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# Discerning the Validity of Arbitration Agreements Containing Heightened Judicial Review Clauses After *Hall Street Associates, L.L.C. v. Mattel, Inc.*

Jeremy L. Zell\*

## INTRODUCTION

In March 2008, the United States Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>1</sup> that the exclusive grounds for vacating, modifying, or correcting arbitration awards governed by the Federal Arbitration Act (FAA) are those provided in sections 10 and 11 of the Act.<sup>2</sup> In doing so, the Court prohibited so called “heightened judicial review clauses,” in which parties agree to subject their arbitration award to court scrutiny on broader grounds than provided for in the FAA. The Court explicitly did not consider whether the now invalid heightened judicial review clauses can be severed from the arbitration agreements in which they sit or whether the agreements are now invalid. Thus, the Court shed a cloud of uncertainty over the validity of countless domestic and international arbitration agreements governed by U.S. law. This Article seeks to clear up that uncertainty by proposing a clear rule for judging the agreements’ validity.

Part I examines the *Hall Street* holding, its facts, and procedural history.<sup>3</sup> It also lays out the scope and nature of the problem that the holding created. Part II examines and critiques current law regarding the severing of invalid clauses.<sup>4</sup> Currently, federal courts will look to applicable state contract law to determine whether an invalid clause may

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1. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

2. 9 U.S.C. §§ 1–16 (2006).

3. See *infra* Part I (discussing *Hall Street Associates, L.L.C. v. Mattel, Inc.*).

4. See *infra* Part II (examining current law in majority and minority jurisdictions regarding severing invalid contract clauses).

be severed from the agreement in which it sits. Under the majority approach, a court will sever the invalid clause if doing so will not vitiate the central purpose of the agreement.<sup>5</sup> The rule is widely adopted, but most jurisdictions, with the notable exception of Texas, do not have a clearly stated method for determining a central purpose.<sup>6</sup> This leads to conclusory holdings that provide little guidance for future litigants. Texas law, on the other hand, presents a clear method for finding an agreement's central purpose. That is: would the parties have entered into their agreement absent the invalid clause?<sup>7</sup> If they would have, then the invalid clause can be severed.<sup>8</sup>

Finally, Part III proposes that courts and arbitral tribunals adopt the essence of Texas's approach, explores the benefits of adopting the rule, and answers some potential criticisms.<sup>9</sup> Adopting the approach will reduce judge and arbitrator discretion and consequently increase predictability. Adopting the proposed rule will also ensure the continued effectuation of a primary principle of arbitration: that parties must consent to arbitrate before being forced to arbitrate a dispute.<sup>10</sup> Finally, the approach protects arbitration from unwanted negative public perception by not too eagerly forcing unwilling parties into arbitration.

As a means of limiting the discretion of courts and arbitral tribunals, Part III also proposes that courts and arbitral tribunals adopt the rebuttable presumption. Specifically, that the parties would not have entered into the arbitration agreement without the protection of heightened judicial review, because the nature of a heightened judicial review clause demonstrates that the parties specially contemplated its protection.

Lastly, Part III addresses two ancillary issues related to the proposed rule and rebuttable presumption. The first issue is that the proposed rule does not conflict with the FAA's strong policy favoring arbitration. The second issue is when an arbitration is ongoing, it is unclear whether one should presume that the parties intended the judge or the arbitrator to have the first say regarding the validity of the arbitration agreement.

We begin with the case itself.

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5. See *infra* notes 56–59 and accompanying text (discussing the holdings and the reasoning behind the majority approach).

6. See *infra* notes 70–74 and accompanying text (discussing the lack of a clearly stated method for determining an agreement's central purpose).

7. *Rogers v. Wolfson*, 763 S.W.2d 922, 925 (Tex. Ct. App. 1989).

8. *Id.*

9. See *infra* Part III (proposing why Texas's approach to invalid clauses should be more widely adopted).

10. See *infra* note 51 (discussing consent as a foundational principle of arbitration law).

I. *HALL STREET ASSOCIATES, L.L.C. v. MATTEL, INC.*

This Part examines *Hall Street*. Part I.A. lays out the case's facts, procedural history, and holding. Part I.B. then explores the nature and scope of the problem created by the invalidation of heightened judicial review clauses.

A. *The Facts, Procedural History, and Holding*

In 1998, Mattel, Inc. and the Oregon Department of Environmental Quality discovered trichloroethylene, a toxic chemical, in the water supply of a manufacturing site leased by Mattel, Inc. from Hall Street Associates, L.L.C.<sup>11</sup> As a result of the discovery, Mattel arranged to decontaminate the water supply and notified Hall Street that it intended to terminate the lease.<sup>12</sup> In response, Hall Street initiated an action in Oregon district court and presented two claims: first, it challenged Mattel's attempt to vacate the property; and second, it requested that Mattel indemnify Hall Street against the cost of cleaning the contaminated water supply and against any future claims against Hall Street related to the contamination.<sup>13</sup> Hall Street based its second claim upon a lease provision that required Mattel to comply with all local, state, and federal environmental laws.<sup>14</sup>

The case was removed to federal court on diversity grounds and the court bifurcated the termination issue from the indemnification issue.<sup>15</sup> After a bench trial, the court ruled in favor of Mattel on the termination issue.<sup>16</sup> The court then ordered the parties into mediation on the indemnification issue.<sup>17</sup> Mediation failed, but the parties proposed that they arbitrate.<sup>18</sup> Their arbitration agreement stipulated that "[t]he United States District Court for the District of Oregon . . . shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."<sup>19</sup> The district court approved the submission agreement and entered it as a court order.<sup>20</sup>

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11. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

12. *Id.*

13. *Id.*

14. *Id.* at 1401.

15. *Id.* at 1400.

16. *Id.*

17. Brief for the Petitioner at 7, *Hall St.*, 128 S. Ct. 1396 (No. 06-989).

18. *Hall St.*, 128 S. Ct. at 1400.

19. *Id.* at 1400–01 (citation omitted).

20. *Id.* at 1400. The fact that the arbitration agreement was entered as a court order raised an issue that the Court remanded. *Id.* at 1407–08. Parties can no longer incorporate heightened

The arbitrator found that the lease did not require Mattel to indemnify Hall Street, because neither of the conditions that could have triggered Mattel's obligation was present.<sup>21</sup> Either Mattel must have been responsible for the water's contamination or Mattel must have otherwise violated an "environmental law."<sup>22</sup> Hall Street never claimed that Mattel had contaminated the property's water supply, but Hall Street did claim that Mattel had violated Oregon's Drinking Water Quality Act (DWQA) by not testing the water as the Act required.<sup>23</sup> The arbitrator, however, found that the DWQA was not an "environmental law" contemplated by the lease.<sup>24</sup> The Act's purpose was to protect individuals from contaminated drinking water, but not to protect landlords, like Hall Street, from damage to their property.<sup>25</sup> Consequently, the arbitrator rendered an award in Mattel's favor.<sup>26</sup>

Mattel then moved, under section 9 of the FAA, that the federal district court enter the award as a judgment.<sup>27</sup> Hall Street, invoking the heightened judicial review clause, requested that the court vacate or modify the award on the grounds that the arbitrator erred by failing to recognize the DWQA as an environmental law.<sup>28</sup> The district court held that the arbitrator committed a mistake of law and ordered the arbitrator to modify the award to correct the mistake.<sup>29</sup>

The arbitrator modified the award, but awarded Hall Street only nominal damages on the grounds that Hall Street did not substantiate the reclamation costs for the property.<sup>30</sup> Both parties moved for the court to modify or vacate the award.<sup>31</sup> This time, the district court corrected the calculated interest but otherwise upheld the award.<sup>32</sup> Both parties appealed to the United States Court of Appeals for the Ninth Circuit.<sup>33</sup>

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judicial review clauses into their arbitration agreements, but the court left open the possibility for judges to provide for heightened judicial review through case management authority independent of the Federal Arbitration Act. *Id.*

21. *Id.* at 1401; Brief for the Petitioner, *supra* note 17, at 6.

22. Brief for the Petitioner, *supra* note 17, at 7.

23. *Id.* at 6.

24. *Id.*

25. *Hall St.*, 128 S. Ct. at 1401; *see also* Brief for the Petitioner, *supra* note 17, at 6 (stating that the Act was not designed to protect landowners' property from environmental contamination).

26. *Hall St.*, 128 S. Ct. at 1401.

27. Brief for Respondent at 10, *Hall St.*, 128 S. Ct. 1396 (No. 06-989).

28. *Hall St.*, 128 S. Ct. at 1401.

29. *Id.*

30. Brief for Respondent, *supra* note 27, at 11-12.

31. *Hall St.*, 128 S. Ct. at 1401.

32. *Id.*

33. *Id.*

Mattel argued that the Ninth Circuit had invalidated the agreement's heightened judicial review clause<sup>34</sup> when it ruled in *Kyocera Corp. v. Prudential-Bache Trade Services* that the exclusive grounds for vacating, modifying, or correcting an award were those under sections 10 and 11 of the FAA.<sup>35</sup> Hall Street argued that *Kyocera* was distinguishable.<sup>36</sup> The Ninth Circuit, citing *Kyocera*, ruled in favor of Mattel and remanded the case to the district court for entry of the original award as a judgment.<sup>37</sup>

On remand, the district court vacated the award solely under section 10(a)(4) of the FAA instead of the grounds in the heightened judicial review clause.<sup>38</sup> Mattel appealed to the Ninth Circuit, which rejected

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34. *Id.*

35. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1002–03 (9th Cir. 2003).

36. *Hall St.*, 128 S. Ct. at 1401.

