the scope of transactions.⁷²

We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be limited to transactions involving interstate commerce. We therefore view the “involving commerce” requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.⁷³

The Court also expanded the FAA’s scope within complex international commercial arbitration by enforcing an arbitration clause against a claim concerning federal statutory law violations.⁷⁴ Further still,

the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation.

Id. at 121.

⁷⁰ 465 U.S. 1 (1984).

⁷¹ *See id.* at 16 (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”). The Court invalidated California’s Franchise Investment Law as unconstitutional. *Id.*

⁷² *See Southland*, 465 U.S. at 11 (highlighting nothing within FAA indicates enforceability principle is regarded with additional limitations under state law).

⁷³ *Id.* at 14-15 (viewing “involving commerce” requirement as qualification for arbitration in both state and federal courts).

⁷⁴ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (holding dealer’s federal antitrust claims against international manufacturer arbitrable). “And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” *Id.* at 637. The Court put the responsibility for selecting competent, impartial, and conscientious arbitrators squarely upon the parties to the arbitration. *See id.* at 634 (describing selection process of arbitrator); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-21 (1974) (ordering arbitration for Securities Exchange Act of 1933 dispute between international parties).

in *Allied-Bruce Terminix Cos. v. Dobson*,⁷⁵ the Court decreed that a dispute arising under a service contract between an individual consumer and a business fell within the scope of a broad reading of §2 of the FAA.⁷⁶ The Court defended its application of the Commerce Clause to the FAA against those who argued it was extending beyond the intent of the 1925 legislation:⁷⁷

The pre-New Deal Congress that passed the [Arbitration] Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court . . . to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively . . .⁷⁸

The Court has also applied the FAA to enforce an arbitration clause that expressly requires arbitration of federal statutory claims between consumers and a securities brokerage.⁷⁹ Finally, the Court has eliminated any form of contractually expanded judicial review of arbitration awards beyond what is expressly mentioned within the FAA, and has held that any appeals, with regard to arbitration awards, are reserved for a mutually bargained for arbitrator's review.⁸⁰

⁷⁵ 513 U.S. 265 (1995).

⁷⁶ See *id.* at 273-74 (concluding word "involving" was functional equivalent of "affecting" for interstate commerce interpretation). The Court highlighted the Act's legislative history indicates an expansive congressional intent. *Id.* at 274.

⁷⁷ See *Allied-Bruce*, 513 U.S. at 275 (stating appropriateness of broad FAA interpretation). The Court stated the purpose of the FAA was to ensure arbitration clauses would be considered equal to other provisions within the contract. *Id.*

⁷⁸ *Id.*

⁷⁹ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483-86 (1989) (holding agreement to arbitrate claims under Securities Exchange Act of 1933 enforceable under FAA). This decision effectively overruled the Supreme Court's first commercial arbitration dispute in *Wilko v. Swan*, 346 U.S. 427 (1953). See *id.* at 484 (overruling *Wilko*). In *Wilko*, the honorable Justice Reed stated, "[Congress] has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights." *Id.* at 438. The *Rodriguez* Court, however, determined *Wilko* was no longer in accord with "the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions." *Rodriguez de Quijas*, 490 U.S. at 484; see *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238-42 (1987) (determining Securities Exchange Act (1934) and Racketeer Influences and Corrupt Organization ("RICO") violation claims arbitrable).

⁸⁰ See, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010) (holding "delegation" provision requiring arbitrator for determining enforceability of entire contract between commercial entities valid); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 590-92 (2008) (eliminating contractually expanded judicial review of arbitration award under FAA grounds); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (determining consumer

C. Key Components of the Arbitration Process

Arbitration administrative organizations are non-profit companies hired to provide a range of arbitration services to contracted parties.⁸¹ These competing agencies offer their own individual rules of engagement, and maintain an independent roster of arbitrators often categorized by specialized industry.⁸² The arbitrator, or administrator of arbitral justice, is the third party specifically selected by the contracting parties to resolve a conflict.⁸³ Arbitrators are selected based on their specialized knowledge of the trade or law in which the dispute arises.⁸⁴ Their selection and service are of paramount importance because it, “vests in one person (or a panel) the tasks of trier of fact, interpreter of the law, and decision-maker on all, or nearly all, substantive and legal issues.”⁸⁵ Although arbitrators are

claim regarding contract validity in its entirety was for arbitration); *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 402-05 (1967) (holding federal courts may only consider issues relating to arbitration clause formation).

⁸¹ See sources cited *supra* note 3 (identifying three leading arbitration administration organizations within United States).

