

6-23-2020

## A Cure for Every Ill? Remedies for “Pathological” Arbitration Clauses

Harout J. Samra

Ramya Ramachanderan

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Jurisdiction Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Harout J. Samra and Ramya Ramachanderan, *A Cure for Every Ill? Remedies for “Pathological” Arbitration Clauses*, 74 U. Miami L. Rev. 1110 (2020)

Available at: <https://repository.law.miami.edu/umlr/vol74/iss4/6>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# A Cure for Every Ill? Remedies for “Pathological” Arbitration Clauses

HAROUT J. SAMRA & RAMYA RAMACHANDERAN\*

*Defective arbitration and dispute resolution clauses—widely called “pathological clauses”—may undermine parties’ intent to seek recourse to arbitration rather than the courts. Questions concerning the existence and validity of arbitration clauses are subject to state contract law despite the wide sweep of the Federal Arbitration Act. This Article examines selected common “pathologies” and reviews recent court decisions, including from the Eleventh Circuit Court of Appeals and its constituent federal district courts, concerning the enforcement of such clauses.*

INTRODUCTION .....	1111
I. FEDERAL POLICY FAVORING ARBITRATION AND THE TEST USED BY COURTS .....	1113
II. DRAFTING ARBITRATION CLAUSES .....	1115
III. JUDICIAL ENFORCEMENT OF PATHOLOGICAL ARBITRATION AGREEMENTS .....	1117
A. <i>Unavailable Forum</i> .....	1117
B. <i>Non-Existing Substantive Law</i> .....	1121
CONCLUSION.....	1121

---

\* Harout J. Samra is a board-certified specialist in international law with DLA Piper LLP who focuses his practice on international dispute resolution and arbitration matters. Ramya Ramachanderan is a junior lawyer specializing in international law and dispute resolution. Ramya is trained in India (B.A., LL.B) and the United States (J.D./ LL.M).

## INTRODUCTION

Carefully drafted dispute resolution clauses in a contract are integral to facilitating transactions between parties but are often neglected in the negotiation process. Parties and their counsel invest significant time and resources to define their commercial relationship in their agreements, but sometimes fail to give the same care—or seek expert advice—when crafting a mechanism for resolving disputes.<sup>1</sup> Whether prompted by exhaustion (i.e., “midnight clauses”) or other influences (i.e., “champagne clauses”),<sup>2</sup> poorly drafted dispute resolution clauses frequently trap parties in a less than optimal dispute resolution process. In some cases, the clauses are so poorly drafted that they are internally inconsistent or otherwise suffer from defects that may make them cumbersome or even, in the worst of scenarios, unenforceable.<sup>3</sup> Frédéric Eisemann, the former Secretary-General of what is today the International Chamber of Commerce’s (“ICC”) International Court of Arbitration, famously—and aptly—called such provisions “pathological.”<sup>4</sup>

Since his 1974 article on the subject, other scholars have discussed Eisemann’s analysis of arbitration clauses with various errors or “pathologies” and his assertion that an arbitration clause must fulfill four essential functions: (1) produce mandatory consequences for the parties; (2) exclude the intervention of State courts in the settlement of the disputes, at least before the issuance of the award; (3) give powers to the arbitrators to resolve the disputes likely to arise between the parties; and (4) implement a procedure which fosters the best conditions of efficiency and speed resulting in a final award that is susceptible to judicial enforcement.<sup>5</sup> These four

---

<sup>1</sup> Nancy Holtz, *Beware the Midnight Clause: Hold the Champagne?*, JAMS (Feb. 19, 2016), <https://www.jamsadr.com/files/uploads/documents/articles/holtz-insidecounsel.com-beware-the-midnight-clause.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Adam Stone & Kaytie Pickett, *When Less Is More: The Dangers of Multiple Inconsistent Arbitration Agreements*, ABA (Oct. 8, 2018), [https://www.americanbar.org/groups/construction\\_industry/publications/under\\_construction/2018/fall/arbitration-agreements/](https://www.americanbar.org/groups/construction_industry/publications/under_construction/2018/fall/arbitration-agreements/).

<sup>4</sup> Frédéric Eisemann, *La Clause D’arbitrage Pathologique*, in COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI 129, 129–30 (1974).

<sup>5</sup> Benjamin G. Davis, *Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria*, 7 ARB. INT’L 365, 366 (1991).

elements, summarized here, have been used as the guiding principles for users and counsel advising or drafting arbitration clauses.