37. *Id.*

38. Brief for the Petitioner, *supra* note 17, at 10. This finding relates to the issue that the Supreme Court acknowledged in its holding and did not resolve. Prior to the *Hall Street* ruling, some federal circuits recognized an arbitrator's "manifest disregard of the law" as a non-statutory ground for vacating an arbitration award. See, e.g., *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64–65 (2d Cir. 2003) (describing manifest disregard of the law as "not prescribed in the statute" and "judicially created"), *overruled on other grounds by Hall St.*, 128 S. Ct. 1396 (2008); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003) (explaining that manifest disregard of the law is a non-statutory ground for vacatur first introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)); *Montes v. Shearman Lehman Bros., Inc.*, 128 F.3d 1456, 1460–62 (11th Cir. 1997) (concluding that manifest disregard of the law can constitute grounds to vacate an arbitration decision). Other circuits viewed manifest disregard of the law as narrow enough to fit within the ground for vacatur found in section 10(a)(4)—"where the arbitrators exceeded their powers . . . ." See, e.g., *Wise v. Wachovia Sec., L.L.C.*, 450 F.3d 265, 268 (7th Cir. 2006) (discussing the grounds for setting aside an arbitral award). If manifest disregard of the law is truly a non-statutory ground, then the court's holding that grounds for vacatur are exclusive to sections 10 and 11 of the FAA would seem to put an end to the use of manifest disregard of the law. If the opposite is true, then manifest disregard of the law can survive, but those who use it will need to demonstrate conceptually how an arbitrator disregards the law by exceeding her powers. The conflict was mentioned briefly during oral arguments in *Hall Street*, see Transcript of Oral Argument at 32, *Hall St.*, 128 S. Ct. 1396 (No. 06-989), and the Court's ruling discussed but did not decide the issue. *Hall St.*, 128 S. Ct. at 1404 ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.") (citations omitted). Shortly after the ruling in *Hall Street*, at least one federal court has suggested, in dicta, that an arbitrator exceeds her powers when she manifestly disregards the law. *Dealer Computer Servs., Inc. v. Fox Valley Ford*, No. 07-15192, 2008 WL 1837229, at \*5 (E.D. Mich. Apr. 23, 2008), *vacated*, 2009 WL361666 (6th Cir. Feb. 6, 2009). Another federal district court acknowledged the fact that *Hall Street* calls manifest disregard of law into question but avoided deciding the issue by finding the award enforceable by any standard. *Halliburton Energy Servs., Inc. v. NL Indus.*, 553 F. Supp. 2d 733 (S.D. Tex. 2008). In June and August 2008, the First and Sixth Circuit Courts of Appeals, respectively, found that manifest disregard of the law was a non-statutory ground for vacatur and then vacated awards for that very reason. Kashner Davidson

the vacatur and remanded the case to the district court for entry of the award as a judgment.<sup>39</sup> Hall Street then appealed to the United States Supreme Court. The sole issue before the Court was whether the grounds for modifying or vacating an arbitration award found in sections 10 and 11 of the FAA were exclusive.<sup>40</sup> The Court explicitly did not consider what effect invalidating the heightened judicial review clause would have on the overall arbitration agreement.<sup>41</sup>

When the Supreme Court considered *Hall Street*, six circuits were split on the issue of whether or not parties could agree to heightened judicial review of arbitration awards. The First, Third, Fourth, and Fifth Circuits had held that heightened judicial review was permissible, largely on the grounds that arbitration agreements should be enforced according to their terms.<sup>42</sup> The Ninth and Tenth Circuits had held that grounds under sections 10 and 11 of the FAA were exclusive. The Ninth Circuit reasoned that heightened judicial review clauses were impermissible because they were tantamount to private parties using contracts to dictate the business of the courts.<sup>43</sup> The Tenth Circuit reasoned that allowing heightened judicial review impermissibly weakens the distinction between arbitration and adjudication.<sup>44</sup> The Second, Sixth, Seventh, and Eighth Circuits had not decided the issue,

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Sec. Corp. v. Mscisz, 531 F.3d 68, 74–79 (1st Cir. 2008); *Coffee Beanery, Ltd. v. WW, L.L.C.*, No. 07-1830, 2008 WL 4899478, at \*3–5 (6th Cir. Nov. 14, 2008). The courts neither mentioned *Hall Street* nor discussed the conflicted nature of manifest disregard at any great length. *Kashner*, 531 F.3d at 74–79; *Coffee Beanery*, 2008 WL 2838010, at \*3–5. Most interestingly, in November 2008, the Second Circuit Court of Appeals held that “‘manifest disregard,’ reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards.” *Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008). The continued use of manifest disregard of the law after *Hall Street* and the apparent split in opinion regarding the nature of the doctrine that has formed between the First, Second, and Sixth Circuits make it foreseeable that the Supreme Court will decide to hear the issue in the near future. At the very least, the First and Sixth Circuits should rehear the cases en banc to give the manifest disregard issue the discussion it warrants.

39. *Hall St.*, 128 S. Ct. at 1401 n.1.

40. *Id.* at 1401.

41. *Id.* at 1405 n.6.

42. *Puerto Rico Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005), *abrogated by Hall St.*, 128 S. Ct. 1396; *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001), *abrogated by Hall St.*, 128 S. Ct. 1396; *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at \*6 (4th Cir. Aug. 11, 1997) (unpublished opinion), *abrogated by Hall St.*, 128 S. Ct. 1396; *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995), *abrogated by Hall St.*, 128 S. Ct. 1396; *see Jacada, Ltd. v. Int’l Mktg. Strategies*, 401 F.3d 701, 709–10 (6th Cir. 2005) (interpreting Michigan’s standard for vacatur as favoring protection of the arbitrator’s authority in deciding the proper standard of vacatur).

43. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003).

44. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001).

but the Eighth Circuit in particular expressed aversion to the idea of heightened judicial review clauses in dicta.<sup>45</sup> Also, the Second Circuit previously invalidated clauses which restricted the grounds for vacating, modifying, or correcting awards.<sup>46</sup> The circuit split echoed a core policy debate in arbitration law: party autonomy to tailor arbitration agreements versus the finality of arbitration awards.<sup>47</sup>

The Supreme Court declined to entertain this policy debate, instead basing its holding on statutory interpretation grounds.<sup>48</sup> The Court relied on the rule *ejusdem generis*—a general term in a statute that follows a list of specific terms cannot be interpreted more broadly than the specific terms—for the proposition that the manner in which Congress expressed the grounds for vacating, modifying, or correcting awards was such that non-statutory grounds, if permissible, could not be broader than those explicitly provided in the FAA.<sup>49</sup> It also found that section 9's requirement that a court "must grant" a motion to enter an award as judgment "unless the award is modified, vacated, or corrected as prescribed in sections 10 and 11," removed from the courts the ability to refuse to enforce an award for reasons different than those found in the FAA.<sup>50</sup>

The ruling in *Hall Street* invalidates existing heightened judicial review clauses by making the grounds for modifying, vacating, or correcting an award exclusive to sections 10 and 11 of the FAA. The Court left open the complicated and important question of whether arbitration agreements containing invalid heightened judicial review clauses are now unenforceable. As will be shown below, the scope of this problem is significant both in the number of arbitration agreements

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45. *UHC Mgmt. Co. v. Computer Sci. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (stating that "[w]e have served notice 'that where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.'" (quoting *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986))).

46. *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 66 (2d Cir. 2003), *overruled on other grounds by Hall St.*, 128 S. Ct. 1396.

47. *Compare Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("[T]he FAA's primary purpose [is] ensuring that private agreements to arbitrate are enforced according to their terms."), *with AIG Baker Sterling Heights, L.L.C. v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) ("[T]he purpose of the Federal Arbitration Act [is] to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation. Because arbitration is an alternative to litigation, judicial review of arbitration decisions is among the narrowest known to the law.") (citations omitted) (internal quotations omitted).

48. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

49. *Id.*

50. *Id.* at 1405.



affected and the amount of time that an arbitration agreement may sit idle before the invalid heightened judicial review clause is discovered.

### *B. The Nature and Scope of the Problem*

The issue left open by *Hall Street* is whether an invalid heightened judicial review clause may be severed and the remaining arbitration agreement enforced. This issue is significant in its nature and potential scope. The nature of the issue is tied to the principle that party consent is an invariable requirement for forming a valid arbitration agreement.<sup>51</sup> The scope of the problem includes numerous existing agreements across the country and could take several years, if not decades, to resolve.

#### 1. The Nature of the Problem

*Hall Street* raises the issue of whether an arbitration agreement without its heightened judicial review clause is still enforceable. A rigid rule severing the invalid clause and enforcing the remainder of the agreement could force into arbitration parties that viewed the heightened judicial review as an indispensable protection. On the other hand, a rigid rule invalidating all arbitration agreements with heightened judicial review clauses could deprive parties that view these clauses as beneficial, but not indispensable, the fruit of hard fought and expensive negotiations. The challenge of finding a middle ground between arbitrary enforcement and wholesale invalidation of arbitration agreements falls not only on the courts, but also upon arbitral tribunals, whose authority is based on arbitration agreements with heightened judicial review clauses.

At the heart of the problem is arbitration's primary rule that parties must consent to arbitrate before any authority can force them to do so.<sup>52</sup> Prior to the ruling in *Hall Street*, parties that agreed to arbitrate with heightened judicial review were entering into valid arbitration agreements. Now that the Supreme Court invalidated one of the clauses in their agreement, some parties can reasonably argue that their consent only applied to arbitration with heightened judicial review and nothing less. For these parties, *Hall Street* has transformed their arbitration agreements into something wholly different than that to which they originally consented. Courts and arbitrators cannot assume that the

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51. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

52. *Id.*

parties' consent survives the removal of heightened judicial review clauses.

The transformation is a potentially significant one, considering the protection that heightened judicial review offered. Heightened judicial review was a safety net for parties reluctant to accept inflexible finality in their arbitration award. Parties like *Hall Street* and *Mattel* that wanted the benefits of the arbitral process but still wanted protection from inept arbitrators, elected to grant a court the final say over conclusions of law or fact.<sup>53</sup> Often, these parties have a substantial interest in ensuring their arbitration is correctly decided. For example, the dispute in *Kyocera* led to an award worth nearly \$250 billion.<sup>54</sup> After the holding in *Hall Street*, parties that strongly valued the protection provided by heightened judicial review may still find themselves bound to arbitrate without it.