⁸² Liz Kramer, *Arbitration Nation Roadmap: When Should You Choose JAMS, AAA or CPR Rules?*, ARBITRATION NATION (June 27, 2013), <http://arbitrationnation.com/arbitrationnation-roadmap-when-should-you-choose-jams-aaa-or-cpr-rules/> (highlighting variances between three leading domestic arbitration providers). The author provides insight into subtle differences between each organization’s administration and resources to assist business clients in choosing the best options to meet their needs. *Id.* For instance, incorporating under the American Arbitration Association Construction Arbitration Rules necessarily means that a proposed list of arbitrators will only include those with construction expertise, by reason of training or experience. *Id.* “Our best research indicates there are over 3,600 on the AAA roster, 500-600 on the CPR roster, and approximately 150-300 on the JAMS roster.” *Id.*

⁸³ See THOMAS H. OEHMKE & JOAN M. BROVINS, ARBITRATOR SELECTION AND SERVICE, 97 AM. JUR. TRIALS 319 § 5 (2005) (defining arbitrator). The authors note the term “arbitrator” can also “collectively refer to an arbitral panel, which may be odd in number or even, usually with at least one neutral or umpire and, perhaps, party-arbitrators who are neutral (unless proclaimed in writing to be non-neutral).” *Id.*

⁸⁴ See *The Code of Ethics for Arbitrators in Commercial Disputes*, AMERICAN BAR 1, 2 (2004) [hereinafter *Code of Ethics*], http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (stipulating general characteristics of an arbitrator). “Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding.” *Id.* See generally Cohen, *supra* note 30, at 150 (highlighting obvious benefits of using arbitrators with trade knowledge to conduct arbitration). The author points out that “the very experts, as witnesses, who are now selected by the parties to dispose of the issue” in the court are able to settle such disputes. *Id.*

⁸⁵ See OEHMKE, *supra* note 83, at § 1 (2005) (explaining arbitrators and selection process). The author also describes the arbitrator appointment process. *Id.* at § 8. “In most controversies, arbitrators are freelancers, selected on a case-by-case basis either by the parties (in a self-administered case) or nominated by institutions (in a case administered by an arbitral institution). [If these options fail], a court will make the appointment.” *Id.*; see Bender, *supra* note 7, at 1-5 (describing how to best strategically select your arbitrator).

similar to judges in their authority to decide disputes, unlike judges they are often engaged in other occupations throughout the arbitration process.⁸⁶ However, like judges, arbitrators and administrative organizations enjoy the doctrine of arbitral immunity from civil liability in performance of their duties.⁸⁷

A significant concern for fair administration of this quasi-judicial process is arbitrator neutrality with regard to the dispute.⁸⁸ Because of its critical importance, the RUAA has dedicated specific rules mandating arbitrator disclosure and imposed procedural rules on administering agencies.⁸⁹ An arbitrator's failure to make the required disclosures does not open the arbitrator to civil liability, however depending upon timely objection of a party, the arbitrator or the award may be vacated.⁹⁰

⁸⁶ See *Code of Ethics*, *supra* note 84, at 1-2 (pointing out difference between judges and arbitrators).

⁸⁷ See *Pfannenstiel v. Merrill Lynch*, 477 F.3d 1155, 1159 (10th Cir. 2007) (holding doctrine of arbitral immunity was available defense). The Tenth Circuit acknowledged, "[e]very other circuit that has considered the issue of arbitral immunity recognizes the doctrine" and "[t]he Supreme Court precedent also supports [it]." *Id.* at 1158-59; see *OEHMKE*, *supra* note 83, at § 19 (clarifying arbitral immunity available under UAA). "Under the UAA (2000), an arbitrator is immune from civil liability to the same extent as a judge of the court acting in a judicial capacity." *Id.*

⁸⁸ See *OEHMKE*, *supra* note 83, at § 55 (emphasizing importance of arbitrator neutrality). The authors note that arbitrators are expected "to behave in a neutral, independent and impartial manner." See *id.* at § 73 (evinced importance of arbitrator neutrality). The authors note that arbitrator disclosure must include, "any known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party, their counsel or a witness." *Id.*; see generally *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (stating basic requirements of impartiality for arbitration).

This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Commonwealth Coatings Corp., 393 U.S. at 150.

