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NOTES

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NOTES

INJUNCTION-JUNCTION, WHAT'S YOUR FUNCTION?: AN ANALYSIS OF INJUNCTIVE RELIEF IN ARBITRATION

Emma Ryan*

INTRODUCTION

Imagine that you are counsel for a multinational American financial services company. A plaintiff brings a claim against your corporation in arbitration, saying that its method of collecting credit card payments is unlawful. The arbitrator enjoins your company from collecting *any* credit card payments under similar circumstances. As a consequence of the enjoinment action, your entire business model may now be jeopardized.

Now say that, instead of an injunction, the arbitrator entered a $5 million judgment against the financial services company. Depending upon how the arbitrator rules, either the company owes a one-time payment to the plaintiff—or the company must cease to collect credit card payments, which is an integral service to their business model that will certainly impact the business's future financial position. Regardless of the arbitrator's decision, both types of awards are subject to vacatur by the court on grounds that are only available under extremely limited circumstances and that are rarely successful.[1]

* J.D., 2024, University of Pittsburgh School of Law; B.S., 2020, The Pennsylvania State University. I would like to thank my Domestic Arbitration Professor, Alex Madrid, for giving me the inspiration and encouragement to write this Note.

[1] 9 U.S.C. § 10(a); 2 DAVID E. ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL §§ 13–21 (2023) ("Were the rights of a party in arbitration prejudiced by the corruption, fraud, or misconduct of an

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The question is, should there be a greater protection against an injunction that impacts the entire business model versus a sole payment to the opposing party? Sweeping injunctive relief issued by an arbitrator can only be vacated if the court finds that there was "corruption, fraud, or undue means"; "evident partiality"; misconduct; or "the arbitrators exceeded their powers," or imperfectly executed them.[2] The Supreme Court has expressly stated that courts cannot review how an arbitration dispute was resolved.[3] A court does not have the authority to vacate an arbitration award based on the merits of a case.[4]

The Federal Arbitration Act ("FAA") permits the facilitation of dispute resolution through arbitration, which is an alternative, private forum compared to judicial adjudication.[5] Parties can agree to binding arbitration through contract, resulting in an arbitration award granted by an arbitrator or arbitration panel as opposed to a judgment given by the court.[6] The American judicial system views arbitration positively precisely because the FAA is a "strong federal policy in favor of arbitration, requiring courts to 'rigorously enforce agreements to arbitrate.'"[7]

Court opinions and arbitration organizations alike have indicated that arbitrators have the power to grant injunctive relief.[8] An arbitrator's power is

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arbitrator, another party or third person? As you will see, courts impose a very high burden of proof on the party seeking vacatur on this ground: clear and convincing evidence, not just a preponderance of the evidence.").

[2] 9 U.S.C. § 10(a).

[3] *See* AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 649–50 (1986).

[4] *Id.*; George L. Blum, Annotation, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators—Commercial, Business, or Real Estate Transactions*, 67 A.L.R. 5th 179 § 2(b) (1999).

[5] 9 U.S.C. § 2.

[6] *See* 9 U.S.C. §§ 2, 9; *see also* Horn v. Cooke, 118 Mich. App. 740, 744 (1982) ("An arbitration agreement is a contract whereby all the parties thereto agree to forego [sic] their rights to proceed with a court action and, instead, to submit their disputes to a panel of arbiters.").

[7] Yahoo! Inc. v. Microsoft Corp., 983 F. Supp. 2d 310, 315 (S.D.N.Y. 2013) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)); *see also* Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 200 (2d Cir. 1998).

[8] BUSINESSES AND LAW FIRMS: WHAT *NOT* TO BELIEVE ABOUT ARBITRATION, AM. ARB. ASS'N 2 (2016), https://www.adr.org/sites/default/files/document_repository/2016_Myth_Busters_WhitePaper_080316_0.pdf ("The arbitrator typically has the power to grant injunctive relief."); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000) ("[A]n arbitrator may order injunctive relief if allowed to do so under the terms of the arbitration agreement.").

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generated from the written agreement between the parties.[9] Injunctive power can be implied within the arbitration clause, even if not expressly authorized.[10] If the contract does not specifically state whether the arbitrator can enjoin a party, the power can also arise from the default rules that are applicable during the arbitration.[11] Default rules are created by arbitration administrative agencies including the American Arbitration Association's *Commercial Arbitration Rules and Mediation Procedures* and JAMS's *Comprehensive Arbitration Rules and Procedures*.[12] The rules are typically broad and include the power of injunctive relief.[13]

There is agreement across both public and private adjudication that arbitrators can have the authority to enjoin a party, and yet the nature of injunctive relief conflicts with an arbitrator's powers. Article III, equitable relief in the form of an injunction, and the authority and purpose provided to arbitrators via the FAA have contradictory objectives that cause a barrier for the execution of proper justice. One legal scholar has gone as far as to say that "[a] literal reading of Article III . . . suggests that sending federal disputes to non-Article III arbitrators under the FAA is *unconstitutional*."[14]

In Part I, this Note analyzes the inconsistencies that arise when an arbitrator is permitted to enjoin a party. Part II focuses on the issues within the judicial system that are associated with the inconsistencies and how they impact parties in a lawsuit. Part III discusses the broader background issue of injunctive relief in arbitration. Finally, Part IV provides potential solutions for the American judicial system to consider in order to rectify the problems that have been described. This Note only discusses arbitration within the United States, not international arbitration (only domestic arbitration is impacted by the FAA and the United States Constitution) and

[9] *See Marsh*, 103 F. Supp. 2d at 924.

