

ARBITRATION EFFECT

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Abstract

Arbitration is changing American law and its justice system. Critics argue that arbitration leads to claim suppression. Proponents argue that it is cheaper and less formal. These claims, particularly claim suppression, have not been empirically tested. Whether and how arbitration impacts individuals' *decision to sue* remains an open inquiry. In a series of experiments, this Article for the time shows the impact of arbitration agreements on individuals' decision to sue. This Article calls it the 'arbitration effect.'

First, this Article tests whether the arbitration effect exists; that is if arbitration agreements negatively impact individuals' decision to sue. *Second*, the Article experimentally tests individuals' decision to opt out of arbitration agreements. *Lastly*, the Article assesses whether any type of information can 'cure' the arbitration effect.

The empirical results establish that individuals are less likely to sue in arbitration as opposed to court, hence the arbitration effect. Such effect, however, does not exist at the contracting stage meaning that individuals do not shun away from arbitration when given the option. Further, none of the fundamental attributes of arbitration, as touted by the U.S. Supreme Court, are what individuals care about. Nor do win-rates and class action mitigate the arbitration effect. Equally, informational nudges do not reduce the effect and individuals do not ascribe negative attributes to firms forcing mandatory arbitration.

For decades, courts and lawmakers grappled with issues related to arbitration, which resulted in a myriad of Supreme Court decisions, several bills sitting on Capitol Hill, and continuous circuit splits on various issues. The Article provides much-needed data that can help clarify some of these issues most notably arbitration's effect on individuals' decision to sue.

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Findings cast serious doubts on the ongoing efforts—market-based, judicial, or regulatory—aiming to change the arbitration course. It further shows that the individuals’ contracting decision differs from their justice decision, an important distinction for courts and lawmakers to note in their approaches to right to sue, unconscionability, and vindication of statutory rights.

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INTRODUCTION[†]

Arbitration has changed the law and the justice system for good.¹ And as to individuals' access to justice, the right to access is more important than the ability to access. At least, this is the conclusion one can reach from the Supreme Court jurisprudence.² The arbitration jurisprudence teaches us that for the most part financial inability is irrelevant. So is lack of access to class action. We learned from the Supreme Court jurisprudence that if there is a way (right) there will be a will. The problem, however, is that there is no will to sue in arbitration.³ This is what this Article establishes.

Despite its importance and omnipresence, the topic of arbitration has yet to surface as a topic of public discussion.⁴ As a result, there is so much unknown about arbitration at least from the behavioral angle.

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¹ One federal judge opined that the arbitration trend and the accompanied Supreme Court's supportive decisions is "among the most profound shifts in our legal history." Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>

² For in-depth discussion on the Supreme Court jurisprudence, see *infra* Part II.

³ This Article focuses on perspectives of individuals (consumers and employees) on arbitration not on organizations' willingness to use arbitration. Relatedly, the study's focus is on unsophisticated individuals when it comes to dispute resolution selection.

⁴ Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 500 (2017)

Much of what we know fits into three categories: lenient Supreme Court jurisprudence *favoring* arbitration,⁵ normative stances vehemently arguing against the use of arbitration (at the minimum in consumer and employment cases),⁶ and some data on the win-rates and repeat player effect.⁷ Put simply, through years of rigorous scholarship and advocacy, we know the law, its critique, and its impact on who's winning.⁸ What remains unknown is the effect of the present law on individuals' decision to sue. The inquiry on arbitration claim suppression therefore is still an open one.

To understand the problem, imagine an individual has a grievance with an organization concerning the imposition of extra fees for services the organization allegedly had not delivered. At some point in the cognitive thought process, the individual decides to take a legal action. Would an arbitration agreement in the contract with the organization make it less likely that the individual take legal action? If so, how? Put differently, the query is whether at the *ex-ante* level (pre-dispute phase),

⁵ See *infra* Part II.

⁶ See e.g., Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631 (2004); Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 500 (2017); Christopher Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); David Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2008); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2000); Mark Budnitz, *Arbitration of Disputes between Consumers and Financial institutions: A Serious Threat to consumer protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1994). David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer rights Claims in an Age of Compelled Arbitration*, 33 WIS. L. REV. (1997). Miles Farmer, *Mandatory and Fair-A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346 (2011) 2346; Richard Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001).

⁷ See e.g., Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 107 1(2019). For a complete review of empirical studies pertaining to win-rate and repeat players, see Farshad Ghodoosi & Monica Sharif, *Justice in Arbitration: the Consumer Perspective*, INT'L J. OF CONFLICT MGMT. (2021).

⁸ See also for positive accounts of arbitration, Pete Rutledge, *Whither Arbitration*, 6 GEO. J.L. & PUB. POL'Y 549 (2008); Peter Rutledge, *Who Can Be against Fairness-The Case against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2007); Peter Rutledge, *The Case Against the Arbitration Fairness Act*, 4 DISP. RESOL. MAG. 16 (2009); Christopher Drahozal, *Is Arbitration Lawless*, 40 LOY. L. A. L. REV. 187 (2006). See also for scholarship related to the intersection of arbitration and administrative law, David Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017); David Noll, *Deregulating Arbitration*, 30 LOY. CONSUMER L. REV. 51 (2017); David Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665 (2018).

arbitration agreements have any behavioral impacts on individuals once they become aware of arbitration agreements after they decide to sue. This query goes to the heart of the behavioral impact of arbitration agreements. This Article calls it the “Arbitration Effect” and will furnish novel findings regarding the ways in which arbitration agreements impact individual legal decision-making prior to taking legal action as well as the ways certain types of information could impact the arbitration effect.⁹

Sporadic existing data seems to suggest that a large portion of our disputes, as employees and consumers, remain unresolved and unclaimed due to arbitration.¹⁰ Take the Wells Fargo scandal as an example. Over the span of several years, Wells Fargo opened nearly 3.5 million fake accounts primarily by using its existing customers’ information without their consent. Wells Fargo however managed to keep arbitration claims extremely low despite the wide-spread alleged fraudulent scheme. In reality, Wells Fargo only faced 250 consumer arbitration claims between 2009 and the first half of 2017.¹¹ ¹² This is in line with CFPB study of 2015 which suggested that across six different consumer finance markets

⁹ Some commentators suggest that the willingness to use arbitration, or as we call it the arbitration effect, maybe broader than claim suppression. The latter focuses on situations where individuals are willing to sue but the terms of the arbitration agreement make it infeasible (*e.g.*, when the cost is prohibitive.) However, the arbitration effect and claim suppression are related topics. While the latter focuses on external factors (such as costs and class action waiver), arbitration effect investigates *ex ante* perceptions and biases toward arbitration. As discussed in this Article, arbitration effect explains how arbitration agreement impact individuals’ decision to sue which in turn inform the discussion related to claim suppression and access to justice.

¹⁰ See *e.g.*, Alexander Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 million American Workers*, ECONOMIC POLICY INSTITUTE (2018).

¹¹ Economic Policy Institute, 2017

¹² Interestingly enough, a similar litigation strategy to the one used by Wells Fargo brought about the opposite results for Uber. The company spent years battling with its drivers in court to compel (enforce) arbitration agreements for their disputes about employees’ benefits. It won. But, to its surprise—and many legal experts’ surprise—Uber drivers have brought more than 60,000 arbitration claims against the company. The arbitration costs alone for Uber are around \$600 million, which is likely more than the costs Uber would have paid to settle court class action lawsuits. Unlike Wells Fargo’s customers, Uber drivers did not throw in the towel because of arbitration (Rosenblatt, 2019). The Uber and Wells Fargo examples have significant differences (*e.g.* one is about employment arbitration and the other about consumer arbitration). However, it demonstrates that organizations have adopted this general corporate strategy (arbitrating claims with employees and consumers) without fully knowing its effects and consequences.

between 2010-2012, only 1,847 arbitration disputes were filed out of which more than 20% may have been filed by companies, rather than consumers.¹³

Concerns for secrecy and claim suppression resulted in some backlash in the context of harassment, discrimination, and civil right complaints. The grassroots opposition (primarily the MeToo movement) managed to make some companies such as Facebook, Microsoft, Alphabet, Wells Fargo, and Bank of America do away with forced arbitration in these types of claims. At Goldman Sachs, which is facing one of Wall Street's biggest discrimination class actions, the shareholders narrowly lost a voting battle to change the company's practice of mandatory arbitration. 49% of investors of Goldman voted for a measure calling the bank to issue a report on how mandatory arbitration is affecting sexual harassment and discrimination claims.¹⁴ Goldman's CEO supported the practice of mandatory arbitration by stating that arbitration provides "a number of mutual benefits to the firm and our people including lower cost, additional flexibility, and quicker resolution than court proceedings."¹⁵

The underclaiming of disputes has happened in conjunction with the unprecedented expansion of mandatory arbitration clauses in both employment and consumer contracts in recent years.¹⁶ It is estimated that

¹³ Consumer Financial Protection Bureau, Arbitration Study: Report to Congress to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028 (a), March 2015, available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. CFBP study ultimately led to its 2017 final rule that, inter alia, prohibits covered providers of certain consumer financial products and services to bar consumers from filing or participating in a class action. See A Rule by CBP, 82 FR 33210, July 19, 2017 available at <https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements>

¹⁴ Max Reyes, Wall Street's Grip on Secret Harassment Hearings Start to Crack. BLOOMBERG, May 12, 2021 at <https://www.bloomberg.com/news/articles/2021-05-12/wall-street-s-grip-on-secret-harassment-hearings-starts-to-crack>

¹⁵ *Id.*

¹⁶ Myriam Gilles, Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012); Peter B. Rutledge & Christopher R. Drahozal, "Sticky" Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAN L. REV. 955, 956 (2014). Jessica Silver-

about 60 million American workers are bound by arbitration agreements.¹⁷ This means that these employees have agreed to give up their right to bring a court claim against their employer. Similar agreements are also signed by consumers every minute. For example, research shows that more than 70% of financial institutions use arbitration clauses in their agreements with consumers.¹⁸

Despite its prevalence, the perceptions of employees and consumers about arbitration, its impact on their ability to sue, and their perceptions of organizations, which use arbitration, remain understudied. Current studies do not show why individuals refrain from suing companies in situations where their agreements have subjected them to mandatory arbitration. Legal scholars have proposed a list of factors including high cost, absence of class action, and lack of favorable outcomes in arbitration.¹⁹ None of these factors and others have been put to test.

This present research therefore is a first empirical study of its kind that investigates the arbitration effect and its contours. It investigates (a) whether individuals are less likely to sue companies when they are subject to arbitration (“arbitration effect”); (b) whether individuals are less likely to enter into agreements which include an arbitration agreement (c) whether positive attributes of arbitration impact individuals’ perception and likelihood of suing in arbitration; (d) the impact of such disuse and underclaiming on corporate reputation and trust in the organization.

The results establish that a strong arbitration effect exists meaning that individuals are less likely to resort to the arbitration procedure in their contracts after a dispute arises.²⁰ The arbitration effect, however, does not mean that individuals opt out of arbitration when given the

Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015, available at <https://nyti.ms/33irJTy>; See also, Jessica Silver-Greenberg & Robert Gebeloff, *In Arbitration, a ‘Privatization of the Justice System’*, NEW YORK TIMES, Nov. 1, 2015, available at <https://nyti.ms/3xI1AM0>.

¹⁷ Max Abelson, *This is What Happens When You Try to Sue Your Boss*, BLOOMBERG, Jan. 24, 2019, available at <https://www.bloomberg.com/features/2019-arbitration-hell/>

¹⁸ Pew Research, *Consumers Want the Right to Resolve Bank Disputes in Court*, PEW, Aug. 17, 2016, available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court>

¹⁹ Judith Resnik, *Diffusing disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2815 (2015).

²⁰ See *Infra* Part III.A. (Study on The Arbitration Effect).

chance at the contracting stage.²¹ Nor does it mean that individuals are more likely to sue when given information about the positive attributes of arbitration.²² Not even the opportunity to join others (class action) or a higher chance of winning mitigates the arbitration effect.²³ Moreover, informational nudging such as peer information does not change the arbitration effect. This Article employs cutting-edge experimental designs on a diverse group of respondents and offers multiple studies. The studies are approved by IRB²⁴ and are pre-registered for reliability.

Findings contribute to the literature, policymaking, judicial decision-making and the access to justice discussion generally. It contributes to behavioral economics and experimental jurisprudence by demonstrating the distinction individuals make at the time of contracting as opposed to claiming (dispute-phase). The findings also contribute to the renewed interest on Capitol Hill on this topic—such as Arbitration Fairness for Consumer Act and the Forced Arbitration Injustice Repeal²⁵—by showing how solutions such as imposing informational nudges or providing choices *ex post* as U.S. lawmakers intend will not lead to the proposed legislative intent.²⁶ Further, this Article sheds important light

²¹ See *Infra* Part III.B. (Study on Arbitration Opt-Out)

²² See *Infra* Part III.B. (Study on Arbitration Fundamental Attributes)

²³ See *Infra* Part III.B. (Study on Arbitration Fundamental Attributes)

²⁴ IRB Exempt # IRB-FY21-25; Date 10/2/2020.

²⁵ See *infra* Part IV.B.

²⁶ Authors believe that studying lay people is crucial for the access to justice debate. Access to justice is inextricably linked to individuals' expectations and perceptions even more so than any objective criteria such as costs or win-rate. See Allan Lind, et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System*, 24 LAW & SOCIETY REVIEW 953 (1990). Access to justice therefore should not be conflated with access to attorneys, at least in this context. Lawyers may have some success by aggregating arbitration claims against companies such as Amazon which decided to drop requirement following 75,000 demands. Or they may have divergent views on pressing issues such as win-rate and procedure, Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 Berkeley J. Emp. & Lab. L. 91 (2014). But access to justice, and justice perceptions whether *ex ante* or *ex post*, solely concerns individuals' views. Ultimately, what makes a judicial system fair or just is what lay people think of it, ALLAN LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*. (1988). Attorneys, too, are officers of the same judicial system. Their decision-making to pursue claims on class-action, aggregate, or on an individual basis pursuant to their choice preferences cannot replace lay people perceptions. Attorneys' preferences may change depending on a variety of market-based factors independent of individuals'

on the discussion of unconscionability and courts' overreliance on arbitration opt-out provisions.²⁷ The Article also contributes to the crucial discussion of access to justice.²⁸

This Article proceeds as follows: Part I discusses the current challenges with arbitration agreements in consumer and employee contracts while showing the gap in our understanding and in the literature. Part II reviews the Supreme Court jurisprudence which is premised on several untested assumptions. Part III & Part IV offer the details of the empirical studies which test the arbitration effect, its scope, and the existing presumptions. Part V provides a summary of the findings, its relevance to public policy and a deeper analysis of the results in aggregate.

I. THE OMNIPOTENT ARBITRATION

A. *Arbitration is Everywhere*

Arbitration is ubiquitous.²⁹ More than half of employees are subject to mandatory arbitration. This means that more than 60 million American workers can no longer sue their employers in court.³⁰ The percentage of

preferences. Courts and lawmakers should consider individuals' perspectives, not attorneys, when assessing access to justice and other arbitration-related issues. That's why studies such as the ones presented in this Article are paramount to understanding the arbitration effect and its ramifications on individuals' choices.

²⁷ See, e.g., Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 964 (9th Cir. 2012), on reh'g en banc, 718 F.3d 1052 (9th Cir. 2013)

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²⁹ A New York Times story report in 2015 titled "Arbitration Everywhere, Stacking the Deck of Justice" had a role in bringing the issue of forced arbitration to public attention particularly after the pro-arbitration Supreme Court decision in American Express Corporation v. Italian Colors Restaurant which will be extensively discussed later in this Article. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015, available at <https://nyti.ms/33irjTy>; See also, Jessica Silver-Greenberg & Robert Gebeloff, *In Arbitration, a Privatization of the Justice System*, NEW YORK TIMES, Nov. 1, 2015, available at <https://nyti.ms/3xI1AM0>.