## 2. The Scope of the Problem

The number of arbitration agreements affected by *Hall Street* is potentially quite large. *Hall Street* invalidated heightened judicial review clauses that exist in federal jurisdictions that either permitted the clauses or had not decided the issue. That means *Hall Street* affected every circuit court jurisdiction except for the Ninth and Tenth Circuits. It includes pre-dispute arbitration agreements; submission agreements; arbitration agreements that have been invoked where arbitration is pending, ongoing, or already submitted to the arbitrator for the rendering of an award; and arbitration agreements that are currently under review by courts.

The scope of the *Hall Street* problem is also significant in terms of time. Arbitration agreements that have not been invoked could sit for years with the invalid heightened judicial review clause unknown to the parties. Some parties will continue fulfilling their contractual duties and never need the arbitration agreement. Others may continue their contractual relationship only to discover five or ten years from now that part or potentially all of their arbitration agreement is invalid.

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53. Lest the danger to parties arbitrating without heightened judicial review be overstated, it should be noted that the parties or an agreed upon arbitration institute are typically free to choose the arbitrators based on the arbitrator's qualifications. This is one of many ways other than heightened judicial review that parties can protect themselves from "inept" arbitrators. That being said, heightened judicial review did offer significant protection and, most importantly, the parties elected for it.

54. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 n.14 (9th Cir. 2003).

Courts and arbitrators must quickly establish a clear rule for handling invalid heightened judicial review clauses. Any such rule must balance the party consent requirement with the desire to avoid wholesale invalidation of arbitration agreements. The starting point in developing this rule is identifying the current legal approach to invalid clauses and understanding its strengths and weaknesses.

## II. THE SEVERABILITY OF INVALID CLAUSES UNDER CURRENT LAW

The process of determining whether a contract can be enforced by removing an invalid clause is an area of contract law known as "severability."<sup>55</sup> This Part reviews the most common approach to severability as it exists today. Part II.A explains that federal courts, based on their reading of state contract law, ask whether the "central purpose" of the agreement will be harmed by severing the offending term. If not, then the agreement remains enforceable. Part II.B explains that most applications of the approach do not clearly state how an agreement's central purpose should be found. Therefore, these cases provide minimal guidance to future litigants, courts, and arbitrators faced with an invalid heightened judicial review clause. Finally, Part II.C examines Texas's approach to distilling a central purpose, namely, inquiring whether the parties would have entered into the agreement without the invalid clause. If they would have, then the clause can be severed.

### A. *The Current Approach to Invalid Clauses*

Federal courts treat arbitration agreements regulated by the FAA like any other form of contract and look to state contract law when interpreting arbitration agreements.<sup>56</sup> Therefore, developing a comprehensive view of the law, as it currently exists, requires

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55. For the purposes of this article, the term "severability" refers solely to the process of severing an invalid, illegal, or otherwise unenforceable provision of an agreement so as to keep the remaining provisions enforceable. The term as it is used in this article is not to be confused with the strictly arbitration law principle of "severability," which states that an arbitration agreement is conceptually separate from the contract in which it is found and, consequently, attacks on the overall contract's validity do not affect the arbitration agreement's validity. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (discussing how the First Circuit interprets severability issues involving arbitration agreements). Internationally, severability in the strictly arbitration sense is also known as "separability," and the arbitration is often said to be independent or autonomous. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 192-93 (1994); FOUCHARD, GAILLARD, GOLDMAN ON *INTERNATIONAL COMMERCIAL ARBITRATION* 198-204 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter *FOUCHARD GAILLARD GOLDMAN*].

56. *Kyocera*, 341 F.3d at 1001 (citing *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1210 (9th Cir. 1998)).

examining both federal and state common law related to the topic of severability. Federal and state courts ask whether the invalid clauses can be severed from an agreement without vitiating the central purpose of the agreement. Under Texas law, an agreement's central purpose is found by deciding "whether [the parties] would have entered into the agreement absent the illegal parts."<sup>57</sup> The majority of jurisdictions, however, do not implement as clear a method for finding an agreement's central purpose. These courts investigate the extent to which the valid and invalid clauses in the agreement are interwoven with one another.<sup>58</sup> If the invalid clause is independent from the valid clauses, then severing the clause does not harm the agreement's central purpose. If the valid and invalid clauses are interwoven and removal of the invalid clause would prevent the agreement's effectuation, then the entire agreement is invalid. In addition to looking at the interconnectedness of the valid and invalid clauses, California courts also inquire into whether severing the invalid clause serves the "interests of justice."<sup>59</sup>

The Ninth Circuit used both inquiries when it severed the invalid heightened judicial review clause in *Kyocera*.<sup>60</sup> The court first considered the interconnectedness of the valid and invalid clauses, and then considered whether severing the clause would further the interests of justice.<sup>61</sup> On the first issue, the court held that the clause could be severed, because the invalidity of the heightened judicial review provisions did not "permeate any other portion of the arbitration clause,

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57. *Rogers v. Wolfson*, 763 S.W.2d 922, 925 (Tex. Ct. App. 1989).

58. *See, e.g., Kidder, Peabody & Co. v. IAG Int'l Acceptance Group*, 28 F. Supp. 2d 126, 139 (S.D.N.Y. 1998) ("New York courts often enforce legal components of an agreement where the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement." (quoting *Artache v. Goldin*, 133 A.D.2d 596, 599 (N.Y. App. Div. 1987)) (internal quotations omitted); *McCall v. Frampton*, 81 A.D.2d 607, 608 (N.Y. App. Div. 1981) (finding that the test for severance in New York "is the degree to which the illegality infects and destroys the agreement"); *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 385 (Ind. 1997) ("[I]f a contract contains an illegal provision which can be eliminated without frustrating the basic purpose of the contract, the court will enforce the remainder of the contract." (citing *Corner v. Mills*, 650 N.E.2d 712, 715 (Ind. Ct. App. 1995))); *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974) ("Generally, when a contract covers several subjects, some of whose provisions are valid and some void, those which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible." (citing *Bristol v. Dominion Nat'l Bank*, 149 S.E. 632, 644 (Va. 1929))); *Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 531-32 (N.C. 1973) ("When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced." (citing *In re Port Publ'g Co.*, 57 S.E.2d 366 (N.C. 1950))).

59. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 699 (Cal. 2000).

60. *Kyocera*, 341 F.3d at 1001-02.

61. *Id.* at 1000-01.

and the [heightened judicial] review provisions are not interdependent with any other.”<sup>62</sup> On the second issue, the court held that the interests of justice required it to sever the invalid heightened judicial review clause and leave the rest of the arbitration agreement intact.<sup>63</sup> It based this holding on the fact that the dispute had been in front of courts and arbitral tribunals for fifteen years, the award had been rendered, and invalidating the entire agreement would render worthless all of the time and money the parties had invested in resolving the dispute.<sup>64</sup> If the entire arbitration agreement had been vitiated, the original prevailing party would have been forced to start all over in prosecuting its claims, thereby conferring a disproportional benefit to the party that lost the original arbitration.<sup>65</sup>

In addition to asking whether an invalid clause strikes at the primary purpose of a contract, California courts also ask whether enforcing the contract without the clause serves justice. In *Oakland-Alameda County Coliseum Authority v. CC Partners*, the California Court of Appeals held that enforcing an entire arbitration agreement without its heightened judicial review clause would serve justice by not allowing one party to benefit over the other.<sup>66</sup> The court seemed to conflate the concept of the interest of justice with the concept of public policy by using the terms interchangeably.<sup>67</sup> The court found that “[t]he interests of justice and the policy of this state to encourage the arbitration of disputes would be ill served by a ruling that would render this arbitration award unenforceable.”<sup>68</sup> Thus, the court implied that when considering whether invalidating an agreement would serve the interests of justice, California courts must consider the state’s pro-arbitration public policy. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Court of Appeals again equated public policy interests with interests of justice when stating that interests of justice would not be

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62. *Id.* at 1001–02.

63. *Id.* at 1002.

64. *Id.* Although not expressed by the court, one could justify the holding in terms of estoppel. One could argue that Kyocera willingly arbitrated for fifteen years and then challenged the validity of the arbitration clause; therefore, it should be bound by the performance of its obligation to arbitrate. On the other hand, the validity of the arbitration clause was not at issue until nearly fifteen years into the dispute when the Ninth Circuit invalidated heightened judicial review clauses after raising and deciding the issue *sua sponte*. *Id.* at 1004 (Rymer, J., dissenting).

65. *Id.* at 1002 (majority opinion).

66. *Oakland-Alameda County Coliseum Auth. v. CC Partners*, 101 Cal. App. 4th 635, 647 (Cal. Ct. App. 2002), *overruled by* *Cable Connection, Inc. v. DIRECTV, Inc.* 190 P.3d 586 (Cal. 2008).

67. *CC Partners*, 101 Cal. App. 4th at 647.

68. *Id.*

served by ignoring California's and the FAA's pro-arbitration policies and invalidating an entire arbitration agreement.<sup>69</sup>

*Kyocera* defined the interests of justice as preventing one party from unfairly gaining an advantage over another and focused its analysis on the current state of the parties after fifteen years of arbitration and litigation. *CC Partners* and *Cable Connection* defined the interests of justice similarly, but also used the idea synonymously with a pro-arbitration policy.

### B. Weaknesses of the Current Approach

The approach to severability taken by most courts suffers from one major flaw: it has no clearly stated method for identifying the central purpose of an agreement. Thus, it leaves far too much discretion in the hands of those interpreting the agreement and makes it difficult for future litigants to predict how a court or arbitrator will rule in their particular case. The uncertainty is magnified when the even more nebulous concept of "the interests of justice" is added to the inquiry.

