

Note
**No Longer Available: Critiquing the
Contradictory Ways Courts Treat Exclusive
Arbitration Forum Clauses when the Forum Can
No Longer Arbitrate**

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Joyce Green, a senior citizen living on social security, entered into a loan in 2012 with two companies collectively known as “the Loan Machine.”¹ With a 36% annual percentage rate (APR), the loan terms Joyce Green agreed to were not exactly favorable.² However, after the Loan Machine compounded the loan with various fees, the actual interest rate was around 200% APR.³ Thus, even after paying back \$983.93 over three months, Green still owed \$1,533.67 on her original \$1,650 loan.⁴ Furthermore, Green only discovered this deception months later when she requested billing statements from the Loan Machine.⁵

The loan agreement contained an arbitration clause which stated that all disputes would “be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum.”⁶ However, the National Arbitration Forum (NAF) has not been accepting consumer arbitra-

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1. Brief of Plaintiff-Appellee at 2–3, *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013) (No. 13-1262), 2013 WL 1886964; Paul Bland, *Activist Seventh Circuit Panel Helps Out Payday Lender Re-Writing Arbitration Clause Picking Corrupt Firm*, PUB. JUST. (Aug. 2, 2013), <http://publicjustice.net/blog/activist-seventh-circuit-panel-helps-out-payday-lender-by-re-writing-arbitration-clause>.

2. See Brief of Plaintiff-Appellee, *supra* note 1, at 3.

3. *Id.*

4. *Id.*

5. See *id.*

6. *Id.* at 4.

tions since July 2009.⁷ Refusing to accept new consumer arbitrations was part of the NAF's settlement agreement with the Minnesota Attorney General over its fraudulent and deceptive trade practices.⁸ Notwithstanding the NAF's unavailability, when Joyce Green brought her dispute to court, the Loan Machine moved to compel arbitration.⁹ The Seventh Circuit upheld the motion and remanded the case, instructing the district court to appoint an arbitrator for the parties who would employ the NAF Procedures.¹⁰

Green v. U.S. Cash Advance Illinois, LLC, illustrates an issue that has plagued state and federal courts alike for years: What should a court do when the parties' contract includes an exclusive arbitration forum agreement and the arbitration forum cannot, or refuses to, hear the dispute?¹¹ While this "exclusive arbitration forum dispute" issue may not appear to be substantial, whether a court hears the case or appoints a new arbitrator can have a huge effect on someone like Joyce Green. Green's loan agreement referred any disputes to the NAF, which had not been accepting arbitrations for nearly three years due to its fraudulent practices against consumers.¹² As such, it is clear that the Loan Machine was either (a) indolent in its drafting, or (b) trying to get around the fact that it could no longer employ the pro-creditor NAF as a forum.¹³ Beyond the consumer implications, however, these exclusive arbitration forum disputes are important because they raise issues of contract interpretation (as exclusive arbitration agreements are contractually created) and statutory interpretation (as courts have decided these issues under the Federal Arbitration Act), with courts conflictingly interpreting the same contractual and

7. *Id.* at 5.

8. *See id.*; *Firm Agrees To End Role in Arbitrating Card Debt*, N.Y. TIMES (July 19, 2009), <http://www.nytimes.com/2009/07/20/business/20credit.html>.

9. Brief of Plaintiff-Appellee, *supra* note 1, at 5.

10. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 788, 793 (7th Cir. 2013).

11. *See id.* at 790–93 (discussing how various courts have approached this issue); *Riley v. Extencicare Health Facilities, Inc.*, 826 N.W.2d 398, 405–06 (Wis. Ct. App. 2012) (same).

12. *See supra* notes 6–8 and accompanying text.

13. *See* Brief of Plaintiff-Appellee, *supra* note 1, at 2–5; *Firm Agrees To End Role in Arbitrating Card Debt*, *supra* note 8. The dissenting judge certainly thought this was the situation. *Green*, 724 F.3d at 794 (Hamilton, J., dissenting) (“When U.S. Cash Advance was still providing for arbitration by the Forum in 2012, was it being negligent or deliberately deceptive?”).

statutory language.¹⁴

This Note argues that the solution to this issue is two-fold: practitioners need to more clearly draft these types of clauses, and the courts must adopt consistent procedures for deciding exclusive arbitration forum disputes. This two-part solution will allow parties to better anticipate how a court will interpret contractual language creating an exclusive arbitration forum agreement. Part I of this Note discusses the types of situations that can cause an exclusive arbitration forum to refuse to hear a dispute, and how courts typically decide whether to adjudicate the dispute or send it to arbitration. It also discusses why parties may be concerned if the case goes to arbitration rather than litigation. Part II examines the contradictory and problematic ways in which courts have interpreted the same basic contractual and statutory language. Part III proposes a two-part solution. First, to ensure that exclusive arbitration disputes never go to court in the first place, this Note contends that attorneys must take care to draft these agreements unambiguously, and sets out guidelines for doing so. Second, Part III argues that when courts do hear these disputes, they should base their rulings on uniformity and fairness. Specifically, this Note proposes that courts should focus more on the intentions of the parties, rather than just the plain language of the contract, and appoint a new arbitrator pursuant to their statutorily-granted power only when the parties intended to arbitrate regardless of whether or not the exclusive arbitration forum was available.

I. WHY EXCLUSIVE ARBITRATION FORUM DISPUTES ARISE AND HOW COURTS CURRENTLY HANDLE THEM

This Part discusses the background behind exclusive arbitration forum disputes and the ways in which courts decide how to rule on them. First, Section A outlines the circumstances under which arbitration forums that parties have exclusively agreed to have nevertheless declined to hear those parties' disputes. Section A also discusses the prevalence of these exclusive arbitration forum disputes. Next, Section B discusses the approaches courts have used to determine whether to adjudicate an exclusive arbitration forum dispute or submit it to arbi-

14. 9 U.S.C. § 5 (2012); *see, e.g., Green*, 724 F.3d at 792–93 (holding that 9 U.S.C. § 5 gave the court the authority to appoint a new arbitrator); *In re Salomon S'holders' Derivative Litig.*, 68 F.3d 554, 559–61 (2d Cir. 1995) (holding that 9 U.S.C. § 5 did not give the court the authority to appoint a new arbitrator).

tration. Finally, Section C describes why parties may want their suit to end up in litigation, rather than arbitration, and thus why this issue may be an important one to parties that face it.

A. CIRCUMSTANCES THAT CAUSE, AND THE PREVALENCE OF, EXCLUSIVE ARBITRATION FORUM DISPUTES

Exclusive arbitration forums refuse or are unable to hear disputes for a number of reasons. The forum may no longer be in existence by the time the dispute arises.¹⁵ The forum may have changed its policies since, or even before, the parties drafted the contract so that the arbitration clause is no longer enforceable in that forum.¹⁶ The forum may have posted a moratorium on the parties' type of dispute.¹⁷ If the forum limits arbitration to members, the party with the membership may have lost good standing with the forum since entering into the contract.¹⁸ If the forum has discretion to do so, it may decline to hear the dispute.¹⁹ Or, in rare cases, the forum may have never

15. See, e.g., *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220–22 (11th Cir. 2000) (noting that the parties agreed to arbitration by the NAF, which was no longer in existence); *Ex parte Warren*, 718 So. 2d 45, 46–47 (Ala. 1998) (noting that the parties agreed to arbitration by the National Academy of Conciliators, which had since gone out of existence).

16. See, e.g., *New Port Richey Med. Investors, LLC v. Stern ex rel. Petscher*, 14 So. 3d 1084, 1086 (Fla. Dist. Ct. App. 2009) (discussing how the parties agreed to arbitration by the American Arbitration Association (AAA) but that the AAA had changed its policies, even before the parties entered into the agreement, to only accept cases where the patient entered into the agreement post-dispute); *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 436–37 (S.C. 2009) (discussing how the parties agreed to arbitration by the National Health Lawyers Association but that the forum “no longer arbitrate[s] personal injury claims arising under pre-injury arbitration agreements”).

17. See, e.g., *QuickClick Loans, LLC v. Russell*, 943 N.E.2d 166, 168–70 (Ill. App. Ct. 2011) (stating that the parties agreed to arbitration by either the NAF or the AAA but that the AAA had since issued a moratorium on certain debt collection cases); *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 558–59 (W. Va. 2013) (same).

18. See, e.g., *Dover Ltd. v. A.B. Watley, Inc.*, No. 04 Civ. 7366(FM), 2006 WL 2987054, at *1–3 (S.D.N.Y. Oct. 18, 2006) (noting that the parties agreed to arbitration by the National Association of Securities Dealers (NASD), which will not arbitrate for terminated members without the other party's consent; that the NASD terminated the defendant's membership; and that the plaintiff did not consent).