³⁰ Max Abelson, *This is What Happens When you Try to Sue Your Boss*, BLOOMBERG, Jan. 24, 2019, available at <https://www.bloomberg.com/features/2019-arbitration-hell/>

employees who are subject to mandatory arbitration in companies with 1,000 or more employees is higher (65%).³¹ Moreover, arbitration is common in “low-wage workplaces” and even more common in industries that are “disproportionately composed of women workers” and “African American workers.”³² In a Bloomberg piece on employment arbitration, the author called it the “Arbitration Hell.”³³

The story is similar for consumers. The majority of consumer contracts include arbitration agreements.³⁴ For example, a Pew research found that the use of arbitration in consumer banking rose from 59% in 2013 to 72% in 2016.³⁵ A recent study suggests that 81 companies out of the Fortune 100 have used arbitration in their agreements with consumers.³⁶ It is also estimated that almost 2/3rds of American households are subject to consumer arbitration agreements.³⁷

B. Arbitration is Rarely Used

In spite of the prevalence of arbitration agreements, arbitration is not used. As organizations and their patrons entangle themselves in a web of arbitration agreements, the evidence seems to suggest that employees and consumers do not “do” arbitration at all.”³⁸ For example, the existing data on consumer arbitration is staggering. In the first three months of

³¹ Alexander Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 Million American Workers*, ECONOMIC POLICY INSTITUTE, Sept., 27, 2017, available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>

³² *Id.*

³³ Abelson, *supra* note 30

³⁴ Colvin, *supra* note 31; Consumer Financial Protection Bureau, Arbitration Study: Report to Congress to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028 (a), March 2015, available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

³⁵ Consumers want the right to resolve bank disputes in court (2016, August). The Pew Charitable Trust, August 17, 2016 available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court>

³⁶ Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 UC DAVIS L. REV. ONLINE 233 (2018).

³⁷ *Id.*

³⁸ Judith Resnik, *Diffusing disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2815 (2015). Colvin, *supra* note 31

2021, only 38 AT&T customers resolved their disputes with the company through arbitration despite the fact that AT&T is one of the largest American companies with more than 150 million wireless subscribers.³⁹ The AT&T customers are subject to mandatory arbitration per their wireless agreements. Similarly, only 82 consumers brought arbitration claims against Amazon.⁴⁰ The story of Wells Fargo described above also reinforces that consumers rarely use arbitration.

Data is scarce on this point but a few research papers suggested that consumers and employees prefer non-arbitration venues when they have the options. Using data from AT&T consumers (who had the option of either suing in small claims court or arbitration), Professor Resnik suggest that the data “raise the possibility that “more consumers [] may be choosing the option of pursuing claims in court rather than in arbitration.”⁴¹ Equally, the data is not available in employment arbitration but the existing numbers seems to suggest that employees prefer Equal Employment Opportunity Commission—the lead agency for civil rights disputes against employers—over arbitration for their claims.⁴² What remains unclear are the underlying behavioral reasons as to why individuals do not prefer arbitration.

C. Behavioral Reasons are Unknown

Little doubt exists concerning the emergence and dominance of the “arbitration revolution.”⁴³ However, the “effect” of the arbitration

³⁹ AAA Consumer Report Q1, 2021. The authors filtered the results to include “AT&T Services,” “AT&T Mobility,” “AT&T Wireless.”

⁴⁰ AAA Consumer Report Q1, 2021. The authors filtered the results to include “Amazon,” “Amazon Corporate, LLC,” “Amazon Payment, Inc.,” “Amazon Services, LLC,” “Amazon, LLC,” “Amazon.com,” “Amazon.com Legal Department,” “Amazon.com, Inc.”

⁴¹ Resnik, *supra* note [...] at 2903. [“Given uneven access to data on small claims, these very preliminary numbers raise the possibility that more consumers (as well as AT&T itself) may be choosing the option of pursuing claims in court rather than in arbitration.”]

⁴² Samuel Estreicher, Michael Heise, and David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U.L. REV. 375 (2017).

⁴³ See e.g., Hila Keren, *Divided and Conquered: The Neoliberal and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575 (2020). David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015). David Horton & Andrea Chandrasekher,

revolution is largely unknown.⁴⁴ The present literature on arbitration does not provide us with the reasons for the disuse of arbitration.

Generally speaking, the existing literature can be divided into theoretical (normative) and empirical areas. The theoretical literature largely analyzes a string of permissive U.S. Supreme Court decisions in support of arbitration.⁴⁵ The empirical literature largely investigates the prevalence of arbitration, monetary awards, and in particular win-rates.⁴⁶ The prevailing empirical approach also appeared in Congressional Hearing, October 25, 2007 and CFPB Report, 2015.⁴⁷ However, the data on the studies on win-rates are contradictory and largely silent on individuals' perceptions of arbitration as opposed to court.⁴⁸

Previous research on the behavioral aspect of dispute resolution sheds some light on what individuals care about the most. Instrumental theory proposed that when considering the fairness of a process, individuals look at the favorable and fair outcome.⁴⁹ Thibaut & Walker

Employment Arbitration After the Revolution, 65 DEPAUL L. REV. (2016). Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS UNI. L. REV. 375 (2018).

⁴⁴ David L. Noll & Zachary D. Clopton, *An Arbitration Agenda for the Biden Administration*, U. ILL. L. REV. ONLINE 104-105 (2021) (“although empirically documenting the effect of ‘arbitration revolution’ is tricky....there is no serious question that it has blunted the real-world impact of regulatory schemes enforced through private litigation”) (footnotes omitted).

⁴⁵ See e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631 (2004); 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 (2006); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91 (2012).

⁴⁶ See e.g., Colvin, *supra* note [...]; Resnik, *supra* note [...]; David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015). David Horton & Andrea Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. (2016); Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. OF EMP. LEGAL STUD. 1 (2011); Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1 (2019).

⁴⁷ Arbitration Fairness Act of 2007. Hearing before the Subcommittee on Commercial and Administrative Law of the Committee of the Judiciary House of Representative. October 25, 2007 ([Link](#)). Consumer Financial Protection Bureau. Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Report and Consumer Protection Act § 1028(a). March 2015. ([Link](#))

⁴⁸ Farshad Ghodoosi & Monica Sharif, *Justice in Arbitration: the Consumer Perspective*, INT'L J. OF CONFLICT MGMT. (2021)

⁴⁹ THIBAUT & WALKER, *PROCEDURAL JUSTICE* (1975).

suggested that people care about the procedure because a fair procedure produces a fair outcome.⁵⁰ For Thibaut & Walker, the control over process is important because that improve one's prospect of having a favorable outcome.⁵¹ Moving away from instrumental theory, scholars such as Tyler & Lind suggested that individuals care deeply about the fairness of the process not because of the outcome but because of the signals it sends about their standing.⁵² Put differently, fairness of the process communicates the perception that one has been treated with politeness, dignity, and respect.⁵³ In summary, according to Lind & Tyler, having a voice in the process (ability to air grievances) and dignified treatment are two particularly important factors that individuals care about the most in procedural justice.⁵⁴

New research in this area suggest that justice judgments are more complex than what can always be explained by control theory or voice theory alone.⁵⁵ For example, a meta-analysis study suggests that

⁵⁰ *Id.*

⁵¹ That's why according to Thibaut & Walker' empirical studies, disputants perceive the adversarial system as the fairness mechanism. *Id.*

⁵² ALLAN LIND & TOM TYLER. THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE. (1988).

⁵³ In rebutting the control theory of Thibaut & Walker, several researchers show that the control over process is not only important to receive favorable outcome. To the contrary, "the opportunity to express one's opinions and arguments, the chance to tell one's own side of the story, is a potent factor in enhancing the experience of procedural justice, even when the opportunity for expression really accomplishes nothing outside the procedural relationship." Tom Tyler & Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, 115, 149 (1992).

⁵⁴ ALLAN LIND & TOM TYLER. THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE. (1988). A series of research of Tom Tyler led to his conclusion that compliance with laws is largely due to individuals' perceived fairness of their enforcement rather than effectiveness of legal sanctions. TOM TYLER, JUSTICE, SELF-INTEREST, AND THE LEGITIMACY OF LEGAL AND POLITICAL AUTHORITY (1990).

⁵⁵ The current justice research discusses four primary types of justice: distributive justice which refers to the fairness of the decision outcome, procedural justice which refers to the fairness of the process leading to the decision outcome, interpersonal justice which refers to respect and behavior of the decisionmakers, and informational justice which refers to the truthfulness provided by the decisionmakers. Jason Colquitt, *On the Dimensionality of Organizational Justice: a Construct Validation of a Measure*, 86 JOURNAL OF APPLIED PSYCHOLOGY 386 (2001).

procedural and distributive (outcome) justice are moderately correlated.⁵⁶ Another study suggested that procedural and distributive justice have multiplicative, interactive effects on judgments of authorities and decisions.⁵⁷ Moreover, people's status vis-à-vis the other party (the authority) plays a role in their fairness perception.⁵⁸

The most notable and relevant new line of research concerns "fairness heuristic theory." In a nutshell, this theory aims to capture individuals' fairness perceptions by analyzing the type of information they have in their possession.⁵⁹ Put differently, this theory is about how people make fairness decisions in light of uncertainty about the future. For instance, Van den Bos suggested that people often do not have information about outcomes (e.g., salaries of other employees in an organization) to be able to form opinions about outcome fairness.⁶⁰ As a result of uncertainty and ambiguity, people "use other information to assess what is fair and how to react to the situation at hand."⁶¹ Consequently, individuals tend to eschew ambiguity by creating cognitive shortcuts and through closing feelings of uncertainty with any available information.⁶²

⁵⁶ Neil MA Hauenstein, Tim McGonigle, & Sharon W. Flinder, *A Meta-analysis of the Relationship between Procedural Justice and Distributive Justice: Implications for Justice Research*, 13 EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL 39 (2001).

⁵⁷ It refers to the facts that procedural justice has stronger effects when the rating for outcomes is low than when they are high whereas the ratings for outcomes have stronger effects when procedural fairness is low than when it is high. Joel Brockner, & Batia Wiesenfeld, *An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures*, 120 PSYCHOLOGICAL BULLETIN 189 (1996).

⁵⁸ JOEL BROCKNER & BATIA WIESENFELD, HOW, WHEN, AND WHY DOES OUTCOME FAVORABILITY INTERACT WITH PROCEDURAL FAIRNESS? (2005).

⁵⁹ Kees Van den Bos, *Fairness Heuristic Theory* in THEORETICAL AND CULTURAL PERSPECTIVES ON ORGANIZATIONAL JUSTICE 63, 64 (2001).

⁶⁰ *Id.* at 63. See also, Jana Janssen, Patrick A. Müller, & Rainer Greifeneder, *Cognitive Processes in Procedural Justice Judgments: The Role of Ease-of-Retrieval, Uncertainty, and Experience*, 32 JOURNAL OF ORGANIZATIONAL BEHAVIOR 726 (2011).

⁶¹ *Id.* at 64. See also Xin Qin, Run Ren, Zhi-Xue Zhang & Russell Johnson, *Fairness Heuristics and Substitutability Effects: Inferring the Fairness of Outcomes, Procedures, and Interpersonal Treatment when Employees Lack Clear Information*, 100 JOURNAL OF APPLIED PSYCHOLOGY 749 (2015).

⁶² This process is often called cognitive closure. Arie Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: "Seizing" and "Freezing"* 103 PSYCHOLOGICAL REVIEW 263 (1996); Ofra Mayseless & Arie W. Kruglanski, *What Makes You So Sure? Effects of Epistemic Motivations on Judgmental Confidence*, 39 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 162 (1987); Allan Lind, *Fairness Heuristic Theory: Justice Judgments as Pivotal Cognitions in Organizational Relations*, 56 ADVANCES IN

In arbitration, the situation is similar. Research shows that individuals' perceptions of justice and fairness is key in their choice of a dispute resolution mechanism.⁶³ Consumers and employees often find out about arbitration after they decide to take legal action. The available information is scarce to them.

In a recent study, Ghodoosi & Sharif, investigated the justice perceptions of consumers for court and arbitration.⁶⁴ They show that consumers hold a higher perception of justice for court as opposed to arbitration even when the outcome is in their favor. Even though a favorable outcome increases consumers' overall perception of justice of the process in advance, but consumers find the court to be fairer regardless of the outcome.⁶⁵ Contrary to the prevailing cost-benefit analysis approach, Ghodoosi & Sharif show that it is not costs nor win-rate but familiarity and legitimacy that drive consumers' view of arbitration.⁶⁶ Put differently, the perception of consumers of arbitration does not result from their perceived (high) costs or fear of losing. It is their poor perception of legitimacy and lack of familiarity.⁶⁷

Even though the negative justice perception towards mandatory arbitration is key in consumer behavior, it is not clear whether it affects their justice decision (*i.e.*, taking a legal action). Moreover, the behavioral factors that can affect individuals' decision to sue in arbitration are unknown. In other words, there is still so much unknown about arbitration and its impact on individuals' justice decisions.

ORGANIZATIONAL JUSTICE (2001). Lind shows that individuals substitute available information when information is lacking to arrive at a conclusion about fairness (substitutability effect) *Id.*

⁶³ Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 1 J. DISP. RESOL. (2011); Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2013). Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008).

⁶⁴ Farshad Ghodoosi & Monica M. Sharif, *Justice in Arbitration: The Consumer Perspective*, INT'L J. OF CONFLICT MGMT (Forthcoming 2021).

⁶⁵ *Id.* Using fairness heuristic theory, the authors explain that for mandatory arbitration, the only available information to consumers is that they their only recourse is through arbitration. Using this information, consumers tend to close the uncertainty about the ambiguous mandatory arbitration by forming a negative justice perception towards arbitration.

⁶⁶ *Id.*

⁶⁷ *Id.*

II. SUPREME COURT'S RIGHT TO SUE PARADIGM

The current edifice of arbitration is a result of a series of pro-arbitration Supreme Court decisions coupled with the emergence and the decline of the effective vindication doctrine.⁶⁸ The Supreme Court bit by bit brushed aside federal and state challenges to create a robust policy favoring arbitration.⁶⁹

A. The Weight: Decline of Effective Vindication Paradigm

In 1985, the Supreme Court assigned a heavy weight on arbitration (borrowing the language from Justice Stevens dissent.)⁷⁰ In a watershed decision, the U.S. Supreme Court allowed arbitration to adjudicate rights arising under a federal statute “so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum.”⁷¹ In *Mitsubishi*, the Supreme Court recognized arbitration as the venue in which statutory rights (*e.g.*, antitrust, securities, civil rights) can be adjudicated so long as arbitration does not thwart recognized rights.⁷²

⁶⁸ Congress enacted the Federal Arbitration Act (*FAA*) in 1925 to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration upon the same footing as other contracts.” Pamela Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019).

⁶⁹ Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. UNI. L. REV. (2014) (arguing that courts have placed arbitration clauses on a “pedestal” relying extensively on the Supreme Court’s adoption of a “federal policy favoring arbitration.”)

⁷⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 645 (1985) (Justice Stevens dissenting) at 473. (“The federal policy favoring arbitration cannot sustain the weight that the Court assigns to it.”)

⁷¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) at 473. Prior to *Mitsubishi*, in 1953, the Supreme Court in *Wilko* held that an arbitration agreement would violate Securities Act of 1933’s prohibition on waiving the rights therein. *Wilko v. Swan*, 346 U.S. 427, 98 L. Ed. 2d 168, 74 S. Ct. 182 (1953).

⁷² David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723 (2011). *Mitsubishi*’s holding concerned vindication of US antitrust laws in the context of an international commercial agreement between two corporations. *Mitsubishi* concerned a distribution and sales agreement between two international companies, *i.e.*, a Japanese car manufacturer (*Mitsubishi*) and a Puerto Rico distributor (*Soler Chrysler-Plymouth*). Subsequently, the U.S. Supreme Court expanded this doctrine to consumer and employment arbitration. In these cases, the

The Court rejected its prior ruling in *Wilko* that the mere inclusion of arbitration would tantamount to waiver of statutory rights.⁷³ In *Wilko*, the Supreme Court pinned on the waiver of right to sue by stating that “when the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts.”⁷⁴ The Court in *Mitsubishi* kept this approach and made it clear that any “prospective waiver of a party’s right to pursue statutory remedies” would violate public policy.⁷⁵ Subsequent Supreme Court decisions in post-*Mitsubishi* have similarly asserted the existence of an “effective vindication” exception.⁷⁶

Flash forward, in *Italian Colors*,⁷⁷ the Supreme Court found the effective vindication doctrine as a ‘judge-made exception’ which originated in *Mitsubishi*’s “dictum.”⁷⁸ By deemphasizing the effective vindication doctrine, the Court in *Italian Colors* stressed the “right to

Supreme Court allowed arbitration to proceed so long as consumers and employees have the right to pursue their statutory claims and arbitration does not thwart such rights. See e.g., *At&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *American Exp. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 570 U.S. 228, 186 L. Ed. 2d 417 (2013); *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 584 U.S., 200 L. Ed. 2d 889 (2018).