This excerpt from *Alston Studios, Inc. v. Lloyd V. Gress & Associates* serves as a good example of courts' all too common approach to the issue of severability:

Generally when a contract covers several subjects, some of whose provisions are valid and some void, those which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible. Here, the excessively broad covenant not to compete is ancillary to an otherwise valid contract of employment between [the parties]. But . . . the principle consideration for the covenant[] is so interwoven with the void portion of the agreement as to be unenforceable. Consequently [the prevailing party] is under no obligation to make severance payments.<sup>70</sup>

The court stated that invalid terms can be severed if they are not interwoven with valid terms. It then found one clause to be "ancillary" to an employment contract, but another too interwoven with the void

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69. *Cable Connection, Inc. v. DIRECTV, Inc.*, 49 Cal. Rptr. 3d 187, 206 (Cal. Ct. App. 2006) (holding that "[invalidating the entire agreement] would ill serve the interest[s] of justice and the policy of this state [and of the FAA] to encourage arbitration of disputes"), *rev'd* 109 P.3d 586 (Cal. 2008). The California Court of Appeals held that heightened judicial review was unenforceable under both the FAA and the California Arbitration Act and severed the clause. *Id.* at 206. The California Supreme Court later reversed the holding (as well as the holding in *CC Partners*) and found that heightened judicial review is permissible under the California Arbitration Act. *Cable Connection*, 190 P.3d 586. Regardless of the California Supreme Court's disposition of the case, *Cable Connection* and *CC Partners* stand as good examples of how California courts apply severability analysis.

70. *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974) (citations omitted).

provision to be enforced. What the court did not do is explain what constitutes an interwoven provision and at what point a provision becomes *too* interwoven to survive. Likewise, the court did not explain what makes a provision ancillary.

Consider this excerpt from *Harbour v. Arelco, Inc.*:

Generally a contract made in violation of a statute is void. However, if [the] contract contains an illegal provision which can be eliminated without frustrating the basic purpose of the contract, the court will enforce the remainder of the contract. We agree with the Court of Appeals that the primary purpose of the contract is not frustrated by the elimination of the [invalid clause]. If the contract had conformed with the statutory requirements, the inclusion of the [invalid clause] alone would not have rendered the entire contract unenforceable.<sup>71</sup>

Here the Indiana Supreme Court stated that invalid terms can be severed if doing so does not harm the contract's basic purpose. As in *Alston Studios*, the court did not attempt to specify what the basic purpose was when it drew the conclusion that it had not been harmed. Finally, the last sentence of the court's reasoning is simply a restatement of the rule. The court's reasoning comes full circle: the agreement is enforceable without the invalid clause, because the original inclusion of the invalid clause did not render the agreement unenforceable.

Without a clear method for finding an agreement's central purpose, two possible methods may be used to understand the holdings. The fact that "purpose" is used in its singular form may imply that every agreement has at its heart one singular, essential *term* that exemplifies the central purpose. Alternatively, the phrase may imply that every agreement's central purpose may be captured by one statement that summarizes the agreement.

Seeking out a central term is problematic because many agreements include a large variety of terms or clauses, with one just as important as the next. Consider this hypothetical example: A, a sporting goods chain, contracts to buy 100,000 cases of baseballs from B, a sporting goods manufacturer, at a price of \$25 per case. The cases will be delivered in three installments. The first installment of 35,000 cases will occur immediately; the second installment of 35,000 cases will occur three months after the first; and the last installment of 30,000 cases will occur three months after the second. A will pay B the value of the delivery after each delivery. Finally, B agrees to pay the cost of

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71. *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 385 (Ind. 1997) (citations omitted).

shipping and to insure the safety of the cases until they are delivered to A. The shipping costs are estimated at around \$65,000.

The agreement has a descriptive term (the goods being purchased are baseballs), a price term (\$25 per case), a quantity term (100,000 cases), a delivery term (three installments of 35,000, 35,000, and 30,000; B pays costs), and an insurance term (B bears the risk of loss prior to delivery).

If the central purpose of an agreement is a singular and essential term, then a fatal problem immediately surfaces: is the price term, the quantity term, or the term describing the goods the essential term? If the price term is the essential term, then a court that hypothetically found either of the other two terms to be invalid could enforce B's attempt to deliver tennis rackets instead of baseballs or its attempt to deliver only a fraction of the order. If the goods' description is the essential term, then a court that hypothetically found one of the other terms unenforceable could enforce A's attempt to pay half the price or demand twice the quantity. It is doubtful that a court would take severability so far.

Perhaps courts will attempt to capture an agreement's central purpose through a concise statement that captures the essence of the agreement. This approach is also problematic. The central purpose of the above agreement could be stated as a contract for sale. Of course, it is more than just a contract for the sale of anything; A is buying baseballs, not tennis rackets. So, the agreement may be better stated as a contract for the sale of baseballs. There is a reason, though, that A and B agreed upon a delivery schedule. A may not have the space to store all 100,000 cases at once or may not have the ability to pay the entire purchase price in one installment. B may not have the manufacturing capacity to fulfill a 100,000-case order and still service its other customers. In that sense, the delivery schedule could be viewed as essential to the agreement. Therefore, the agreement should be stated as a contract for sale of baseballs, with delivery to occur in three phases, and payment after each delivery. Finally, A and B agreed that B should insure the safety of the goods until delivery. A may be unable to self-insure or purchase separate insurance for the goods. B may use bearing the risk of loss as a carrot for attracting customers. There could be an infinite number of reasons why the parties put the risk on B; the important thing is that they did. If the successful conclusion of an agreement was contingent on B's willingness to bear the risk of loss, then in that sense the term is essential to the agreement. The agreement should then be stated as a contract for the sale of baseballs, with delivery to occur in three phases, payment after each delivery, and B bears the risks of loss prior to



delivery. Without a clear method for finding an agreement's central purpose, a judge or arbitrator could choose any of the above examples as the agreement's central purpose based solely on her discretion.

When it comes to arbitration agreements, courts tend to find that the central purpose of the arbitration agreement is upheld so long as the parties are allowed to arbitrate in one sense or another.<sup>72</sup> This view demonstrates a lack of appreciation for what it means to arbitrate and permits courts and arbitral tribunals the opportunity to undervalue or outright ignore key provisions in carefully drafted and complex arbitration agreements. Arbitration agreements often prescribe, among numerous other things, the number of arbitral tribunals, the arbitrator selection process, the law governing the substance and procedure of the arbitration, division of responsibilities between arbitral tribunals and the courts, and institutional rules that govern all of the above.<sup>73</sup> Theoretically, one or more of those provisions could be removed without denying the parties the opportunity to arbitrate in the most minimal sense. Doing that, however, could significantly change what the parties had in mind when they agreed to arbitrate. An approach to severing invalid heightened review clauses—and other defective clauses—must provide a clear method for determining the importance of the provision to the essence of the arbitration agreement as the parties imagined it. The approach used by most jurisdictions relies too heavily on the court's or arbitral tribunal's discretion.

Any given agreement, whether for a sale or an arbitration, is more than just a singular term or clause. An agreement, at least among parties with similar bargaining power,<sup>74</sup> is the final product of the parties' negotiations and is the most accurate representation of what the parties desired and what they were willing to give up to obtain it. Some terms in an agreement may be the subject of heated discussion; others may be thrown in at the eleventh hour. It is impossible for any outside

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72. See *supra* notes 56–69 and accompanying text.

73. BORN, *supra* note 55, at 4–5, 9–10.

74. In the United States, legal commentators, journalists, and others in the public have voiced concerns regarding the use of form contracts to bind consumers to arbitrate claims arising out of everyday purchases, such as wireless phones, home computers, and televisions. The same concern extends to arbitration agreements in employment contracts. For a discussion of the role of bargaining power in the formation of consent to arbitrate, see, for example, Colin J. Daniels, Note, *Mandatory Arbitration: How Private Actors Can Improve Their Footing on Unstable Ground*, 12 HARV. NEGOT. L. REV. 525 (2007); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J. L. & SOC. PROBS. 275 (1999); and Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998).

party, including courts and arbitral tribunals, to meaningfully understand the central purpose of that bargain without understanding the importance that each party places on the given terms.

### *C. A Passing Reference to Party Intent Is Insufficient*

Some jurisdictions, not including Texas, reference party intent when deciding if severing an invalid clause would harm an agreement's central purpose. These jurisdictions, however, are not clear as to how party intent should interact with an agreement's central purpose. This is problematic for two reasons. First, jurisdictions that do not draw a clear link between party intent and an agreement's central purpose may invoke the same conclusory, overly discretionary reasoning as jurisdictions that make no reference to party intent. Second, case law that only cursorily references party intent as a means of finding an agreement's central purpose may lose all reference to party intent as it develops.

#### 1. Failing to Clearly Link Party Intent and Central Purpose Diminishes Party Intent's Usefulness

*Ignazio v. Clear Channel Broadcasting, Inc.* serves as a good example of how a court's improper treatment of party intent diminished its usefulness.<sup>75</sup> In *Ignazio*, the Ohio Supreme Court addressed the issue of whether an invalid heightened judicial review clause should void the arbitration agreement in which it sat. Under Ohio law, whether or not an invalid clause in an agreement may be severed "depends on the intention of the parties, and this must be ascertained by the ordinary rules of construction."<sup>76</sup> The court found that the parties intended the invalid clause to be severable, because their agreement explicitly stated that any unenforceable clauses should be severed and the remaining clauses be given effect.<sup>77</sup> The court could have rested its decision solely on the parties' intent, but instead based its decision partially on its belief that severance would not materially change the requirement to arbitrate, the process of requesting arbitration, the process of conducting arbitration, and the means of enforcing an award.<sup>78</sup> Additionally, the

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75. *Ignazio v. Clear Channel Broad., Inc.*, 865 N.E.2d 18, 21 (Ohio 2007).

76. *Id.* at 20 (quoting *Huntington & Finke Co. v. Lake Erie Lumber & Supply Co.*, 143 N.E. 132 (Ohio 1924)).