However, the practice of arbitration cannot be separated from the context of a domestic legal regime. For instance, while the United States has a federal policy that favors arbitration, the validity of arbitration clauses is governed by state contract law.<sup>6</sup> This fact does not conflict with the supremacy of the Federal Arbitration Act (“FAA”), which has been repeatedly held to pre-empt any State law on arbitration.<sup>7</sup> As a general matter,

[t]he FAA applies to the parties’ agreement to arbitrate disputes whether or not it is expressly mentioned in that agreement – and is presumed to preempt the state law selected in a general choice-of-law provision unless the contract expressly evidences the parties’ clear intent that state arbitration law applies in place of or in addition to the FAA.<sup>8</sup>

However, “[w]hen federal courts interpret arbitration agreements, state contract law governs and directs the courts’ analyses of whether the parties committed an issue to arbitration.”<sup>9</sup> Therefore, while the FAA governs the arbitration clause, its existence is determined by state law concerning the construction and interpretation of contracts.<sup>10</sup>

As we explain below, the Eleventh Circuit, in line with the majority of Circuit Courts, has adopted the integral provision rule to determine whether a defect in an arbitration clause is so fundamental to the parties’ agreement to arbitrate that it has the effect of rendering the agreement unenforceable.<sup>11</sup> However, how the court has

---

<sup>6</sup> See *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1426 (2017).

<sup>7</sup> Terry L. Trantina, *What Law Applies to an Agreement to Arbitrate?*, DISP. RESOL. MAG., Fall 2015, at 29.

<sup>8</sup> *Id.* (emphasis removed); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–64 (1995).

<sup>9</sup> *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1147 (11th Cir. 2015) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)); see *Paladino v. Avnet Comp. Techs., Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998) (applying “basic principles of contract interpretation in harmony with a general federal policy in favor of arbitration”).

<sup>10</sup> See *Kindred Nursing*, 137 S. Ct. at 1426.

<sup>11</sup> See *infra* notes 51–55.

applied the rule raises questions regarding whether it may be applied more broadly in a consistent and predictable manner.<sup>12</sup> This Article concludes that in light of the integral provision rule, parties should carefully draft arbitration agreements and avoid boilerplate content prone to pathological defects that may render the dispute resolution clause void.

## I. FEDERAL POLICY FAVORING ARBITRATION AND THE TEST USED BY COURTS

U.S. courts were for many years infamous for decisions that thwarted arbitration agreements between disputants. In many cases, the courts simply refused to enforce arbitration agreements.<sup>13</sup> As a result, arbitration in the United States faced significant growing pains, particularly in the early twentieth century.

Initially, courts refused to enforce arbitration agreements, arguing that an agreement to arbitrate refused the right of every “citizen . . . to resort to all the courts of the country.”<sup>14</sup> This was coupled with what is referred to as the “revocability doctrine,” in which the courts refused to compel arbitration by allowing either party to the arbitration to revoke its agreement.<sup>15</sup> Courts broadly adopted the view that arbitration—as a process—failed to provide adequate safeguards.<sup>16</sup> As a consequence, judges in this era envisioned a more active role for the justice system to protect citizens’ rights of access to the courts.<sup>17</sup> The consequence of this judicial paternalism,

---

<sup>12</sup> *See id.*

<sup>13</sup> *See generally* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 92 n.4, 97 (2012) (citing *Headley v. Aetna Ins. Co.*, 80 So. 466, 467 (Ala. 1918) (an agreement to arbitrate for disputes from the contract was universally held to be void, as against public policy); *Rison v. Moon*, 22 S.E. 165, 167 (Va. 1895) (holding that either party to an agreement to arbitrate may withdraw from it before the award is rendered)).

<sup>14</sup> *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

<sup>15</sup> Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 239 (1929).

<sup>16</sup> *See id.* at 242.

<sup>17</sup> *See generally* KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 22 (2d ed. 2010).

however, was that parties were deprived of contractual autonomy and agency.