⁷³ In 1953, the Supreme Court in *Wilko* held that an arbitration agreement would violate Securities Act of 1933’s prohibition on waiving the rights therein. *Wilko v. Swan*, 346 U.S. 427, 98 L. Ed. 2d 168, 74 S. Ct. 182 (1953). In 1989, the Supreme Court overruled *Wilko* pursuant to “a federal policy favoring arbitration.” *R. de Quijas v. Shearson/Am. Exp.*, 490 U.S. 477, 489 (1989)

⁷⁴ *Wilko* at 435.

⁷⁵ *Mitsubishi*, U.S. 614 at n. 19. For further discussion on the implications of public policy in arbitration following *Mitsubishi*, see Farshad Ghodoosi, Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts, 20 LEWIS & CLARK L. REV. 237 (2016).

⁷⁶ See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247, 273–274 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 28 (1991). In these cases, however, the Supreme Court did not invalidate the arbitration agreement pursuant to the effective vindication doctrine.

⁷⁷ *American Exp. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 570 U.S. 228, 186 L. Ed. 2d 417 (2013). (hereafter *Italian Colors*)

⁷⁸ “Respondents invoke a judge-made exception to the FAA which, they say, serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right...The ‘effective vindication’ exception to which respondents allude originated as dictum in *Mitsubishi Motors*...” *Italian Colors* at 235

pursue” language of *Mitsubishi*.⁷⁹ To put it simply, the Court in *Italian Colors* ruled that it is the *right to sue* that should be the focus not the *ability* to bring a claim.⁸⁰ In the process of gutting the effective vindication rule, as Justice Kagan noted in her dissent, the Court significantly limited the access to justice defenses of arbitration to only (i) where assertion of the rights is prohibited, (ii) where the initial costs are prohibitive.⁸¹

Italian Colors caused an uproar. In her dissent, Justice Kagan reminded the Court of *Mitsubishi*’s ruling which stated that arbitration clauses should be set aside if “for all practical purposes” an individual is deprived of a day in court.⁸² Justice Kagan warned that arbitration clauses shall not create a “*de facto* immunity.”⁸³ Legal academics also raised a red flag about the decision. Glover called it a “a critical conceptual move” where the court effectively reduced federal substantive causes “to mere formalities.”⁸⁴

B. *The Lunatic: Rise of Right to Sue Paradigm*

At first look, the Supreme Court in *Italian Colors* drew a distinction between the ability to sue and the right to sue. So long as the arbitration agreement does not affect the right to sue, it is enforceable. A close reading of the Supreme Court decision, however, suggests that the

⁷⁹ *Italian Colors* 570 U.S. at 236 (“As we have described, the exception finds its origin in the desire to prevent “prospective waiver of a party’s *right to pursue* statutory remedies,” *Mitsubishi Motors*, *supra*, at 637, n. 19 (emphasis added).”)

⁸⁰ Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121 (2018) (n. 129) (stating that according to *Italian Colors* ‘effective vindication’ of a federal claim “does not require that a person retain the *ability* to pursue the federal claim; it merely requires that a person retain the *right* to bring the claim.”)

⁸¹ “The rule, the majority asserts, applies to arbitration agreements that eliminate the ‘right to pursue statutory remedies’ by ‘forbidding the assertion’ of the right (as addressed in *Mitsubishi*) or imposing filing and administrative fees ‘so high as to make access to the forum impracticable’ (as addressed in *Randolph*).” *Italian Colors* at 247.

⁸² *Mitsubishi*, U.S. 614 at n. 19 at 632.

⁸³ “What the FAA prefers to litigation is arbitration, not *de facto* immunity.” *Italian Colors* at 244 (Kagan, J. dissenting). Justice Kagan proceeds to safeguard the effective vindication rule by proclaiming that “the effective vindication rule carries out that purpose [enforcing federal rights – in this case antitrust rights] by ensuring that any arbitration agreement operating as such a waiver is unenforceable.” *Italian Colors* at 251 (Kagan, J. dissenting).

⁸⁴ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052, 3073 (2015).

Court's decision centers on the notion of prohibitive costs. Put differently, the decision suggests that the Court saw the "ability to sue" in the context of financial ability. In the decision, the Court stressed that federal statutes "do not guarantee *an affordable* procedural path to the vindication of every claim."⁸⁵ To further concretize it, the Court stated that "the fact that is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."⁸⁶ Further, the Court stated that "perhaps" fees and costs of arbitration can affect the right to sue if such fees are "so high as to make access to the forum impracticable."⁸⁷

Distilling the opinion and the dissent, the 'beef' boils down to what's "prohibitive" in terms of costs and fees. The majority distinguishes between "economic infeasibility" on the one hand and "impracticability" on the other hand.⁸⁸ It is only the latter that may affect an individual's access to justice. To the contrary, Justice Kagan's dissent relies on the argument that when it is "too costly" to pursue a claim, arbitration agreement is prohibitive as "no rational actor" would bring such a claim.⁸⁹ The dissent echoed Justice Breyer's dissent in the *AT&T* case in which he said that "only a lunatic or fanatic sues for \$30."⁹⁰

C. *The Hammer: In Quest of Fundamental Attributes*

Contrary to some views, *Italian Colors* does not appear to foreclose or end the effective vindication doctrine.⁹¹ It does narrow it in the context

⁸⁵ *Italian Colors*, 570 U.S. at 228.

⁸⁶ *Italian Colors*, 570 U.S. at 229. (emphasis in original)

⁸⁷ *Italian Colors*, 540 U.S. at 236. ("That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.") On prohibitive costs, the Court cited its precedent in *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U. S. 79, 90 (2000)

⁸⁸ As Justice Thomas stated *Italian Colors* cannot escape its obligations "merely because the claim it wishes to bring might be economically infeasible." *Italian Colors*, 570 U.S. at 239. (Justice Thomas concurring)

⁸⁹ *Italian Colors*, 570 U.S. at [...]. The majority opinion is reminiscent of commercial impracticability discussion in contracts.

⁹⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting).

⁹¹ Stephen A. Fogdall & Christopher A. Reese, *The "Effective Vindication" Doctrine is a Virtual Dead Letter After American Express Co. v. Italian Colors Restaurant*,

of costs and class action. However, the door is still open for other “practical reasons” mentioned in *Mitsubishi* that can prohibit the pursuit of right.

Much of the discussion in arbitration in both case law and scholarship has been related to the issue of cost and class action.⁹² To a hammer (the majority in the Supreme Court), as Justice Kagan wrote in the dissent, everything looks like a nail (class action).⁹³ The dominance of costs and class action has limited our understanding of the ways in which arbitration impacts private enforcement and vindication of rights.⁹⁴

In addition to the prospective waiver issue, the justice paradigm has important ramifications from the pure contractual perspective. Contract law developed the notion of unconscionability to prohibit “unjust enforcement of onerous contractual terms.”⁹⁵ Even though

Appellate & Financial Services Litigation, July 2013, available at <https://bit.ly/3gMyeGm>

⁹² Judith Resnik, *Diffusing disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2014) (emphasizing on cost and familiarity as two important factors for erasure of rights in arbitration); Mark Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004). Jean Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?* 67 LAW AND CONTEMPORARY PROBLEMS 75 (2004).

⁹³ Justice Kagan wrote this phrase to emphasize that the Court should not look at Italian Colors’ argument only through the lens of class action but also through other forms of cost-sharing that prohibit effective vindication. *Italian Colors*, 570 U.S. at 251. Even Justice Kagan’s dissent does not go beyond the cost-paradigm which is the prevailing view of arbitration. This is further evidence from Justice Kagan’s dissent where she focuses on “outlandish filing fees or an absurd (*e.g.*, one-day) statute of limitations” from the “front end” that can practically eliminate a company’s antitrust liability. *Italian Colors*, 570 U.S. at 240.

⁹⁴ Perhaps, this is the reason that federal courts opinions do not offer a clear direction on how to measure effective vindication and accessibility. Judith Resnik, *Diffusing disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2878 (2014).

⁹⁵ *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62 (1978) at 569. The courts may refuse to enforce a contract, if the court “as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made.” Restatement (Second) of Contracts. § 2-302. *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910 (holding that substantive unconscionability focuses on whether the terms of an agreement are overly harsh, unduly oppressive, or one-sided as to shock the conscience.) *Cabatit v. Sunnova Energy Corporation*, C089576 (3rd Dist. 1/29/21) (holding that arbitration agreement in a door-to-door solar panel is unconscionable and therefore unenforceable.) *Maldonado v. Fast Auto Loans* (holding

unconscionability remains a difficult notion to pin down, unjust one-sided terms can undoubtedly fall under its rubric.⁹⁶ The recent efforts in consumer protection laws including the draft restatement suggest that the unconscionability doctrine remains one of the few avenues left to tackle consumer boilerplate contracts.⁹⁷

The extent to which the unconscionability doctrine could affect the enforceability of arbitration agreements remains contested. The Supreme Court in *AT&T v. Conception* seemingly put a nail in the coffin by guarding arbitration agreements against any discrimination and by jettisoning the *Discover Bank* rule.⁹⁸ This rule refers to the *Discover Bank v. Superior Court* decision in which it affirmed that most waiver of class-wide procedures in consumer contracts are unconscionable.⁹⁹ The Court in *AT&T* ruled

that a lender charging unconscionable interest rates cannot force arbitration of a class action for an injunction)

⁹⁶ As a general manner, there are two types of unconscionability: procedural and substantive. Procedural unconscionability refers to circumstances in which contract is formed with a focus on elements of suppression or surprise. Substantive unconscionability concerns the fairness of the contract and its terms with a focus on assessing harshness and one-sidedness of the terms. Some courts have established that in order for an unconscionability defense to succeed, both procedural and substantive elements much be established. *See e.g.*, *OTO, LLC v. KEN KHO*, 8 Cal. 5th 111 (2019) (citing *Armendariz v. Foundation Health Psychcare Service, Inc.*, 2000, 24 Cal.4th 83.). In California for example, courts have refused to enforce terms that are “overly harsh,” (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532), “unduly oppressive,” (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925), “shock the conscience” (*Pinnacle*, 55 Cal.4th at p. 246), “unfairly one-sides,” (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.)

⁹⁷ Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45 (2019); David McGowan, *Consumer Contracts and the Restatement Project*, SAN DIEGO LEGAL STUDIES PAPER 19 (2019).

⁹⁸ *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (Justice Scalia writing for the majority ruling that FAA preempts California *Discover Bank* Rule regarding the unconscionability of class arbitration waivers in consumer contracts.)

⁹⁹ *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100. Under California law, courts may refuse to enforce any contract found “to have been unconscionable at the time it was made,” or may “limit the application of any unconscionable clause.” Cal. Civ. Code Ann. §1670.5(a). In *Discover Bank*, the California Supreme Court applied this rule in the context of small claims where the class-action waiver becomes “in practice the exemption of the party” from responsibility. *Id.*, at 162 The decision in *Discover Bank* led to a series of California courts’ decisions in which arbitration agreements were found unconscionable. *See, e.g.*, *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1451–1453, 48 Cal. Rptr. 3d 813, 819–821 (2006); *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1297, 36 Cal Rptr. 3d

that state law rules (including the unconscionability doctrine) cannot “stand as an obstacle” to FAA’s objectives and have a “disproportionate impact on arbitration.”¹⁰⁰ The Court’s interpretative approach stems from its broad construction of the word “any” in the saving clause of FAA.¹⁰¹ Consequently, the Court makes it clear that it does not tolerate the unconscionability approach that targets the “uniqueness” of arbitration agreements and violates arbitration’s “equal-treatment principle.”¹⁰²

What is unique about arbitration, however, is unclear.¹⁰³ In its rejection of class arbitration, the Supreme Court put forward another judicially-created notion—fundamental attributes of arbitration—to preempt state law contract rules.¹⁰⁴ Per Supreme Court rulings, state laws

728,738–739 (2005); *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 556–557, 36 Cal. Rptr. 3d 229, 237–239 (2005).

¹⁰⁰ *Concepcion*, 131 S. Ct. at 1743.

¹⁰¹ Section 2 of FAA states that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.” 9 U. S. C. §2 (emphasis added).

¹⁰² *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) at n. 9 (“Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.”); *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (“The FAA...establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on ‘generally applicable contract defenses,’ but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” (citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742.) *Buckeye*, at 443 (holding that the FAA places arbitration agreements on an equal footing with other contracts). *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (holding that FAA requires courts to enforce them according to their terms). Similar to other contracts however, arbitration agreements may be may be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U. S. 681, 687 (1996).

¹⁰³ In the same vein, the standards for unconscionability defense that does not “target” arbitration agreement remain unclear. *See also*, Richard Frankel, *Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court’s Arbitration Jurisprudence*, 17 J. DISP. RESOL. 225 (2014) (arguing that *Concepcion* and *Italian Colors* have little impact outside of the context of class action waivers.)

¹⁰⁴ Arpan Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 408 (2013) (arguing that Supreme Court’s *Concepcion* fundamental attributes analysis is a newly minted preemption analysis.) (Other judicially-made notions include the “federal policy favoring arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d

cannot target arbitration “by name or by more subtle methods” such as through interfering with “fundamental attributes of arbitration.”¹⁰⁵ The Supreme Court in *AT&T* ruled that “switch bilateral to class arbitration” would “sacrifice[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁰⁶ The Court reiterated this approach in *Epic Systems v. Lewis* and *Lamps Plus v. Varela*.¹⁰⁷

D. The Watershed: Class Arbitration’s Many Sins

The Supreme Court used all of the tools to limit class arbitration and support class action waivers. The last shot was its rejection of the basic *contra proferentem* rule which is as “even-handed as contract rules come.”¹⁰⁸ This case was also related to class arbitration. As Justice Kagan noted in *Lamps Plus*, “the heart of the majority’s opinion lies in its cataloging of class arbitration’s many sins.”¹⁰⁹ In fact, most of the jurisprudence in this

765. See also, Farshad Ghodoosi, *Fall of Last Safeguard in Global Dejudicialization: Protecting Public Interest in Business Disputes*, 98 OR. L. REV. 99, 130 (2020) (“it was not until 1980s that, in a series of cases, the United State Supreme Court judicially created a ‘federal policy’ that favored ‘arbitration over litigation.’”).

¹⁰⁵ *Conception*, 563 U. S., at 344; See also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018).

¹⁰⁶ *Conception*, 563 U. S., at 344. The Court proceed to state that “class arbitration greatly increases risks to defendants.” Moreover, “efficiency” is another fundamental attribute of arbitration. *Conception*, 563 U. S., at 344.

¹⁰⁷ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1621 (2018) (“By attacking (only) the individualized nature of the arbitration proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.”). *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (“We have explained, however, that such an equal treatment principle cannot save from preemption general rules ‘that target arbitration either by name or by more subtle methods, such as by ‘interfer[ing] with fundamental attributes of arbitration.’”) (citing *Epic Systems*, 138 S.Ct., at 1622 quoting *Conception* 131 S.Ct. 1740).

¹⁰⁸ *Lamps Plus v. Varela*, 139 S. Ct. 1407; 203 L. Ed. 2d 636 (2019) (holding that an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration). Earlier cases from the Supreme Court took a different approach. *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. (2010) (arbitration agreements “may be invalidated by ‘generally applicable contract defenses’” (quoting *Doctor’s Associates, Inc. v. Casarotto*, 517 U. S. 681, 687 (1996))). Justice Kagan dissented arguing, *inter alia*, that “California’s anti-drafter rule is as even-handed as contract rules come” and therefore does not target arbitration agreements per se. *Lamps Plus* at [...]

¹⁰⁹ *Lamps Plus* at [...] (Justice Kagan dissenting) (“The heart of the majority’s opinion lies in its cataloging of class arbitration’s many sins.”)

area was developed in the context of waiver of collective action in arbitration or litigation.