⁸⁹ See e.g., UNIF. ARBITRATION ACT §§ 11-12 (amended 2000); MODEL CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 84, at 2 (discussing standards for arbitrator neutrality); *The Code of Ethical Conduct for Arbitrators*, NATIONAL ARBITRATION FORUM 1, 3-4 (2015), <http://www.adrforum.com/resources/Neutrals/FORUM%20Code%20of%20Ethical%20Conduct%20for%20Arbitrators%201.27.2015.pdf> (discussing arbitration standards); *Arbitrators Ethics Guidelines*, JAMS, <http://www.jamsadr.com/arbitrators-ethics/> (last visited Nov. 1, 2015) (illustrating arbitration guidelines); Platt W. Davis III, *Nondisclosure of Arbitrator Conflicts and the 'Evident Partiality' Standard*, 74 THE CPA J. 54 (2004) (highlighting importance of arbitrator neutrality to final awards).

⁹⁰ See *OEHMKE*, *supra* note 83, at § 19 (acknowledging arbitrators' failure to make necessary disclosures does not create civil liability). The author notes the responsibility to disclose vests

The arbitration clause is a negotiated binding contractual obligation and, as such, the parties are free to fashion it to incorporate specific features to the basic arbitration process.⁹¹ Depending on the complexity of the contract, the parties can fashion the arbitration to include any number of services, such as transcription, as provided by the administrative organizations.⁹² Once the clause is drafted, depending upon the services selected by the parties, the resulting costs quickly add up and often exceed litigation costs.⁹³ Once the arbitration is complete, the arbitrator must issue a final award within the proscribed rules of the organization.⁹⁴ Under

with the arbitrator and failure to do so will result in either removal of the arbitrator before the arbitration commences or the award being set aside post arbitration. *Id.* at §§ 73, 78.

⁹¹ See 6 C.J.S. *Arbitration* § 1 (2015) (articulating negotiation of parties in drafting arbitration clause). “Arbitration is consensual, and a matter of contract[.] [A] party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit.” *Id.* Attorney Cox notes clients will need such counsel to assist in drafting the practical aspects of an arbitration clause. See Joseph M. Cox, *Clause and Effect: A Few Helpful Tips on Scope, Rules of Evidence, and Other Things You Should Know about Arbitration*, 77 TEX. B. J. 292, 292 (2014) (recommending business clients consult experienced arbitration counsel). Factors to consider include controlling the time of the proceeding, determining whether to include the rules of evidence or limit discovery, and minimizing procedural costs. *Id.* at 292-93; Bender, *supra* note 7, at 1 (describing best strategies to achieve your goals within arbitration).

⁹² See Jackson Williams, *The Costs of Arbitration*, PUBLIC CITIZEN 1, 39-51 (April 2002), <http://www.citizen.org/documents/acf110a.pdf> (listing various costs associated with arbitration). The authors show the total costs for identical arbitrations with the three leading administrative organizations at varying damage claim levels. *Id.* For each of the arbitration’s cumulative costs, the authors include the following fees: (1) administrative agency, (2) hearing/arbitrator, (3) room, (4) subpoena, (5) discovery request, (6) motion, (7) continuance, (8) post hearing memo, and (9) written findings. *Id.*; see *Alternative Dispute Builder Tool*, AMERICAN ARBITRATION ASSOCIATION, https://www.clausebuilder.org/cb/faces/welcome?_adf.ctrl-state=rtk5h4zt4_4&_afLoop=1427129335076805 (last visited Nov. 1, 2015) (providing tool to help clients choose proper functions for their arbitration clause); see also

JAMES ACRET & ANNETTE DAVIS PERROCHET, *CONSTRUCTION ARBITRATION HANDBOOK* § 9:2 (2d ed. 2012) (explaining importance of transcript in arbitration).

A transcript also may be useful, indeed crucial, to provide evidence of grounds to vacate an award. For example, suppose a party offers important, material, original, and firsthand testimony that is relevant to prove an essential fact, but the arbitrator refuses to listen to the testimony Without a transcript, however, the party might find it difficult to prove that the arbitrator rejected material evidence.

JAMES ACRET & ANNETTE DAVIS PERROCHET, *supra*, at § 9:2.

⁹³ See Alan Dabdoub & Trey Cox, *Which Costs Less: Arbitration or Litigation*, INSIDE COUNSEL (Dec. 6, 2012), <http://www.insidecounsel.com/2012/12/06/which-costs-less-arbitration-or-litigation> (last visited Nov. 1, 2015) (conducting limited case study of arbitration versus similar litigation); see also Williams, *supra* note 92, at 42 (revealing case study of cost differences between consumer and commercial arbitration verses similar litigation).