[10] Mari Tomunen, *Injunctive Relief Pending Arbitration*, 72 DISP. RESOL. J. 1, 3 (2017) ("Even though the arbitration clause would not expressly authorize the arbitrator to award injunctive relief, the power can be implied.").

[11] *Id.* at 4.

[12] *Id.*

[13] *Id.* Tomunen goes on to explore the "extent of the court's power to grant injunctive relief" when an arbitration clause exists in the context of these various rules: while the AAA and JAMS "do not expressly state whether parties can seek injunctive relief from court," for instance, FINRA, the Financial Industry Regulatory Authority, expressly gives "the sole authority to order injunctive relief to courts." *Id.* at 5–16.

[14] Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 201 (2012) (emphasis added).

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focuses on private arbitration because judicial arbitration does not have the same standards.

I. THE CONFLICT BETWEEN AN ARBITRATOR'S POWER, ARTICLE III, AND INJUNCTIVE RELIEF

A. Article III v. Arbitration

Article III of the U.S. Constitution establishes the legal authority for the federal court to hear a case, known as subject matter jurisdiction.[15] A dispute meets federal subject matter jurisdiction requirements if it arises under federal law or the parties are of diverse citizenship,[16] meaning that if either of the requirements are met, the plaintiff party has the right to bring the case into federal court. Yet, if parties have contractually agreed to arbitration, the dispute is to be resolved by an arbitrator, pursuant to the FAA.[17]

Before 1920, federal courts often refused to compel arbitration under contract agreements for two reasons: they argued that (1) private parties could not forbid courts from hearing cases within their jurisdiction; and they argued that (2) arbitration was not effective in dispensing justice.[18] Once the Federal Arbitration Act was passed by Congress in 1925, courts were required to enforce arbitration provisions just as any other valid contractual agreement.[19] Disputes that were once brought in federal court in front of a judge could then be sent to arbitration.[20] The FAA can certainly be considered in opposition to Article III, which seems to mandate that life-tenured and salary-protected judges decide federal issues.[21] Arbitrators are

[15] *See* U.S. CONST. art. III, § 1–2.

[16] *See* 28 U.S.C. §§ 1331–1332.

[17] Perlstadt, *supra* note 14, at 202.

[18] *Id.* at 210.

[19] *Id.* at 212.

[20] *Id.*

[21] *Id.* at 226–27. Perlstadt acknowledges that there is an argument that arbitrators are not exercising judicial power "because arbitration is merely a glorified form of settlement." *Id.* at 225. However, he argues that "[a]s soon as a third party is brought in to render a binding adjudication . . . even if brought in voluntarily by the parties, that third party is exercising judicial power, and thus potentially encroaching on Article III's allocation of power to Article III courts." *Id.*

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selected and compensated by the parties, which is neither a life-tenured nor salary-protected position.[22]

However, this "literal reading" of Article III is flawed and unworkable.[23] "[A]dministrative agencies, bankruptcy courts, courts-martial, and federal magistrate judges, all exercise judicial power over Article III disputes without tenure or salary protections."[24] Federal courts have traditionally read arbitration agreements as a *waiver* of the right to have a court-appointed judge rule over the case.[25]

Adoption of the waiver theory does not resolve the underlying issues. Inconsistencies between Article III and the FAA have certain unwanted implications. An Article III judge with tenure and salary protections may have different incentives compared to an arbitrator, who is paid by the parties of a dispute: an arbitrator is incentivized to treat repeat arbitration players more favorably to increase the likelihood of being hired for future disputes.[26] Arbitrators are at a higher risk of bias and "are actually held to a lower standard of impartiality than Article III judges."[27]

This analysis might be moot without research demonstrating that these implications have impacted case outcomes, but it is unclear whether the differing incentives between arbitrators and judges are outcome determinative.[28] Conducting research in this field is difficult due to lack of access to data, difficulty in comparing data (a case will only be processed through arbitration or the court, never both), and uncertainty regarding which variables should be evaluated to find appropriate results.[29] Complications cause inconsistent results. Specifically, scholars have

[22] *Id.* at 203.

[23] *Id.* at 203–04.

[24] *Id.* at 204.

[25] *Id.* at 207 (stating that lower federal courts have adopted the waiver theory, based on the notion that arbitration does not violate Article III because access to an Article III court is a waivable right).