A closer look at these decisions suggests that the avenue for interjection of state contract law is not entirely foreclosed. Subsequent lower courts' decisions reinforce that these decisions may indeed be "far from the watershed."¹¹⁰ Recent decisions of the Supreme Court of California are case in point.¹¹¹ In *Sonic II*, the California Supreme Court stated that the waiver of an employee's right to an administrative procedure—commonly known as Berman procedure—cannot categorically make an arbitration agreement unconscionable. It, however, added that an agreement to arbitrate must provide "an accessible and affordable process" for resolution of disputes in order to be enforceable.¹¹² This approach is even more pronounced in a recent decision by the Supreme Court of California. In *OTO* (One Toyota of Oakland) *v. Kho*, the Court found an arbitration clause—which was comprised of densely-packed, single-spaced, small font type containing legalese and complicated charts—unconscionable. In reaching its decision, the Supreme Court of California stressed that a "closer scrutiny of overall fairness" is required in determining unconscionability.¹¹³ The US Supreme Court denied certiorari in this case.¹¹⁴

The game (state law defenses and prospective waiver challenges to arbitration) is far from over. Relatedly, there is so much unknown about arbitration and its impact at the individual level. Other factors beyond excessive cost and inability to aggregate claims have rarely been discussed. These factors, too, could be prohibitive or unconscionable. Such understanding can shed light on "all practical reasons" that arbitration

¹¹⁰ Chief Roberts writing for the majority. "Our opinion is far from the watershed Justice Kagan claims it to be."

¹¹¹ "Nevertheless, we noted that unconscionability remains a valid defense to enforcement, even after Conception." *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 447 P.3d 680 (2019) at 124.

¹¹² *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 311 P.3d 184 (2013) at 191. In *Sonic I*, the Supreme Court of California held that waiving Berman rights through arbitration is substantively unconscionable. *Sonic I*'s ruling was vacated in Conception by the U.S. Supreme Court, *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130.

¹¹³ *OTO, L.L.C. v. Kho*, 8 Cal. 5th 126 (citing Baltazar, at pp. 1245-1246, 200 Cal.Rptr.3d 7, 367 P.3d 6; *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1267-1268, 215 Cal.Rptr.3d 785).

¹¹⁴ Cert. denied sub nom. *OTO, L.L.C. v. Ken Kho*, 141 S. Ct. 85, 207 L. Ed. 2d 170 (2020).

affect access to justice.¹¹⁵ Moreover, arbitrators may also have to decide these complex questions if such authority has been delegated to them. A deeper understanding of the behavioral effects of arbitration can be critical for arbitrators as well. Lastly, this new understanding can shed light on the constitutionality of arbitration as well.¹¹⁶

III. FRAMING ARBITRATION EFFECT

To understand the effect of arbitration, we ran several studies as detailed below (the summary of the studies are in section IV.A below). In sum, in the three experiments discussed in this Part, we tested whether individuals are less likely to take legal action in arbitration, more likely to opt out of arbitration agreements, and would preemptively avoid arbitration after the knowledge of their legal dispute.

A. Study I: The Arbitration Effect

Organizations increasingly use arbitration in their agreements while its impact on access to justice is not empirically tested. The courts, legal scholars and organizations have largely been speculating about the effect of arbitration on suing.

Hypothesis. We test whether there is a direct effect between arbitration agreements and suing. The query is whether individuals are less likely to sue if the dispute resolution mechanism is arbitration as opposed to court. Consequently, the hypothesis is that individuals are less likely to sue if encountered with an arbitration clause.

¹¹⁵ In a series of cases, the Supreme Court distinguished between two types of validity challenges: one is related to the validity of the agreement to arbitrate and the other relates to the validity of the whole agreement (including where the challenge to agreement to arbitrate renders the whole contract invalid). Courts decide the former while arbitrators decide the latter.

¹¹⁶ MARGARET JANE RADIN, *BOILERPLATE* (2012); David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459 (2014); Judith Resnik, *Diffusing disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2815 (2015).



Methodology. We have designed 8 conditions to test the arbitration effect.¹¹⁷ Participants were randomly provided with 4 different scenarios, *i.e.*, employee non-monetary,¹¹⁸ employee monetary,¹¹⁹ customer non-monetary,¹²⁰ and customer monetary.¹²¹ We pre-registered the study at Wharton's AsPredicted.Org to increase reliability and trust in the data.¹²² We launched the study at Amazon's Mechanical Turk (*MTurk*) and paid for the feature provided by the platform that blocks low quality

¹¹⁷ 2 (Arbitration versus Court) x 2 (Employee versus Consumer) x 2 (Non-Monetary versus Monetary) Design

¹¹⁸ Imagine: You are an employee in a company. You claim that your company has created a hostile and difficult work environment for you because your boss repeatedly insults and humiliates you at work. You complain about your boss to human resources. They disagree with your claim.

¹¹⁹ Imagine: You are an employee in a company. You claim that the company has ended your employment right before the end-of-the-year bonus payment is due. You believe that the company has unjustly let you go and owes you the bonus based on the employment contract. The company disagrees with your claims.

¹²⁰ Imagine: You have opened an account with a bank. You claim your bank has fraudulently used your information from your existing account to open another account without your knowledge and permission. The bank disagrees with your claims.

¹²¹ Imagine: You have purchased a brand-new refrigerator. A few days after the manufacturer has installed the product, the refrigerator catches on fire and causes significant damage to your house. You discover that this was a result of a faulty part in the refrigerator. Your insurance company does not cover this loss. You believe that the refrigerator manufacturer is responsible for the damages to your house. The refrigerator manufacturer disagrees with your claim.

¹²² See https://aspredicted.org/see_one.php ("Arbitration Effect- 2x2x2" - #65305). Date created 05/06/2021. For further discussion of pre-registration and its benefits for transparency, reproducibility, and reduction of bias see, Anna Elisabeth van't Veer & Roger Giner-Sorolla. *Pre-registration in Social Psychology—A Discussion and Suggested Template*, JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 67, 2 (2016). Joseph Simmons, Leif D Nelson, & Uri Simonsohn. *Pre-registration: Why and How*, JOURNAL OF CONSUMER PSYCHOLOGY 31, 151 (2021).

participants.¹²³ We also provided comprehension questions to assure that only individuals who carefully read the prompts be counted in our analysis.¹²⁴ After providing the scenarios, individuals in the arbitration conditions were given some information about the arbitration clause in their agreement¹²⁵ whereas individuals in the court condition were provided information about court.^{126 127}

After removing participants who did not correctly answer the comprehension questions, a total of 1024 participants were included in the study.^{128 129}

¹²³ MTurk is widely used for experimental research in a variety of research areas and top journals of various disciplines (including marketing, management, psychology) use data from MTurk.

¹²⁴ Example of comprehension questions in the arbitration condition include: Given your contract, you can sue the company in court. Answer: False; An arbitrator is a private person who decides cases outside of the court system. Answer: True; The decision of the arbitration is not final. Answer: False. The comprehension questions along with other measures in this study and other studies in this Article address the issue of consumers' understanding of arbitration agreements. *See generally* Jeff Sovern, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 74 MD. L. REV. 1 (2015).

¹²⁵ You then carefully read (your employment contract/ the contract you have with the bank/ refrigerator purchase contract). You notice that the contract states that any dispute that you have with the company must only be resolved by arbitration, rather than court. You realize arbitration is a process outside of the court system in which a neutral third person decides the dispute between you and the company. The decision of the arbitration is final and enforceable by courts.

¹²⁶ You then carefully read (your employment contract/ the contract you have with the bank/ refrigerator purchase contract). You notice that the contract states that any dispute that you have with the company must only be resolved in court.

¹²⁷ After viewing this information, the participants were asked: In the court conditions: "How likely are you to sue the company in court?" In the arbitration conditions: "How likely are you to sue the company in arbitration?"

¹²⁸ The number of participants per condition were as follows, after removing participants who did not correctly answer all comprehension questions: 1. Employee Non-Monetary Court: 142; 2. Employee Monetary Court: 143; 3. Employee Non-Monetary Arbitration: 111; 4. Employee Monetary Arbitration: 114; 5. Consumer Non-Monetary Court: 153; 6. Consumer Monetary Court: 149; 7. Consumer Non-Monetary Arbitration: 120; 8. Consumer Monetary Arbitration: 117.

¹²⁹ Sixty-five percent of the participants were female. Seventy percent of the sample was White/Caucasian, 11% Black/African American, 9% Asian, and 7% Hispanic/Latino. Five percent of participants were between the ages of 18-21, 35% between the ages of 22 to 34, 28% between the ages of 35 to 44, 16% between the ages of 45 to 54, 11% between the ages of 55 to 64 and the remaining 65 and older. Twenty-seven percent of the sample had graduated with a high school degree, 14% with an

Results. We conducted regression analyses using a dummy coded variable: Court vs. Arbitration. Court was coded as 1 and arbitration was coded 0. The total sample was included in the analysis and therefore included all four scenarios as detailed above.

In the examination of Hypothesis 1, the dummy coded court/arbitration variable was regressed on the dependent variable “likelihood to sue.” The regression analyses were highly significant ($B=.40$, $SE=.11$, $t(1048)=3.69$, $p=.00$) indicating that there is a direct relationship between inclusion of arbitration agreement and likeness of suing, such that inclusion of the arbitration agreement was associated with less likelihood of suing.¹³⁰ Hypothesis 1 was therefore supported.

Other Studies. We ran similar experiments among student participants which yielded similar results. A total of 230 respondents from a historically black university in the mid-Atlantic region of the United States completed a similar survey which was comprised of 87% African-Americans.¹³¹ The results suggested that an arbitration clause led to a

associate’s degree, 39% with a bachelor’s degree, 14% with a master’s degree and 2% with a Ph.D. Seventy-three percent of the sample was employed. For those participants who indicated they were employed, 77% worked full time and 7% earned \$10,000 or less, 20% earned between \$10,000 to \$30,000, 26% between \$30,000 to \$50,000, 22% between \$50,000 and \$70,000, 14% between \$70,000 and \$100,000 and 8% between \$100,000 and \$150,000.

¹³⁰ The breakdown of Consumer/Employee is as follows: *Consumer*: In the examination of only the consumer scenarios, the regression analyses were highly significant ($B=.51$, $SE=.13$, $t(538)=3.89$, $p=.00$) indicating that there is a direct relationship between inclusion of arbitration agreement and likeness of suing for consumers; *Employee*: In the examination of only the employee scenarios, the regression analyses were marginally significant ($B=.28$, $SE=.16$, $t(509)=1.71$, $p=.088$) indicating that there may be a direct relationship between inclusion of arbitration agreement and likeness of suing for employees. The breakdown of Monetary/Non-monetary is as follows: *Monetary*: In the examination of only the monetary scenarios, the regression analyses were not significant ($B=.07$, $SE=.15$, $t(522)=.46$, $p=.65$) indicating that there is not a direct relationship between inclusion of arbitration agreement and likeness of suing for monetary cases. *Non-monetary*: In the examination of only the employee scenarios, the regression analyses were highly significant ($B=.74$, $SE=.15$, $t(525)=4.80$, $p=.00$) indicating that there is a direct relationship between inclusion of arbitration agreement and likeness of suing for non-monetary cases.

¹³¹ Fifty-four percent of the sample was female. Thirty-five percent of the sample was between the ages of 18 to 21, 59% from 22 to 34, and 5% from 35 to 44. Eight-five percent of the sample was African-American, 5% Middle Eastern, 4 Asian, 2%

significant drop in likelihood of suing. In the arbitration conditions, the average was lower ($M = 5.10$, $SD = 1.64$, $N = 82$) than the court conditions ($M = 5.45$, $SD = 1.57$, $N = 148$).

B. Study II: Arbitration Opt-Out

The previous study establishes the arbitration effect by showing that at the time of dispute individuals are less likely to use arbitration to resolve their disputes as opposed to courts. To comprehend the arbitration effect and the factors leading to it, more experiments are required. As a first step, we separated the arbitration effect at the time of contracting as opposed to its effect at the time of decision-making to pursue legal action.¹³²

We suggest that the *contractual decision* should be separately tested from the *dispute decision*.¹³³ The query is whether the arbitration effect

White/Caucasian, and 1% Hispanic/Latino. Sixty-four percent of the sample was full-time employees. Of those employed, 31% were full time employees and 69% part-time employees. We randomly assigned participants to conditions in a 2 (Arbitration vs. Court) x 2 (Employee vs. Consumer) x 2 (Monetary vs. Non-monetary) between subjects design. As described above, all participants were given a scenario in which they imagined themselves in a dispute. After the scenario was presented, the participants were immediately asked several survey questions. In the arbitration condition, the scenario indicates that the contract indicates that their only option is to sue the company in a process called arbitration. At the beginning of the arbitration condition survey, respondents were given a description of arbitration and its current use by companies. In the court condition, the scenario indicates that they have the option to sue the company in court.

¹³² Generally, there are three stages that can be empirically tested. The first stage is the decision to enter into an arbitration agreement. The second is the decision to use arbitration after finding out about it. The third is the experience of individuals from arbitration procedure. There are some studies on the second and third phases under the rubric of *ex ante* and *ex post*, see e.g., Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2013); Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An ex ante and ex post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008); Farshad Ghodoosi & Monica Sharif, *Justice in Arbitration: the Consumer Perspective*, INT'L J. OF CONFLICT MGMT. (2021)

¹³³ Albeit different from this distinction, Thibaut & Walker offered decision control and process control as two main decision individuals make with regard to dispute resolution. Decision control refers to the disputants' ability to shape the final outcome. Process control refers to the disputants' ability to influence the procedures and presentation of evidence and arguments.

exists at the time of contracting as well. The results can lead to a significant leap in our understanding of contracting as well as the justice behavior of individuals. Some previous studies suggest that when individuals are informed about arbitration, they prefer to take their disputes to court.¹³⁴ The results seem to lead to the understanding that individuals will likely opt out of arbitration agreements when informed about it in the agreements.

To empirically test this, we looked at individuals' tendency to opt out of arbitration.¹³⁵ Corporations often allow consumers or employees to opt out of arbitration agreements. The arbitration opt-out feature has convinced some courts that such practice defeats the unconscionability argument against enforceability of arbitration clauses. For example, in *Suarez v. Uber Technologies* based on the opt out provision in the contract, the court decided against any procedural unconscionability because "Plaintiffs had the absolute right to opt out of Arbitration Provision."¹³⁶ In complex and multi-page contracts, consumers do not typically read the terms even if there is an arbitration opt-out provision which is sufficiently conspicuous. However, to understand the arbitration effect, we isolated the arbitration opt out provision.

Hypothesis. Based on the strong arbitration effect at the dispute decision stage, we hypothesize that individuals will opt out of arbitration

¹³⁴ Ams. for Fin. Reform & Ctr. for Responsible Lending, 1,000 Likely 2016 National Voters, LAKE RES. PARTNERS (2015), <http://ourfinancialsecurity.org/wp-content/uploads/2015/07/Toplines.AFRCL.public.070715.pdf> [<http://perma.cc/S4TQ-XBCE>] (polling 2016 likely voters on Dodd-Frank Wall Street Reform and Consumer Protection Act and the activities of the CFPB)

¹³⁵ Previous studies suggest that default choices are often sticky which means that individuals are less likely to opt out from default choices. Eric Johnson & Daniel Goldstein, *Do Defaults Save Lives?* SCIENCE 1338 (2003); Dominique Cappelletti, Luigi Mittone & Matteo Ploner, Are Default Contributions Sticky? An Experimental Analysis of Defaults in Public Goods Provision, 108 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 331 (2014); Reid Kress Weisbord, & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis* 103 IOWA L. REV. 663 (2017). The query here is whether arbitration effect is strong enough to override the stickiness of the default rules.

¹³⁶ *Suarez v. Uber Techs., Inc.*, No. 8:16-cv-166-T-30MAP, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016). The opt out provisions must be conspicuous for the. For example, in *Noble v. Samsung Electronics America Inc.*, the U.S. District Court for the District of New Jersey refused to enforce an arbitration clause in a consumer contract despite the opt out provision because the terms were not conspicuous to the reader.

agreement at the contracting stage. We hypothesize that individuals will opt out arbitration clauses when they are directly asked.