In the face of this judicial skepticism, Congress enacted and President Coolidge signed the FAA in 1925 to rejuvenate party autonomy by ensuring that agreements to arbitrate were enforced.<sup>18</sup> Thus, the first step in the rehabilitation of arbitration in the United States was to recognize that arbitration agreements were contracts in themselves and that parties had a right to enforce them as such. Indeed, the FAA's purpose is to "quell judicial hostility by mandating that arbitration agreements be enforced on the same footing as other contracts."<sup>19</sup> As with all things, however, it took decades until the significance of the FAA was truly felt.<sup>20</sup>

In 1983, the Supreme Court held that as a matter of federal policy any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*.<sup>21</sup> To this end, the Court explained the FAA was a "congressional declaration of a liberal federal policy favoring arbitration agreements."<sup>22</sup> This clear pro-arbitration policy has been a hallmark of the Supreme Court's jurisprudence in the subsequent decades.<sup>23</sup> From this newfound enthusiasm for arbitration, a presumption of "a national policy" in favor of arbitration has emerged and influences every aspect of arbitration jurisprudence,

---

<sup>18</sup> See 65 CONG. REC. 1931 (1924); see also THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 114–15 (3d ed. 2009) (observing that legislative history shows that the FAA was enacted to allow the enforcement of ordinary contractual rights).

<sup>19</sup> Wilson, *supra* note 13, at 101 (citing H.R. REP. No. 68–96, at 1 (1924)).

<sup>20</sup> See generally *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding that an arbitration agreement is separable from the rest of the contract and is subject to independent assessment by the court and introducing the "separability doctrine").

<sup>21</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25–26 (1983).

<sup>22</sup> *Id.* at 24.

<sup>23</sup> See generally *Southland Corp. v. Keating*, 465 U.S. 1, 10–12 (1984); *Volt Info. Sci., Inc., v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–56 (1995); *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581–84 (2006); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

including, as will be seen, the enforcement of arbitration clauses suffering from defects or pathologies.<sup>24</sup>

The Supreme Court outlined the process courts must undertake when considering whether to enforce an arbitration provision in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*<sup>25</sup> The Court established a two-step inquiry that courts must administer to determine whether parties must submit the dispute to arbitration in light of the clause in the contract.<sup>26</sup> First, the court must determine whether the parties agreed for the dispute to be ultimately settled by arbitration.<sup>27</sup> Two pivotal considerations guide this analysis: (1) whether there is a valid agreement to arbitrate, and (2) whether the dispute falls within the arbitration agreement.<sup>28</sup> Second, the court must analyze whether there are legal constraints external to the parties' agreement which foreclose the arbitration of claims being made.<sup>29</sup> Thus, the clear federal policy favoring arbitration remains susceptible to state laws of contract construction to determine the parties' intentions, taking into consideration the strong policy in favor of arbitration.<sup>30</sup>

## II. DRAFTING ARBITRATION CLAUSES

A well-drafted, clear arbitration clause ensures—or at least fosters—efficient dispute resolution and highlights the parties' clear intention to submit any dispute arising from or related to the agreement to arbitration.<sup>31</sup> Indeed, the core purpose of an arbitration

---

<sup>24</sup> See, e.g., *Concepcion*, 563 U.S. at 336–39; *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 65–66 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

<sup>25</sup> 473 U.S. 614, 628 (1985); see also *Rivera v. United HealthCare Serv., Inc.*, No. 8:17-CV-1409-T-33TBM, 2018 WL 623677, at \*2 (M.D. Fla. Jan. 30, 2018) (describing the Supreme Court's process for determining whether a matter must be submitted to arbitration).

<sup>26</sup> *Mitsubishi*, 473 U.S. at 628.

<sup>27</sup> *Id.* at 626.

<sup>28</sup> *Id.*; see also *Rivera*, 2018 WL 623677, at \*2 (quoting *Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)).

<sup>29</sup> *Mitsubishi*, 473 U.S. at 628.

<sup>30</sup> See, e.g., *Delano v. Mastec, Inc.*, No. 8:10-cv-320-T-27MAP, 2010 WL 4809081, at \*2 (M.D. Fla. Nov. 18, 2010).