[26] *Id.* at 205 ("[B]ecause arbitrators are chosen by and compensated by the parties, they are competing with each other for dispute resolution business. Indeed, one arbitration provider, JAMS, openly acknowledges this competition, encouraging disputants to choose it over other providers the disputants may have already selected. Consequently, the incentive exists for arbitrators to favor parties they expect to require arbitration services again in the future.") (citation omitted).

[27] *Id.* at 206.

[28] *See id.* at 206 n.22.

[29] Jean R. Sternlight, *Consumer Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 127, 151 (Edward Brunet, Richard E. Speidel, Jean R. Sternlight & Stephen J. Ware eds., 2006).

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argued over the research regarding repeat players.[30] Research presented by Alexander J.S. Colvin found "an employer advantage in repeat-employer-arbitrator pairings [that] may reflect arbitral bias."[31] David Horton and Andrea Chandrasekher, however, challenged this finding by categorizing repeat players into tiers based on company sophistication and find no link to arbitrator partiality.[32] Though arbitrators may be at a higher risk of potential bias, there is inconclusive evidence to suggest it is actually occurring. Without definite results pointing towards an answer, differing incentives between arbitrators and Article III judges cannot be ruled out.

The limited nature of judicial review of arbitration awards conflicts with the appeals process that are afforded to Article III courts: "[t]he scope of judicial review of an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation."[33] With a broader interpretation of the FAA and a narrow scope of appeal for an arbitration award, it would appear that the FAA is especially inconsistent with Article III. Waiver theory is how the FAA survives in the Article III landscape.[34]

B. Injunctive Relief v. Arbitrator's Powers

As this Note has discussed, an arbitrator can have the power to grant injunctive relief, if the contract's terms permit.[35] Yet, on its face, the nature of injunctive relief is inconsistent with an arbitrator's power. An injunction is a remedy typically sought through a court order requiring a party to do something or to stop doing something.[36] Arbitration, on the other hand, is a method of resolving disputes *outside* of the courtroom.[37] In this form of private dispute resolution, the parties have agreed

[30] David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 83 (2015).

[31] Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 21 (2011).

[32] Horton & Chandrasekher, *supra* note 30, at 120–21.

[33] Perlstadt, *supra* note 14, at 220.

[34] *Id.* at 251.

[35] *See supra* text accompanying notes 8–13.

[36] 20 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 308.11 (3d ed. 2024).

[37] *Arbitration Defined: What is Arbitration?*, JAMS, https://www.jamsadr.com/arbitration-defined/ (last visited Aug. 5, 2024).

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through contract for an arbitrator to hear and decide the dispute; if it proves necessary, a neutral third party hears evidence from both sides and makes a decision that is binding on the parties.[38] Therefore, an arbitrator is *not* an officer of the court, but a private individual whose authority arises from the contract terms.[39] Once the dispute has ended and a decision has been rendered, unlike a court, the arbitrator has no means of enforcing this decision.[40]

Injunctive relief requires continuous authority to enjoin the parties after the litigation has ended, which is inconsistent with an arbitrator's lack of authority over the parties after a decision has been given. Unlike an injunction, once damages are awarded to a party in arbitration, the litigation ends, the parties go their separate ways, and the arbitrator is finished with her duties and authority.[41] Conversely, when a court enjoins a party, it retains the power to enforce that injunction through a contempt order or to modify or dissolve the injunction as necessary.[42]

This critical distinction between injunctive relief and monetary damages can be traced back to the English judicial system.[43] The Court of Chancery was a court of equity with the power to provide remedies other than monetary damages, including injunctive relief, by applying an equitable standard rather than principles of the law.[44]

The arbitrator is traditionally *not* construed as retaining any authority over the parties once the dispute has ended; she goes back to being a private citizen.[45] If a

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[38] *Id.*

[39] *See* Blum, *supra* note 4, § 2(a) ("In private arbitration, the arbitrator is not necessarily a judge or government official; the arbitrator's power over the parties stems from his or her appointment.").

[40] Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991) ("Arbitrators have no power to enforce their decisions. Only courts have that power.").

[41] An arbitration award must be "confirmed by a court of appropriate jurisdiction" in order to be "entered as a judgment," whereby the arbitration decision is rendered enforceable—but this is the court's only role in the arbitration and the arbitrator has no role in this action. *See Arbitration Defined: What is Arbitration?*, *supra* note 37.

[42] *See* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 345 (2000) (exploring how contempt citations and sanctions are used by courts); Thompson v. U.S. HUD, 404 F.3d 821, 825 (4th Cir. 2005) ("It has long been recognized that courts are vested with the inherent power to modify injunctions they have issued.").

[43] *See* Jeffrey Steven Gordon, *Our Equity: Federalism and Chancery*, 72 U. MIA. L. REV. 176, 187 (2017) ("Entirely separate from the common law courts, the Court of Chancery exercised equity jurisdiction in England until 1873, when the Chancery Division was created within the High Court of Justice.").