Methodology. Three experiments were designed all of which have been pre-registered.¹³⁷ We also paid for the feature provided by the platform that blocks low quality participants. Each study included a question to prime the participants related to the scenario before it is presented to them. In the first study, individuals were presented with an email from their online shopping company which notified them of a recent update to the terms & conditions.¹³⁸ The individuals were provided the information that they can only sue in arbitration and that they have waived their right to go to court unless they opt out of arbitration.¹³⁹ In the second study, individuals were in the process of purchasing a car at a dealership where a similar arbitration agreement and right to opt out were presented to them.¹⁴⁰ In the third study, individuals are about to purchase a laptop at a store and an arbitration agreement and right to opt-out were presented to them.¹⁴¹ Each study had three conditions (no nudge, mild nudge, and significant nudge). Under no nudge, participants were simply asked to select one of the options: “I agree to use arbitration for resolution of my disputes with the company” or “I will opt out of arbitration.” Under mild nudge, the “I agree to use arbitration...” was a default option. Under significant nudge, the default

¹³⁷ See https://aspredicted.org/see_one.php (“Opt Out - (#68261); https://aspredicted.org/see_one.php (“Opt out Dealership” - #68444); https://aspredicted.org/see_one.php (“Opt Out- Laptop” (#68813)

¹³⁸ See Appendix [1] for the email.

¹³⁹ The image of the email is attached as an appendix.

¹⁴⁰ We are happy to see that you like this particular vehicle. Before we proceed, we would like to flag an important term in our terms & conditions. If you have issues with this sale, the car you are buying now and/or our future services you must sue us in arbitration. Arbitration is a process outside of court system in which a neutral third person (an arbitrator) decides the dispute between you and the company. By selecting arbitration you waive your right to go to court. The decision of the arbitration is final and enforceable by courts. You can decide to opt out of arbitration now.

¹⁴¹ Thanks for shopping with us. Before we proceed, we would like to flag an important term in our terms & conditions. If you have issues with this laptop, issues related to data loss, and/or our future services you must sue us in arbitration. Arbitration is a process outside of court system in which a neutral third person (an arbitrator) decides the dispute between you and the company. By selecting arbitration, you waive your right to go to court. The decision of the arbitration is final and enforceable by courts. You can decide to opt out of arbitration now.

option (“I agree to use arbitration”) was also accompanied by “(recommended).”¹⁴²

Results.

Study 1 (Online Shopping Company). After removing participants who did not correctly answer the comprehension questions, a total of 380 participants were included in the study.^{143 144}

In the no nudge condition, 47% opted out of arbitration. In the mild nudge condition, 36% opted out and in the significant nudge condition, 29% opted out. We conducted a binary logistic regression analysis in which nudge was regressed on opting out of arbitration. No nudge was not significant ($B=-.12$, $SE=.17$, $Wald=.477$, $p=.49$). Mild nudge was significant such that individuals were less likely to opt out of arbitration ($B=-.57$, $SE=.19$, $Wald=8.91$, $p=.00$). Significant nudge was also significant such that individuals were less likely to opt out of arbitration ($B=-.89$, $SE=.20$, $Wald=20.72$, $p=.00$).

Study 2: (Laptop). After removing participants who did not correctly answer the comprehension questions, a total of 385 participants were included in the study.^{145 146}

¹⁴² “I agree to use arbitration for resolution of my disputes with the company (recommended)”

¹⁴³ The number of participants per condition were as follows, after removing participants who did not correctly answer all comprehension questions: 1 (No nudge): 134; 2 (Mild nudge): 119; 3 (Significant nudge): 127

¹⁴⁴ Fifty-seven percent of the participants were female. Seventy-two percent of the sample was White/Caucasian, 10% Black/African American, 11% Asian, and 5% Hispanic/Latino. One percent of participants were between the ages of 18-21, 36% between the ages of 22 to 34, 27% between the ages of 35 to 44, 19% between the ages of 45 to 54, 12% between the ages of 55 to 64 and the remaining 65 and older. Twenty-three percent of the sample had graduated with a high school degree, 15% with an associate’s degree, 40% with a bachelor’s degree, 16% with a master’s degree and 2% with a Ph.D. Eighty-two percent of the sample was employed. For those participants who indicated they were employed, 76% worked full time and 5% earned \$10,000 or less, 19% earned between \$10,000 to \$30,000, 29% between \$30,000 to \$50,000, 24% between \$50,000 and \$70,000, 14% between \$70,000 and \$100,000 and 6% between \$100,000 and \$150,000.

¹⁴⁵ The number of participants per condition were as follows, after removing participants who did not correctly answer all comprehension questions: 1 (No nudge): 123; 2 (Mild nudge): 131; 3 (Significant nudge): 131.

¹⁴⁶ Fifty-seven percent of the participants were female. Seventy-five percent of the sample was White/Caucasian, 8% Black/African American, 11% Asian, and 3%

In the no nudge condition, 50% opted out of arbitration. In the mild nudge condition, 47% opted out and in the significant nudge condition, 31% opted out. We conducted a binary logistic regression analysis in which nudge was regressed on opting out of arbitration. No nudge was not significant ($B = -.02$, $SE = .18$, $Wald = .01$, $p = .93$). Mild nudge was not significant but directionally lower ($B = -.14$, $SE = .18$, $Wald = .62$, $p = .43$). Significant nudge was significant such that individuals were less likely to opt out of arbitration ($B = -.82$, $SE = .19$, $Wald = 18.77$, $p = .00$).

Study 3: (Dealership). After removing participants who did not correctly answer the comprehension questions, a total of 379 participants were included in the study.^{147 148}

In the no nudge condition, 46% opted out of arbitration. In the mild nudge condition, 41% opted out and in the significant nudge condition, 32% opted out. We conducted a binary logistic regression analysis in which nudge was regressed on opting out of arbitration. No nudge was not significant ($B = -.14$, $SE = .18$, $Wald = .647$, $p = .42$). Mild nudge was

Hispanic/Latino. Four percent of participants were between the ages of 18-21, 36% between the ages of 22 to 34, 25% between the ages of 35 to 44, 16% between the ages of 45 to 54, 12% between the ages of 55 to 64 and the remaining 65 and older. Thirty percent of the sample had graduated with a high school degree, 13% with an associate's degree, 37% with a bachelor's degree, 14% with a master's degree and 2% with a Ph.D. Eighty-three percent of the sample was employed. For those participants who indicated they were employed, 83% worked full time and 5% earned \$10,000 or less, 20% earned between \$10,000 to \$30,000, 25% between \$30,000 to \$50,000, 21% between \$50,000 and \$70,000, 17% between \$70,000 and \$100,000 and 7% between \$100,000 and \$150,000.

¹⁴⁷ The number of participants per condition were as follows, after removing participants who did not correctly answer all comprehension questions: 1 (No nudge): 125; 2 (Mild nudge): 128; 3 (Significant nudge): 126.

¹⁴⁸ Fifty-one percent of the participants were female. Sixty-six percent of the sample was White/Caucasian, 16% Black/African American, 10% Asian, and 5% Hispanic/Latino. Four percent of participants were between the ages of 18-21, 36% between the ages of 22 to 34, 34% between the ages of 35 to 44, 14% between the ages of 45 to 54, 8% between the ages of 55 to 64 and the remaining 65 and older. Twenty percent of the sample had graduated with a high school degree, 16% with an associate's degree, 42% with a bachelor's degree, 17% with a master's degree and 2% with a Ph.D. Eighty-three percent of the sample was employed. For those participants who indicated they were employed, 81% worked full time and 9% earned \$10,000 or less, 19% earned between \$10,000 to \$30,000, 26% between \$30,000 to \$50,000, 23% between \$50,000 and \$70,000, 15% between \$70,000 and \$100,000 and 7% between \$100,000 and \$150,000.

significant such that individuals were less likely to opt out of arbitration ($B = -.38$, $SE = .18$, $Wald = 4.45$, $p = .04$). Significant nudge was also significant such that individuals were less likely to opt out of arbitration ($B = -.77$, $SE = .19$, $Wald = 16.00$, $p = .00$).

Therefore, individuals do not necessarily opt out of arbitration even when given the chance. This effect is stronger when organizations use nudging techniques as described above.

C. Study III: Post Dispute Arbitration Option

Much of the regulatory discussion about arbitration is related to the prohibition of pre-dispute arbitration agreements. As discussed in Section IV below, the existing Congressional efforts at curtailing arbitration in consumer and employment context rests on the presumption that individuals make a different decision after a dispute arises. Put differently, the presumption is that individuals opt for court rather than arbitration after a dispute arises. Embedded in this presumption is that firms impose arbitration agreements on individuals without giving them the chance to opt out or select their preferred forum of dispute resolution. In the previous study, we showed that individuals typically do not opt out of arbitration. In this study we test whether individuals select court over arbitration when they find themselves in a dispute with businesses.

Hypothesis. Based on the foregoing, we hypothesize that individuals do not avoid arbitration even after a dispute has arisen.

Methodology. In order to test whether individuals prefer to have their issue resolved in court or arbitration after a dispute arises, we randomly assigned participants to 2 different scenarios (i.e. customer non-monetary, and customer monetary).¹⁴⁹ We pre-registered the study at

¹⁴⁹ *Scenario 1:* Imagine: You have opened an account with a bank. You claim your bank has fraudulently used your information from your existing account to open another account without your knowledge and permission. The bank disagrees with your claims. *Scenario 2:* Imagine: You have purchased a brand-new refrigerator. A few days after the manufacturer has installed the product, the refrigerator catches on fire and causes significant damage to your house. You discover that this was a result of a faulty part in the refrigerator. Your insurance company does not cover this loss. You believe

Wharton's AsPredicted.Org to increase reliability and trust in the data.¹⁵⁰ We launched the study at Amazon's Mechanical Turk (*MTurk*) and paid for the feature provided by the platform that blocks low quality participants. We also provided a comprehension question to assure that only individuals who carefully read the prompts be counted in our analysis.¹⁵¹ After providing the randomly assigned scenario, all participants were presented with basic information about arbitration.¹⁵² We then asked presented them with the question: "You are given the option to sue the company in court or arbitration. Which one do you choose?" and asked them to select one of the following options: "Court" OR "Arbitration." We randomized the order and appearances of these two options to avoid any order and appearance bias.

After removing participants who did not correctly answer the comprehension questions, a total of 204 participants were included in the study.^{153 154}

Results. We examined the frequencies of response options: whether participants selected court or arbitration. Of the 204 responses, 112 (54.9% of the sample) selected "Arbitration" and 92 (45.1%) selected

that the refrigerator manufacturer is responsible for the damages to your house. The refrigerator manufacturer disagrees with your claim.

¹⁵⁰ https://aspredicted.org/see_one.php ("After a Dispute Arises- Court Versus Arbitration #70588)

¹⁵¹ Arbitration is a process outside of the court system in which a neutral third person (an arbitrator) decides the dispute between you and the company. Answer: True

¹⁵² You are given the option to sue the company in court or arbitration. Arbitration is a process outside of the court system in which a neutral third person (an arbitrator) decides the dispute between you and the company. The decision of the arbitration is final and enforceable by courts.

¹⁵³ 102 participants in each of the two conditions.

¹⁵⁴ Forty-four percent of the participants were female. Seventy percent of the sample was White/Caucasian, 11% Black/African American, 10% Asian, and 6% Hispanic/Latino. Two percent of participants were between the ages of 18-21, 44% between the ages of 22 to 34, 30% between the ages of 35 to 44, 14% between the ages of 45 to 54, 9% between the ages of 55 to 64 and the remaining 65 and older. Twenty-four percent of the sample had graduated with a high school degree, 11% with an associate's degree, 49% with a bachelor's degree, 12% with a master's degree and 2% with a Ph.D. Eighty-one percent of the sample was employed. For those participants who indicated they were employed, 84% worked full time and 4% earned \$10,000 or less, 24% earned between \$10,000 to \$30,000, 24% between \$30,000 to \$50,000, 22% between \$50,000 and \$70,000, 13% between \$70,000 and \$100,000 and 9% between \$100,000 and \$150,000.

“Court.” This indicates that more than half of the sample selected Arbitration. Thus, individuals do not necessarily avoid arbitration even after a dispute arises.

IV. INVASIVENESS OF ARBITRATION EFFECT

To understand the scope of arbitration effect, we ran several studies as detailed below (the summary of the studies are in section IV.A below). In sum, in the three experiments discussed in this Part, we tested whether the Supreme Court’s ascribed arbitration attributes will change the arbitration effect, whether informational nudges affect arbitration effect, and whether arbitration effect impacts individual’s perceptions of firms utilizing mandatory arbitration.

A. Study I: (Not So) Fundamental Attributes

The arbitration narrative is often accompanied with some ascribed positive attributes such as speed and efficiency. This narrative became compelling enough that it made to the Supreme Court jurisprudence from *Conception* onwards and was weaved into reading of FAA.¹⁵⁵ The Supreme Court’s reasoning seems to be as follows: (a) the principal purpose of FAA is to enforce private arbitration agreements according to their terms,¹⁵⁶ (b) FAA has provided parties with discretion in designing arbitration processes which allow for certain fundamental attributes such as efficiency and speed,¹⁵⁷ (c) any reading of FAA that collides with the fundamental attributes of arbitration runs against FAA and the consensual nature of arbitration agreements.¹⁵⁸ In sum, the Supreme Court suggests that parties choose arbitration due to its fundamental

¹⁵⁵ See *Supra* Part [...]

¹⁵⁶ Volt, 489 U. S., at 478; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U. S. ___, ___ (2010); *Conception*, at [...]

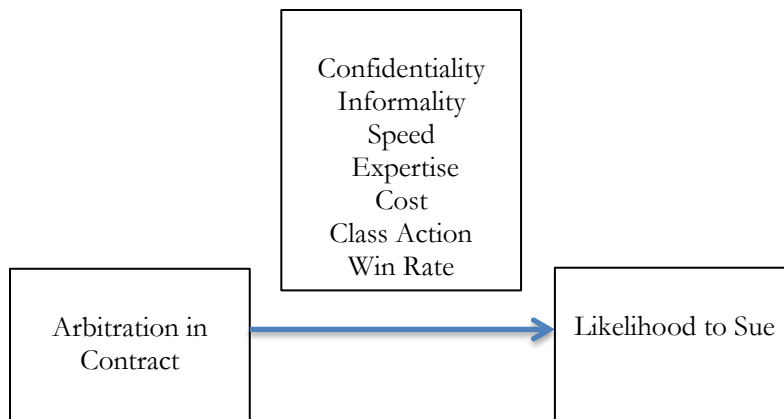
¹⁵⁷ *Conception*, (“the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”)

¹⁵⁸ *Conception*, “requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” “Class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, interferes with fundamental attributes of arbitration.”

attributes that it lists as informality, efficiency, reduced costs, and speed.¹⁵⁹

To better understand, the contours of the arbitration effect, we empirically test individuals' behavior to find out if any of these attributes play a role in nudging individuals to use arbitration. In other words, the query is whether any of the alleged procedural advantages of arbitration can act as an accelerator for individuals to use arbitration for the resolution of their disputes as opposed to court.

Hypothesis: Based on the foregoing, we hypothesize that the information about features of arbitration does not negatively impact the arbitration effect (*i.e.*, does not lead to more likelihood of suing).



Methodology. To test the effect of fundamental attributes, two studies with 9 conditions were designed. In the first study, the participants were presented with a scenario about a cell phone company charging a fee for international texting.¹⁶⁰ This scenario is a low-stake dispute. In the second study, the participants were presented with a high-stake dispute involving purchasing a damaged new vehicle from a

¹⁵⁹ *Concepcion*, 131 S. Ct. at 1748.

¹⁶⁰ Imagine: Your wireless cellphone service provider charged you a high fee for international text messaging. You never sent a single international text message. You claim that you should not be responsible for the fee. You contact the company to remove the fee. But, the company disagrees and dismisses that you have been wrongfully charged.

dealership. Following the scenario, the respondents were given information about arbitration similar to the other studies. In the arbitration condition, participants were randomly presented with extra information about confidentiality,¹⁶¹ informality,¹⁶² speed,¹⁶³ cost,¹⁶⁴ arbitrator expertise,¹⁶⁵ class action¹⁶⁶ and win rate. In two of the conditions—one about court and one about arbitration—participants were not given any extra information. The last two conditions (class action and win rate) were added to give us the ability to compare with the other conditions. Both of the studies were pre-registered with Aspredicted, included comprehension questions, and blocked inattentive participants.¹⁶⁷

Study 1 (Cellphone):

For the cell phone company scenario, after removing participants who did not correctly answer the comprehension questions, a total of 1143 participants were included in the study.^{168 169}

¹⁶¹ The arbitration process including your claim, the company's claim and the final decision will be confidential.