<sup>31</sup> See *Davis*, *supra* note 5, at 365–66; see also, JEFFREY MAURICE WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 129–

clause is to clearly communicate the parties' intention to resolve all disputes finally through arbitration without recourse to a court of law on the merits of the dispute.<sup>32</sup> This definition is in tune with the requirements posed by Eisemann.<sup>33</sup> Failing this, the agreement is pathological.<sup>34</sup> Scholars and practitioners have identified several types of pathological arbitration clauses.<sup>35</sup> These defects are best avoided by careful construction before a dispute arises.<sup>36</sup> Although parties have the ability to enter into agreements after a dispute arises, such a solution is often fraught and subject to new and special considerations of party advantage.<sup>37</sup>

Generally, arbitration clauses are upheld as valid, irrevocable, and enforceable unless defeated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."<sup>38</sup> As a result, when faced with a poorly drafted or defective arbitration clause, the courts must determine whether the parties agreed to arbitrate the dispute notwithstanding the poor drafting of the clause.<sup>39</sup> To do so, courts analyze of all the circumstances surrounding the arbitration agreement to determine whether the parties both had or should have had knowledge of the clause, were capable of entering into the agreement, whether the arbitration agreement suffers

---

30 (2012) (describing the importance of the language of an arbitration clause and explaining the essential components of an arbitration agreement); Holtz, *supra* note 1 (explaining that carefully drafted arbitration clauses can best meet the needs and reflect the intentions of the parties to a contract).

<sup>32</sup> See Davis, *supra* note 5, at 366; see also WAICYMER, *supra* note 31, at 129–130 ("Arbitration by its essential nature is based on an agreement between the parties to submit their dispute to binding and final adjudication by an identifiable tribunal.").

<sup>33</sup> See Davis, *supra* note 5, at 366.

<sup>34</sup> See *id.* at 365–66.

<sup>35</sup> See generally John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, DISP. RESOL. J., Feb.–Apr. 2003, at 29 and *passim*.

<sup>36</sup> See generally Holtz, *supra* note 1 (explaining the importance of a well-drafted arbitration clause).

<sup>37</sup> See, e.g., PIETRO ORTOLANI & DONNA SHESTOWSKY, THE ROLES OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION 133–34 (2017) (analyzing the reasons why post-dispute arbitration agreements are typically disfavored by parties).

<sup>38</sup> *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

<sup>39</sup> See *id.* at 67–73.



unconscionability, whether the forum in the agreement is available, etc.<sup>40</sup> The following Section assesses recent decisions by the Eleventh Circuit Court of Appeals and the district courts located within the Circuit in which the courts were confronted with the question of whether to enforce arbitration agreements that suffered from common pathologies, including unavailable fora and non-existing substantive law.

### III. JUDICIAL ENFORCEMENT OF PATHOLOGICAL ARBITRATION AGREEMENTS

#### A. *Unavailable Forum*

In *Parm v. National Bank of California, N.A.*, the Eleventh Circuit Court of Appeals was confronted with an arbitration agreement that required parties to arbitrate in an unavailable forum.<sup>41</sup> The appellee had entered into a payday loan agreement, which provided for arbitration conducted by the Cheyenne River Sioux Tribal Nation in accordance with its consumer dispute rules and the terms of the loan agreement.<sup>42</sup> The arbitration agreement in the contract, in full, provided the following:

*Agreement to Arbitrate.* You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

*Arbitration Defined.* Arbitration is a means of having an independent third party resolve a Dispute. A “Dispute” is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future,

---

<sup>40</sup> *See id.*

<sup>41</sup> 835 F.3d 1331, 1332 (11th Cir. 2016).

<sup>42</sup> *Id.* at 1333.

including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement.

*Choice of arbitrator.* [ . . . ] [Ms. Parm] shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association [ . . . ]; JAMS [ . . . ]; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate.<sup>43</sup>

When the appellee sought to initiate a class action, the appellant financial institution sought to enforce the arbitration agreement.<sup>44</sup> However, the district court declined to do so, finding that the arbitration agreement was unenforceable because, in part, it required the parties to arbitrate in an unavailable forum.<sup>45</sup>

The court first noted its prior binding precedent, *Inetianbor v. CashCall, Inc.*,<sup>46</sup> in which the court was faced with a very similar arbitration provision involving the same financial institution.<sup>47</sup> In

---

<sup>43</sup> *Id.* at 1333–34.

<sup>44</sup> *Id.* at 1334.

<sup>45</sup> *Id.*

<sup>46</sup> 768 F.3d 1346 (11th Cir. 2014).

<sup>47</sup> *Parm*, 835 F.3d at 1335.