[44] *See id.* at 187–88.

[45] *See supra* notes 39–40 and accompanying text.

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party does not comply with an arbitral injunction, the arbitrator cannot require obedience.[46] Courts have sought to fix this glaring issue by holding that *the courts* have the power to enforce an arbitrator's injunction.[47] Indeed, as the court in *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, stated:

> "Arbitrators have no power to enforce their decisions. Only courts have that power. Consequently, courts in other circuits that have been faced with arbitrators' temporary equitable awards have not characterized them as non-final awards on the merits which can only be reviewed in extreme cases. Rather, they have characterized them as confirmable, final awards on an issue distinct from the controversy on the merits." In short, as the other circuits to have addressed this issue recognize, arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction, and district courts must have the power to confirm and enforce that equitable relief as "final" in order for the equitable relief to have teeth.[48]

The power to enjoin a party before a decision has been rendered on the merits of the case, known as a preliminary injunction, is clearly inconsistent with an arbitrator's powers. An arbitrator does not have authority over the dispute pending arbitration because no third-party neutral has been chosen by the parties and thus granted power through the contract.

This creates an issue. Say, for example, a company demands cancellation charges from a manufacturer which must be pursued through arbitration per the agreed-upon arbitration provision.[49] Meanwhile, the manufacturer decides to sell its assets and close its business. The company wants to ensure that the manufacturer will have sufficient funds to pay if monetary damages are awarded in arbitration. The dispute must be determined through arbitration, which is pending, and if an injunction is not enacted soon, the manufacturer may pay off its other creditors, leaving nothing for the potential award.

Parties have the power—and are encouraged—to customize their arbitration provision so that the default rules of arbitration agreements are not implemented by

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[46] Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991).

[47] *See id.*; Arrowhead Glob. Sols., Inc. v. Datapath, Inc., 166 F. App'x 39 (4th Cir. 2006).

[48] *Arrowhead*, 166 F. App'x at 44 (quoting *Pac. Reinsurance*, 935 F.2d at 1023) (citations omitted).

[49] *See* Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 44–45 (1st Cir. 1986). The facts of this example are taken from this case.

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the court.[50] The agreed upon exceptions are called carve-outs.[51] A common carve-out found in a provision includes the right to seek injunctive relief from the court when arbitration is pending.[52] The extent of the court's power to grant injunctive relief stems from the arbitration rules, statutes, and case law.[53] The purpose of such a carve-out is to "maintain the status quo pending arbitration."[54]

Arbitration associations have addressed the issue as well by creating the concept of an "emergency arbitrator" to provide "emergency relief" while an arbitration is pending.[55] However, an arbitrator still lacks the ability to issue a preliminary injunction, let alone enforce one, due to limited sanctioning powers, which requires a court to enforce the ruling for it to be effective.[56]

Injunctive carve-outs and the court's ability to enforce arbitral injunctions imply that the judicial system is aware of the inconsistencies between private disputes and public enjoinment. Often, this is the end of the discussion when it comes to these issues. Arbitrators do not have the power to enforce injunctions, and so this power has been provided to the courts. Nevertheless, there are a few problems within the scheme that can negatively impact the parties of the dispute and the judicial system itself.

II. THE IMPACT OF INCONSISTENCY ON THE JUDICIAL SYSTEM

There are two issues within the arbitration injunction scheme that this Note explores. First, the limited grounds for vacatur make it difficult for a court to overturn

[50] *See* Tomunen, *supra* note 10, at 1 ("Customization is important because unless the parties have expressly agreed about a particular matter, courts will have to rely on default rules, which at their best are commonly understood, but at their worst, can be unpredictable.").

[51] *Id.*

[52] *Id.*

[53] *See id.* at 5 (explaining that while some arbitration rules do not expressly state whether a party can receive injunctive relief from a court, it can be inferred from the rules that seeking such relief is not precluded).

[54] Philip E. Karmel, Comment, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. CHI. L. REV. 1373, 1375 (1987).

[55] *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N, at R-38 (Oct. 1, 2013), https://adr.org/sites/default/files/Commercial%20Rules.pdf.

[56] Coleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519, 1520 (1991).

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an injunction award. Second, the court is required to enforce an arbitration award of injunctive relief, and yet has no standard to determine how this should be done.

A. Vacatur Limitations

Once an award is handed down by an arbitrator, a party can either move for a court to affirm the award or for the award to be vacated.[57] Arbitrator orders are subject to extremely limited grounds for vacatur.[58] Under a motion to vacate, the standard of review for the court is based on the actions of the arbitrators.[59] The award cannot be vacated based on the merits of the claim.[60]

Under § 10 of the Federal Arbitration Act, there are four potential grounds for vacatur.[61] The court may vacate if it finds that: (1) the arbitration award was "procured by corruption, fraud, or undue means"; (2) an arbitrator was evidentially partial; (3) an arbitrator was guilty of misconduct; or (4) an arbitrator exceeded their powers.[62] This section significantly restricts the court's review of the decisions made in a dispute resolution that was agreed upon to be determined *outside* of the courtroom.[63] There would be no point to alternative dispute resolution if the court always had the final say in the matter.