19. See, e.g., *Salomon*, 68 F.3d at 556 (discussing how the parties agreed to arbitration through the New York Stock Exchange, which has the discretion to refuse to hear a case and did so with the parties because it found that it had neither the jurisdiction nor the expertise to hear the dispute); *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1362–63 (N.D.

conducted arbitrations²⁰ or never existed in the first place.²¹

Most recently, the primary reason courts face exclusive arbitration forum disputes is because the NAF has stopped accepting consumer arbitrations.²² Lori Swanson, the Minnesota Attorney General, sued the NAF for bias against consumers in July of 2009.²³ The lawsuit included accusations of the NAF “violating state consumer fraud, deceptive trade practices and false advertising laws by hiding financial ties to collection agencies and credit card companies.”²⁴ More specifically, among the charges against the NAF were allegations that the NAF had ties with the debt-collection law firms representing credit card companies that arbitrated before it, and that a New York hedge fund “owned stakes in such collection law firms and the NAF, sending arbitration business between the two.”²⁵ Three days after filing the complaint, Swanson and the NAF reached a settlement in which the NAF agreed to stop accepting all new consumer arbitrations nationwide.²⁶ Swanson noted that the “alleged cross ownership” between the NAF and debt collection law firms helped give her the necessary leverage for the settlement, though she also uncovered allegations that the NAF was even helping creditors write their cases.²⁷ In simple terms, the NAF stopped accepting arbitrations because it was defrauding

Ill. 1990) (discussing how the parties agreed to arbitration through the Chicago Board of Trade but that the Board declined to hear the parties’ dispute, possibly because of a conflict of interest).

20. See *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1348–49 (11th Cir. 2014) (stating that the parties agreed to arbitration conducted by the Cheyenne River Sioux Tribal Nation but that the Cheyenne River Sioux Tribal Nation does not conduct arbitrations).

21. See *Laboratorios Grossman, S.A. v. Forest Labs., Inc.*, 295 N.Y.S.2d 756, 757 (App. Div. 1968) (stating that the parties agreed to arbitration by the Pan-American Arbitration Association, which does not and never has existed).

22. See, e.g., *Khan v. Dell Inc.*, 669 F.3d 350, 351–53 (3d Cir. 2012); *Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *1 (W.D. Ark. Nov. 18, 2011); *Klima v. Evangelical Lutheran Good Samaritan Soc’y*, No. 10-cv-1390-JAR-JPO, 2011 WL 5412216, at *1 (D. Kan. Nov. 8, 2011); *Miller v. GGNCS Atlanta, LLC*, 746 S.E.2d 680, 682–84 (Ga. Ct. App. 2013); *Carr v. Gateway, Inc.*, 944 N.E.2d 327, 329–31 (Ill. 2011); *Wright v. GGNCS Holdings LLC*, 2011 SD 95, ¶¶ 1–7, 808 N.W.2d 114, 115–17.

23. *Minnesota Sues a Credit Arbitrator, Citing Bias*, BLOOMBERG BUS. (July 14, 2009), http://www.businessweek.com/bwdaily/dnflash/content/jul2009/db20090714_952766.htm.

24. *Firm Agrees To End Role in Arbitrating Card Debt*, *supra* note 8.

25. Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BLOOMBERG BUS. (July 19, 2009), http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html.

26. See *id.*

27. *Id.*

consumers.²⁸

It is difficult to say how often exclusive arbitration forum disputes arise, as there is limited scholarly work on this issue. However, it appears that their numbers are on the rise, primarily because of the NAF's unavailability. For example, between 1958²⁹ and July 2009 only three circuits (the Second, Ninth, and Eleventh) had ruled on what to do in an exclusive arbitration forum dispute.³⁰ In the almost six year period since July 2009, that number has doubled with the Third, Fifth, and Seventh Circuits also ruling on this issue³¹ and with yet another exclusive arbitration dispute coming before the Eleventh Circuit.³² This is unsurprising when one considers that the NAF, the largest provider of commercial debt arbitration services before shutting down, handled 214,000 claims in 2006 alone.³³ Moreover, based on articles published in magazines and online, it is apparent that this issue is becoming widespread enough to garner the attention of attorneys practicing arbitration law.³⁴

28. See Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WK., June 16, 2008, at 072–74 (“NAF presents its service in print and online advertising as quicker and less expensive than litigation but every bit as unbiased. Its Web site promotes ‘a fair, efficient, and effective system for the resolution of commercial and civil disputes in America and worldwide.’ But internal NAF documents and interviews with people familiar with the firm reveal a different reality. Behind closed doors, NAF sells itself to lenders as an effective tool for collecting debts. The point of these pitches is to persuade the companies to use the firm to resolve clashes over delinquent accounts. . . . At times, NAF does this kind of marketing with the aid of law firms representing the very creditors it’s trying to sign up as clients.”).

29. One of the first (if not the first) exclusive arbitration forum disputes occurred in 1958. See *Delma Eng’g Corp. v. K & L Constr. Co.*, 174 N.Y.S.2d 620, 621 (App. Div. 1958).

30. See *Reddam v. KPMG LLP*, 457 F.3d 1054, 1059–61 (9th Cir. 2006), *abrogated on other grounds by* *Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000); *In re Salomon Inc. S’holders’ Derivative Litig.*, 68 F.3d 554, 557–61 (2d Cir. 1995).

31. See *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013); *Khan v. Dell Inc.*, 669 F.3d 350, 353–57 (3d Cir. 2012); *Ranzy v. Tijerina*, 393 F. App’x 174 (5th Cir. 2010) (per curiam).

32. See *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014).

33. Nancy A. Welsh, *What Is “(Im)partial Enough” in a World of Embedded Neutrals*, 30 J. NAT’L ASS’N ADMIN. L. JUDICIARY 495, 538 (2010).

34. See, e.g., Christopher J. Karacic & Howard S. Suskin, *When the Arbitration Forum Is Unavailable: What Happens Next?*, ALTERNATIVE DISP. RESOL., Winter 2014, at 2, 5 (“Ultimately, the Supreme Court may be called upon to resolve the split among the circuits The issue is particularly salient because the NAF—a once-popular and oft-chosen arbitration forum—has become unavailable for all consumer arbitrations.”); William A. Schreiner, Jr., *Is an Arbitration Agreement Valid if the Designated Arbitrator Is Unavailable??*, LEXOLOGY (Oct. 2, 2013), <http://www.lexology.com/library/>

One might assume that the NAF's impact on creating exclusive arbitration disputes is over, now that it has been nearly six years since the NAF stopped accepting consumer arbitrations. However, that assumption would be incorrect. It is unclear how many people have active contracts designating the NAF as the exclusive arbitration forum, but Swanson's complaint noted that MBNA/Bank of America, JP MorganChase, Citigroup, Discover Card, Deutsche Financial, and American Express were, at the time, processing claims in the NAF under pre-dispute mandatory arbitration clauses.³⁵ If large credit card companies like these designated the NAF as an exclusive arbitration forum, one can only imagine how many smaller companies did the same. Thus, although these large, sophisticated companies have likely updated their contracts with their consumers to write out the NAF as the exclusive arbitration forum,³⁶ it is unlikely that all of these smaller, less sophisticated companies have done the same. This is not mere conjecture; after conducting a brief online search, this author found a number, and variety, of companies that still list the NAF as the exclusive arbitration forum under the Terms and Conditions found on their websites—websites that have been updated since July 2009.³⁷ Therefore, while the numbers may be uncertain, it is clear a large number of active contracts exist that still

detail.aspx?g=3b8fd87e-cf63-4655-9c06-ce2c650570c2 (discussing a Virginia Supreme Court ruling on this issue).

35. Complaint at 5, *Swanson v. Nat'l Arbitration Forum, Inc.* (July 14, 2009) (No. 27CV0918550), 2009 WL 2029918.

36. For example, in new contracts with customers, Discover Card and American Express both designate the American Arbitration Association or JAMS as the exclusive arbitration forum. *Cardmember Agreement: Part 2 of 2*, AM. EXPRESS 1, 5 (Dec. 31, 2014), <http://web.aexp-static.com/us/content/pdf/cardmember-agreements/green/AmericanExpressGreenCard.pdf>; *Interactive Guide: Arbitration*, DISCOVER, <http://www.discover.com/credit-cards/cardmember-agreement/arbitration.html> (last updated Dec. 31, 2014).