77. *Id.*

78. *Id.* at 21. The court stated:

Severing only the second sentence of Section 10B will not modify or alter the remainder of the provision for enforcing an arbitration award. The agreement still requires the parties to arbitrate disputes. Severing does not modify or change the terms

court stated that severing a “single phrase in one sentence in a multi-page agreement [did] not alter the *fundamental nature* of the agreement” and that the “*essence* of the agreement remain[ed].”<sup>79</sup>

When parties explicitly state that they want invalid clauses to be severed so that the remainder of the agreement may survive, it is not difficult for a court or arbitrator to give effect to parties’ intent and sever the invalid clause.<sup>80</sup> That is the easy case. The hard case arises when the parties do not express their intent. Therefore, it is unclear how Ohio would effectuate party intent in the hard case. In *Ignazio*, the court fell into the same pitfalls as courts that do not reference the intent of the parties. First, its findings regarding the central purpose of the agreement were conclusory. The court failed to explain how or why the requirement to arbitrate and the processes for requesting arbitration, conducting the arbitration, and enforcing an award comprised the arbitration agreement’s central purpose and, more importantly, failed to adequately explain why heightened judicial review did not.<sup>81</sup>

Second, the court seemed to rely heavily on the size of the heightened judicial review clause in relation to the size of the rest of the agreement. In the court’s view, the fact that the heightened judicial review clause was a single phrase in a single sentence in a very large agreement must

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of the agreement for demanding and conducting the arbitration process. The agreement continues to provide a means of enforcement in that “[e]ither party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award.”

*Id.*

79. *Id.* (emphasis added). The contract at issue in *Ignazio* contained a so-called savings clause, which provided that “[s]hould any provision of this Agreement be found to be unenforceable, such portion shall be severed from the Agreement and the remaining portions shall remain in full force and effect.” *Id.* at 20. The court, for obvious reasons, found this language instructive when it determined that the heightened judicial review clause did not alter the central purpose of the agreement and severance would not offend the intent of the parties. *Id.* at 21.

80. This Article does not take a stand on the issue of whether a savings clause should be dispositive on the severance issue. If the judge or arbitrator took a strictly objective approach to determine party intent and examined only the plain meaning of the agreement’s text, then a savings clause would likely be dispositive. If the judge or arbitrator took a more subjective approach and extended her inquiry into the circumstances surrounding the formation of the agreement, then a *pro forma* savings clause may provide less evidence of the parties’ true intent. Discussing the advantages and disadvantages of the objective and subjective approaches to understanding party intent is beyond the scope of this Article. Under either approach, explicit language would likely make deciding the issue substantially easier.

81. *Ignazio*, 865 N.E.2d at 21 (“Severing only the second sentence of Section 10B will not modify or alter the remainder of the provision for enforcing an arbitration award. The agreement still requires the parties to arbitrate disputes. Severing does not modify or change the terms of the agreement for demanding and conducting the arbitration process. The agreement continues to provide a means of enforcement in that “[e]ither party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award.””).

make it expendable.<sup>82</sup> This is an unfortunate view, however, because the size of a provision compared to the complete agreement says little about the importance of that provision or its connection to the agreement's central purpose. For example, eliminating a single sentence that states, "The parties agree to arbitrate disputes arising out of this contract," could doom an arbitration agreement regardless of its size or complexity.<sup>83</sup> Stating clearly how party intent should be used to find a contract's central purpose eliminates such conclusory reasoning and helps a court or arbitrator effectuate party intent in the hard case.

## 2. If Party Intent Is Not Paramount to an Inquiry, It May Be Lost Altogether

California's severability analysis initially looked to the intent of the parties to find an agreement's central purpose, but that inquiry silently disappeared. When the California Supreme Court decided *Armendariz v. Foundation Health Psychcare Services, Inc.* in 2000, it applied a severability analysis to unconscionable clauses in an arbitration agreement and held that the clauses invalidated the entire agreement.<sup>84</sup> In its analysis, the court first acknowledged the importance of the intent of the parties by stating that "[w]hether a contract is entire or severable . . . [is a question of] construction to be determined by the court according to the intention of the parties."<sup>85</sup> But then after a discussion of case law and the policies behind severing invalid clauses (including interests of justice), the court stated that "[c]ourts are to look to the various purposes of the contract."<sup>86</sup> According to the court, "[i]f the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced."<sup>87</sup> Ultimately, the court based its decision primarily on its belief that the unconscionable and conscionable provisions were too interwoven to permit severability.<sup>88</sup> It did not rest its decision on the intention of the parties in any discernable way.<sup>89</sup> The court's reasoning was very similar to the reasoning in

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82. *Id.* at 20–21.

83. See JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 167–68 (2003) (explaining the essential ingredients of an arbitration agreement).

84. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 699 (Cal. 2000).

85. *Id.* at 695 (quoting *Keene v. Harling*, 392 P.2d 273 (Cal. 1964)).

86. *Id.* at 695–96.

87. *Id.* at 696.

88. *Id.* at 696–97 ("The arbitration agreement contains more than one unlawful provision . . . [T]here is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.").

89. See *id.* at 695–99 (stating the two factors the court weighed against severance of the

*Ignazio*. Thus, the courts referred to the intent of the parties in passing, but then rested their decisions on conclusory statements regarding the interwoven character, or lack thereof, of the agreement's provisions.<sup>90</sup>

Following *Armendariz*, California courts applying severability analysis refrained from referencing party intent at all. In *Little v. Auto Stiegler, Inc.*, the California Supreme Court considered, among other things, whether a provision in an employment related arbitration agreement allowing either party to appeal an arbitration award to a second arbitrator was unconscionable, and if it was, whether the unconscionable provision could be severed and the remaining arbitration agreement enforced.<sup>91</sup> After finding the provision unconscionable, the court began its severability analysis by citing *Armendariz* for the proposition that the two purposes for severing illegal provisions are first, to prevent one party from gaining an undeserved benefit, and second, to preserve contractual relationships without condoning an illegal scheme.<sup>92</sup> The court also stated that the overarching inquiry was whether severing an unenforceable provision would further the interests of justice and noted that severance was permissible if the central purpose of the agreement was not tainted with illegality.<sup>93</sup> What the court did not carry over from *Armendariz* was any mention of party intent. The court held that the unconscionable appeal provision was not too interwoven with the remaining provisions and that severance was appropriate.<sup>94</sup>

Any hope of infusing an "intent-of-the-parties" approach back into California severance analysis was greatly diminished when the Ninth Circuit rested its holding in *Kyocera v. Prudential-Bache Trade Services, Inc.*, that the heightened judicial review clause involved was severable, primarily upon the reasoning in *Little*.<sup>95</sup> The *Kyocera* court determined that the clause was severable because it did not taint the central purpose of the agreement and the interest of justice demanded

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unlawful provision).

90. Compare *id.* at 696–97 (concluding that an arbitration agreement which cannot be cured by severance and is permeated by unconscionability must be rescinded), with *Ignazio v. Clear Channel Broad., Inc.*, 865 N.E.2d 18, 21–22 (Ohio 2007) (noting the parties' intent to arbitrate but ultimately holding the provision was severed because it was not an essential term of the arbitration agreement).

91. *Little v. Auto Stielger, Inc.*, 63 P.3d 979, 981 (Cal. 2003).

92. *Id.* at 985.

93. *Id.* at 985–86.

94. *Id.* at 986–87.

95. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1001–02 (9th Cir. 2003).

severance.<sup>96</sup> Thus, any reference to intent of the parties has been completely jettisoned from California severance case law.

In summary, as demonstrated by *Ignazio* as well as *Armendariz* and its progeny, the intent of the parties must have more than just a passive role in deciding whether an invalid clause can be severed from an agreement without invalidating the entire agreement. If the party consent requirement is to be effectuated and future litigants, courts, and arbitrators are to be given guidance, then the method for finding an agreement's central purpose must implement the Texas approach of asking whether the parties would have entered into the agreement absent heightened judicial review.

### III. PARTY INTENT SHOULD BE CENTRAL TO FINDING AN AGREEMENT'S CENTRAL PURPOSE

This Part proposes that courts and arbitral tribunals analyze invalid heightened judicial review clauses by inquiring whether the parties would have entered into the arbitration agreement without the clause. Part III.A sets out a proposed rule based on Texas's approach and adds to it a rebuttable presumption that parties would not have agreed to arbitrate without heightened judicial review. Part III.B highlights the three primary benefits the proposed rule can provide: 1) stating a clear rule that can guide future litigants, courts, and arbitrators; 2) effectuating the party consent requirement; and 3) protecting the legitimacy of arbitration as a dispute resolution mechanism. Part III.C explains that the proposed rule and rebuttable presumption do not conflict with the FAA's pro-arbitration policy. Finally, Part III.D explains that in cases where arbitration is pending or ongoing, the arbitrator, not the court, has the first right to decide on the arbitration agreement's validity.

#### A. *The Proposed Rule and Rebuttable Presumption*

Courts and arbitral tribunals should adopt the rule that, when faced with an invalid heightened judicial review clause, the clause will be severed and the remaining agreement enforced if the parties would have entered into the agreement without the invalid clause. By investigating

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96. *Id.* *Armendariz* and *Hall Street* are connected. When the Ninth Circuit first ruled in *Hall Street*, it held, in an unpublished opinion, that the heightened judicial review clause was severable based on the court's holding in *Kyocera*, which was the eventual progeny of *Armendariz*. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 03-35526, 2004 WL 2596020 (9th Cir. Nov. 16, 2004). Fortunately, the Supreme Court did not have the opportunity to adopt California's approach to severability because *Hall Street* chose not to include the Ninth Circuit's severance ruling in its request for certiorari. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 n.6 (2008).

party intent, the court or arbitral tribunal places itself at the proverbial negotiating table and asks what result would have occurred if the Supreme Court had eliminated the possibility of heightened judicial review prior to the agreement's formation. If the parties would have consented to arbitrate even without heightened judicial review, then the clause's invalidity should not invalidate the agreement. If the Court's removal of the heightened judicial review clause prior to the agreement's formation would have prevented the parties from consenting to arbitrate, then the clause's invalidity must also invalidate the agreement. This rule draws a clear and easily accessible link between the invalid clause, party intent, and the agreement's central purpose.