Case law has narrowly defined the prongs from § 10 and has provided few examples of cases that meet this high standard.[64] Some jurisdictions have historically

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[57] 9 U.S.C. §§ 9–10.

[58] *See* 9 U.S.C. § 10(a); *see also* Yahoo! Inc. v. Microsoft Corp., 983 F. Supp. 2d 310, 315 (S.D.N.Y. 2013) ("If the parties agreed to submit their dispute to arbitration . . . a court will 'uphold a challenged award as long as the arbitrator offers a barely colorable justification for the outcome reached.'") (quoting ReliaStar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009)).

[59] *See* Perlstadt, *supra* note 14, at 220.

[60] *Id.*

[61] *See* 9 U.S.C. § 10(a).

[62] *Id.*

[63] *See* Perlstadt, *supra* note 14, at 220–21 (citing Three S Del., Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007)).

[64] *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147–48 (1968) (holding that the evident partiality prong is an objective standard and that actual bias unnecessary to vacate an award on this basis); Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 80–81 (2d Cir. 1984) (holding that a "father-son relationship between an arbitrator and an officer of one party to the arbitration rises to the level of 'evident partiality'"); UBS Fin. Servs. Inc. v. Asociación de Empleados del Estado Libre Asociado de P.R., 419 F. Supp. 3d 266, 275 (D. Mass. 2019) (exploring a circuit split as to "whether actual knowledge of a conflict, or potential conflict, is necessary" to prove partiality); Wachovia Sec., LLC v. Brand, 671 F.3d 472, 480 (4th Cir. 2012) (holding that it is neither misconduct

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recognized an additional, non-statutory ground for vacating an arbitration award known as "manifest disregard" of the law.[65] Courts that acknowledge these grounds require that a clearly defined controlling principle, not subject to debate, existed, but the arbitrator did not apply it.[66] Regardless of the interpretation of the prongs and whether a fifth ground is used in a circuit, the possibility of the movant winning a motion to vacate an arbitration award is incredibly slim.[67]

Under certain circumstances, the high standard for vacatur is useful in order to separate private disputes from the judicial system. In a dispute between parties where monetary damages are sought, the limited grounds for vacatur may be inconvenient to the party that must pay the award, but they ultimately protect the parties' agreement to have a third-party neutral determine the case. At the end of the day, business disputes happen, parties pay each other money, and life moves forward. A monetary judgment against a business is an inconvenience, yet after the payment, the inconvenience has ended. However, if an arbitrator is issuing sweeping injunctive relief, that too can only be vacated on these very limited grounds. Arguably, this is a much greater inconvenience compared to a one-time payment.[68]

Let's walk through an analysis of this exact issue in a real-world example. Say that a subcontractor alleges that a contractor breached their agreement by working with a third party.[69] The dispute is sent to arbitration, pursuant to the contract, and the arbitrator enjoins the contractor from working with the third party. The contractor disagrees that working with the party was a breach of contract; this third party is a supplier company that has been a critical part of the contractor's business for many years. The contractor moves to vacate the award, but the court finds that the very

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nor misbehavior "where the arbitrators attempted to address one party's unhappiness with the fairness of the hearing and that party refused to take advantage of the opportunity provided").

[65] *See* Perlstadt, *supra* note 14, at 221.

[66] *Id. See also* Yahoo! Inc. v. Microsoft Corp., 983 F. Supp. 2d 310, 315 (S.D.N.Y. 2013) ("Awards are vacated on [manifest disregard for the law] grounds 'only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent.'") (quoting T.Co Metals LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010)).

[67] Perlstadt, *supra* note 14, at 223.

[68] It is possible that a monetary judgment would impact a company's finances. However, equitable relief is arguably more impactful because it is taking away a party's right to *physically* do—or refrain from doing—something, which can be a direct impact on a business model, instead of a one-time payment of monetary damages.

[69] *See* Arrowhead Glob. Sols., Inc. v. Datapath, Inc., 166 F. App'x 39, 42 (4th Cir. 2006). This example comes from the facts of this case.

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limited basis for vacation is not found in this case because the arbitrator was impartial to the parties. The injunction is sent to the federal court to be enforced by a judge. The judge does not know the merits of the case or if the contractor truly breached the contract, but he is required to enforce the injunction. The contractor has lost an essential business partner and would like to get the case reviewed on the merits.