37. See *Terms and Conditions*, DYNVOX, <http://www.dynavoxtech.com/terms-and-conditions> (last visited Apr. 3, 2015) (belonging to a tablet and app company with a website copyright of 2014); *Terms and Conditions*, LEADERSHIP INST. LAS VEGAS, <http://www.leadlv.com/terms-and-conditions> (last visited Apr. 3, 2015) (belonging to a leadership program, sponsored by the Las Vegas Metro Chamber of Commerce, with a website copyright of 2015); *Terms & Conditions*, MYPAYDAYCASHADVANCELOANS.COM, <http://mypaydaycashadvanceloans.com/terms-and-conditions.aspx> (last visited Apr. 3, 2015) (belonging to a loan company with a website copyright of 2012); *Terms & Conditions / Privacy Policy*, FIX IT TODAY, <http://www.fixittoday.com/tcp.php> (last visited Apr. 3, 2015) (belonging to an auto repair company with a website copyright of 2015); *Terms of Use*, RENOVATION READY, <http://www.renovationready.com/about/terms-of-use> (last visited Apr. 3, 2015) (belonging to a home remodeling loan company with a website copyright of 2014).

list the NAF as the exclusive arbitration forum. Therefore, potentially hundreds of lawsuits could still arise over the NAF being unavailable to arbitrate. Indeed, a number of court decisions have even involved contracts that designated the NAF as the exclusive arbitration forum and were signed by the parties after July 2009, including *Green v. U.S. Cash Advance Illinois, LLC*.³⁸

Additionally, contracts involving the NAF do not have a monopoly over this issue; some of the recent cases involving exclusive arbitration forum disputes have arisen over forums completely separate from the NAF.³⁹ And even if the NAF's effect on the rising number of exclusive arbitration forum disputes peters out, what happened with the NAF could happen again. For example, "[v]ery often parties designate the American Arbitration Association (AAA) as the forum in which disputes will be heard and determined, and specify AAA rules for commercial and other types of disputes to control the process."⁴⁰ Thus, the same thing would happen if the AAA were to stop accepting consumer arbitrations like the NAF, which is not entirely implausible since the AAA has been accused of fraudulent activities in the past⁴¹ and issued a moratorium on commercial arbitration for a period around the time Swanson filed her complaint against the NAF.⁴² Therefore, it is unlikely that this issue will become obsolete any time soon.

In sum, there are a number of reasons why a forum might

38. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 788–89 (7th Cir. 2013) (signed May 8, 2012); see, e.g., *Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 66–67 (S.D.N.Y. 2012) (signed March 9, 2011); *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 969 (D. Minn. 2012) (signed September 9, 2009); *Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398, 401 (Wis. Ct. App. 2012) (signed June 3, 2010).

39. See, e.g., *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1348 (11th Cir. 2014) (involving the Cheyenne River Sioux Tribal Nation as the designated arbitration forum).

40. Robert N. Rapp & Alexander B. Reich, *AAA Shakes Up ADR with New Rules To Permit Appeals of Arbitration Awards*, LEXOLOGY (Nov. 6, 2013), <http://www.lexology.com/library/detail.aspx?g=1d466bd0-aeff-43e5-96b9-def338ff7baf>; see, e.g., *Terms and Conditions*, STUDENT LOAN COALITION, http://www.studentloancoalition.com/index.php?option=com_content&view=article&id=6&Itemid=104 (last visited Apr. 3, 2015).

41. See Pam Martens, *How Citigroup Stays Fraud-Proof*, SALON (Sept. 8, 2012), http://www.salon.com/2012/09/08/how_citigroup_stays_fraud_proof.

42. Mark Cohen, *Minnesota AG To Testify in D.C. Today; AAA Puts Moratorium on Consumer Debt Cases*, MINN. LAW. (July 22, 2009), <http://minnlawyer.com/2009/07/22/minnesota-ag-to-testify-in-d-c-today-aaa-puts-moratorium-on-consumer-debt-cases>.

refuse to hear a party's dispute.⁴³ However, the fact that the NAF is no longer accepting arbitrations has been by far the most common reason within the last five years, and it appears to be the reason why the number of these disputes has been on the rise. Although it is unclear how many contracts exist with, or how many lawsuits are filed over, exclusive arbitration forum agreements, one can surmise that this will continue to be an active issue in the coming years. Nevertheless, while a forum's refusal may be why the parties are fighting, issues also arise once they bring their dispute to court.

B. THE APPROACHES COURTS TAKE WHEN DECIDING WHETHER TO ARBITRATE OR ADJUDICATE AN EXCLUSIVE ARBITRATION FORUM DISPUTE

Generally, courts face two types of interpretation issues when deciding whether to send parties with an exclusive arbitration forum clause to arbitration or to adjudicate their dispute. First, courts must use contract law to interpret the parties' contract and its arbitration clause,⁴⁴ and contract law varies from state to state.⁴⁵ Second, courts face issues of statutory interpretation because their ability to appoint a new arbitrator arises from statute.⁴⁶ Though some state courts have assumed this power from state statute,⁴⁷ most state courts and all federal courts gain authority from the Federal Arbitration Act (FAA) to appoint a new arbitrator.⁴⁸ Specifically, 9 U.S.C. § 5 states:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming

43. See *supra* notes 15–21 and accompanying text.

44. See *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990) (“An arbitration provision, like any other binding agreement between parties, is a creature of contract, and therefore a party can be compelled to arbitrate only to the extent he has so agreed.” (citation omitted)).

45. Charles L. Knapp, *Opting Out or Copping Out?: An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOYOLA L.A. L. REV.* 95, 116 (2006) (“[T]he rules governing contract enforcement vary from state to state . . .”).

46. See *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792–93 (7th Cir. 2013) (using 9 U.S.C. § 5 to appoint a new arbitrator); *Khan v. Dell Inc.*, 669 F.3d 350, 356–57 (3d Cir. 2012) (same).

47. See, e.g., *New Port Richey Med. Investors, LLC v. Stern ex rel. Petscher*, 14 So. 3d 1084, 1087 (Fla. Dist. Ct. App. 2009) (using the Florida Arbitration Code to appoint a new arbitrator).

48. See 9 U.S.C. § 5 (2012).

of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.⁴⁹

Although courts use contract and statutory law when trying to resolve this issue, they vary widely in how they apply them.⁵⁰ This Section discusses the three general approaches that courts have used in determining whether to litigate a case or send it to arbitration under 9 U.S.C. § 5.

1. Approach #1: The Integral-Ancillary Test

The vast majority of courts use the “Integral-Ancillary Test” when determining how to treat an exclusive arbitration forum clause under 9 U.S.C. § 5.⁵¹ This test originates from *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,⁵² but *Brown v. ITT Consumer Financial Corp.* provides the most cited form of the test⁵³:

Where the chosen forum is unavailable . . . or has failed for some reason, [9 U.S.C.] § 5 applies and a substitute arbitrator may be named. Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an “ancillary logistical concern” will the failure of the chosen forum preclude arbitration.⁵⁴

Even though this test is the majority rule, courts apply it differently. Courts generally accept that rules of contract interpretation decide whether the choice of forum is integral or not.⁵⁵ However, some courts only look to the plain language of the

49. *Id.* (emphasis added).

50. *See* *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 438–39 (S.C. 2009).

51. *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 567 (W. Va. 2013) (“This [integral-ancillary] formulation of the application of section 5 of the FAA is the majority rule.”).

52. *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364–66 (N.D. Ill. 1990).

53. *See* *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 685 (Ga. Ct. App. 2013) (“The integral term vs. ancillary logistical concern test articulated by *Brown* has been adopted by the large majority of jurisdictions . . .” (internal quotation marks omitted)).

54. *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (citations omitted) (quoting *Zechman*, 742 F. Supp. at 1364).

55. *See* *Klima v. Evangelical Lutheran Good Samaritan Soc’y*, No. 10-cv-1390-JAR-JPO, 2011 WL 5412216, at *3 (D. Kan. Nov. 8, 2011) (“To determine whether selection of a specific arbitrator is integral to the entire agreement, courts refer to general principles of contract interpretation.”).

contract in making the integral-ancillary determination.⁵⁶ Other courts emphasize that a choice of forum cannot be integral without a showing that it was integral to the parties when they entered into the contract via external evidence.⁵⁷ Still other courts examine a combination of contractual plain language and other, external evidence, such as party testimony.⁵⁸

As for the plain language of the contract, some courts rely heavily on whether the contract contains an “express statement” designating a particular arbitration forum as exclusive.⁵⁹ Others find that an implied statement of exclusivity is enough to make the forum integral.⁶⁰ As for external evidence, a number of courts examine the forum’s rules or code of procedures when deciding if the forum is integral,⁶¹ but other courts hold that a forum’s rules and procedures have no effect on whether the forum is integral.⁶² Altogether, while the Integral-Ancillary Test may be the majority rule, courts vary widely in how they apply it.