In theory, the rule is relatively straightforward as stated. In practice, discerning party intent presents two key problems. First, it could require litigants to gather a great deal of evidence that an opposing party is holding. Determining whether the heightened judicial review clause was central to the agreement's formation would require a thorough examination of the agreement's negotiation phase. During negotiations, parties have an incentive to only reveal a minimal amount of information to each other. If one party reveals that it views a proposed term as expendable early in the negotiation process, then that revelation could seriously disadvantage that party's bargaining position as the negotiation progresses. Often, the evidence needed to show that the heightened judicial review clause was or was not central to the agreement's formation would not be found in overt communications between the parties. It is more likely to take the form of internal, perhaps protected, communications between the parties and their respective counsel. Consequently, the opposing party probably holds most, if not all, of the necessary evidence. In court, this could lead to protracted discovery processes. In arbitration, where discovery is often limited,<sup>97</sup> the parties may have trouble obtaining the evidence needed to prove their case.

Second, discerning party intent could grant the finder of fact too much discretion when interpreting the evidence. Boldly asking whether the parties would have agreed to arbitrate absent a heightened judicial review clause is a subjective inquiry. The approach asks the court or arbitral tribunal to predict party conduct based on its reading of the evidence.

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97. See generally W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. LAW. 280 (2006) (analyzing the unique nature of the discovery process in arbitration proceedings).

To avoid these problems, courts and arbitral tribunals should presume, subject to rebuttal, that parties *would not* have agreed to arbitrate without the heightened judicial review clause. The presumption is largely justified by the fact that the presence of a heightened judicial review clause in an arbitration agreement demonstrates that the parties specially contemplated the clause. The placing of a heightened judicial review clause in an arbitration agreement is a unique event, especially when parties adopt the language of model agreements offered by arbitration institutions. Any given model arbitration clause can provide for, among other things, the resolution of disputes by arbitration, the applicable institution and rules, the scope of issues covered by the agreement, and the entering of an arbitration award as judgment in any court with jurisdiction.<sup>98</sup> One notable absence from any institute's model arbitration agreement, however, is a heightened judicial review clause. For example, not only do the American Arbitration Association's (AAA) model clauses not provide for heightened judicial review of the arbitration award, but the AAA also, as *amicus curiae* in *Hall Street*, argued against the wisdom of heightened judicial review.<sup>99</sup>

The addition of heightened judicial review language to model language demonstrates that the parties specially contemplated the

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98. See, e.g., AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (Amended and Effective Sept. 1, 2007), available at <http://www.adr.org/sp.asp?id=22440&printable=true> (outlining the procedural rules for commercial arbitration, including procedures for large, complex commercial disputes); AMERICAN ARBITRATION ASS'N, INTERNATIONAL DISPUTE RESOLUTION (Amended and Effective Mar. 1, 2008), available at <http://www.adr.org/sp.asp?id=33994&printable=true> (outlining the procedural rules for international dispute resolution); Chicago International Dispute Resolution Association, Model Arbitration Clause or Separate Arbitration Agreement, <http://www.cidra.org/modelarb.htm> (last visited Feb. 12, 2009) (providing a model arbitration clause that includes the number of arbitrators, place of arbitration, and language to be used in arbitral proceedings); INT'L CTR. FOR CONFLICT RESOLUTION & PREVENTION, NON-ADMINISTERED ARBITRATION RULES (2007), available at <http://www.cpradr.org/Portals/0/2007%20Arbitration%20Rules%20SlimJim.pdf> (providing procedures to facilitate the conduct of the arbitration process fairly); LONDON COURT OF INT'L ARBITRATION, LCIA ARBITRATION RULES (1998), available at <http://www.jus.uio.no/lm/lcia.arbitration.rules.1998/portrait.pdf> (setting the arbitration rules for London courts for international arbitration); INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (1998), available at <http://www.jus.uio.no/lm/icc.arbitration.rules.1998/portrait.pdf> (establishing the procedures for international commercial arbitration); ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES (2007), available at [http://www.sccinstitute.se/\\_upload/shared\\_files/regler/2007\\_Arbitration\\_Rules\\_eng.pdf](http://www.sccinstitute.se/_upload/shared_files/regler/2007_Arbitration_Rules_eng.pdf) (providing the procedures and rules for arbitration).

99. See Brief of Amicus Curiae Am. Arbitration Ass'n in Support of Affirmance at 19–20, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989) (arguing that while the FAA endorses party autonomy and flexibility, the FAA does not grant parties the power to determine the applicable judicial review because it would be an unconstitutional delegation to private parties of Congress' power to regulate courts' practice and procedure).



clause's addition. Additional concerted effort was needed to tailor the arbitration agreement so that both parties could be protected from a poorly decided award. The heightened judicial review clause was important enough to the parties for them to make the effort to specifically include it in the agreement. This demonstrates, albeit not conclusively, that one or both of the parties would likely have scrapped the arbitration agreement and chosen to resolve their disputes in court rather than arbitrate without the protection of the specially negotiated heightened judicial review clause. The proposed rebuttable presumption embraces the unique nature of the heightened judicial review clause and the protection it offers the parties.

### *B. The Rule's Three Major Benefits*

The proposed rule has three major benefits. First, it limits court and arbitrator discretion and, consequently, provides clearer guidance for those confronted with heightened judicial review clauses. Second, it effectuates the party consent requirement in arbitration law. Third, it protects the legitimacy of arbitration by not unduly forcing unwilling parties into arbitration.

#### **1. The Rule Limits Arbitrator and Court Discretion and Leads to Clear Guidance**

The key weakness of the majority approach is that there is no clearly stated method for finding the agreement's central purpose. Consequently, courts and arbitral tribunals enjoy a considerable amount of discretion and parties suffer from greatly diminished predictability regarding their case's potential disposition. Without a clearly stated method for finding an agreement's central purpose, parties are disadvantaged in their case planning.

Parties that wish to pursue a dispute that is subject to an arbitration agreement containing an invalid heightened judicial review clause must choose one of a number of options before going forward. First, they could initiate arbitration. This is the best option if they are relatively certain that the arbitration agreement will be enforced by severing the invalid heightened judicial review clause. Second, they could ignore the arbitration clause and take their dispute directly to court. This is the best option if they are relatively certain that their arbitration agreement is now invalid. Third, they could renegotiate an arbitration agreement if they still want to arbitrate but are relatively certain the agreement was invalid. Fourth, they could negotiate a settlement if they felt unlikely to prevail in either court or arbitration, but the calculus used to determine the strength of their case would depend on the forum.

Each of the above scenarios assumes that the parties' decisions are guided by a clearly stated rule regarding the arbitration agreement's validity. The law as it is, however, does not have a clearly stated rule. If one party wishes to proceed with the dispute, it is uncertain exactly what evidence must be presented to demonstrate whether the invalid heightened judicial review clause is severable. It is also unclear who bears the burden of proof. These uncertainties increase the parties' costs by requiring more consultation with counsel and by increasing the risk of the parties investing significant resources in an arbitration or a court proceeding only to discover that they bet on the wrong forum. A risk-averse or even risk-neutral party is likely to feel compelled to settle its case instead of pursuing its dispute in an uncertain forum. The strong desire to avoid pursuing the dispute could force the party that is the least tolerant of risk to settle for less than it is legally entitled. The lack of a clearly stated rule regarding invalid heightened judicial review clauses promotes inefficiency by increasing costs and forcing cautious parties into settling for less than they would be entitled.

The proposed rule avoids these problems. First, it clearly states that the central purpose of a contract is to be determined by whether the parties would have entered into the agreement absent the heightened judicial review clause. From the outset, the parties know what they need to prove to win their case and can plan their case strategy accordingly. Second, the rule presumes that parties would not have entered into the agreement without a heightened judicial review clause. The burden of proof is placed on the party requesting that the invalid clause be severed and the remaining agreement enforced. That party knows that it will bear the lion's share of discovery costs as it tries to build its case and can take that knowledge into account when planning its strategy. The party that bears the burden can also consider the likelihood of proving its case and compare the costs of proceeding to the costs of settling. Knowing what is to be proven and who must prove it promotes efficiency.

## 2. The Rule Effectuates the Party Consent Requirement in Arbitration Law

The lack of a clearly stated method for finding the central purpose of an agreement opens the door for courts and arbitral tribunals to undervalue the requirement that parties must consent to arbitrate before a valid arbitration agreement can exist. With very few exceptions, arbitration's central tenet is that parties cannot be forced to arbitrate

unless they have consented to arbitrate.<sup>100</sup> Parties that agree to arbitrate, through their own free will, give up the courts' procedural safeguards for the cost-effective advantages of arbitration. Arbitration does not permit the same level of discovery as the courts; it has significantly more relaxed evidence rules,<sup>101</sup> and after the holding in *Hall Street*, its opportunity for judicial review is limited strictly to the narrow grounds found in sections 10 and 11 of the FAA.<sup>102</sup> Arbitration, however, can be speedier, more flexible, and have greater finality and confidentiality.<sup>103</sup> Giving up one's proverbial day in court is a significant act, but an arbitration agreement reflects the parties' freewill decision to forego court protections for the advantages of arbitration.

By not including party intent in their analysis of an agreement's essence, courts and arbitral tribunals are free to infer the essence of the agreement without considering to what the parties would have consented. In this manner, the party consent requirement can be ignored. If, on the other hand, party intent is the sole basis by which a clause may be severed, then the only ground for enforcing the arbitration agreement is party consent. If, after severing the invalid heightened judicial review clause, the resulting arbitration agreement is something to which the parties would have consented, a court or arbitrator can infer consent on behalf of the parties. If the parties would never have consented to arbitrate without heightened judicial review, courts and arbitrators must acknowledge this fact and nullify their agreement in its entirety. Thus, the party consent requirement retains its primacy.