⁹⁴ See *Decision and Award*, FIN. INDUS. REGULATORY AUTH., <http://www.finra.org/arbitrationandmediation/arbitration/process/decisionawards/> (last visited Nov. 1, 2015) (listing information contained within each arbitration award). “Awards must be in writing, but arbitrators are not required to write opinions or provide explanations or reasons for

Section 9 of the FAA:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then at any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.⁹⁵

Although arbitrations are not “judicial proceedings,” the award’s confirmation in court gives it the force of a judgment under the Full Faith and Credit Clause of Article IV, § 1 of the US Constitution.⁹⁶ However, there is some dispute among the circuits regarding the statute of limitation noted in § 9 with regard to the confirmation of an arbitration award.⁹⁷ Sections 10 and 11 of the FAA provide a very limited opportunity to modify or vacate a final arbitration award.⁹⁸ An additional risk in arbitration is that the arbitrator may apply the governing law incorrectly

their decision.” *Id.*; see also Kramer, *supra* note 82 (highlighting difference in expediency with regard to arbitration awards among leading domestic agencies). She indicates, “JAMS and AAA explicitly require 30 days’ time in which arbitrators must render a final award.” See Kramer, *supra* note 82 (highlighting variances between three leading domestic arbitration providers).

⁹⁵ 9 U.S.C. § 9 (1947).

⁹⁶ U.S. CONST. art. IV, § 1; see WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 56 (2005) (explaining transformation of arbitral awards once confirmed by court). The author explains that the award confirmation process is a judicial procedure which is enforced by the Constitutional clause. *Id.*

⁹⁷ See *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 154 (2d Cir. 2003) (holding FAA one-year statute of limitation applies to award confirmation); *IBEW, Local Union No. 545 v. Hope Elec. Corp.*, 293 F.3d 409, 417 (8th Cir. 2002) (holding one-year limitation period applies to action to confirm award but not for award victor). *But see Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 156 (4th Cir. 1993) (holding statutory language limitation did not bar confirmation of award after one-year time period).

⁹⁸ See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (explaining limited ability under FAA for judicial review of arbitration award).

Sections 10 and 11, after all, address egregious departures from the parties’ agreed-upon arbitration: “corruption,” “fraud,” “evident partiality,” “misconduct,” “misbehavior,” “exceed[ing] . . . powers,” “evident material miscalculation,” “evident material mistake,” “award[s] upon a matter not submitted;” the only ground with any softer focus is “imperfect[i]ons,” and a court may correct those only if they go to “[a] matter of form not affecting the merits.”

Id.; see also 9 U.S.C. § 10 (1947) (explaining grounds for vacating arbitration award); 9 U.S.C. § 11 (1947) (listing reasons justifying modification to arbitration award).

making errors with respect to the evidence or facts on which they base their rulings.⁹⁹

IV. ANALYSIS

Fundamentally, the *res judicata* doctrine of claim preclusion prevents a party from re-litigating a prior case in hopes of a more favorable result.¹⁰⁰ The central function of this doctrine is to “force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit.”¹⁰¹ The court can enforce this doctrine, when compelled, by simply reviewing the previous suit’s record and comparing it to the claims of the second suit.¹⁰² However, when parties, who have completed arbitration, attempt to use this vital doctrine as an affirmative defense to a subsequent litigation, the courts have been inconsistent with their application.¹⁰³ The *a la carte* method of the modern arbitration procedure offered by administration agencies makes it nearly impossible to ensure the vital transcript is produced.¹⁰⁴ The lack of a uniform rule, with regard to the application of claim preclusion for final arbitral awards, leads to fragmentation among the circuit courts.¹⁰⁵

A. Doctrine of Claim Preclusion Inapplicable

Recently, the Sixth Circuit refused to apply the doctrine of claim

⁹⁹ See *Hall St. Assocs.*, 552 U.S. at 586 (distinguishing review for legal error mistake not within language of 9 U.S.C. §§ 10-11).

¹⁰⁰ See *supra* Part II.C (discussing doctrine of claim preclusion); see also CHARLES A. WRIGHT ET AL., 18 FED. PRAC. & PROC. JURIS. § 4408 (2d ed. 2014) (“Claim-preclusion rules are most easily applied when an unsuccessful plaintiff seeks to reopen basically the same theories in search of basically the same remedies . . .”).

¹⁰¹ WRIGHT ET AL., *supra* note 100, at § 4408. See *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 259-62 (3d Cir. 2010) (discussing requirements for successfully asserting claim preclusion defense).