56. *See, e.g., id.* (noting that the court only needs to look to the terms of the agreement to determine the parties’ intent); *Branch v. Sickert*, No. 2:10-CV-128-RWS, 2011 WL 796783, at *5 (N.D. Ga. Feb. 28, 2011) (looking only to the terms of the contract in deciding whether the choice of forum was integral).

57. *See, e.g., Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 966, 975 (D. Minn. 2012) (noting, first, that the plaintiff offered no evidence that designating the NAF as the arbitration forum was important to either party when entering into the contract); *New Port Richey Med. Investors, LLC v. Stern ex rel. Petscher*, 14 So. 3d 1084, 1087 (Fla. Dist. Ct. App. 2009) (same).

58. *See, e.g., Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167–68 (D.S.D. 2010) (looking to the language of the contract and to the testimony of the plaintiff).

59. *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (“We see no evidence that the choice was integral here—in fact, there was not even an express statement that the NASD would be the arbitrator.”), *abrogated on other grounds by* *Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010); *Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195, 1202 (Ind. Ct. App. 2011) (“At a minimum, for the selection of an arbitrator to be ‘integral’, the arbitration clause must include an express statement designating a specific arbitrator.”).

60. *See, e.g., Riley v. Extencicare Health Facilities, Inc.*, 826 N.W.2d 398, 406 (Wis. Ct. App. 2012) (“Even without the express use of the term ‘exclusively,’ the Indiana Supreme Court found the . . . provision integral to the agreement . . .”).

61. *See, e.g., Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 686 (Ga. Ct. App. 2013) (taking into account the fact that NAF’s Code of Procedure states that only the NAF may apply it).

62. *See, e.g., Wright v. GGNSC Holdings LLC*, 2011 SD 95, ¶ 19, 808 N.W.2d 114, 120 (finding of “little significance” the fact that the NAF rules state that only the NAF may apply them).

2. Approach #2: The Exclusivity Test

A few other courts have followed a second approach, here termed the “Exclusivity Test.” Instead of debating the importance, or integrality, of the arbitration forum, the court simply focuses on whether the contract specifies that arbitration can only be conducted by a single arbitration forum.⁶³ If it does, the court holds that it must adjudicate the dispute.⁶⁴ If it does not, the court holds that it must submit the dispute to arbitration.⁶⁵ However, courts applying this test may interpret the same basic contract language differently. For example, when faced with contractual language specifying arbitration by the rules or procedures of a particular forum, the Second Circuit decided the forum was exclusive and the Seventh Circuit decided it was not.⁶⁶

3. Approach #3: Arbitration Bias

Finally, a couple of early courts faced with exclusive arbitration forum disputes simply opted to submit the case to arbitration.⁶⁷ These courts appear to have assumed that if the parties agreed to arbitration, arbitrating was their intent and the forum was secondary.⁶⁸ This Note will not discuss this approach further, as it was only followed by a few courts that faced this issue over thirty years ago.⁶⁹

63. See, e.g., *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 789–91 (7th Cir. 2013) (looking at whether the language of the contract exclusively designates an arbitration forum).

64. See *In re Salomon Inc. S’holders’ Derivative Litig.*, 68 F.3d 554, 561 (2d Cir. 1995) (holding 9 U.S.C. § 5 inapplicable because the court had read the contract as designating arbitration before only the New York Stock Exchange).

65. See *Green*, 724 F.3d at 789–91, 793 (holding that, because the court had interpreted the contract to contain just an arbitration clause, it could use 9 U.S.C. § 5 to appoint a new arbitrator).

66. Compare *id.* at 788–91 (finding an agreement to resolve all disputes under the Code of Procedure of the NAF did not name the forum as the exclusive arbitrator), with *Salomon*, 68 F.3d at 557 (finding an agreement to arbitrate disputes according to the NYSE Constitution and rules named the NYSE as the exclusive arbitrator).

67. See *Astra Footwear Indus. v. Harwyn Int’l, Inc.*, 442 F. Supp. 907, 908, 910–11 (S.D.N.Y. 1978), *aff’d*, 578 F.2d 1366 (2d Cir. 1978); *Delma Eng’g Corp. v. K & L Constr. Co.*, 174 N.Y.S.2d 620, 621 (App. Div. 1958).

68. See *Delma Eng’g Corp.*, 174 N.Y.S.2d at 621 (holding that, even though the agreement provided for arbitration “in accordance with the rules of the New York Building Congress, Inc.,” the “dominant intent” of the parties was simply to arbitrate).

69. See, e.g., *Astra Footwear*, 442 F. Supp. 907.

Overall, most courts follow the Integral-Ancillary Test,⁷⁰ though a few courts (the Second and Seventh Circuits in particular) have used the Exclusivity Test.⁷¹ As may be surmised from this discussion, however, there is significant disparity in how courts apply these tests. Much of this disparity arises from differences in how courts interpret contractual language and the FAA, which will be discussed in Part II.

C. HOW ARBITRATION CAN AFFECT A CASE

Of course, the exclusive arbitration forum dispute only matters if arbitration actually unfairly affects the course of a case. The fact that contentions over exclusive arbitration forum agreements arise indicates that arbitration must be less desirable than litigation to at least some parties, like Joyce Green.⁷² However, critics vary on whether arbitration is actually unfair and whether it affects the outcome of a case.⁷³

Many supporters of arbitration argue that the costs of arbitration are lower than the costs of litigation.⁷⁴ These lower costs, they contend, make arbitration forums more accessible than the court system.⁷⁵ Moreover, supporters of arbitration often point to the fact that studies comparing arbitration and litigation are largely inconclusive and therefore argue that there is no evidence that plaintiffs fare worse in arbitration.⁷⁶

On the other hand, the arbitration system has many critics, and some directly challenge the merits of the arbitration system that its advocates put forth. Mark Budnitz argues that “[a]n examination of the fees charged by arbitration service

70. *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 567 (W. Va. 2013); see, e.g., *supra* notes 51–62.

71. See, e.g., *Green*, 724 F.3d at 789–91, 793; *Salomon*, 68 F.3d at 561.

72. See *Green*, 724 F.3d at 788–89; *supra* notes 11–13 and accompanying text.

73. See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249–53 (2009) (discussing some of the arguments over whether arbitration is fair).

74. See Steven C. Bennett & Dean A. Calloway, *A Closer Look at the Raging Consumer Arbitration Debate*, DISP. RESOL. J., May/Oct. 2010, at 28, 31 (“As a general proposition, arbitration is quicker and cheaper than traditional litigation.”); accord Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 561 (2001).

75. See Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 791 (2008) (“One study concluded that litigation is not a plausible option for employees below around the \$60,000 income level, but arbitration is a realistic alternative.”).

76. See Schwartz, *supra* note 73, at 1259.

providers demonstrates that the costs are often so high consumers are denied access to arbitration and, therefore, to any dispute-resolution forum.”⁷⁷ Budnitz goes on to examine the costs of using various arbitration forums and how they can be prohibitive for a party.⁷⁸

David Schwartz argues that studies examining whether arbitration affects the ultimate outcome of the case have generally used flawed methodology.⁷⁹ After reinterpreting the data of a well-known arbitration versus litigation study, Schwartz notes that the results seem to be pro-defendant.⁸⁰ He also argues that while defendants are likely to prefer arbitration, plaintiffs usually only prefer arbitration for low stakes claims.⁸¹ For high-cost/high-stakes claims, plaintiffs prefer the court system because the arbitration evidentiary and discovery systems make it more difficult for the plaintiff to meet his or her burden of proof.⁸²

Other critics of the arbitration system question the accountability and transparency of arbitration; arbitration awards are subject to limited review, and arbitrators generally do not need to articulate reasons for their decisions.⁸³ Additionally, U.S. citizens expect a “day in court,” and arbitration deprives parties of that, often to the disappointment of the non-sophisticated party.⁸⁴ Therefore, while the proponents of arbi-

77. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 135 (2004).

78. *Id.* at 136–44. *But see* Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 754–56 (arguing that arbitration costs are very likely not prohibitive).

79. *See* Schwartz, *supra* note 73, at 1284–97.

80. *See id.* at 1297–1308.

81. *See id.* at 1269–74; *cf.* Drahozal, *supra* note 78, at 749–50 (arguing that enforcing pre-dispute arbitration agreements is not unfair because the individual has agreed to give up the right to adjudicate rare, high-dollar claims in exchange for the ability to arbitrate more common, low-dollar claims).

82. *See* Schwartz, *supra* note 73, at 1274–77. *But see* Drahozal, *supra* note 78, at 752–53 (arguing that arbitration can be beneficial to an individual because it can limit costly discovery).