¹⁶² The arbitration process is informal, meaning that you and the company can mutually have a say in designing the dispute resolution process.

¹⁶³ The arbitration process is typically completed in a relatively short time span.

¹⁶⁴ The arbitration process is typically low-cost.

¹⁶⁵ You can select an arbitrator who has experience resolving similar disputes.

¹⁶⁶ You have the option of joining with other individuals with similar grievances in a collective arbitration process in which you sue the company together.

¹⁶⁷ https://aspredicted.org/sec_one.php ("Arbitration Effect- Factors" (#66223); ("Arbitration Effect- Supreme Court Points" (#68177)

¹⁶⁸ The number of participants per condition were as follows, after removing participants who did not correctly answer all comprehension questions: 1 (Court): 177; 2 (Arbitration-No Manipulation): 134; 3 (Confidential): 110; 4 (Informal): 114; 5 (Speed): 113; 6 (Cost): 137; 7 (Previous Experience with Disputes): 115; 8 (Class Action): 124; 9 (Win Rate): 119.

¹⁶⁹ Fifty-five percent of the participants were female. Seventy-two percent of the sample was White/Caucasian, 11% Black/African American, 9% Asian, and 5% Hispanic/Latino. Four percent of participants were between the ages of 18-21, 37% between the ages of 22 to 34, 28% between the ages of 35 to 44, 16% between the ages of 45 to 54, 10% between the ages of 55 to 64 and the remaining 65 and older. Twenty-three percent of the sample had graduated with a high school degree, 14% with an associate's degree, 40% with a bachelor's degree, 17% with a master's degree and 2% with a Ph.D. Seventy-eight percent of the sample was employed. For those participants who indicated they were employed, 80% worked full time and 5% earned \$10,000 or less, 18% earned between \$10,000 to \$30,000, 27% between \$30,000 to \$50,000, 25%

Study 2 (Dealership):

For the dealership scenario, after removing participants who did not correctly answer the comprehension questions, a total of 1152 participants were included in the study.^{170 171}

Results.

Study 1 (Cellphone)

In the first study which included the scenario about a cell phone company charging a fee for international texting, the means, standard deviations and *N* values for each of the conditions are as follows: Court (*M* = 4.14, *SD* = 2.07, *N* = 177), Arbitration- No Manipulation (*M* = 4.51, *SD* = 2.08, *N* = 134), Confidential (*M* = 4.04, *SD* = 2.00, *N* = 110), Informal (*M* = 4.37, *SD* = 1.88, *N* = 114), Speed (*M* = 4.65, *SD* = 1.88, *N* = 114), Cost (*M* = 4.40, *SD* = 1.99, *N* = 137), Previous Experience with Disputes (*M* = 4.28, *SD* = 2.05, *N* = 115), Class Action (*M* = 4.95, *SD* = 1.81, *N* = 124), Win Rate (*M* = 4.97, *SD* = 1.79, *N* = 119).

Variable	M	SD	N
Court	4.14	2.07	177
Arbitration-No Manipulation	4.51	2.08	134

between \$50,000 and \$70,000, 17% between \$70,000 and \$100,000 and 6% between \$100,000 and \$150,000.

¹⁷⁰ The number of participants per condition were as follows, after removing participants who did not correctly answer all comprehension questions: 1 (Court): 157; 2 (Arbitration-No Manipulation): 125; 3 (Confidential): 110; 4 (Informal): 131; 5 (Speed): 119; 6 (Cost): 133; 7 (Previous Experience with Disputes): 121; 8 (Class Action): 139; 9 (Win Rate): 117.

¹⁷¹ Fifty-eight percent of the participants were female. Seventy-five percent of the sample was White/Caucasian, 10% Black/African American, 8% Asian, and 4% Hispanic/Latino. Three percent of participants were between the ages of 18-21, 36% between the ages of 22 to 34, 27% between the ages of 35 to 44, 17% between the ages of 45 to 54, 11% between the ages of 55 to 64 and the remaining 65 and older. Twenty-five percent of the sample had graduated with a high school degree, 14% with an associate's degree, 40% with a bachelor's degree, 15% with a master's degree and 2% with a Ph.D. Seventy-seven percent of the sample was employed. For those participants who indicated they were employed, 77% worked full time and 6% earned \$10,000 or less, 18% earned between \$10,000 to \$30,000, 25% between \$30,000 to \$50,000, 25% between \$50,000 and \$70,000, 16% between \$70,000 and \$100,000 and 8% between \$100,000 and \$150,000.

Confidential	4.04	2.00	110
Informal	4.37	1.88	114
Speed	4.65	1.88	114
Cost	4.40	1.99	137
Previous Experience with Disputes	4.28	2.05	115
Class Action	4.95	1.81	124
Win Rate	4.97	1.79	119

First, we tested again for the arbitration effect and we once again found the strong relationship between arbitration in contract and the likelihood of suing. We then conducted regression analyses using a dummy coded variable: Court vs. Arbitration. Court was coded as 1 and all arbitration conditions were coded as 0. The regression analyses were significant ($B = -.39$, $SE = .16$, $t(1142) = -2.42$, $p = .02$) indicating that there is a direct relationship between inclusion of arbitration agreement and likeness of suing, such that individuals in the court condition were less likely to sue.¹⁷²

We then created dummy coded variables for all other conditions in the study including: Arbitration-No Manipulation, Confidential, Informal, Speed, Cost, Previous Experience with Disputes, Class Action and Win Rate. Arbitration-No Manipulation was not included in the regression in order to act as the referent variable. We then regressed the remaining dummy coded variables on the likelihood to sue variable. The results were as follows: Confidential ($B = -.48$, $SE = .25$, $t(965) = -1.92$, $p = .06$), Informal ($B = -.15$, $SE = .25$, $t(965) = -.59$, $p = .55$), Speed ($B = .13$, $SE = .25$, $t(965) = .53$, $p = .60$), Cost ($B = -.11$, $SE = .24$, $t(965) = -.48$, $p = .63$), Previous Experience with Disputes ($B = -.24$, $SE = .25$, $t(965) = -.96$, $p = .34$), Class Action ($B = .44$, $SE = .24$, $t(965) = 1.81$, $p = .07$), Win Rate ($B = .45$, $SE = .24$, $t(965) = 1.85$, $p = .07$). Thus, none of the effects are significant. In sum, in the low stake disputes, individuals were less likely to sue in court. Additionally, the fundamental attributes affected the likelihood of suing.

Variable	B	SE	t	df	p
Confidential	-.48	.25	-1.92	965	.06

¹⁷² We also ran a regression in which Court was coded as 1 and only the Arbitration-No Manipulation scenario was coded as 0, to have a simple comparison. In this analysis, the regression result was not significant ($B = -.38$, $SE = .24$, $t(310) = -1.60$, $p = .11$). This may indicate that there may not be a significant difference between court and arbitration with regard to suing in this scenario.

Informal	-.15	.25	-.59	965	.55
Speed	.13	.25	.53	965	.60
Cost	-.11	.24	-.48	965	.63
Previous Experience with Disputes	-.24	.25	-.96	965	.34
Class Action	.44	.24	1.81	965	.07
Win Rate	.45	.24	1.85	965	.07

Study 2 (Dealership)

In the second study in which the participants were presented with a high-stake dispute involving purchasing a damaged new vehicle from a dealership, the means, standard deviations and *N* values for each of the conditions are as follows: Court (*M* = 6.25, *SD* = 1.04, *N* = 157), Arbitration- No Manipulation (*M* = 5.97, *SD* = 1.42, *N* = 125), Confidential (*M* = 6.07, *SD* = 1.33, *N* = 110), Informal (*M* = 5.79, *SD* = 1.42, *N* = 131), Speed (*M* = 5.88, *SD* = 1.42, *N* = 119), Cost (*M* = 6.22, *SD* = 1.24, *N* = 133), Previous Experience with Disputes (*M* = 5.93, *SD* = 1.44, *N* = 121), Class Action (*M* = 6.07, *SD* = 1.27, *N* = 139), Win Rate (*M* = 6.14, *SD* = 1.32, *N* = 117).

Variable	M	SD	N
Court	6.25	1.04	157
Arbitration-No Manipulation	5.97	1.42	125
Confidential	6.07	1.33	110
Informal	5.79	1.42	131
Speed	5.88	1.42	119
Cost	6.22	1.24	131
Previous Experience with Disputes	5.93	1.44	121
Class Action	6.07	1.27	139
Win Rate	6.14	1.32	117

We conducted regression analyses using a dummy coded variable: Court vs. Arbitration. Court was coded as 1 and all arbitration conditions were coded as 0. The regression analyses were significant (*B* = .24, *SE* = .11, *t*(1151) = 2.09, *p* = .037) indicating that there is a direct relationship between inclusion of arbitration agreement and likeness of

suing, such that individuals in the court condition were more likely to sue.¹⁷³

We then created dummy coded variables for all other conditions in the study including: Arbitration-No Manipulation, Confidential, Informal, Speed, Cost, Previous Experience with Disputes, Class Action and Win Rate. Arbitration-No Manipulation was not included in the regression in order to act as the referent variable. We then regressed the remaining dummy coded variables on the likelihood to sue variable. The results were as follows: Confidential ($B=.11$, $SE=.18$, $t(994)=.59$, $p=.55$), Informal ($B=-.17$, $SE=.17$, $t(994)=-1.03$, $p=.30$), Speed ($B=-.09$, $SE=.17$, $t(994)=-.49$, $p=.62$), Cost ($B=.26$, $SE=.17$, $t(994)=1.52$, $p=.13$), Previous Experience with Disputes ($B=-.03$, $SE=.17$, $t(994)=-.20$, $p=.84$), Class Action ($B=.10$, $SE=.17$, $t(994)=.62$, $p=.54$), Win Rate ($B=.17$, $SE=.18$, $t(994)=.97$, $p=.33$). Thus, none of the factors were significant.

Therefore, in the high stake scenario, individuals were more likely to sue in court in line with the arbitration effect. However, once again, none of the fundamental attributes affected the likelihood of suing.

Variable	B	SE	t	df	p
Confidential	.11	.18	.59	994	.55
Informal	-.17	.17	-1.03	994	.30
Speed	-.09	.17	-.49	994	.62
Cost	.26	.17	1.52	994	.13
Previous Experience with Disputes	-.03	.17	-.20	994	.84
Class Action	.10	.17	.62	994	.54
Win Rate	.17	.18	.97	994	.33

B. Study II: Informational (In)curability

Informational nudges are commonplace in shaping individuals' behavior. Product labels, warning signs, and disclosures are examples of

¹⁷³ We also ran a regression in which Court was coded as 1 and only the Arbitration-No Manipulation scenario was coded as 0, to have a simple comparison. In this analysis, the regression result was also significant ($B=.28$, $SE=.15$, $t(1151)=1.91$, $p=.057$). This, again, indicates that there is a direct relationship between inclusion of arbitration agreement and likeness of suing, such that individuals in the court condition were more likely to sue.

informational nudges, which impact individuals' choice architecture¹⁷⁴ Simply put, informational nudges shape individual choices.

The extent to which information nudges are effective is an open question.¹⁷⁵ Some suggest that targeted and simplified information is effective.¹⁷⁶ It is important individuals receive simple information. And

¹⁷⁴ Informational nudges serve as one tool for a choice architectures. Eric Johnson et al, Beyond Nudges: Tools of a Choice Architecture, 23 *MARKETING LETTERS* 487 (2012). Pelle Hansen et al, Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behavior Change in Public Policy, 4 *EUROPEAN JOURNAL OF RISK REGULATION* 3 (2013); Thomas Leonard, Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008):

¹⁷⁵ See e.g., Oren Bar-Gill & Franco Ferrari, Informing Consumers About Themselves, 3 *ERASMUS L. REV.* 93 (2010); Marianne Bertrand & Adair Morse, Information Disclosure, Cognitive Biases, and Payday Borrowing, 66 *J. FIN.* 1865 (2011); Leemore Dafny David Dranove, Do Report Cards Tell Consumers Anything They Don't Already Know? The Case Of Medicare HMOs, 39 *RAND J. ECON.* 790 (2008); David Dranove et al., Is More Information Better? The Effects of "Report Cards" on Health Care Providers, 111 *J. POL. ECON.* 555 (2003); Allen Ferrell, Mandatory Disclosure and Stock Returns: Evidence from the Over-the-Counter Market, 36 *J. LEGAL STUD.* 213 (2007); Michael J. Fishman & Kathleen M. Hagerty, Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers, 19 *J.L. ECON. & ORG.* 45 (2003); Robert A. Hillman, Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?, 104 *MICH. L. REV.* 837 (2006); Shameek Konar & Mark A. Cohen, Information as Regulation: The Effect of Community Right To Know Laws on Toxic Emissions, 32 *J. ENVTL. ECON. & MGMT.* 109 (1997); Anthony T. Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 *J. LEGAL STUD.* 1 (1978); Paul G. Mahoney, Mandatory Disclosure as a Solution to Agency Problems, 62 *U. CHI. L. REV.* 1047 (1995); Florencia Marotta-Wurgler, Does Contract Disclosure Matter?, 168 *J. INSTITUTIONAL & THEORETICAL ECON.* 94 (2012); Florencia Marotta-Wurgler, Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts," 78 *U. CHI. L. REV.* 165 (2011); Alan D. Mathios, The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market, 43 *J.L. & ECON.* 651 (2000); A. Mitchell Polinsky & Steven Shavell, Mandatory Versus Voluntary Disclosure of Product Risks, 26 *J.L. ECON. & ORG.* 1 (2010); William M. Sage, Regulating Through Information: Disclosure Laws and American Health Care, 99 *COLUM. L. REV.* 1701 (1999); Daniel J. Solove, The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure, 53 *DUKE L.J.* 967 (2003); Note, Disclosure as a Legislative Device, 76 *HARV. L. REV.* 1273 (1963).

¹⁷⁶ See e.g., James Bettman, John W. Payne, & Richard Staelin, *Cognitive Considerations in Designing Effective Labels for Presenting Risk Information*, 5 *JOURNAL OF PUBLIC POLICY & MARKETING* 1 (1986); Eugene G. Chewning, Jr. & Adrian M. Harrell, The Effect of Information Load on Decision Makers' Cue Utilization Levels and

the type and source of information play a role in its effect on individuals. Some scholars have suggested that information is key to accessibility to arbitration and that we moved from “class action wars” to “information wars.”¹⁷⁷

As a result, in this study we provide individuals with 5 different types of information (namely, peer statement, win-rate statement, cost statement, history statement, and formality statement) to assess whether the information can lessen the arbitration effect. The source of the information provided is from the individuals’ research or their trusted peers to avoid any bias against information from third parties or companies. In other words, the aim is to make sure individuals trust the the information.

Hypothesis. Based on the foregoing, we hypothesize that informational nudges will not meaningfully and negatively impact the arbitration effect.

Methodology. After removing participants who did not correctly answer the comprehension questions,¹⁷⁸ a total of 697 participants were included in the study.¹⁷⁹

Decision Quality in a Financial Distress Decision Task, 15 ACCT. ORG. & 527, 539-40 (1990); Kevin Lane Keller & Richard Staelin, Effects of Quality and Quantity of Information on Decision Effectiveness, 14 J. CONSUMER RES. 200, 211-12 (1987).

¹⁷⁷ Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611 (2020)

¹⁷⁸ Comprehension questions included: *Employee Scenario*: You claim that the company has unjustly ended your employment. Answer: True; *Consumer Scenario*: You claim that the refrigerator manufacturer should pay for the damages to your house. Answer: True; *Arbitration Scenarios*: Given your contract, you can sue the company in court. Answer: False. An Arbitrator is a private person who decides cases outside of the court system. Answer: True The decision of the arbitration is not final. Answer: False In the contract, you have given up your right to go to court. Answer: True; *Court Scenarios*: The company agrees with your claim. Answer: False The refrigerator manufacturer agrees with your claim. Answer: False.

