AND THEREFORE . . . . : COMMENTS ON "UNBUNDLING PROCEDURE: CARVE-OUTS FROM ARBITRATION PROVISIONS"

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In *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, Christopher R. Drahozal and Erin O'Hara O'Connor offer a wealth of information about how sophisticated parties allocate the costs and risks of various forms of dispute resolution.[1] What they discover is that these parties, in a variety of contexts, make choices between arbitration and litigation based on the claims and remedies that are likely to be involved.[2] In other words, the parties "carve out" from a general arbitration clause matters that will be litigated.[3] For example, it appears the parties are more inclined to select the judicial process when property, as opposed to liability, rules are at stake.[4] While the descriptive element of their effort is interesting, it is not clear what implications, if any, follow from that information. Or, it may be that they have gone a bit far in suggesting that courts should mimic the services available in private markets.

According to the authors, their findings have implications in four areas: legal scholarship, the usefulness of courts in resolving business disputes, the proper use of the doctrine of unconsionability in the context of arbitration clauses, and the application of severability to arbitration clauses.[5] These comments concern the second and third of these areas.

To understand the implications and their possible limitations with respect to the usefulness of courts, it is beneficial to refer to a statement by the authors: "… even in situations where parties routinely refer matters to arbitration, the contracts we analyzed suggest that they nevertheless continue to prefer courts as a mechanism for protecting information, innovation, reputation, and property. If so, then courts should focus on providing the best possible substantive and procedural rules for the resolution of these types of disputes. That is the best way to provide value to private parties."[6]

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1. 66 FLA. L. REV. 1945 (2014) [hereinafter Drahozal & O'Hara O'Connor, *Unbundling Procedure*].

2. *Id.* at 1949.

3. Or in the context of a contract in which disputes will be settled by litigation, the parties may carve in arbitration exceptions. *Id.* at 1950.

4. *Id.* at 1993; *see generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (describing the differences between entitlements protected by property rules and entitlements protected by liability rules).

5. Drahozal & O'Hara O'Connor, *Unbundling Procedure*, *supra* note 1, at 1988. "Severability" refers to viewing parts of an arbitration agreement as separate from others for the purposes of deciding which are enforceable. *Id.* at 2002–03.

6. *Id.* at 1993 [internal citation omitted].

The authors portray the parties as shopping in the dispute resolution marketplace. Arbitration, generally, and arbitration by specific sellers offer a menu of choices, as do courts. One concern the authors address is that courts are less and less able to remain competitive in this marketplace.[7] The advantages of each service can be weighed with the most advantageous service, within limits, selected. In employing this (hopefully not overstated) premise, it is possible the authors have neglected the process through which the parties arrive at their decision.

Presumably, among sophisticated parties to a contract, each party, acting in its self-interest, prefers terms it finds most favorable. Ultimately all terms are part of the process as each party attempts to acquire the largest share possible of the gains created by contracting. One of the bargaining points is likely to be the choice of method to resolve disputes. For example, suppose the parties believe an issue of copyright may arise. Given the likely outcome and remedies available, one party may favor litigation[8] while another would prefer arbitration with a more limited array of remedies. In the same contract, they may anticipate an issue concerning termination of employment and a liquidated damages clause. One party may prefer judicial resolution because of the reluctance of courts to enforce liquidated damages clauses while the other may prefer arbitration. In fact, each party may attribute different probabilities to success under each regime. In time they may settle on a combination of methods of resolving disputes. The demand manifested in the dispute resolution market will reflect this compromise.

Whether this leads anywhere with respect to whether courts *should* change their offerings is not clear.[9] What it means to be "better" at resolving a certain type of dispute may differ with the interests of the parties—in this regard the authors seem especially concerned about increased availability of specific performance.[10] No matter what courts do—whether making specific performance more available or not—the principal effect will be on the positions taken by the parties in their negotiations. The authors do not present a rationale for why changes in the judicial system would do any more than shuffle the preferences of the parties. Moreover, an effort to mimic what the private sector offers in terms of dispute resolution may simply be a wash, making courts less attractive for some purposes for some parties while possibly making them more attractive for other parties or with respect to certain matters.

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7. Whether courts try to remain competitive is another question not addressed here. That would likely depend on the extent judicial decisions have a public, as opposed to private, effect.

8. For example, the owner of the work may prefer injunctive relief and the possibility of statutory damages available through a judicial process.

9. Moreover, if courts duplicate what is available through arbitration, the choices may actually decrease.

10. *Id.* at 1993–94.

Another implication described by the authors relates to the application of the doctrine of unconscionability to arbitration clauses particularly in the context of employment contracts.[11] Since arbitration clauses are often found to be unconscionable, the authors note that this tendency makes courts less useful to sophisticated parties. The principal example here is California, which routinely refuses to enforce arbitration clauses in the context of employment contracts.[12] According to the authors, "[t]his Article's findings cast doubt on these lines of cases[,]"and "this analysis suggests that the seemingly unrebuttable presumption that such carve outs are unfair to consumers or employers is unwarranted."[13] It is not clear what the relationship is between the research presented by the authors and judicial policy with respect to arbitration clauses pertaining to employment, nor whether there should be one. The question of whether any clause is rightfully viewed as unconscionable or not is independent of the descriptive materials provided by the authors and is hardly a function of what is found in existing contracts. In addition, dissatisfaction with a particular jurisdiction's position with respect to many issues may more easily be addressed by the "sophisticated parties" about whom the authors write by a choice of law provision. Finally, it may be the California approach that results in an employee agreeing to the arbitration clause in the first place. Changing California law may simply alter the negotiating positions of the parties.

11. *See id.* at 2000–04.

12. *See* Erin O'Hara O'Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 138 (2012). Oft times arbitration panels have safeguards as well.

13. Drahozal & O'Hara O'Connor, *Unbundling Procedure*, *supra* note 1, at 2000.