83. *See* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 300–01 (2004). *But see* Drahozal, *supra* note 78, at 753 (contending that giving up the right to appeal in exchange for arbitration may be advantageous for parties because it saves in costs and often corrections on appeal are for lawmaking purposes); *cf.* Daniel R. Strader, *Bridging the Gap: Amending the Federal Arbitration Act To Allow Discovery of Nonparties*, 41 STETSON L. REV. 909, 933–34 (2012) (arguing that, because arbitration results are final, awards are disbursed more quickly, thereby benefitting parties).

84. *See* Reuben, *supra* note 83, at 310 (“Anecdotal evidence suggests that

tration argue otherwise, its critics articulate a number of ways in which the arbitration system can unfairly affect a case. Thus, a party facing an exclusive arbitration forum dispute may have a legitimate concern in wanting to keep the case in litigation, rather than letting the court remand it to arbitration.

II. THE COURTS' PROBLEMATIC TREATMENT OF EXCLUSIVE ARBITRATION FORUM DISPUTES

As Part I discussed, courts take different approaches when interpreting the same contractual language and FAA statutory provision.⁸⁵ These different approaches create problems for parties by making it difficult for them to predict how a court will interpret a contract with an exclusive arbitration forum clause. As such, Section A discusses some of the issues with how courts have interpreted exclusive arbitration forum agreements. Moreover, these approaches may be inconsistent with the FAA, which is discussed in Section B.

A. ISSUES WITH THE WAYS COURTS INTERPRET EXCLUSIVE ARBITRATION FORUM CLAUSES

Multiple issues exist with regard to how courts have decided to interpret contracts with exclusive arbitration forum clauses. Subsection 1 illustrates the contradictory ways courts have interpreted the same basic contractual language of exclusive arbitration forum agreements. Subsection 2 examines the courts' infrequent use of external evidence when deciding exclusive arbitration agreements and why that is problematic. Finally, Subsection 3 discusses how most contracts with an exclusive arbitration forum clause are contracts of adhesion and how the courts consider (or neglect to consider) this fact when deciding disputes arising under them.

1. Contradictions in How Courts Interpret the Contractual Language of Exclusive Arbitration Forum Agreements

It is well-known that principles of contract interpretation vary from state to state.⁸⁶ This fact is demonstrated by the preceding discussion of exclusive arbitration forum disputes, as courts take widely different approaches when interpreting ex-

many are shocked and dismayed when they learn that they no longer have that right [to a day in court] because of an arbitration clause buried in the fine print.”).

85. *See supra* Part I.B.

86. *See supra* note 45 and accompanying text.

clusive arbitration forum agreements.⁸⁷ Doing so is within the courts' prerogatives; however, one troublesome issue lies in the fact that courts have interpreted the exact same, or at least substantially similar, contractual language differently. To illustrate this point, this Subsection discusses how courts have read two common examples of contractual language establishing an exclusive arbitration forum agreement.

a. "In Accordance with the Procedures of an Arbitration Forum"

A large number of contracts contain language specifying that arbitration will be conducted in accordance with a specific arbitration forum's rules or code of procedure.⁸⁸ Courts using the Integral-Ancillary Test⁸⁹ have held both ways when applying the test to this language. Some courts have found that this language indicating the procedure of a particular forum thereby makes the forum integral to the parties' agreement and that, since the forum is unavailable for arbitration, the court should litigate the case. Other courts, instead emphasizing the overarching agreement to arbitrate, have found that this same basic language does not make the forum integral to the agreement and that the court should thus remand the case to arbi-

87. See *supra* Part I.B.

88. A number of variations of this language exist, but they all specify the same basic contractual language. See, e.g., *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 788 (7th Cir. 2013) ("All disputes . . . shall be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum."); *Ranzy v. Tijerina*, 393 F. App'x 174, 175 (5th Cir. 2010) (per curiam) ("You and we agree that any and all claims, disputes, or controversies . . . shall be resolved by binding individual (and not class) arbitration by and under the Code of Procedure of the National Arbitration Forum."); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220 (11th Cir. 2000) ("The Agreement contains an arbitration clause which provides that ITT and the employee 'agree that any dispute between them . . . shall be resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum.'"); *Branch v. Sickert*, No. 2:10-CV-128-RWS, 2011 WL 796783, at *4 (N.D. Ga. Feb. 28, 2011) ("[A]ny controversy . . . shall be settled by arbitration . . . in accordance with the rules of the Board of Governors of the National Association of Securities Dealers then in effect . . ."); *Miller v. GGNCS Atlanta, LLC*, 746 S.E.2d 680, 682 (Ga. Ct. App. 2013) ("[A]ll claims . . . shall be resolved exclusively by binding arbitration . . . in accordance with the National Arbitration Forum Code of Procedure . . ."); *Stewart v. GGNCS-Canonsburg, L.P.*, 9 A.3d 215, 217 (Pa. Super. Ct. 2010) ("[T]he agreement states that this binding arbitration shall be conducted 'in accordance with [the NAF] Code of Procedure, which is hereby incorporated into this agreement.'" (alteration in original)).

89. See *supra* Part I.B.1.

tration.⁹⁰

Courts finding the forum to be integral based on just the contractual language have emphasized the repeated use of the forum's name in the contract,⁹¹ that the contract used mandatory language to indicate that the parties should use the forum's rules or procedures,⁹² and that the parties designated one arbitrator throughout.⁹³ Courts have often tied this latter point into an "express statement" discussion, which, as discussed above, courts have sometimes found indicative of a forum being integral to the agreement.⁹⁴ In cases where the contract specifies the NAF's Code of Procedure, courts have also stressed the fact that the NAF's Code of Procedure states that only the NAF may administer it.⁹⁵

90. *Compare, e.g.,* Meskill v. GGNSC Stillwater Greeley LLC, 86 F. Supp. 2d 966, 977 (D. Minn. 2012) ("[T]he Court concludes that even if Meskill were correct that the Arbitration Agreement mandated arbitration before the NAF, the forum's unavailability simply results in a 'lapse' under 9 U.S.C. § 5 that the Court must remedy by appointing a substitute arbitrator."), *with Ranzy*, 393 F. App'x at 176 ("Thus, a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable.").

91. *Klima v. Evangelical Lutheran Good Samaritan Soc'y*, No. 10-cv-1390-JAR-JPO, 2011 WL 5412216, at *3 (D. Kan. Nov. 8, 2011) ("Defendant's form arbitration agreement names the NAF specifically and exclusively throughout the agreement. . . . [T]hese provisions show that the parties intended to select the NAF as the exclusive arbitrator."); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 38, 150 N.M. 398, 259 P.3d 803 ("The pervasive references to the NAF in the contract compel our conclusion that the parties intended for the NAF to be the exclusive arbitrator in any out-of-court dispute resolution.").

92. *See Miller*, 746 S.E.2d at 686 ("The Arbitration Agreement's use of the mandatory [language,] together with its express incorporation of the NAF Code, indicates that the parties . . . contracted to arbitrate only before the NAF."); *Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195, 1203 (Ind. Ct. App. 2011) ("The express designation of the NAF as the arbitration provider in addition to the use of mandatory, as opposed to permissive, contractual language demonstrates that the parties intended that the NAF was integral to the arbitration agreement."); *Rivera*, 2011-NMSC-033, ¶ 31, 150 N.M. 398, 259 P.3d 803 ("Mandatory, as opposed to permissive, contractual language further demonstrates that a specifically named arbitration provider is integral to the agreement to arbitrate."); *cf. Ranzy*, 393 F. App'x at 175 (emphasizing the fact that the contract used the term "shall").

93. *See Rivera*, 2011-NMSC-033, ¶ 32, 150 N.M. 398, 259 P.3d 803 ("In this case, [the] contract names the NAF specifically and exclusively throughout . . .").

94. *See Geneva-Roth*, 956 N.E.2d at 1202 ("At a minimum, for the selection of an arbitrator to be 'integral', the arbitration clause must include an express statement designating a specific arbitrator. An express designation of a single arbitration provider weighs in favor of a finding that the designated provider is integral to the agreement to arbitrate." (citations omitted)); *see also supra* Part I.B.1.

95. NAT'L ARBITRATION FORUM, CODE OF PROCEDURE 1 (2008), *available at* <http://www.adrforum.com/users/odr/resources/Employment/CODEof>

Other courts have directly rejected these arguments, finding the arbitration forum not integral based on the contractual language—even after considering party testimony. Several courts have held that the language “in accordance” with the NAF’s Code of Procedure is not strong enough to designate, explicitly, arbitration before the NAF⁹⁶ (though one court suggested that “by and under the Code of Procedure of the [NAF]” would have been explicit enough to make the NAF integral to the agreement).⁹⁷ Another court has held that, even though the NAF’s Code says only the NAF can administer it, it is of little significance.⁹⁸ Moreover, a few courts have held the forum to be not integral simply because they found no evidence to the contrary, presumably based primarily on the court’s reading of the language of the contract itself.⁹⁹

Procedure2008.pdf (“This Code shall be administered only by the National Arbitration Forum . . .”); see, e.g., *Klima*, 2011 WL 5412216, at *4 (holding that the fact that the NAF’s Code of Procedure states that only the NAF may employ it “strengthens the Court’s finding that the parties exclusively selected the NAF”); *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 220 (Pa. Super. Ct. 2010) (emphasizing that the contract specified arbitration under the NAF Code, which says that only NAF members may apply it).