¹⁷⁹ Sixty-four percent of the participants were female. Seventy-five percent of the sample was White/Caucasian, 10% Black/African American, 6% Asian, and 6% Hispanic/Latino. Four percent of participants were between the ages of 18-21, 49% between the ages of 22 to 34, 24% between the ages of 35 to 44, 13% between the ages of 45 to 54, 10% between the ages of 55 to 64 and the remaining 65 and older. Twenty-two percent of the sample had graduated with a high school degree, 17% with an associate’s degree, 42% with a bachelor’s degree, 12% with a master’s degree and 2%

Participants were randomly given one of two scenarios: an employee scenario in which they were let go right before the end-of-the-year bonus and a consumer scenario in which a refrigerator they purchased caught on fire and caused significant damage to their house.¹⁸⁰ They were then randomly presented with one of the following types of information: Arbitration with No Manipulation, Arbitration with Peer statement, Arbitration with Win-Rate statement, Arbitration with Cost statement, Arbitration with History statement, Arbitration with Formality statement, or Court.¹⁸¹ In all arbitration conditions, after reading the scenario, participants were presented with additional information about the arbitration clause in their contract.¹⁸² In the court

with a Ph.D. Seventy-eight percent of the sample was employed. The full sample was employed. Eighty percent worked full time and 5% earned \$10,000 or less, 23% earned between \$10,000 to \$30,000, 30% between \$30,000 to \$50,000, 19% between \$50,000 and \$70,000, 15% between \$70,000 and \$100,000 and 6% between \$100,000 and \$150,000.

¹⁸⁰ *Employee Scenario*: Imagine: You are an employee in a company. You claim that the company has ended your employment right before the end-of-the-year bonus payment is due. You believe that the company has unjustly let you go and owes you the bonus based on the employment contract. The company disagrees with your claims; *Consumer Scenario*: Imagine: You have purchased a brand-new refrigerator. A few days after the manufacturer has installed the product, the refrigerator catches on fire and causes significant damage to your house. You discover that this was a result of a faulty part in the refrigerator. Your insurance company does not cover this loss. You believe that the refrigerator manufacturer is responsible for the damages to your house. The refrigerator manufacturer disagrees with your claim.

¹⁸¹ *Peer Statement*: Then imagine: After talking with your peers, they tell you that they have used arbitration in their disputes with companies; *Win-Rate Statement*: Then imagine: After conducting some research, you realize that there is about a 50% chance of winning your case in arbitration; *Cost Statement*: Then imagine: After conducting some research, you find out that in some cases arbitration costs less than court; *History Statement*: Then imagine: After conducting some research, you find out that, similar to the court system, arbitration has been in use for several centuries; *Formality Statement*: Then imagine: After conducting some research, you realize that arbitration, in comparison to court, provides a less formal setting to resolve your dispute.

¹⁸² *Employee arbitration information*: You then carefully read your employment contract. You notice that the contract states that any dispute that you have with the company must only be resolved by arbitration, rather than court. You realize arbitration is a process outside of the court system in which a third person decides the dispute between you and the company. The third person—called the arbitrator—is chosen by a private service provider that keeps a list of candidates with experience in resolving similar disputes. The decision of the arbitration is final; *Consumer arbitration information*: You then carefully read your refrigerator purchase contract. You notice that the contract states that any dispute that you have with the company must only be resolved by

conditions, no additional information was provided beyond the initial scenario. After receiving the information, participants were asked “how likely are you to sue the company in arbitration?” for the arbitration conditions and “how likely are you to sue the company in court?” in the court conditions.

Results. The means, standard deviations and *N* values for each of the conditions are as follows: Arbitration-No Manipulation (*M* = 5.22, *SD* = 1.68, *N* = 93), Peer (*M* = 5.36, *SD* = 1.56, *N* = 81), Win-Rate (*M* = 5.12, *SD* = 1.69, *N* = 95), Cost (*M* = 5.38, *SD* = 1.32, *N* = 90), History (*M* = 5.26, *SD* = 1.51, *N* = 92), Formality (*M* = 5.20, *SD* = 1.51, *N* = 113), Court (*M* = 5.62, *SD* = 1.40, *N* = 139).

Variable	M	SD	N
Arbitration-No Manipulation	5.22	1.68	93
Peer	5.36	1.56	81
Win-Rate	5.12	1.69	95
Cost	5.38	1.32	90
History	5.26	1.51	92
Formality	5.20	1.51	113
Court	5.62	1.40	139

We then conducted a linear regression in which we regressed all five manipulations (Peer, Win-Rate, Cost, History, Formality) on the dependent variable likeliness of suing.¹⁸³ The results were as follows: Peer (*B* = -.10, *SE* = .20, *t*(702) = -.50, *p* = .62), Win-Rate (*B* = -.34, *SE* = .19, *t*(702) = -1.84, *p* = .07), Cost (*B* = -.08, *SE* = .19, *t*(702) = -.42, *p* = .68), History (*B* = -.20, *SE* = .19, *t*(702) = -1.04, *p* = .30), Formality (*B* = -.25, *SE* = .18, *t*(702) = -1.45, *p* = .15). Therefore, none of the manipulations were significant. The results show that none of the provided information impacted the arbitration effect.

Variable	B	SE	t	df	p
Peer	-.10	.20	-.50	702	.62

arbitration, rather than court. You realize arbitration is a process outside of the court system in which a third person decides the dispute between you and the company. The third person—called the arbitrator—is chosen by a private service provider that keeps a list of candidates with experience in resolving similar disputes. The decision of the arbitration is final.

¹⁸³ We again tested for arbitration effect in this study and the results, similar to other studies, show the effect.

Win-Rate	-.34	.19	-1.84	702	.07
Cost	-.08	.19	-.42	702	.68
History	-.20	.19	-1.04	702	.30
Formality	-.25	.18	-1.45	702	.15

C. Study III: (Non) Reputational Cost

Many businesses and managers have decided to subject employees and customers to mandatory arbitration. This trend seems to be only growing. For example, the retail industry is increasingly online. According to a study, 60% of retail e-commerce sales are covered by arbitration agreements.¹⁸⁴ Other retail industries have not incorporated arbitration as fast, but it is expected that the number of arbitration agreements “increase in coming years.”¹⁸⁵

Despite its wide-spread use, businesses and organizations have not gauged the impact of arbitration on individuals’ perceptions of organizations that use arbitration. Corporate reputation is a subjective evaluation of firms’ overall quality, which determines individuals’ judgment of firms’ capabilities and propensities (Berens & van Riel, 2004; Fombrun, 1996).¹⁸⁶ Several factors have been shown to have an impact on corporate reputation including firm performance,¹⁸⁷ management

¹⁸⁴ Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, UC. DAVIS L. REV. Online (2019). Available at <https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf>

¹⁸⁵ Colins Marks, *Online and as Is*, 45 PEPP. L. REV. 1 (2018).

¹⁸⁶ See e.g., CEES B.M. VAN RIEL & CHARLES FOMBRUN, ESSENTIALS OF CORPORATE COMMUNICATION: IMPLEMENTING PRACTICES FOR EFFECTIVE REPUTATION MANAGEMENT (1996); Donald Lange, Peggy M. Lee, & Ye Dai, *Organizational Reputation: A Review*, 37 J. OF MANAGEMENT 153 (2011); Owen Parker, Ryan Krause & Cynthia E. Devers, *How Firm Reputation Shapes Managerial Discretion*, 44 ACADEMY OF MANAGEMENT REVIEW 254 (2019); Geoffrey Love, Jaegoo Lim & Michael K. Bednar, *The Face of the Firm: The Influence of CEOs on Corporate Reputation*, 60 ACADEMY OF MANAGEMENT JOURNAL 1462 (2017); Guido Berens & Cees BM Van Riel, *Corporate Associations in the Academic Literature: Three Main Streams of Thought in the Reputation Measurement Literature*, 7 CORPORATE REPUTATION REVIEW 161. (2004).

¹⁸⁷ Charles Fombrun & Mark Shanley, *What’s in a Name? Reputation Building and Corporate Strategy*, 33 ACADEMY OF MANAGEMENT JOURNAL 233 (1990).

practices,¹⁸⁸ charitable activities,¹⁸⁹ social responsibility,¹⁹⁰ and corporate leaders.¹⁹¹

Trust in organization has become a central topic in social science research¹⁹² and indicates the likelihood of future and continued cooperation.¹⁹³ Trust is essential for employer-employee relationships when uncertainty or risk is present¹⁹⁴ and has played a huge role in the wide acceptance and adoption of new consumer behavior such as e-shopping.¹⁹⁵ Trust therefore is pivotal for each organization. Studies have shown that trust impacts workplace attitudes, behaviors and performance.¹⁹⁶ Trust also supports organizational effectiveness, development, stakeholder relationships and organizational transactions and market participation.¹⁹⁷

¹⁸⁸ Barry Staw & Lisa D. Epstein, *What Bandwagons Bring: Effects of Popular Management Techniques on Corporate Performance, Reputation, and CEO Pay*, 45 ADMINISTRATIVE SCIENCE QUARTERLY 523 (2000).

¹⁸⁹ Robert Williams & Douglas Barrett, *Corporate Philanthropy, Criminal Activity, and Firm Reputation: Is There a Link?* 26 JOURNAL OF BUSINESS ETHICS 341 (2000).

¹⁹⁰ Déborah Philippe & Rodolphe Durand, *The Impact of Norm-Conforming Behaviors on Firm Reputation*, 32 STRATEGIC MANAGEMENT JOURNAL 969 (2011).

¹⁹¹ Geoffrey Love, Jaegoo Lim & Michael K. Bednar, *The Face of the Firm: The Influence of CEOs on Corporate Reputation*, 60 ACADEMY OF MANAGEMENT JOURNAL 1462 (2017)

¹⁹² TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH (Roderick Kramer & Tom R. Tyler, eds., 1995.)

¹⁹³ Oliver Williamson, *Calculativeness, Trust, and Economic Organization*, 36 JOURNAL OF LAW AND ECONOMICS 453 (1993).

¹⁹⁴ Roger Mayer, James H. Davis, & F. David Schoorman, *An Integrative Model of Organizational Trust*, 20 Academy of Management Review 709 (1995).

¹⁹⁵ Paul Pavlou, *Consumer Acceptance of Electronic Commerce: Integrating Trust and Risk with the Technology Acceptance Model*, 7 International journal of electronic commerce 101 (2003); Keng Siau & Zixing Shen, *Building Customer Trust in Mobile Commerce*, 46 *Communications of the ACM* 46 91 (2003); Merrill Warkentin, David Gefen, Paul A. Pavlou & Gregory M. Rose. *Encouraging Citizen Adoption of E-government by Building Trust*, 12 *Electronic Markets* 157 (2002).

¹⁹⁶ Robert Golembiewski & Mark McConkie, *The Centrality of Interpersonal Trust in Group Processes in Theories of group processes* (Cary Cooper ed., 1975) 131 (1975); Gareth Jones & Jennifer M. George, *The Experience and Evolution of Trust: Implications for Cooperation and Teamwork*, 23 Academy of Management Review 531 (1998); Roger Mayer, James H. Davis, & F. David Schoorman, *An Integrative Model of Organizational Trust*, 20 Academy of Management Review 709 (1995).

¹⁹⁷ Kurt Dirks & Donald Ferrin, *The Role of Trust in Organizational Settings*, 12 Organization Science 450 (2001); Jeffrey Dyer, & Wujin Chu, *The Role of Trustworthiness in Reducing Transaction Costs and Improving Performance: Empirical*

Hypothesis. Based on the foregoing we hypothesize that inclusion of arbitration agreements affects individual perception of corporate reputation and inclusion of arbitration agreements affects individual trust in organization.



Methodology. After removing participants who did not correctly answer the comprehension questions, a total of 544 respondents from Amazon’s Mechanical Turk (MTurk) participated.¹⁹⁸ Sixty-four percent of the sample was female. Forty percent of the sample was between the ages of 22 to 34, 27% from 35 to 44, 16% from 45 to 54, and 12% from 55 to 64. Seventy-five percent of the sample was Caucasian/White, 10% African-American, 7% Asian, and 5% Hispanic/Latino. 23% had a high school degree, 17% an Associate’s degree, 40% a Bachelor’s degree, 14% a Master’s degree and 2% a Ph.D. Seventy-nine percent of the sample were full-time employees and 21% worked part time.

All participants were presented with a scenario in which they were supposed to envision themselves amidst a dispute. The same eight scenarios in Study 1 were used and participants were randomly assigned to the different scenarios. After the scenario was presented, the participants were asked a series of questions including measures of Trust and Reputation as indicated below.

Measures

Trust. Trust was measured with an adapted 4-item version of Robinson’s trust in the organization measure.¹⁹⁹ Reverse-scored items from Robinson’s original scale were not included. Sample items include

Evidence from the United States, Japan, and Korea, 14 *Organization science* 57 (2003); Francis Fukuyama, *Social Capital and the Global Economy*, 74 *Foreign Aff.* 89 (1995); Ashley Fulmer & Michele Gelfand, *At What Level (and in Whom) We Trust: Trust Across Multiple Organizational Levels*, 38 *Journal of Management* 1167 (2012).

¹⁹⁸ The same comprehension questions as listed above in Study 1 were used.

¹⁹⁹ Sandra Robinson, *Trust and Breach of the Psychological Contract*, *ADMINISTRATIVE SCIENCE QUARTERLY* 574 (1996).

“I believe the organization has high integrity” and “In general, I believe the organization’s motives and intentions are good.” The Cronbach alpha for this measure was .87. All responses were made on a seven-point Likert type scale.

Reputation. Reputation was measured with Walsh, Beatty & Shiu’s Corporate Reputation measure.²⁰⁰ Participants who were in an employee dispute condition were given the Good Employer sub-scale. A sample item for this sub-scale is “This company looks like a good company to work for.” The Cronbach alpha was .93. Participants who were in a consumer dispute condition were given the customer orientation sub-scale. A sample item for this sub-scale is “This company has employees who are concerned about customer needs. The Cronbach alpha was .90. All responses were made on a seven-point Likert type scale.

Results. We conducted linear regression analyses using a dummy coded variable: Court vs. Arbitration. Court was coded as 1 and arbitration was coded 0. We tested the hypotheses by examining the relationship between arbitration in contract and perception of organizational reputation and trust in the organization. In the examination of hypothesis, the regression results were not significant ($B = -.02$, $SE = .02$, $t(501) = -.119$, $p = .91$) indicating that there is not a relationship between arbitration in contract and perceptions of organizational reputation. In the examination of Hypothesis, the regression results were not significant ($B = .01$, $SE = .02$, $t(501) = .624$, $p = .53$) indicating that there is not a relationship between arbitration in contract and trust in organization. Therefore, the hypotheses were not supported. The results show that in fact the inclusion of an arbitration clause does not impact individuals' perceptions of corporate reputation nor their trust in organization. In other words, individuals do not hold a negative evaluation of firms, nor do they lose trust in the organization due to the arbitration agreement.

²⁰⁰ Gianfranco Walsh, Sharon Beatty, & Edward Shiu, *The Customer-based Corporate Reputation Scale: Replication and Short Form*, 62 JOURNAL OF BUSINESS RESEARCH 924 (2009).

IV. EQUAL JUSTICE UNDER LAW

Individuals' access to justice is a basic human right. To protect this right, it is imperative that we understand when and how individuals decide to sue. Much of the discussion in law centers on the ability to sue (primarily the financial ability to sue). The critique of arbitration contends that individuals cannot sue in arbitration due to costs or lack of class action. The proponents provide countervailing evidence that arbitration is less costly and more consumer friendly.

The leading problem with both sides is that arbitration is viewed *ex post*. This means that the good, the bad, and the ugly of arbitration are analyzed after people have taken steps to sue in arbitration (or courts). It is only within this paradigm that win-rate, costs, procedure, and class action matter. The innerworkings of a vehicle is not that important if individuals do not want to drive it. Hence, a closer look at the *ex ante* perceptions of arbitration is warranted. And this Article is a step in this direction.

This part first provides an explanation and a summary of the results of this Article. The second part discusses the efforts to curtail mandatory arbitration and what this Article means for these efforts.

A. Arbitration Effect Recap

Arbitration is omnipresent. Yet, data suggest that individuals do not use arbitration. At some point in the cognitive process, individuals decide to take legal action. The query is whether individuals are less likely to sue in arbitration rather than courts. And, whether this effect exists at the selection (contracting) stage. Or, if the effect can be mitigated. A series of empirical studies summarized below show the arbitration effect and its contours.