### 3. The Rule Protects Arbitration's Legitimacy by Not Unduly Forcing Unwilling Parties to Arbitrate

The current approach allows courts and arbitrators to compel parties to arbitrate under terms to which they would not have agreed. Doing so may make parties reluctant to arbitrate in the future. This would be unfortunate considering the strides that arbitration has made in building its legitimacy in the United States.

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100. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1142 (9th Cir. 1991) (stating that the "first principle" of arbitration prevents parties from being compelled to arbitrate if they have not agreed to do so).

101. *See* BORN, *supra* note 55, at 81-93 (discussing evidentiary rules and the discovery process in arbitration).

102. *See supra* Part I.A (discussing the *Hall Street* holding).

103. *See* ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 22-33 (4th ed. 2004).

Arbitration, especially interstate arbitration, is a widely accepted form of dispute resolution, but this has not always been the case. Prior to the 1920s, courts and legislatures refused to effectuate arbitration agreements or enforce arbitration awards based largely on the belief that arbitral tribunals were less qualified than judges to decide legal issues.<sup>104</sup> At the urging of the business community, Congress and state legislatures took proactive measures to combat this suspicion by enacting arbitration legislation that afforded arbitration agreements the same protections as other forms of contract and provided for the enforcement of arbitration awards.<sup>105</sup> The FAA, comparable state statutes, and favorable Supreme Court rulings have allowed arbitration to gain widespread acceptance.<sup>106</sup>

Yet, factions of attorneys, journalists, and politicians continue to view arbitration with suspicion.<sup>107</sup> Sometimes the suspicion is based on lingering biases, such as the outdated notion that arbitral tribunals are ill-equipped to decide complex legal and substantive issues. Other times the suspicion is based on valid criticism, such as the use of adhesion contracts to force unsophisticated parties to give up their right to go to court, or that the lack of transparency in arbitration.<sup>108</sup>

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104. BORN, *supra* note 55, at 187–88.

105. *Id.* at 188.

106. *Id.*

107. See, e.g., Jayne Bryant Quinn, Editorial, *Arbitration Favors Firms Over Investors*, WASH. POST, Aug. 3, 2008, at F01 (criticizing the fairness of arbitration panels with industry representatives sitting on the panel); Rep. Linda T. Sánchez, Letter to the Editor, *Arbitration or Trial in Court Should Be a Fair Choice*, WALL ST. J., July 28, 2008, at A16 (arguing that large corporations with superior bargaining power have taken the choice whether to arbitrate or litigate a dispute away from consumers, employees, and small businesses by requiring all disputes to go to a private, secret forum picked by a corporation); Chris Serres, *Arbitrary Concern for the National Arbitration Forum*, MINNEAPOLIS STAR TRIB., May 11, 2008, at B1 (noting that the National Arbitration Forum has begun attracting attention from consumer advocates and legal scholars for lopsided victory rates against consumers).

108. The Arbitration Fairness Act of 2007 is an excellent example of the mix between valid and reactionary public perception of arbitration. See Arbitration Fairness Act, H.R. 3010, 110th Cong. (2007) (as forwarded by subcommittee to full committee by voice vote on July 15, 2008). On one hand, the bill protects consumers from unwittingly waiving their right to court by prohibiting pre-dispute arbitration agreements between consumers and businesses. H.R. 3010, § 4. Other nations, such as Sweden, have the same prohibition. 6 § Lag om skiljeförfarande (Svensk författningssamling [SFS] 1999:116) (Swed.) (English translation available at [http://www.sccinstitute.se/\\_upload/shared\\_files/lagar/lagen\\_1999\\_eng.pdf](http://www.sccinstitute.se/_upload/shared_files/lagar/lagen_1999_eng.pdf)). On the other hand, the bill smacks of misplaced distrust regarding arbitral tribunals' independence and impartiality by stripping from them any ability to determine the validity of an arbitration agreement. H.R. 3010, § 4. The bill states:

Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing

To avoid fostering negative public perception of arbitration, courts and arbitral tribunals should make a concerted effort to honor the intent of the parties when deciding whether to invalidate an arbitration agreement containing a heightened judicial review clause. If a party would not have consented to arbitrate without the protection of heightened judicial review, then that party should not be forced to arbitrate without it. To force a party into arbitration without what it viewed as a central procedural protection could likely cause that party to avoid arbitration agreements in the future, for fear that agreed upon arbitration procedures would be vulnerable to substantial court and arbitrator intervention and revision.

Arbitral tribunals should particularly loathe too-easily enforced arbitration agreements that lack heightened judicial review. This could foster a perception of jurisdiction-grabbing on the part of arbitrators. A common, if slightly unfounded, criticism of arbitration relates to the for-profit nature of the arbitral process. According to the criticism, arbitrators' and arbitration institutions' profits are maximized when the arbitration runs its course and is concluded with a rendered award. If an arbitration agreement is found to be invalid, then the case is cut short and the profit potential may be limited. Therefore, arbitrators and arbitration institutions have an economic incentive to validate questionable arbitration agreements and compel parties to arbitrate. This criticism is unfounded for a number of reasons, not the least being that if an arbitrator is released from one case, she is able to take on another, thereby continuing to maximize her profit. Regardless of whether the criticism is well founded, it exists. Parties forced to arbitrate under terms to which they would not have agreed upon could seize onto the criticism that their consent was ignored to guarantee the arbitrators' payday. Whether valid or not, this belief also runs the risk of fanning the flames of public suspicion.

The proposed rule presents a clear and understandable approach to invalid heightened judicial review clauses that places a premium on

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such agreement.

*Id.* This provision flies in the face of well-established national and international legal principles regarding circumstances when the arbitral tribunal has the first right to decide the validity of an arbitration agreement. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995); FOUCHARD GAILLARD GOLDMAN, *supra* note 55, at 213-14; REDFERN & HUNTER, *supra* note 103, at 299-302; UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION, art. 16(1) (2006) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."); German Arbitration Act of 1997 § 1040(1), translated in MICHAEL BÜHLER, THE GERMAN ARBITRATION ACT OF 1997: TEXT AND NOTES 23 (1998) ("The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement.").

party intent. By adopting this proposed rule, courts, and arbitrators in particular, will help assure the parties that they are the most important players in the process. This will help build on the substantial grounds arbitration has made as a legitimate form of dispute resolution.

### C. The Proposed Rule Does Not Conflict with the FAA's Pro-Arbitration Policy

Federal and state courts recognize that the FAA embodies a federal policy favoring arbitration and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."<sup>109</sup> Courts, like the Ohio Supreme Court in *Ignazio*, cite the pro-arbitration policy as a reason for severing invalid heightened judicial review clauses.<sup>110</sup> As such, one could argue that the proposed rebuttable presumption runs counter to the FAA's pro-arbitration policy by making it more difficult to enforce arbitration agreements. This argument is misplaced. The presumption can co-exist with the pro-arbitration policy, because the Supreme Court invokes the policy in the context of an existing agreement's scope and not, as is the case with severing invalid clauses, the agreement's underlying validity. Briefly examining the Supreme Court's invocations of the pro-arbitration policy demonstrates this point.

First, the Supreme Court has invoked the policy to compel arbitration of claims when an arbitration agreement existed, but the claims were stayed in federal court. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court affirmed the reversal of a district court's stay of arbitration proceedings pending the disposition of a parallel state court matter.<sup>111</sup> The district court meant to avoid piecemeal resolution of the parties' dispute that would result from sending the dispute simultaneously into arbitration and court.<sup>112</sup> Despite this laudable goal, the Supreme Court held that the FAA embodied a federal policy to honor arbitration agreements and to send disputes to arbitration as quickly and easily as possible.<sup>113</sup>

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109. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (explicitly adopting a federal pro-arbitration policy), *superseded by statute on other grounds*, Judicial Improvements and Access to Justice Act, 9 U.S.C. § 16(b)(1) (2006).

110. *Ignazio v. Clear Channel Broad., Inc.*, 865 N.E.2d 18, 21 (Ohio 2007).

111. *Moses H. Cone*, 460 U.S. at 19.

112. *Id.* at 7, 19–20.

113. *Id.* at 22. Likewise, the Court has invoked the policy to compel arbitration of claims stayed in state courts. In *Dean Witter Reynolds, Inc. v. Byrd*, the Court compelled the arbitration of state law claims, despite the fact it would create piecemeal and inefficient proceedings. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Second, the Supreme Court has invoked the pro-arbitration policy when holding that the FAA pre-empts many state statutory and procedural rules governing arbitration. In *Southland Corp. v. Keating*, the United States Supreme Court reversed the California Supreme Court's refusal to compel the arbitration of claims brought under a California statute.<sup>114</sup> The Supreme Court held that the federal pro-arbitration policy justified the FAA's pre-emption of a California statute prohibiting the arbitration of certain claims.<sup>115</sup> Similarly, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Supreme Court held that, on the basis of the FAA's pro-arbitration policy, an arbitrator could ignore New York's prohibition against punitive damages in arbitration, even when the parties chose New York law to govern the dispute.<sup>116</sup> Likewise, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court relied on the FAA's pro-arbitration policy to pre-empt state laws requiring questions of contract validity to be decided by state courts.<sup>117</sup> In *Preston v. Ferrer*, the Court also pre-empted the same rule relating to state administrative agencies.<sup>118</sup>

Third, the Supreme Court has invoked the pro-arbitration policy to compel the arbitration of federal statutory claims that are meant to protect the public. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court compelled the arbitration of claims under the Sherman Antitrust Act.<sup>119</sup> Furthermore, in *Green Tree Financial Corp. v. Randolph*, the Court compelled arbitration of claims under the Truth in Lending Act.<sup>120</sup> In *Randolph*, the Court noted the pro-arbitration policy when rejecting Randolph's argument that the prohibitively high cost of arbitrating would effectively prevent her from vindicating her statutory rights.<sup>121</sup>

The above cases demonstrate the Supreme Court's use of the FAA's pro-arbitration policy to move parties quickly into arbitration—regardless of the practical effects on the parties—when a valid arbitration agreement exists. That includes lifting stays of arbitration proceedings, pre-empting state laws and procedure that restrict arbitration, and compelling arbitration even when statutory rights are at issue. However, the Supreme Court has not used the pro-arbitration

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114. *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

115. *Id.* at 15–16.

116. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995).

117. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447–49 (2006).

118. *Preston v. Ferrer*, 128 S. Ct. 978, 987 (2008).

119. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–40 (1985).

120. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90–92 (2000).

121. *Id.* at 90–91.

policy to settle the question of whether an arbitration agreement becomes unenforceable when one of its clauses is invalidated. In terms of arbitration agreements that contain invalid heightened judicial review clauses, if a court finds that the parties would not have agreed to arbitrate without the protection of a heightened judicial review clause, then no previous use of the FAA's pro-arbitration policy demonstrates how or why the policy could be used to save the agreement.<sup>122</sup> Therefore, a court or arbitral tribunal can presume an arbitration agreement with an invalid heightened judicial review clause is null without flying in the face of the FAA's pro-arbitration policy.

#### D. Determining "Who Decides"

The proposed rule raises the issue of who, the court or arbitral tribunal, should first decide whether the invalid heightened judicial review clause is severable. Perhaps the arbitral tribunal should stay its proceedings and wait for a court to decide whether the arbitration agreement is enforceable, or, perhaps the court should defer to the arbitrator. Exploring *First Options of Chicago, Inc. v. Kaplan*<sup>123</sup> and *Green Tree Financial Corp. v. Bazzle*<sup>124</sup> provides a framework for considering the issue.

In *First Options*, Manuel and Carol Kaplan owned an investment company named MKI.<sup>125</sup> They, on behalf of MKI and not as individuals, signed a debt work-out agreement with First Options of Chicago, a firm that cleared trades on the Philadelphia Stock Exchange.<sup>126</sup> The work out agreement contained an arbitration agreement.<sup>127</sup> Later, when First Options tried to compel arbitration against the Kaplans as individuals, they argued that only MKI, not the Kaplans as individuals, had consented to arbitrate.<sup>128</sup>

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122. By specifically stating that doubts regarding the *scope* of arbitral issues should be resolved in favor of arbitration (and not doubts as to the *validity* of arbitration agreements), U.S. law seems to more closely resemble the international arbitration principle of effective interpretation (when two different interpretations of the same term can be reached, the interpretation giving the term effect should be adopted) and not the principle of interpretation *in favorem validitatis* (the allegation of a valid arbitration agreement should raise a presumption as to its validity). See FOUCHARD GAILLARD GOLDMAN, *supra* note 55, at 257–61.

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

124. *Green Tree*, 539 U.S. at 445.

125. *First Options*, 514 U.S. at 940.

126. *Id.* at 940–41.

127. *Id.* at 941; see generally Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* 24 ARB. INT'L 199 (2008) (discussing the theoretical distinction in U.S. courts between claims that nothing was ever agreed to and claims that the parties did agree to something, but it is unclear exactly what).

128. *First Options*, 514 U.S. at 941.



The Court found that before it could answer whether the Kaplans as individuals were bound to arbitrate, it first had to decide whether the parties intended to decide the question of who the parties to the arbitration agreement were, or whether they intended that a court decide the matter.<sup>129</sup> It found that under normal circumstances, doubts concerning what the parties intended should be decided in favor of arbitration; however, for an exceptional class of issues, the courts should assume that parties intended the courts to decide.<sup>130</sup> According to the Court, when parties agree to arbitrate, they most likely contemplated that an arbitrator may decide the scope of the issues that fall within their agreement.<sup>131</sup> In contrast, the question of who should decide the existence of an arbitration agreement, however, is one that the Court viewed as “arcane” and unlikely to have been considered by the parties.<sup>132</sup> Therefore, the Court held that courts should assume that parties wanted those questions to be decided by courts unless the parties present “clear and unmistakable” evidence that they intended otherwise.<sup>133</sup> Underlying the distinction is the Court’s desire to avoid forcing “unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.”<sup>134</sup>

*First Options* suggests that disputes regarding the existence of an arbitration agreement are for the courts to decide (unless the parties have made their contrary intent clear), and disputes regarding the scope of the arbitration agreement are for the arbitrators to decide.<sup>135</sup> This reading of *First Options* is supported by the Court’s holding in *Green Tree Financial Corp. v. Bazzle*.<sup>136</sup> In *Bazzle*, the contracts between a commercial lender and its customers contained arbitration agreements

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129. *Id.* at 943.

130. *Id.* at 944–45.

131. *Id.* at 945.

132. *Id.* at 944–45.

133. *Id.* at 945; see also William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, in INT’L COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, at 55, 125–46 (Albert Jan van den Berg ed., 2007) (stating that in general, “jurisdictional differences have been manipulated into the realm of substantive questions whose resolution the parties are deemed to have given to the arbitrators”).

134. *First Options*, 514 U.S. at 945.

135. The issue is not whether the arbitrator has the exclusive right to decide, but whether the arbitrator has the first right to decide. Under U.S. law, no issue is ever exclusively for the arbitrator to decide. The very existence of the grounds for vacatur in sections 10 and 11 of the FAA demonstrates that parties may always appeal to the courts for review of an arbitrator’s decision. See 9 U.S.C. §§ 10–11 (2006). The Court, however, has made it clear that an arbitrator’s decision will be given great deference and that the grounds for vacatur are 1) exceedingly narrow and 2) after *Hall Street*, limited to those found in the FAA.

136. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 445 (2003).

that called for the arbitration of contract-related disputes.<sup>137</sup> When the Bazzles, South Carolina residents, attempted to initiate a class-wide arbitration, Green Tree claimed it had only agreed to arbitrate with its customers as individuals and not as a class.<sup>138</sup> The South Carolina Supreme Court held that the arbitration agreements should be interpreted under South Carolina law as allowing class-wide arbitrations.<sup>139</sup> Green Tree appealed to the United States Supreme Court, which held that it could not decide whether the arbitration agreements allowed class-wide arbitrations because resolution of the issue hinged on contractual interpretation and it should be assumed that the parties intended arbitrators to interpret their agreement.<sup>140</sup> The Court supported its holding by citing *First Options* and again distinguished between two categories of issues: one category in which courts should assume the parties intended arbitrators to decide and one category in which courts should assume the parties intended courts to decide.<sup>141</sup> Thus, courts should assume that parties intended courts to decide “gateway” questions regarding whether the parties “agreed to arbitrate a matter” or “whether the parties have a valid arbitration agreement at all.”<sup>142</sup> Conversely, courts should assume that parties intended arbitrators to decide disputes over the “kind of arbitration proceeding” or those that involve contract interpretation.<sup>143</sup>

The issue of who should decide whether an invalid heightened judicial review clause can be severed from the arbitration agreement in which it sits does not clearly fall within any of the distinctions marked by *First Options* or *Bazzele*. On one hand, the issue is one to be resolved by interpreting the parties’ agreements (regardless of whether the rule proposed in this Article is adopted). This falls into the category of issues that parties are assumed to have left to the arbitrator. On the other hand, resolving the question strikes to the validity of the arbitration agreement. If a court or arbitrator decides that the parties would not have agreed to arbitrate without a heightened judicial review clause, then the entire arbitration agreement is invalid. This falls into the category of issues in which courts should assume that the parties intended a judge to decide.

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137. *Id.* at 448.

138. *Id.* at 449.

139. *Id.* at 450.

140. *Id.* at 451–52.

141. *Id.* at 452–53.

142. *Id.* at 452.

143. *Id.* at 452–53.

Resolving the question of “who decides” the fate of arbitration agreements with invalid heightened judicial review clauses is beyond the scope of this Article. Proper resolution would require a much more lengthy examination of *First Options* and its progeny, including *Bazzele*. The question is mentioned for the purpose of identifying the issue and suggesting an analytical starting point for its resolution.

#### IV. CONCLUSION

The Supreme Court’s invalidation of heightened judicial review clauses has left the validity of existing arbitration agreements uncertain. This uncertainty extends to countless agreements in almost every jurisdiction covering any category of dispute. The issue of the agreements’ validity is currently facing courts and arbitrators and will continue to come up as parties invoke currently dormant arbitration agreements.

Federal courts will apply state law and find that the invalid clauses can be severed if doing so does not vitiate the agreement’s central purpose. The majority approach to this question, however, does not clearly state a method for finding an agreement’s central purpose. Therefore, if left unchanged, treatment of invalid heightened judicial review clauses will continue to be conclusory and provide little insight for future litigants, courts, or arbitral tribunals.

Courts and arbitral tribunals can avoid these problems by adopting the Texas courts’ approach and inquire into whether the parties would have agreed to arbitrate without the heightened judicial review clause. If the parties would have agreed to arbitrate, then the clause can be severed and the remaining agreement enforced. To promote predictability, courts and arbitral tribunals should presume that the parties would not have entered into the agreement without the heightened judicial review clause. This rebuttable presumption is based on the notion that a heightened judicial review clause is not a common addition to most arbitration clauses and, therefore, evidences its particular importance to the parties.

The proposed rule co-exists with FAA’s pro-arbitration policy, because the policy is used to remove roadblocks from arbitrations under existing agreements. The Court has not invoked the pro-arbitration policy to breathe life back into agreements that have been invalidated. Additionally, when arbitration is ongoing, parties, judges, and arbitrators should be aware of the uncertainty of who has primary authority, the judge or arbitrator, to decide the validity of the arbitration agreement.

Considering the scope of the problem created by the ruling in *Hall Street*, courts and arbitral tribunals should act quickly to employ an easily accessible approach that reduces discretion, leads to predictable outcomes, preserves the fundamental party intent requirement, and protects arbitration's legitimacy as a dispute resolution mechanism. Inquiring into whether the parties would have entered into the arbitration agreement absent the heightened judicial review clause accomplishes all of those goals.