*Inetianbor*, the arbitration agreement also called for arbitration “conducted by the Cheyenne River Sioux Tribe,” but noted that such arbitration should be in accordance with its “consumer dispute rules.”<sup>48</sup> However, the court concluded that the “consumer dispute rules” did not exist and the Cheyenne River Sioux Tribe “does not authorize Arbitration.”<sup>49</sup> Underscoring the latter point, the arbitrator that CashCall attempted to appoint stated that the agreement was “a private business deal” and added that “[t]he Tribe has nothing to do with any of this business.”<sup>50</sup>

Citing its prior precedent in *Brown v. ITT Consumer Financial Corporation*,<sup>51</sup> the *Inetianbor* court analyzed the arbitration agreement in light of the “integral provision rule,” which provides that the agreement will be rendered unenforceable if an “integral part of the agreement to arbitrate”—for example, the choice of forum—fails.<sup>52</sup> The court in *Inetianbor* thus declined to enforce the arbitration agreement, concluding that the parties’ selection of the Cheyenne River Sioux Tribe as the entity that would resolve the dispute was integral to their agreement, and that such forum was unavailable.<sup>53</sup>

In *Inetianbor* the court noted that while majority of circuits, specifically the Second, Third, Fifth, and Ninth, followed the integral provision rule, the rule had been subject to significant criticism in the Seventh Circuit.<sup>54</sup> In *Green v. U.S. Cash Advance Illinois*, the Seventh Circuit held that, when faced with a failure to select an available forum, the “[c]ourts should not use uncertainty in just how [an arbitration] would be accomplished to defeat the evident choice,” but instead use the power available under § 5 of the FAA to “supply details in order to make arbitration work” by “appoint[ing] an arbitrator.”<sup>55</sup>

Notably, the court in *Inetianbor* distinguished *Brown*, the very case in which the Eleventh Circuit first adopted the integral

---

<sup>48</sup> *Inetianbor*, 768 F.3d at 1348.

<sup>49</sup> *Id.* at 1354.

<sup>50</sup> *Id.*

<sup>51</sup> 211 F.3d 1217 (11th Cir. 2000).

<sup>52</sup> *Inetianbor*, 768 F.3d at 1350.

<sup>53</sup> *Id.* at 1354.

<sup>54</sup> *Id.* at 1350 & n.1.

<sup>55</sup> 724 F.3d 787, 793 (7th Cir. 2013).

provision rule.<sup>56</sup> In *Brown*, the arbitration agreement provided for binding arbitration “under the Code of Procedure of the National Arbitration Forum.”<sup>57</sup> However, by the time the dispute arose, the National Arbitration Forum (“NAF”) no longer existed.<sup>58</sup> Nevertheless, the court concluded that “[t]he unavailability of the NAF does not destroy the arbitration clause” because there was “no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate” and that this defect, in any event, could be cured by the court naming the arbitrator pursuant to 9 U.S.C. § 5.<sup>59</sup> The court in *Inetianbor* noted that “[t]his case is quite unlike *Brown*, where this Court applied the integral provision rule but permitted substitution pursuant to §5” because, “[i]n *Brown*, the arbitration agreement provided for the procedural rules only,” whereas the agreement in *Inetianbor* selected “not just the rules of procedure, but also the arbitral forum.”<sup>60</sup>

Revisiting this issue in *Parm*, the court once again applied the integral provision rule.<sup>61</sup> Though the arbitration agreements were substantially similar, the agreement in *Parm* also provided “the option to select the American Arbitration Association (“AAA”) or JAMS . . . as neutral arbitral fora” to “to administer the arbitration.”<sup>62</sup> The court applied the “plain-meaning” rule of contract construction under Georgia law.<sup>63</sup> Concluding that the reference to the AAA and JAMS in the agreement “only provides an administrative vehicle to appoint the CRST arbitrator and does not affect the importance of the CRST forum in the agreement,” the court noted that it could not distinguish the agreement from *Inetianbor* and that the agreement was, therefore, not enforceable.<sup>64</sup>

---

<sup>56</sup> *Inetianbor*, 768 F.3d at 1351.

<sup>57</sup> *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1220 (11th Cir. 2000).

<sup>58</sup> *Id.* at 1220–21.

<sup>59</sup> *Id.* at 1222.

<sup>60</sup> *Inetianbor*, 768 F.3d at 1351.

<sup>61</sup> *See Parm v. Nat’l Bank of Cal.*, 835 F.3d 1331, 1337 (11th Cir. 2016).

<sup>62</sup> *Id.* at 1333, 1335.

<sup>63</sup> *Id.* at 1335.

<sup>64</sup> *Id.* at 1338.