Under current FAA and case law rules, the contractor would not be able to do that.[70] The injunction cannot be reviewed on the merits; it must simply be enforced by the judge, unless grounds for vacatur are found. One may argue that since the parties have contractually agreed to the terms, they should suffer the repercussions of an injunction provided by an arbitrator.[71] Indeed, arbitration provisions are reviewed based on basic contract interpretations.[72] Subjective intent is not a factor, and only the objective actions of the parties are considered when a court determines if there is a valid arbitration provision.[73] Even third parties that are not a part of the arbitration provision can be bound to the contract.[74] Though arbitration is considered to be a "creature of consent," the ability to bind a third party to an agreement that they had not signed would make it more of a creature of adhesion.[75]

B. A Lack of Standard

What is the standard pursuant to which a court should hold a party in contempt for failing to enforce an arbitral injunction, or for that court to modify or dissolve the injunction? The court does not have the benefit of a full factual record for injunction, since the arbitrator made the decision, but the court is now tasked with enforcing it.[76] The problem is, there is no clear standard for the court to follow in enforcement of the arbitral injunction.

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[70] *See Yahoo!*, 983 F. Supp. 2d at 315; Perlstadt, *supra* note 14, at 220–21.

[71] *Cf.* Stephen P. Bedell & Louis K. Ebling, *Equitable Relief in Arbitration: A Survey of American Case Law*, 20 LOY. U. CHI. L.J. 39, 42 (1988) (explaining that when an arbitral award is challenged, "the court will base its determination primarily upon the language of the arbitration agreement itself").

[72] Perlstadt, *supra* note 14, at 216.

[73] *Id.*

[74] *Id.* at 216–17 (discussing various scenarios where a non-party is bound to an arbitration agreement to which they did not subjectively assent).

[75] *Id.* at 215. For a more in-depth analysis into consumer arbitration contracts as contracts of adhesion, see Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 738–41 (2016).

[76] *See* Yahoo! Inc. v. Microsoft Corp., 983 F. Supp. 2d 310, 315 (S.D.N.Y. 2013).

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From the previous example discussed in Section II.A, a judge must now enforce the injunctive decision brought down on the contractor.[77] The judge does not have the benefit of a full factual background since the injunction was determined by the arbitrator. Often an arbitrator will not issue an opinion since it is often not a requirement in private dispute resolution.[78]

That is one of the reasons why an injunction is enforced by the court that issued the opinion. A judge has the benefit of the factual record because the opinion came from their own courtroom. Therefore, the judge can modify, dissolve, or enforce an injunction as it deems appropriate. Without the record, the court is left to enjoin the party with minimal understanding of the case.

III. A BROADER BACKGROUND ISSUE

There is a broader background issue that is located at the heart of this argument. American arbitration was designed for parties to resolve *bilateral disputes*.[79] It is difficult to get third-party discovery into arbitration for this very reason.[80] The FAA was never intended to reach third parties. Private dispute resolution is just that: a private dispute where two individuals are in a room arguing their position, and a neutral party decides who is more right.

Private dispute resolution is in complete opposition to an injunction. Equitable relief is not about resolving a dispute; it is about ordering one party to do or not do something that affects more than just the other party.[81] Issuing an injunction in private arbitration makes the dispute a public issue, which defeats the purpose of alternative dispute resolution.

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[77] *See supra* notes 71–72 and accompanying text.

[78] Perlstadt, *supra* note 14, at 221 n.95.

[79] *See* Alan Scott Rau, *Evidence and Discovery in American Arbitration: The Problem of "Third Parties,"* 19 AM. REV. INT'L ARB. 1, 2 (2006) ("[The United States has] wholeheartedly embraced . . . the notion that the arbitration process should be understood above all as an exercise in private autonomy—understood, that is, 'through the lenses of contract rather than of adjudication.'") (quoting Alan Scott Rau, *On Integrity in Private Judging*, 14 ARB. INT'L 115, 154 (1998)).

[80] *See id.* at 5–9 (discussing the shift towards imposing limits on arbitrators' power to exercise authority over third parties).

[81] *See, e.g.*, Arrowhead Glob. Sols., Inc. v. Datapath, Inc., 166 F. App'x 39, 42 (4th Cir. 2006). Arrowhead was issued an injunction to stop working with Psi Systems. *Id.* Psi Systems was not a party of the arbitration and yet was impacted by the decision of the arbitrator. *Id.*

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An arbitrator is not empowered to turn a private dispute into a public one. Injunction does not agree with the objective of arbitration because "the overarching purpose of the FAA was to promote private ordering in dispute resolution as free as possible from state interference."[82] Injunctive relief granted by arbitrators is an example of arbitration far exceeding the original scope intended by the drafters of the FAA.

IV. FIXING THE SYSTEM

I am recommending three possible solutions to the inconsistencies of arbitration and injunctive relief. None of these solutions perfectly fixes the problem because each resolution comes with its own pitfalls within the FAA and judicial system. These recommendations are simply ideas that the judicial system should begin to consider. First, I recommend that arbitration needs to stay in the realms of private dispute resolutions and should not enter the public judicial system. Second, I suggest that the standard for the court to vacate an arbitral award of injunctive relief should be the *abuse of discretion* standard. Finally, and arguably most controversially, I am suggesting that arbitrators should *never* have the power to grant injunctive relief. These recommendations would not require amending the FAA, because as of now, the way that injunctions have been implemented within the arbitration realm has been in opposition of the intent of the Federal Arbitration Act.[83]

A. Separating Private and Public Adjudication

Court opinions and commentary have consistently discussed the purpose of the Federal Arbitration Act: arbitration is a more efficient and cheaper way to litigate a case and this form of private dispute resolution relieves pressure from the court.[84] Pressure cannot be relieved if private and public dispute resolution continue to cross

[82] Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1941 (2014).