¹⁰² See *W. Md. Wireless Connection v. Zini*, 601 F. Supp. 2d 643, 647 (D. Md. 2009) (finding subsequent litigation barred by claim preclusion after reviewing arbitration transcript). *But see Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1322-23 (9th Cir. 1992) (holding lack of arbitration transcript fatal to claim preclusion affirmative defense). “[T]he defendants did not show with clarity and certainty what issues were determined in the arbitration. Because the defendants did not introduce a sufficient record of the arbitration . . . [they] have failed to meet their burden.” *Id.* at 1322-23.

¹⁰³ See cases cited *supra* note 15 and accompanying text (highlighting circuit court split regarding applicability of claim preclusion as bar to litigation after arbitration).

¹⁰⁴ See sources cited *supra* note 91 and accompanying text (highlighting challenge of drafting arbitration clauses to satisfy needs of parties).

¹⁰⁵ See cases cited *supra* note 15 and accompanying text (discussing recent circuit court split concerning arbitration and claim preclusion doctrine).

preclusion between parties who completed a previous arbitration producing a final award.¹⁰⁶ In *W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*,¹⁰⁷ the plaintiff was a mechanical contractor who was hired as a subcontractor by the project's construction manager to install various systems within a University of Michigan hospital.¹⁰⁸ The defendants were the project and system design architects who were also hired for the university's project.¹⁰⁹ Each party, as a condition of employment, was required to sign a contract containing an arbitration clause with a "flow-through" provision consenting to joinder for any disputes that could arise from the construction process.¹¹⁰ The arbitration clause included in the plaintiff's contract also required that he agree to "be bound by the 'procedures, decisions, and determinations resulting from any dispute resolution process'" with the construction manager or the university.¹¹¹

Due to various difficulties and alleged design errors, the plaintiffs brought a claim of \$19,000,000 against the construction manager and the defendants in state court.¹¹² The court compelled arbitration between the plaintiff and its construction manager, and through a series of further indemnification and consolidation acts, the defendants were eventually

¹⁰⁶ See *W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 765 F.3d 625, 632 (6th Cir. 2014) (holding arbitration between same parties over identical cause of action insufficient bar for subsequent litigation).

¹⁰⁷ 765 F.3d 625 (6th Cir. 2014).

¹⁰⁸ See *id.* at 628 (describing role of plaintiff within complex commercial construction project). The construction manager, Barton Malow Company, was hired directly by the University of Michigan for development of their Cardiovascular Center Hospital. *Id.* The plaintiff was subcontracted for installation of the heating, plumbing, cooling, and ventilation systems. *Id.*

¹⁰⁹ See *id.* (detailing roles performed by defendants within the project). Defendant Shepley, Bulfinch, Richardson & Abbot Inc. was hired by the university to serve as the overall project architect. *Id.* Defendant Smith Seckman Reid, Inc. was hired by Shepley to provide electrical, mechanical, fire protection, and plumbing design services for the project. *Id.*

¹¹⁰ *Id.* at 635. See generally Thomas E. McCurnin, *Two Party Arbitration in a Multiple-Party World*, 26 CONSTR. L. 5, 5-8 (2006) (describing construction industry's arbitration clause standards when multiple parties are involved). "Where there are two or more arbitrations in a construction dispute, common sense, efficiency, and a desire for consistency would suggest that these matters should be joined and resolved in a single forum." *Id.* at 5. The parties must evince a clear contractual agreement to consolidate. *Id.* The author notes that a carefully drafted flow-through arbitration provision can ensure that subcontractors in a multi-party project will arbitrate "to the same extent as the general contractor" even in the most restrictive jurisdictions. *Id.* at 8.

¹¹¹ *W.J. O'Neil Co.*, 765 F.3d at 635 (McKeague, J., dissenting); see sources cited *supra* note 91 and accompanying text (discussing parties' ability to negotiate arbitration clause).

¹¹² See 765 F.3d at 628 (discussing claims raised and damages sought by plaintiff against construction manager). The plaintiff alleged, "[b]reach, cardinal change, and abandonment of contract 'arising from substantial design errors and mismanagement of the project by the owner and general contractor.'"). *Id.*

joined as parties.¹¹³ The final arbitration award, that was neither confirmed nor challenged, resulted in the plaintiff receiving \$2,400,000 from the construction manager and denial of all indemnity claims flowing from the university.¹¹⁴ The dissatisfied plaintiff then filed a subsequent law suit against the defendants and the district court found it barred by claim preclusion under state law.¹¹⁵ On appeal, the Sixth Circuit parsed the arbitration clauses of each party's contract and determined that despite the "flow-through" provisions, there was no express requirement for the parties to arbitrate all claims.¹¹⁶ Therefore, the court held that even if the award was confirmed, the plaintiff never consented to arbitrate directly with the defendants and that "[t]his contagion theory of arbitration has no basis in law or relevant contracts."¹¹⁷