96. See *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 969, 976 (D. Minn. 2012) (stating that the arbitration agreement, which stated that disputes must be resolved “in accordance” with the NAF Code of Procedure, only implicitly designated arbitration before the NAF and therefore undermines the idea that the NAF was integral to the agreement); *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167 (D.S.D. 2010) (“In between those provisions [designating that disputes are to be resolved by arbitration and not by a court] is the language specifying resolution ‘in accordance with the National Arbitration Forum Code of Procedure.’ The clause at issue does not mandate the NAF per se . . .”).

97. *Meskill*, 862 F. Supp. at 969, 976 (holding that the arbitration clause before the court, which contained the phrase “in accordance with the [NAF] Code of Procedure,” did not include an express designation of an arbitration forum, distinguishing it from the arbitration clause before the Fifth Circuit in *Ranzy*, which contained the language “by and under the Code of Procedure of the [NAF]” and which, the court argued, more clearly mandated the NAF).

98. See *Wright v. GGNSC Holdings LLC*, 2011 SD 95, ¶¶ 17–21, 808 N.W.2d 114, 119–21 (“We conclude that designation of the NAF Code of Procedure did not require an ‘NAF arbitrator’; a substitute arbitrator could apply common procedural rules like those found in the NAF Code of Procedure and public domain . . .”).

99. See *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060–61 (9th Cir. 2006), (explaining only that the arbitration forum is not integral because there was no express statement that the National Association of Securities Dealers, Inc. (NASD) would be the arbitrator and no evidence that the NASD was central to the agreement), *abrogated on other grounds by* *Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (holding only that “[h]ere there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate”).

The Second and Seventh Circuits are alone in using the Exclusivity Test approach,¹⁰⁰ and both adopted this approach when faced with this contractual language.¹⁰¹ The *Salomon* court (Second Circuit) held that the contract's language clearly designated arbitration "by the NYSE [New York Stock Exchange] and only the NYSE."¹⁰² On the other hand, though the NAF's Code of Procedure states that only the NAF can apply it, the *Green* court (Seventh Circuit) held that, as other arbitration forums could still technically use the NAF's Code of Procedure, the agreement was not exclusive.¹⁰³

What a court may accept as a valid argument when faced with "under the procedure of" contractual language in an arbitration agreement is largely ambiguous. However, this phrase does not hold a monopoly on ambiguity in exclusive arbitration forum clauses.

b. "Shall Be Resolved by Arbitration Administered by a Particular Arbitration Forum"

Another type of contract that has come before the courts specifies that any disputes between the parties shall be resolved by arbitration administered by a particular arbitration forum.¹⁰⁴ Although this language seems arguably clearer than

100. *See supra* Part I.B.2.

101. *Compare* *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 788 (7th Cir. 2013) ("All disputes, claims or controversies . . . shall be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum."), *with In re* *Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 556 (2d Cir. 1995) ("[T]he defendants . . . had signed an agreement to arbitrate (under the Constitution and rules of the NYSE) any dispute arising out of their employment by [the plaintiff].").

102. *Salomon*, 68 F.3d at 557.

103. *See Green*, 724 F.3d at 789–90; *supra* note 95 and accompanying text.

104. *See, e.g., Khan v. Dell Inc.*, 669 F.3d 350, 351 (3d Cir. 2012) ("ANY CLAIM, DISPUTE, OR CONTROVERSY . . . SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect . . ."); *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933, at *1 (W.D. Wash. Oct. 26, 2009) ("The arbitration clause provides that any claims related to the Agreement shall be resolved by binding arbitration administered by the National Arbitration Forum ('NAF')."); *New Port Richey Med. Investors, LLC v. Stern ex rel. Petscher*, 14 So. 3d 1084, 1086 (Fla. Dist. Ct. App. 2009) ("The agreement provided . . . that any disputes would be submitted to arbitration to be administered by the American Arbitration Association (the AAA)."); *Carr v. Gateway, Inc.*, 944 N.E.2d 327, 330 (Ill. 2011) ("You agree that any Dispute between You and Gateway will be resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) and conducted under its rules . . ."); *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 436–37

the language discussed in the previous section, courts have still split in their interpretations.¹⁰⁵ Courts considering this contractual language have generally been ones following the Integral-Ancillary approach. Courts that have upheld the forum as integral to the agreement under this language have emphasized that the contract clearly sets out the forum as the arbitrator.¹⁰⁶ On the other hand, at least one court has held that this language by itself is not enough to make the forum integral.¹⁰⁷ Yet another court faced with this language held the forum to be not integral because the parties did not present external evidence showing that it was.¹⁰⁸

At least two courts have explicitly found this type of language ambiguous. In both cases, Dell, Inc. was the defendant, and the contractual language of the arbitration clause specifically stated that disputes “shall be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum.”¹⁰⁹ The two courts decided that “exclusively” could modify either “binding arbitration” or “administered by the National Arbitration Forum.”¹¹⁰ Ultimately, both courts held that the identity of the forum was not integral to the agreement because federal policy supports arbitration.¹¹¹ How-

(S.C. 2009) (“Pursuant to the Federal Arbitration Act, any action, dispute, claim, or controversy . . . shall be resolved by binding arbitration administered by the National Health Lawyers Association (the ‘NHLA’).”).

105. *Compare, e.g., Khan*, 669 F.3d at 357 (“The contract’s language does not indicate the parties’ unambiguous intent not to arbitrate their disputes if NAF is unavailable.”), *with Carideo*, 2009 WL 3485933, at *6 (“[S]election of NAF is integral to the arbitration clause To appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause.”).

106. *See Carideo*, 2009 WL 3485933, at *4 (“This language clearly and unequivocally selects NAF as the arbitrator, specifies that NAF will apply its own rules in the arbitration, and does not provide for an alternative arbitral forum.”); *cf. Grant*, 678 S.E.2d at 437, 439 (holding the forum integral because the contract mandated “arbitration administered by the National Health Lawyers Association” (now the “AHLA”) and the AHLA has specific rules that the court felt reflected the parties’ intent to “arbitrate *exclusively* before that body”).

107. *Carr*, 944 N.E.2d at 335 (“[T]he mere fact parties name an arbitral service to handle arbitrations and specify rules to be applied does not, standing alone, make that designation integral to the agreement.”).

108. *See New Port Richey*, 14 So. 3d at 1087 (holding the forum not integral because the appellee did not present evidence to the circuit court showing that the designation of the AAA was integral to the agreement to arbitrate).

109. *Khan*, 669 F.3d at 351 (changed from all capitals); *Adler v. Dell Inc.*, No. 08-cv-13170, 2009 WL 4580739, at *1 (E.D. Mich. Dec. 3, 2009) (same).

110. *See Khan*, 669 F.3d at 354–55; *Adler*, 2009 WL 4580739, at *2.

111. *See Khan*, 669 F.3d at 356–57 (“Although courts are divided on the issue, we conclude that the ‘liberal federal policy in favor of arbitration’ counsels us to favor the [pro-arbitration] line of cases.”); *Adler*, 2009 WL 4580739,

ever, yet another court faced with the same contractual language, and with Dell as the defendant, found that the language unambiguously supports the NAF as the exclusive forum.¹¹²

Moreover, in these same Dell cases, the court finding for the plaintiff found the forum integral partially because the contract specified that the NAF would apply its own rules in the arbitration, and partially because the contract did not provide for an alternate forum.¹¹³ Yet, one of the courts finding for Dell found the contractual language ambiguous for these same reasons.¹¹⁴

Thus, the ways in which courts have at times interpreted the same basic contractual language are contradictory. This has the unfortunate effect of making it difficult for parties to predict how a court will rule on their exclusive arbitration forum contract, particularly when they are before a court that has not interpreted that specific contractual language at issue in the parties' dispute. The disparate holdings discussed in this Subsection may be more understandable in situations in which the court took party testimony into account when reaching the decision; in those cases, it would seem that the different rulings are because of the parties' different situations.¹¹⁵ However, many of these contradictory decisions are from courts looking

at *4 (“[T]he Sixth Circuit [has] stated that any doubts regarding arbitrability should be resolved in favor of arbitration.”).