[83] *See* discussion *supra* Part III.

[84] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995); Publicis Commc'n v. True N. Commc'ns Inc., 206 F.3d 725, 727 (7th Cir. 2000) ("Arbitration can be an effective way to resolve a dispute in less time, at less expense, and with less rancor than litigating in the courts."); Blum, *supra* note 4, § 2(a) ("In terms of time, the average arbitration takes about 4 to 5 months while litigation may take several years. The cost of arbitration is minimal compared to a civil trial since the American Arbitration Association charges only a nominal filing fee and the arbitrator may even work without a fee to broaden his or her professional experience.").

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paths every time there is potential for an injunction.[85] The only way the purpose of arbitration can be achieved, I argue, is through near-complete separation to preserve the autonomy of private dispute resolution: near-complete only because parties would still need the ability to motion that the court compel arbitration, as an arbitrator does not have the authority to compel arbitration if one party is refusing to arbitrate the claim.

To separate private from public adjudication, carve-out provisions cannot grant the court the power to preliminarily enjoin a party while arbitration is pending. Of course, there will still be circumstances when a party will suffer serious damages if the other side is not given an injunction before the arbitration begins and there need to be protections in place.

The American Arbitration Association has established optional rules for Emergency Measures of Protection.[86] The rules allow the appointment of an emergency arbitrator who, when "the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief . . . may enter an interim order or award granting the relief."[87] Just as a carve-out provision would permit a court to grant a preliminary injunction pending arbitration, this carve-out gives the power to an arbitrator, thus staying in the private sphere of alternative dispute resolution.

This does not solve the issue of the inconsistencies of injunctive relief and arbitration because it is granting *more* power to the arbitrator, who does not have the authority to enforce an injunction once the dispute is complete. Nonetheless, an emergency arbitrator does not need the authority to enforce their order once the dispute is completed since this is a *preliminary* injunction, meaning interim relief that may have an end date.[88] However, since an arbitrator lacks the sovereign powers given to the states, which limits its power to compel the interim relief *at all*, arbitrators would need the court to enforce this preliminary injunction.[89] The

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[85] *See Publicis*, 206 F.3d at 727 ("Arbitration loses some of its luster, though, when one party refuses to abide by the outcome and the courts are called in after all for enforcement.").

[86] *See Commercial Arbitration Rules*, *supra* note 55.

[87] *Id.* at R-38(e).

[88] *See* Sparks v. Gray, 334 Ill. App. 3d 390, 396 (2002) ("Preliminary injunctions are designed simply to preserve the status quo pending the resolution of the merits of the case. In contrast, permanent injunctions are designed to extend or maintain the status quo indefinitely when the plaintiff has shown irreparable harm and has shown that there is no adequate remedy at law.") (citations omitted).

[89] Higgins, *supra* note 56.

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emergency arbitrator also seems to conflict with the broader background issue that injunctive relief was never intended to be a part of the arbitrator's power.[90]

The solution also implies that a court cannot be given the power to enforce an arbitral injunction. This is where it becomes complicated, and ultimately where the solution would fail. At this time, there are no optional rules that permit an arbitrator to be appointed after the dispute has ended to enforce an injunction. Once again, to satisfy the solution, arbitrators would need enforcement powers so that the courts do not have to implement the arbitral injunctions. An appointed arbitrator would need the power to either review an arbitral award or enforce an award, thus taking away the need for court involvement.

Just as preliminary injunctions would be unenforceable without court involvement, an appointed post-arbitrator approach would fail because arbitration does not have contempt power to enforce an award.[91] Indeed, enforcement of arbitration awards is delegated to the courts for this very reason.[92] That is why a party must motion for an arbitration award to be confirmed by the court. Consequently, it is likely impossible for public and private dispute resolution to be completely separate. There must be some crossover.

B. A New Standard for Arbitral Injunctions

The judicial system currently requires courts to enforce an injunctive arbitration award without reviewing the factual background. As discussed in Section II.B of this Note, a judge is then forced to enjoin a party, taking away their fundamental right to do or not do something, without an understanding of the case.[93] For that reason, injunctions that are issued by arbitrators should be automatically sent to the court for review. A new standard that is not as strict as the current vacation standard must apply to allow courts to enforce, modify, or dissolve an injunction from an arbitrator.

I suggest that the standard of review required by the court for injunctive relief issued by an arbitrator should be the abuse of discretion standard. This standard would permit the court to reverse the decision of the arbitrator if the judgment was

[90] *See* discussion *supra* Part III.