B. Doctrine of Claim Preclusion Applicable

In stark contrast, the First Circuit has held that claim preclusion is a viable affirmative defense to subsequent litigation after arbitration.¹¹⁸ In *FleetBoston Financial Corp. v. Alt*,¹¹⁹ a group of former employees ("appellants") initially filed multiple New York Stock Exchange ("NYSE")

¹¹³ *Id.* (detailing evolution of consolidated arbitration proceedings directly involving plaintiff and defendants). As a result, the construction manager filed a demand for arbitration with the University for indemnification, who in turn, filed a demand for indemnification with the defendants. *Id.* Interestingly, the court noted the plaintiff objected to the joining of the two arbitration proceedings and indicated the parties were hostile. *Id.* See generally *supra* notes 55-57 and accompanying text (highlighting key provisions enabling judicial action regarding arbitration awards).

¹¹⁴ See *W.J. O'Neil Co.*, 765 F.3d at 628-29 (explaining actions leading to subsequent litigation). The arbitration between the parties was quite complex and "lasted 42 days over the course of nine months" comprising of "more than 1400 exhibits" and "50 witnesses." *Id.* at 628. By the arbitrator refusing the indemnity claims from the construction manager against the University, the defendants were never held liable. *Id.* at 627.

¹¹⁵ *Id.* at 629 (granting defendants' motion for summary judgment). The court found the plaintiff's claims against the defendants for tortious interference, professional negligence, and innocent misrepresentations based on design failures arose from the exact same nucleus of fact as the previous arbitration. *Id.*; see discussion *supra* Part II.C (discussing doctrine of claim preclusion).

¹¹⁶ *Id.* at 633. The court held that even if disputes arising from the same circumstances were a valid reason for consolidating arbitrations, it was not grounds "to conclude that the [plaintiff] agreed to arbitrate its claims against the defendants." *Id.* "But even if the consolidated arbitration included O'Neil and the defendants, the contract does not require O'Neil to raise and arbitrate claims against the defendants or forever lose those claims." *Id.*

¹¹⁷ *W.J. O'Neil Co.*, 765 F.3d at 633; see *supra* notes 95-96 and accompanying text (describing basis for arbitration award confirmation).

¹¹⁸ See *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 80-81 (1st Cir. 2011) (holding arbitration between identical parties over same claims barred subsequent litigation).

¹¹⁹ 638 F.3d 70 (1st Cir. 2011).

arbitration claims against Robertson Stephenson, Inc. (“RSI”) and its parent companies (“appellees”) in aggregate for damages of over \$140,000,000.¹²⁰ As a member of the NYSE, RSI was required to arbitrate the claims, but the appellees challenged the arbitration panel’s authority in federal court.¹²¹ In response, the appellants strategically and timely filed a subset of counterclaims in the same lawsuit identical to those already claimed in arbitration against the appellees, in order to preserve their claims.¹²² When the arbitration hearings finally commenced, the appellants successfully argued that despite the NYSE rules, their employer and the appellees were so interconnected that they were imputed under various principles “including agency, alter ego, and single employer doctrines.”¹²³ The arbitration, which was extremely lengthy and complicated, resulted in a nearly \$14,700,000 award for the appellants and constituted a “full and final settlement of all claims between the parties.”¹²⁴

Because the final arbitration award did not specify what claims had been successful, nor which of the companies were at fault, the appellants

¹²⁰ *Id.* at 72-73 (providing details about each party). The appellants were a group of forty-two former employees who initially filed claims in 2002. *Id.* The original named defendants were RSI, their owner Robertson Stephens Group, Inc. (“RSGI”), and their owner FleetBoston Financial Corporation (“Fleet”). *Id.* at 72. The appellant’s claims alleged violations of Worker Adjustment and Retraining Notification Act and state wage statutes, breach of promises for bonus pay, severance pay, fraud, and negligent misrepresentation. *Id.* at 73. The appellants included additional claims in the first half of 2003 for breach of contract regarding their cash equivalent plans (“CEP”) and restricted stock unit plans (“RSU”). *Id.* at 73-74.