112. See *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933, at *4 (W.D. Wash. Oct. 26, 2009).

113. See *id.* at *4–5 (“This language clearly and unequivocally selects NAF as the arbitrator, specifies that NAF will apply its own rules in the arbitration, and does not provide for an alternative arbitral forum.”).

114. See *Adler*, 2009 WL 4580739, at *3 (“[T]he agreement requires NAF rules be used. This would appear to be mere surplusage, except in the case of a substitute arbitration forum Further, the agreement lacks any provision for a course of conduct in the event that NAF is unavailable or unwilling to arbitrate disputes between the parties. The lack of an alternative to NAF in the agreement may be taken as indicating a primary intent to arbitrate all disputes, or on the other hand, that the parties contemplated arbitration only if administered by NAF.”).

115. See, e.g., *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 975 (D. Minn. 2012) (noting that the plaintiff offered no evidence that the designation of the NAF was important to him or the defendant); *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) (holding that, due in part to the plaintiff's testimony, simply specifying the NAF rules in the parties' agreement did not mean that the NAF was integral to the agreement); *Wright v. GGNSC Holdings LLC*, 2011 SD 95, ¶ 25, 808 N.W.2d 114, 122 (noting that the NAF Code could not have been integral to the parties' agreement because the plaintiff did not raise the unavailability of the NAF Code as a defense—the circuit court did sua sponte).

solely at the plain contractual language.¹¹⁶ Indeed, many courts have neglected to look at external evidence altogether when deciding exclusive arbitration forum disputes.

2. Courts Often Do Not Use Parol Evidence in Deciding Exclusive Arbitration Forum Disputes

Parol evidence is evidence that is external to the plain language of the contract, and courts may use parol evidence to interpret an ambiguous contract.¹¹⁷ As indicated, courts often try to ascertain the parties' intentions at the time they agreed to the arbitration clause from the plain language of the contract alone.¹¹⁸ However, though courts may not acknowledge it, it appears that this approach often yields little more than judicialized guesswork.

For example, in *Stewart v. GGNSC-Canonburg, L.P.*, the Superior Court of Pennsylvania discussed how there is comparable authority that supports litigating and that supports arbitrating an exclusive arbitration forum dispute.¹¹⁹ The court proceeded to compare the facts before it to the facts of a case recently before a federal court in South Dakota, finding them to be very similar.¹²⁰ However, the Superior Court rejected the

116. See, e.g., *Klima v. Evangelical Lutheran Good Samaritan Soc'y*, No. 10-cv-1390-JAR-JPO, 2011 WL 5412216, at *3 (D. Kan. Nov. 8, 2011) ("Here, the terms of the arbitration agreement are clear, and the Court need not look outside the written agreement to ascertain the parties' intent."); *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 221 (Pa. Super. Ct. 2010) ("[T]his Court will not rewrite an arbitration agreement Sanctioning this type of action would run contrary to the clear intent of the parties as expressed by the plain language of the Agreement itself.>").

117. See Ferdinand S. Tinio, Annotation, *The Parol Evidence Rule and Admissibility of Extrinsic Evidence To Establish and Clarify Ambiguity in Written Contract*, 40 A.L.R.3D 1384, 1389 (1971) ("[T]here seems to be a . . . wider recognition of the principle that extrinsic evidence can be introduced to clarify an ambiguity").

118. See, e.g., *Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *6 (W.D. Ark. Nov. 18, 2011) ("The plain language of the agreement shows that the parties' primary and overriding concern was that claims in excess of \$15,000 be submitted to arbitration, not that they be arbitrated by the NAF."); *Stewart*, 9 A.3d at 221 ("[T]his Court will not . . . insert additional terms Sanctioning this type of action would run contrary to the clear intent of the parties as expressed by the plain language of the Agreement itself."); see also *supra* notes 59–62, 91–95 and accompanying text. *But see*, e.g., *Jones*, 684 F. Supp. 2d at 1168 (holding that the plaintiff's testimony supported a finding that the forum was not integral because she testified that "she did not negotiate the Arbitration Agreement, did not remember the Arbitration Agreement itself, but did not doubt that she signed the document").

119. *Stewart*, 9 A.3d at 219–20.

120. *Id.* at 220–21.

federal court's legal analysis because it concluded that the parties expressly agreed to several terms that, it felt, the federal court had not fully considered.¹²¹ Yet, in doing so, the Superior Court of Pennsylvania only examined the plain language of the contract.¹²² If the Superior Court had considered parol evidence, the contradictory rulings between the two courts might have been reconcilable because the Superior Court's disparate holding would have been based on the parties' different circumstances between the two cases. Instead, the Superior Court of Pennsylvania summed up the stance of most courts, which neglect to examine parol evidence: "[T]his Court will not . . . insert additional terms [into the parties' agreement]. . . . Sanctioning this type of action would run contrary to the clear intent of the parties as expressed by the plain language of the Agreement itself."¹²³

Of course, there is an impediment to courts using parol evidence: the parol evidence rule. The convoluted parol evidence rule is not capable of being definitively stated,¹²⁴ but one aspect of the rule is relevant to this discussion. Courts generally agree that parol evidence can be used to interpret ambiguous contractual language.¹²⁵ However, conservative courts will only admit external evidence to interpret a contract if it is ambiguous on its face.¹²⁶ Other, more liberal courts will admit external evidence to determine whether a contract is ambiguous, and then allow parol evidence if the court determines that the contract is ambiguous.¹²⁷ For the conservative courts, then, the parol evidence rule may block the admissibility of all external evidence in an exclusive arbitration forum dispute. If a conservative court decides that the language is unambiguous on its face, it will only consider the plain language of the contract.¹²⁸

121. *Id.*

122. *See id.* at 219–20.

123. *Id.* at 221.

124. *See* Ralph James Mooney, *A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule*, 84 OR. L. REV. 369, 372 (2005).

125. Leonard Marinaccio, III, *Out on Parol?: A Critical Examination of the Alaska Supreme Court's Application of the Parol Evidence Rule*, 11 ALASKA L. REV. 405, 407 (1994) ("All courts agree that where such language is vague or ambiguous, the parol evidence rule permits evidence of surrounding circumstances to be introduced . . . to resolve any ambiguity.").

126. *See* 11 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 33:42 (4th ed. 2012).

127. *Id.*

128. *See id.* ("Generally, the language is to be viewed as a reasonable person, under the circumstances, would view it . . .").

Yet, even for these conservative courts, parol evidence should be admissible for most exclusive arbitration forum clauses. There has been controversy over the meaning of a clause stating that the parties agree to resolve disputes through binding arbitration administered by a particular forum,¹²⁹ and that clause is arguably more straightforward than many exclusive arbitration forum clauses. Courts should note that if other jurisdictions have reached such varied interpretations of this arguably straightforward language, there is likely enough ambiguity on the face of most exclusive arbitration forum clauses to admit parol evidence.

In sum, because courts often do not use parol evidence when deciding exclusive arbitration forum disputes even though they very likely could, they often resort to guesswork, which undermines contractual predictability for parties. This problem is even more disconcerting when one considers that most of the contracts involving an exclusive arbitration forum clause are contracts of adhesion.

3. Most Exclusive Arbitration Forum Agreements Are Contracts of Adhesion

In a contract of adhesion, the “accepting party” must agree to the terms of the “drafting party’s” contract on a “take-it-or-leave-it” basis.¹³⁰ Contracts of adhesion are very common, ranging from insurance policies to credit card agreements.¹³¹ With a contract of adhesion, the accepting party has no meaningful opportunity to negotiate the terms of the agreement,¹³² typically

129. See *supra* Part II.A.1.

130. See Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 346 (2011) (“A ‘contract of adhesion’ in the parlance of contract law, is a take-it-or-leave-it standard form agreement, usually presented to a consumer by a business entity.”). But see Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years After Doctor’s Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 267 (2006), for a discussion of the higher definition some courts have placed on adhesion contracts.

131. See 25 DAVID K. DEWOLF, KELLER W. ALLEN, & DARLENE BARRIER CARUSO, WASHINGTON PRACTICE SERIES: CONTRACT LAW AND PRACTICE § 9:19 (3d ed. 2014), available at 25 WAPRAC 9:19 (Westlaw) (discussing common examples of contracts of adhesion); Susan Rabin & Christopher Q. Pham, *Contracts of Adhesion*, L.A. LAW., Feb. 2006, at 11, 11 (“When people travel, rent cars, and purchase insurance, for example, they accept form contracts, which can be a normal . . . way of doing business.”).