[91] *See* Higgins, *supra* note 56; *cf.* Livingston, *supra* note 42, at 345 (noting the assumption of contempt power by Anglo-American courts).

[92] Higgins, *supra* note 56.

[93] *See* discussion *supra* Section II.B.

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plain error, the discretion of the arbitrator was not justified by the evidence of the case, or the judgment was clearly against the facts.[94]

The court is the one that will be enforcing this injunction, so it needs the power to ensure that there is equity in this injunction, instead of the high standard of partiality from the arbitrator. Since injunctive relief originated in the court of equity, the standard of review should reflect that of an equitable standard.

There are two different avenues where this standard can be implemented. First, the abuse of discretion standard can apply in motions to vacate injunctive relief. Therefore, when a party seeks to vacate an arbitration award, if the award includes an injunction from the arbitrator, the court can review the injunction under the abuse of discretion standard, while reviewing the rest of the arbitration award via the partiality standard.

Second, a standard can be created for courts to enforce, modify, or dissolve an injunction altogether. So, once the arbitration has been completed and a court is required to enforce an arbitral injunction, the court will be permitted to immediately apply the abuse of discretion standard when either enforcing, modifying, or, ultimately, dissolving the injunction. Once again, as a court of equity, they should have the ability to apply equitable relief with a full factual understanding.

This standard is in direct opposition to § 10 of the FAA, which only permits vacatur of an arbitration award under limited grounds.[95] But injunctive relief was never really intended to be a part of the private dispute resolution in the first place and therefore this solution is creating a remedy for the incorrect, overexpansive interpretation of the FAA.

There are a few issues that follow if a new standard is developed. First, arbitrators are oftentimes not required to issue opinions.[96] For a court to grant a decision on the merits of an arbitration award, it can be extremely impractical, and sometimes downright impossible, if there is no opinion from the arbitration decision.[97] For that reason, arbitration divisions or the courts would need to require arbitrators to write opinions when an injunction is issued or construct a new trial, which costs time and money.

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[94] I Rabkin v. Or. Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

[95] 9 U.S.C. § 10(a).

[96] Perlstadt, *supra* note 14, at 221 n.95.

[97] *Id.*

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This new standard suggestion also falls short because it does not satisfy the broader background issue of arbitration being inherently inconsistent with an injunction. This remedy is to correct the overexpansion of the FAA, and yet it is still granting a power to arbitrators that was never intended for them.

C. Take Away the Power from the Arbitrator

Injunctive relief is inconsistent with the idea of arbitration.[98] Permitting an arbitrator to grant equitable relief expands the Federal Arbitration Act's power into something that it was never intended to be. Therefore, the only logical way to fix the issues that have occurred from arbitrators' injunctions is to get rid of the power altogether.

This would take several steps. First, it would have to be required that preliminary injunctions are always determined by the court pending an arbitration. If a preliminary injunction carve out is not within the contract, then it would have to be implied. Second, a party would not be permitted to request injunctive relief from the arbitrator. If this type of relief is required, the dispute must be resolved through the judicial system.

There are significant downsides to this solution. First, parties could use injunctive relief as an excuse to exit arbitration. Contractual principles do not align with this concept. For that reason, the arbitrator should look at the merits of the case to see if an injunction would be necessary. However, that solution to the problem would also pose an issue. Parties would have to go through the arbitration process and spend money on the case only for an arbitrator to send the dispute to a court. Arbitration is meant to be a more efficient alternative form of dispute resolution,[99] and requiring an arbitrator to take the time to review the merits of the case and ultimately send it to the court would defeat the purpose of the system.

Contract interpretation and the purpose of arbitration impacts each one of the solutions that I have suggested.[100] If parties want to agree to a private dispute forum, is it *equitable* to send them to a public forum every time there is a question of *equity* in the case?

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[98] *See* discussion *supra* Parts I–III.

[99] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).

[100] *See supra* notes 73, 81 and accompanying text.

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CONCLUSION

Arbitration, Article III, and injunctive relief have evident inconsistencies that are worth exploring further. Limited vacatur options and a lack of standard for the courts to use when enforcing arbitral injunctions causes problems in the private and public adjudication system that need solutions. Equitable relief requires greater protections than monetary judgments in arbitration because it is taking away a liberty to *do* or *not do* something.[101] Without a check on the arbitration system, unfair injunctions cannot be overturned without hurdling the high bar for vacation required under the FAA.[102]

The issues related to injunctive relief and arbitration are prevalent and this Note has attempted to make them apparent. The potential solutions that are mentioned in this Note all have serious caveats, so there needs to be further research and analysis on this topic because it is ripe for review. Equity is an integral part of the American justice system in both public and private fora. The first step is to acknowledge the lack of equity that currently exists between the systems.

[101] *See* 20 MOORE ET AL., *supra* note 36.

[102] *See* 9 U.S.C. § 10(a).

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