¹²¹ *See id.* at 73-74 (detailing unsuccessful measures taken by RSGI and Fleet to be released from arbitration). In early 2003, RSI’s defense counsel attempted several times to dismiss both RSGI and Fleet from the arbitration and met opposition from the appellants. *Id.* Because the arbitration panel never dismissed RSGI or Fleet, the defendants sought declaratory judgment from the court on the basis that they had not agreed to arbitrate. *Id.* at 74. The district court declined to stay the arbitration as to RSGI and Fleet, instead choosing to stay its own proceeding until the conclusion of the NYSE arbitration in April 2003. *Id.*

¹²² *See id.* at 74 (explaining rationale for appellant’s counterclaims). In June 2004, a full year after the federal action had been stayed, the appellants filed counterclaims against the defendants to protect against the statute of limitations in the event any of the defendants were dismissed from the arbitration. *Id.* At the request of both parties, the arbitration panel sought guidance from the court to determine if RSGI and Fleet were required to arbitrate. *Id.* In response, the district court issued a responsive subsequent order essentially stating the Southern District of New York was the best court to answer that inquiry. *Id.* However, neither party sought further clarification order from the district court. *Id.*

¹²³ *Id.* at 74 (additional quotations omitted). The arbitration hearing eventually began in January 2005. *Id.*

¹²⁴ *See FleetBoston Fin. Corp.*, 638 F.3d at 75 (describing complex arbitration proceeding). The arbitration proceeding consisted of fifty-nine witnesses and over four thousand exhibits. *Id.* In September 2007, the arbitration panel awarded damages to twenty-seven of the forty-two appellants. *Id.* The arbitration award did not specify what claims had been successful nor which defendant was found liable. *Id.*; *see supra* notes 92-93 and accompanying text (revealing substantial costs of arbitration).

requested the panel modify it to state with specificity the exact issues that had been decided and to name RSI as solely liable.¹²⁵ Upon the arbitration panel's refusal of their demands, the appellants returned to court, amended their complaint to exempt RSI, and alleged that a subset of their arbitration claims had been left unresolved.¹²⁶ Upon confirming the unchallenged arbitration award, the district court granted summary judgment for the appellees by determining the appellants' claims were barred by the doctrine of claim preclusion.¹²⁷ The First Circuit affirmed, finding no ambiguity in the final award and held that when the district court confirmed the arbitration award it gained a "res judicata effect as to all matters adjudicated by the arbitrators and embodied in their award."¹²⁸

C. The Correct Application of Claim Preclusion to Subsequent Litigation After Arbitration

First, the court must look only to the express language of the arbitration clause when determining its applicability to the parties.¹²⁹ The strategic placement of both a "flow-through" and an "agreement to be bound" clause within an arbitration provision is specifically designed to

¹²⁵ See *id.* at 75 (explaining appellant's actions upon receipt of final arbitration award). On three occasions, the appellant sought to modify the final award to reflect it was made "against RSI alone" and that it did not address the CEP and RSU claims. *Id.*

¹²⁶ See *id.* (highlighting appellants' efforts to enter into litigation against Fleet and RSGI).

¹²⁷ See *id.* at 78-79 (justifying confirmation of award as acceptance of arbitrators' decision by both parties). The First Circuit noted that the appellants never asserted there was an ambiguity that required remand, nor did they pursue any other measure available to them in the district court before confirming the award. *Id.* at 78; see *supra* notes 95-96 and accompanying text (discussing rationale and process for arbitration award confirmation).

¹²⁸ See *FleetBoston Fin. Corp.*, 638 F.3d at 80 (quoting *Apparel Art Int'l, Inc. v. Amertex Enter. Ltd.*, 48 F.3d 576, 585 (1st Cir. 1995)).

[The appellant] essentially seeks another bite at the apple after it submitted the relevant claims to arbitration; after the panel issued a "full and final" arbitral award that it refused to modify . . . ; after [appellant] failed to pursue the various available avenues for clarifying, vacating, or modifying that award; and even after the [appellants] further ratified the award by accepting payments . . . that constituted "full and final payment of the arbitration awards granted" We conclude [appellant] is not entitled to this second chance.

Id. at 79; see *supra* notes 55-57 and accompanying text (describing FAA rules for arbitration award modification, confirmation and power of confirmed award).