It is important to remember that in an ideal world, individuals read the contracts and fine print. Hence, a building block of US contract law is the duty to read.²⁰¹ Individuals have a duty to read the contracts they enter into. Regardless, they are held liable for the terms of contracts even if the majority of them do not read contractual terms, at least in the

²⁰¹ Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

context of consumer contracts.²⁰² Much has been written about duty to read and consumers' aversion or impossibility to read and understand contractual terms.²⁰³ Courts have policed to some extent to assure that at least links and fine prints are readable (conspicuous) to pass the procedural unconscionability low bar. Similarly, courts emphasize on opt out opportunities to assess unconscionability. Courts and scholars want the consumers to read (and understand) the contracts.

What if consumers do in fact read some of these terms? What impact does it have on their behavior? Seemingly, when an individual decides to sue, the forum of dispute resolution is the first information that concurs the individual.

Arbitration is a stable provision in most consumer and employee contracts. The discussion about arbitration has primarily been based on a rational approach: individuals engage in a cost-benefit analysis when it comes to arbitration. A common narrative is that individuals may not sue in arbitration as often because costs, low win-rate, and lack of class action. In a series of experimental studies, this Article sheds new light on the behavioral impact of arbitration.

1. Are individuals less likely to take legal action in arbitration?

Arbitration Effect.²⁰⁴ First this Article establishes the effect that arbitration agreements have on likelihood of suing. The studies which have used a variety of situations (both consumer and employment disputes) have shown that individuals are less likely to pursue legal actions in arbitration. Put simply, the inclusion of arbitration agreements leads to lesser likelihood of suing (taking legal action). This is the baseline arbitration effect.

2. Do individuals tend to avoid arbitration in their contracts when given the chance?

Arbitration Opt-Out.²⁰⁵ Next, we tested to find out whether individuals have a similar reaction at the contracting stage. In other

²⁰² Omri Ben-Shahar, The Myth of The 'Opportunity to Read' in Contract Law (2009).

²⁰³ See e.g., JANE MARGARET RADIN, BOILERPLATE (2012).

²⁰⁴ For details of the study see *supra* III.A.

²⁰⁵ For details of the study see *supra* III.B

words, when given the chance, whether the arbitration effect makes individuals opt out of arbitration agreements more often. Our results suggest that even when individuals are given the chance along with appropriate explanation (most notably that arbitration means waiving the right to court), individuals do not opt out of arbitration provisions. This leads to the conclusion that even if people are less likely to use arbitration for their disputes when they arise, they do not opt out of arbitration provisions at the contracting stage. In addition to the importance of this discussion in the arbitration context, these experiments suggest that individuals' behaviors are different at the contracting stage as opposed to the dispute stage.

3. Do individuals preemptively avoid arbitration after a dispute arises?

Post-Dispute Option.²⁰⁶ Complementing the prior study, individuals are given the option to select court or arbitration after a dispute arises. This is still the contracting (selection) phase, but individuals now are aware of their disputes. The premise of some of the regulatory efforts aiming to curtail arbitration rests on the notion that individuals shun away from arbitration in the post-dispute phase. The results suggest that individuals do not overwhelmingly reject arbitration as an option.

4. Do individuals care about ascribed features of arbitration such as speed?

Arbitration Fundamental Attributes.²⁰⁷ In the next study, individuals were tested to understand which arbitration attribute they care about the most. The Supreme Court of the United States and some of the proponents of arbitration have ascribed certain fundamental attributes to arbitration. This approach suggests that individuals select arbitration due to these unique features. Typically, arbitration is touted for its confidentiality, informality, speed, expertise of the neutral and its relatively low costs. Added to this list, this Article tested class action and win rate as well. An experiment with 9 conditions was conducted where individuals were given information about one of these fundamental attributes (each condition provides one piece of information). The

²⁰⁶ For details of the study see *supra* III.C.

²⁰⁷ For details of the study see *supra* IV.A.

results, however, suggest that none of these conditions (attributes) lead to individuals' likelihood of suing more than courts even when positive information about class action (that they can join others) and win rate (that they may win more in arbitration) are presented. Put simply, the arbitration effect stands tall even in light of the positive attributes often ascribed to arbitration vis-à-vis courts.

5. Can individuals be (mildly) nudged to utilize arbitration?

Incurability of Arbitration Effect.²⁰⁸ The query is whether the arbitration effect can be 'cured' by providing neutral information. The information provided stems from either peers or individuals' own research to avoid any bias that they may have towards the information provided by firms or other third parties. In a series of studies, individuals are given information about peer experience, speed, cost, win-rates, formality, and familiarity. The results suggest that such (mild) informational nudges do not result in the change of behavior of individuals. They are still more likely to pursue legal action in courts than arbitration in all the conditions of the study.

6. Do individuals form a negative view of the firms which force arbitration on them?

Hold-Harmlessness of Arbitration Effect.²⁰⁹ The last study tested individuals' perceptions of the organizations which have mandated arbitration for their dispute resolution. Measures for trust and reputation were used. The query is whether the inclusion of an arbitration agreement negatively impacts individuals' perception of trust and reputation of the organizations using forced arbitration. The results suggest that individuals do not hold negative perceptions of trust or reputation of the firms utilizing arbitration agreements in their contracts.

B. Inadequacy of Congressional Efforts

Congress has taken several stabs at curtailing arbitration in particular forced arbitration in the context of consumer contracts. Each time, it did not succeed in passing legislation. The last effort, Force Arbitration

²⁰⁸For details of the study see *supra* IV.B.

²⁰⁹For details of the study see *supra* IV.C.

Injustice Repeal Act, was introduced in the Senate on March 1, 2021.²¹⁰ The bill aims to prohibit two types of arbitration agreements: First, predispute arbitration agreements in employment, consumer, antitrust, or civil rights disputes. Second, arbitration agreements that interfere with the right of individuals to pursue class action for vindication of their rights.²¹¹ In a prior effort, Arbitration Fairness Act was introduced in the Senate on March 22, 2018.²¹² The Bill renders predispute arbitration invalid and unenforceable in the context of employment, consumer, antitrust, or civil rights dispute.²¹³ In it, the Congress finds that the Supreme Court decisions are contrary to the intent of FAA. Moreover, it finds that “[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.”

Whether the legislative efforts succeed remain to be seen. However, the premise of some of these efforts should be revisited. As this Article suggests, consumers and employees may not opt out of arbitration. Put differently, the idea that consumers and employees are trapped because they do not know what they have gotten themselves into may be a wrong place to start. When given the chance, consumers and employees may willfully and with consent agree to arbitration. For many, courts may be too daunting and arbitration may look like a *hipster* alternative. This occurs at the contracting stage whether the individuals are aware of their disputes or not. However, individuals do not tend to utilize arbitration to redress their grievances.

And it is this arbitration effect that make access to justice problematic. No amount of (mild) nudging seems to work in steering individuals to utilize arbitration even if we brush aside the paternalistic

²¹⁰ <https://www.congress.gov/bill/117th-congress/senate-bill/505/text>; The same bill was introduced in the House on February 11, 2021. <https://www.congress.gov/bill/117th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22Forced+Arbitration+Repeal+Act%22%5D%7D&r=1&s=2>

²¹¹ “The purposes of this Act are to: (1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.”

²¹² <https://www.congress.gov/bill/115th-congress/senate-bill/2591/text>

²¹³ “Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”

characteristic of nudging. To add to the arbitration effect, individuals do not necessarily form a negative view of the firms which utilize arbitration. In sum, the results suggests that individuals do not avoid selecting arbitration at the contracting stage—whether they are informed of their dispute or not—but avoid using arbitration to seek redress.

It is also helpful to revisit arguments put forward by proponents of arbitration. US Chamber of Commerce sent a letter on March 8, 2021 about the FAIR Act. In it, the Chamber of Commerce emphasizes on multiple empirical studies suggesting that individuals win more often and recover more money. That may be true even though other studies have produced opposite results.²¹⁴ Moreover, the letter suggests that arbitration is cheaper than courts. Further, the letter states that providers such as American Arbitration Associate (AAA) provides a streamlined process for consumers which is superior to court proceedings. Previously, similar arguments were put forward before the Senate Committee on the Judiciary in 2013 when the Committee was considering the Arbitration Fairness Act.²¹⁵ However, these arguments largely discuss the situation when individuals have initiated arbitration. The problem lies elsewhere. Even though individuals do not shun away from opting for arbitration, they tend not to use it for their disputes.

The studies presented in this Article suggest that neither market-based solutions nor regulatory solutions can change the course of arbitration. By market-based solution, we mean provision of information to assure that individuals use arbitration for their disputes. The results suggest that the informational market-based solution failed to overcome the arbitration effect. The regulatory solution which rests on individuals' informed decisions also fails. Individuals do not opt out of arbitration. Even after knowing their dispute, they do not overwhelmingly select court over arbitration. However, this selection evidently impacts their decision to sue. Individuals do not tend to sue in arbitration.

C. A Little Too Late: An Epilogue

²¹⁴ For a complete review of empirical studies pertaining to win-rate and repeat players, see Farshad Ghodoosi & Monica Sharif, *Justice in Arbitration: the Consumer Perspective*, INT'L J. OF CONFLICT MGMT. (2021)

²¹⁵ <https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89563.pdf>

Individuals are less likely to pursue their claims in arbitration. This is the arbitration effect. A series of studies presented here establish the arbitration effect and the contours of it. However, when given the option, individuals do not avoid arbitration. Why is there a difference? Put differently, what can explain the difference in behavior for individuals when selecting arbitration versus when seeking redress in arbitration. This query invites a separate paper. However, here we provide some preliminary conjectures.

The difference lies in the types of decisions individuals face and the ways they close their ambiguity. This is often referred to cognitive closure.²¹⁶ Individuals have a need for cognitive closure, and they do so by finding answers to eschew ambiguity.²¹⁷ Facing a legal issue is an example where individuals need to close the ambiguity pursuant to existing available information. Making decisions regarding arbitration is a great gateway into understanding the complexities of human *legal* decision-making. As this Article suggests, individuals arrive at two different closures depending on whether they are selecting arbitration or pursuing a claim in arbitration.

At the contracting phase, individuals select an option. It is more akin to consumer behavior when selecting a product.²¹⁸ Their fairness judgment does not seem to be active, and they process the information about arbitration differently. In the consumer contract context, consumers typically have to make a fast decision about some of the provisions of their contracts (assuming they are given the option of opting out or opting in). The fast-and-frugal and quick-and-dirty decision of individuals at the contracting stage is to select arbitration.²¹⁹ Perhaps it

²¹⁶ Donna Webster & Arie W. Kruglanski, Individual Differences in Need for Cognitive Closure, 67 *Journal of Personality and Social Psychology* 1049 (1994).

²¹⁷ Kruglanski, A. W. (1990b). Motivations for judging and knowing: Implications for causal attribution. In E. T. Higgins & R. M. Sorrentino (Eds.), *The handbook of motivation and cognition: Foundation of social behavior* (Vol. 2, pp. 333-368). New York: Guilford Press at 337 (stating that the need for closure is a desire for an “answer on a given topic, any answer...compared to confusion and ambiguity.”)

²¹⁸ Monroe Friedman, Models of Consumer Choice Behavior in *HANDBOOK OF ECONOMIC PSYCHOLOGY*, 332 (1998); Chung Park, Hoon, and Young Gul Kim, Identifying Key Factors Affecting Consumer Purchase Behavior in an Online Shopping Context, *International journal of retail & distribution management* (2003); Matthew Lawrence, *Mandatory Process*, 90 *IND. L.J.* 1429 (2015) (viewing dispute resolution as a commodity but a special kind).

²¹⁹ Gerd Gigerenzer & Daniel Goldstein, *Reasoning the Fast and Frugal way: Models of Bounded Rationality*, 103 *PSYCHOLOGICAL REVIEW* 650 (1996).

owes in part to the fact that arbitration looks like an alternative to daunting court procedures even when individuals know that their right to sue in court will be taken away. Or arbitration does not seem that bad after all (in case of opt-outs).

However, after a dispute arises and individuals find out about arbitration in their contracts, the justice judgment kicks in.²²⁰ They resort to any available information to close the ambiguity. Following the fairness heuristic theory, the available information here is that their option is limited to arbitration.²²¹ Perhaps, it is at this stage that individuals fully process the fact that they cannot go to court. It is at this stage where the really sets in. And this is how arbitration effect functions.

Another potential explanation emanates from the discussion of projection bias. People tend to underestimate their future emotional changes (hence they buy more food when they are hungry projecting their present emotions into the future). As a result, when selecting a dispute resolution *ex ante*, people tend to project the happy state of contracting into the future and fail to appreciate that they may suffer grievances in the future.²²² This Article's findings contribute to this literature but also casts doubt on this analysis. The findings show that even when individuals are aware of their "grievances" they still do not avoid arbitration.²²³ It is only when individuals are at the crossroad of deciding to sue that the arbitration effect comes into play. Additionally, this Article contributes to the discussion of *naming*, *blaming*, and *claiming*.²²⁴ At the

²²⁰ For a complete discussion on the justice judgment, see *supra* Part [...]

²²¹ see Farshad Ghodoosi & Monica Sharif, *Justice in Arbitration: the Consumer Perspective*, INT'L J. OF CONFLICT MGMT. (2021)

²²² Matthew Lawrence, *Mandatory Process*, 90 IND. L.J. 1429, 1432-1433 (2015). Projection bias is also known as hedonic forecasting and has been the subject of study in many areas, see e.g., John Grable et al, *Projection Bias and Financial Risk Tolerance*, 5 J. OF BEHAVIORAL FINANCE 142 (2004).

²²³ See *supra*, Section III (C) (post-dispute arbitration option).

²²⁴ See William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...* 15 LAW & SOCIETY REV. 631 (1990) (*Naming* is the first transformation "saying to oneself that a particular experience has been injurious." For instance, "asbestosis only became an acknowledged 'disease' and the basis of a claim for compensation when shipyard workers stopped taking for granted that they would have trouble breathing after ten years of installing insulation and came to view their condition as a problem." *Blaming*: "the transformation from perceived injurious experience to grievance blaming; our diseased shipyard worker makes this transformation when he holds his employer or the manufacturer of asbestos insulation

claiming stage, individuals voice their grievances to the other party. It is where a grievance becomes a controversy. The present Article sheds light on the impact of arbitration agreements on individuals' claiming process and how it prevents grievances from maturing into disputes or controversies.



V. CONCLUSION

Arbitration has changed the landscape of seeking judicial redress. This is largely due to its omnipresence in contracts coupled with its low utilization rate. Those who oppose arbitration point at costs, unavailability of class action, and lack of familiarity. The proponents argue that arbitration is cheaper, less formal, and more efficient. Against this backdrop, some congressional efforts aim to prohibit predispute arbitration to assure individuals knowingly select arbitration. The foregoing positions assume that individuals would take the first step to sue in arbitration. And that individuals disavow arbitration whenever they find the chance. By showing the arbitration effect, this Article shakes these assumptions. Individuals are less likely to sue in arbitration yet do not necessarily shun away from arbitration at the contracting stage. Moreover, the arbitration effect is invasive, and nudges do not work in subverting this effect. Moreover, individuals do not hold negative views on firms utilizing arbitration. By establishing the arbitration effect, this Article casts serious doubts on the effectiveness of existing efforts, be it in the form of curing informational asymmetry or banning predispute arbitration. It also opens a new perspective as to how individuals tend to process information at the contract phase as opposed to the redress phase. The current arbitration practice will not likely withers anytime soon due to the strong arbitration effect.

responsible for his asbestosis.” *Claiming*: “The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy...A claim is transformed into a dispute when it is rejected in whole or in part. Rejection need not be expressed by words. Delay that the claimant construes as resistance is just as much a rejection as is a compromise offer (partial rejection) or an outright refusal.”)

Appendix [1]

Email from online company:

New Terms  Inbox x 

Online Shopping Company 9:17 PM (0 minutes ago) ☆ ↶ ⋮

to me ▾

Dear Customer,

We have recently updated our terms & conditions. As part of the change, we have updated our dispute resolution agreement.

If you have issues with our product, data privacy, and/or our service, you must sue us in arbitration.

Arbitration is a process outside of the court system in which a neutral third person (an arbitrator) decides the dispute between you and the company. By selecting arbitration you waive your right to go to court.

The decision of the arbitration is final and enforceable by courts.

You can decide to opt out of arbitration now.

↶ Reply ➜ Forward