### B. *Non-Existing Substantive Law*

In *Parnell v. Cashcall, Inc.*, a plaintiff once again challenged the validity of the arbitration clause contained in a loan agreement with Western Sky Financial, LLC that was virtually identical to the arbitration agreements at issue in *Parm* and *Inetianbor*.<sup>65</sup> In addition to analyzing the selection of the Cheyenne River Sioux Tribal Nation as the forum for the arbitration, the district court also considered the choice of law provision, which provided that “[t]he arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement.”<sup>66</sup> Significantly, the court determined that it was “not clear that the Tribe even has any laws governing the enforceability of contracts.”<sup>67</sup> As a result, the court stated that the plaintiff would be left with “little to no ability to determine what substantive law would govern the Agreement at an arbitration, even if the dispute resolution rules of an arbitration organization can govern the conduct of the arbitration proceeding itself.”<sup>68</sup> This “contradictory and confusing” language was part of an effort, the court concluded, to “convert a choice of law clause into a choice of no law clause.”<sup>69</sup> The court declined to enforce the arbitration agreement considering the unavailability of the forum in combination with the broader unconscionability of the arbitration agreement.<sup>70</sup>

### CONCLUSION

The Eleventh Circuit’s approach to resolving the challenge of “pathological” arbitration clauses, particularly after *Inetianbor*, raises several important questions. First, the practical consequence of the court’s analysis is difficult to assess beyond the particular circumstances of those cases, which assessed the question of an unavailable forum. Beyond this context, it is difficult to extract a general principle for application. In *Green*, Judge Easterbrook highlighted this challenge as a practical matter for judicial determination and asked “[h]ow could a district judge tell what is ‘integral’ without

---

<sup>65</sup> *Parnell v. Cashcall, Inc.*, 181 F. Supp. 3d 1025, 1030 (N.D. Ga. 2016).

<sup>66</sup> *Id.* at 1040.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1042–43.

<sup>70</sup> *Id.* at 1044.

a trial at which parties testify about what was important to them and lawyers present data about questions such as whether consumers or businesses shifted from arbitration to litigation when the Forum stopped accepting new consumer disputes for resolution?”<sup>71</sup> Absent such an inquiry, the analysis may be reduced little more than a parody of Justice Stewart’s definition of obscenity—“I know it when I see it.”<sup>72</sup>

Second, the court’s distinction of *Brown* in *Inetianbor* may elevate form over substance, especially in light of the hasty manner in which arbitration agreements frequently are negotiated and drafted.<sup>73</sup> For example, a provision calling for “arbitration under the rules of” an institution which does not exist would be enforceable, but a provision providing for “arbitration by” the same non-existent institution would not be enforceable. Under the court’s stated approach, the latter would be an integral provision, but the former would not.<sup>74</sup>

Such decisions have serious and long-reaching consequences. *Parm* and *Inetianbor* highlight two frequent challenges when drafting arbitration agreements. First, parties commonly utilize templates for dispute resolution agreements. As a result, when an arbitration agreement suffers from some pathology that renders it unenforceable, the problem risks cascading when that agreement, or substantially similar agreements, have been used repeatedly in numerous contracts. Consider, for example, that in 2018, the Third Circuit heard a challenge to an arbitration agreement nearly identical to those at issue in *Parm* (2016) and *Inetianbor* (2014).<sup>75</sup> This is the consequence of the repeated use of a single defective arbitration agreement. Second, and compounding the first point above, parties draft agreements long before disputes arise and, as a consequence, sometimes face new legal developments that make established

---

<sup>71</sup> *Green v. U.S. Cash Advance Ill.*, 724 F.3d 787, 792 (7th Cir. 2013).

<sup>72</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>73</sup> *See Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1351 (11th Cir. 2014).

<sup>74</sup> *See id.* at 1351–53.

<sup>75</sup> *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 223 (3d Cir. 2018). *See also Parm v. Nat’l Bank of Cal.*, 835 F.3d 1331, 1333–34 (11th Cir. 2016); *Inetianbor*, 768 F.3d at 1346.

arbitration agreements unenforceable.<sup>76</sup> As a consequence, parties must be cautious not only to thoroughly vet their draft arbitration agreements, but should also be as attentive as possible to legal developments that might render their arbitration agreements unenforceable in the future.

---

<sup>76</sup> See, e.g., *Parm*, 835 F.3d at 1337 (noting that “the agreement in [*Parm*] was executed more than four months before even the district court held that the agreement in the *Inetianbor* case was void”).