¹²⁹ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-29 (1983) (enforcing arbitration provision within commercial construction contract). The Court held "[u]nder the Arbitration Act, an arbitration agreement must be enforced . . . [i]f the dispute between Mercury and the Hospital is arbitrable" *Id.*; see also sources cited *supra* note 91 and accompanying text (emphasizing caution when negotiating and drafting arbitration provisions).

prevent multiple arbitrations.¹³⁰ These carefully constructed phrases ensure multiple parties to a complex project can be assured that participation in arbitration, and the associated payment of its high expenses, will be reasonably limited.¹³¹ To do otherwise could presumably sound the death knell for small and medium sized companies lacking limitless resources.¹³² Second, the courts must respect the previous arbitration proceeding by looking to the language of the final award to accurately determine the participating parties and underlying cause of action.¹³³ The critical information contained within it must be compared to the subsequent litigating parties and their claims to effectively apply the claim preclusion analysis.¹³⁴ Refusal by the court to conduct this objective analysis of the contract provision's express language effectively invalidates the integrity of the arbitration process.¹³⁵

The FAA substantially restricts the ability of parties to challenge an arbitration award within the courts.¹³⁶ With the courts demonstrated reluctance to second-guess an arbitrator's decision, the threshold to vacate an award is extremely high.¹³⁷ Because the scope of the FAA has

¹³⁰ See *W.J. O'Neil Co.*, 765 F.3d at 635 (McKeague, J., dissenting) ("Claim preclusion 'bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involved the same parties or their privies, and (3) the matter in the second case was, or could have been resolved in the first.'" (quoting *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004)); see also sources cited *supra* note 109 and accompanying text (discussing use of specific language within contract to ensure multiple parties are bound to arbitrate).

¹³¹ See CAMERON, *supra* note 109, at 6-39 (suggesting ceiling or cap may be advised to control arbitration costs between multiple parties).

¹³² See *supra* notes 92-93 and accompanying text (detailing high fees often associated with arbitration).

¹³³ See sources cited *supra* note 94 and accompanying text (describing information contained within arbitration award).

¹³⁴ See discussion *supra* Part II.C (discussing elements of claim preclusion).

¹³⁵ Cf. *W.J. O'Neil Co.*, 765 F.3d at 635 (McKeague, J., dissenting) (finding the doctrine of claim preclusion applicable).

The parties in the present case have already spent substantial time and money litigating the exact issues raised in this case. The previous arbitration lasted almost a year and generated 10,000 pages of transcripts, over 1,400 exhibits, and testimony from 50 witnesses. Now, the parties must begin again. Nothing prevented O'Neil from bringing his tort claims in the initial arbitration, and it is apparent that O'Neil has simply repurposed his arbitration claims to take a second bite at the apple. As I believe O'Neil's claims are barred by *res judicata* under Michigan law, I respectfully dissent.

Id.

¹³⁶ See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (describing limited ability for judicial review of final award under FAA).

¹³⁷ See *supra* notes 88 and 100 and accompanying text (discussing review for legal error outside purview of FAA and doctrine of arbitral immunity).

expanded and includes substantially more commercial and employment contracts, numerous less-sophisticated parties are finding themselves resolving disputes in arbitration.¹³⁸ Although this results in presumably less congestion within the taxed court system, it clearly exceeds the original purpose of the Arbitration Act.¹³⁹ By simply signing a contract involving commerce containing an arbitration clause, a party waives—often unknowingly—an important constitutional right to a jury trial.¹⁴⁰ The party further commits themselves to paying exorbitant fees, which can exceed those of litigation, should a dispute arise.¹⁴¹ The courts, who so strongly endorse arbitration, have an affirmative duty to litigating parties of applying claim preclusion to a final award to preserve the integrity of the arbitration process.¹⁴²

V. CONCLUSION

The undeniably powerful federal policy of favoring enforceability of arbitration provisions within commercial and employment contracts, regardless of party sophistication, mandates the incorporation of procedural safeguards. Implementing policy designed to minimize risks to parties consenting to arbitration should be a primary concern of the Legislature and other bodies governing arbitration proceedings. A simple step to ensure parties rights are protected and costs are contained under claim preclusion is to mandate the servicing administrative organization generate a transcript with each arbitration. The transcript would provide the courts an effective way to prevent a party unsatisfied with an arbitration award, either confirmed or unconfirmed, from litigating identical claims. The resulting costs to implement the requirement could be incorporated into already existing standard arbitration fees borne by the parties. Given the substantially expansive scope of the FAA, this procedural safeguard is well worth the minor costs because it ensures judicial claim preclusion effectiveness, thereby preserving the integrity of the arbitration process.

¹³⁸ See *supra* Part III.B (chronicling Supreme Court's expansion of the FAA).

¹³⁹ See *supra* Part II.B (revealing intention and purpose of FAA's drafters).

¹⁴⁰ See sources cited *supra* note 12 and accompanying text (discussing constitutional considerations of arbitration).

¹⁴¹ See *supra* notes 93-94 and accompanying text (exposing costs of arbitration versus costs of litigation).

¹⁴² See *supra* Part II.C and III.B (discussing claim preclusion rationale and national policy favoring arbitration).

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