132. Schwartz, *supra* note 130, at 346 (“Negotiation over any of the terms contained in the form—except, often, the price—is neither contemplated nor permitted.”).

is not represented by legal counsel,¹³³ and often does not understand, or even read, the entire agreement.¹³⁴ And, unfortunately, but predictably, the vast majority of exclusive arbitration forum disputes arise from contracts of adhesion, with the accepting party bringing the dispute before the court.¹³⁵

Because these disputes are often over contracts of adhesion, many of the fact patterns regarding the plaintiffs in these suits are quite sympathetic. Joyce Green is an example.¹³⁶ *Geneva-Roth, Capital, Inc. v. Edwards* presents another example.¹³⁷ In *Geneva-Roth*, Akeala Edwards entered into a loan agreement that included an exclusive arbitration forum clause with LoanPoint USA for \$300.¹³⁸ However, every ten days LoanPoint USA implemented a finance charge against Edwards, which resulted in over \$700 of charges against her over ninety days.¹³⁹ Edwards eventually filed a complaint against LoanPoint USA, asserting that the loan violated Indiana consumer protection law.¹⁴⁰

These types of fact patterns are common and are not limited to the sphere of small loans. In *Meskill v. GGNSC Stillwater Greeley LLC*, the nursing facility Golden Living Center (GLC) admitted Howard Meskill, an eighty-three-year-old man, as a patient.¹⁴¹ At the time of admission, Meskill signed several agreements with GLC specifying the NAF as the exclusive arbi-

133. *Cf.* *New Eng. Eyecare of Waterbury, P.C. v. New Eng. Eyecare, P.C.*, No. 099465, 1991 WL 27919, at *1 (Conn. Super. Ct. Jan. 18, 1991) (stating that the contract before the court was not a contract of adhesion and noting that both parties were represented by attorneys in its writing).

134. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (“Customers do not in fact ordinarily understand or even read the standard terms.”); Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 360 (“Sensible consumers/investors do not read most of the contracts they sign, and sellers and issuers know this so well that they often dispense with even showing the contract to the consumer/investor.”).

135. *See, e.g.*, *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 794 (7th Cir. 2013) (Hamilton, J., dissenting) (“The payday loan agreement that [the plaintiff] signed was certainly a contract of adhesion.”); *Khan v. Dell Inc.*, 669 F.3d 350, 351 (3d Cir. 2012) (noting that the plaintiff agreed to the terms of the agreement by clicking a box on Dell’s website); *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 682–83 (Ga. Ct. App. 2013) (discussing how the plaintiff signed the contract as part of an admission packet to a nursing home).

136. *See Green*, 724 F.3d at 794 (Hamilton, J., dissenting); *see also supra* notes 1–10 and accompanying text.

137. 956 N.E.2d 1195 (Ind. Ct. App. 2011).

138. *Id.* at 1196–97.

139. *Id.* at 1197.

140. *Id.*

141. 862 F. Supp. 2d 966, 969 (D. Minn. 2012).

tral forum.¹⁴² Meskill fell down numerous times during the five months he lived at GLC.¹⁴³ During his last fall, Meskill sustained vertebral fractures and died three days later.¹⁴⁴ Meskill's son filed suit against GLC, asserting that his father's falls were a result of the nursing facility's negligence.¹⁴⁵ *Grant v. Magnolia Manor-Greenwood, Inc.* presents similar facts.¹⁴⁶ The Magnolia Manor-Greenwood nursing home admitted Lessie Grant as a patient, with her admission contract designating the National Health Lawyers Association as the exclusive arbitral forum.¹⁴⁷ Grant fell while living at Magnolia Manor-Greenwood, sustaining a large hematoma above her left eye that she died from five days later.¹⁴⁸ Her surviving husband sued the nursing home for survival, wrongful death, and loss of consortium.¹⁴⁹

Despite fact patterns that would presumably push courts to examine the circumstances surrounding the acceptance of these contracts, courts rarely seem to take the fact that the contract was a contract of adhesion into account when deciding an exclusive arbitration forum dispute. For example, in an exclusive arbitration forum dispute, the testimony or record generally shows that the plaintiff(s) did not consider the indicated arbitration forum important when entering into the contract.¹⁵⁰ Courts then point to a plaintiff's testimony or the record to support a decision that the parties simply agreed to arbitration, stating that this evidence shows that the plaintiff(s) did not consider the arbitration clause as "integral."¹⁵¹ This might be

142. *Id.*

143. *Id.* at 970.

144. *Id.*

145. *Id.*

146. 678 S.E.2d 435 (S.C. 2009).

147. *Id.* at 436–37.

148. *Id.* at 437.

149. *Id.*

150. See *Selby v. Deutsche Bank Trust Co. Ams.*, No. 12cv01562 AJB (BGS), 2013 WL 1315841, at *11 (S.D. Cal. Mar. 28, 2013) ("Plaintiff has not established, or even argued, that she would not have entered into the underlying Agreement in the event of NAF's unavailability to arbitrate the resulting disputes."); *Meskill*, 862 F. Supp. 2d at 975 ("[T]here is nothing in the record indicating that [the plaintiff] was even aware of the NAF (or its Code) when he signed the Arbitration Agreement."); *Jones v. GGNPC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) ("[The plaintiff] testified that she did not . . . remember the Arbitration Agreement itself, but did not doubt that she signed the document . . ."); *Ex parte Warren*, 718 So. 2d 45, 49 (Ala. 1998) ("There is no evidence that [the plaintiff] or [the defendant] intended their choice of an arbitrator to be an essential term of the contract . . .").

151. See, e.g., *Jones*, 684 F. Supp. 2d at 1168 ("The testimony of Plaintiff Carol Jones further supports the conclusion that the NAF provision was not

valid when the courts are dealing with parties with equal bargaining power.¹⁵² However, since most of the contracts involved in exclusive arbitration forum disputes are contracts of adhesion, the party accepting the contract may not have even understood what the exclusive arbitration forum agreement meant—and even this presumes that the party read the contract in its entirety, which most do not.¹⁵³ Therefore, it is illogical for courts to make these kinds of assumptions about party testimony regarding contracts of adhesion.

As these last three Subsections have shown, there is a large amount of disparity in (a) how courts interpret the same basic contractual language, and (b) what arguments they will find effective. This disparity makes it difficult for parties to anticipate how a court might rule on the language of their contract. All of this goes against the fundamental policy of contract law: ensuring predictability for parties.¹⁵⁴ Aside from contradictions in how courts have interpreted parties' contracts, however, another issue exists in how courts have interpreted the FAA.

B. COURTS MAY BE MISINTERPRETING 9 U.S.C. § 5

Section 5 of 9 U.S.C., enacted as part of the FAA, is generally the source of courts' power to decide whether to proceed with a case involving an exclusive arbitration forum dispute or whether to send it to arbitration.¹⁵⁵ Two issues are at play with regard to 9 U.S.C. § 5. First, courts deciding exclusive arbitration forum disputes seem to be misinterpreting the policy in favor of arbitration as established by the FAA. Second, most courts are basing their decisions on precedent, without consulting the text of 9 U.S.C. § 5 at all.

1. The Policy in Favor of Arbitration Does Not Compel Courts To Remand Exclusive Arbitration Forum Agreements to

integral to the arbitration agreement.”).

152. Cf. Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL & INS. PRAC. L.J. 85, 106–07 (2003) (arguing that a higher standard probably applies to insurance contracts where both parties had equal bargaining power and mutually wrote the contract).

153. See Schwartz, *supra* note 130, at 350 (“[I]t is a commonplace that practically no one reads, let alone understands, the . . . contracts of adhesion to which they assent.”).

154. See Steven N. Baker, *Foreign Law Between Domestic Commercial Parties: A Party Autonomy Approach with Particular Emphasis on North Carolina Law*, 30 CAMPBELL L. REV. 437, 440 (2008) (noting that predictability and party expectations are fundamental values of contract law).

155. See 9 U.S.C. § 5 (2012); see also *supra* Part I.B.

Arbitration

The Supreme Court has often articulated a liberal policy in favor of arbitration in connection with the FAA.¹⁵⁶ Accordingly, in many situations it seems that courts send cases to arbitration largely because of pro-arbitration policy,¹⁵⁷ with courts often citing the FAA as the reason behind this policy.¹⁵⁸ However, based on the legislative history of the FAA, this may be a hasty judgment on the courts' part.

There is essentially no legislative history behind § 5 of the FAA. However, legislative history exists for the FAA as a whole.¹⁵⁹ United States courts were originally hostile to arbitration agreements and generally did not enforce them.¹⁶⁰ In the early twentieth century, business groups began lobbying for federal legislation that would make arbitration agreements enforceable.¹⁶¹ The result of that lobbying was the FAA, which Congress passed in 1925 to place arbitration agreements on equal footing with other contract provisions.¹⁶² "A key purpose

156. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

157. See, e.g., *Khan v. Dell Inc.*, 669 F.3d 350, 355–56 (3d Cir. 2012) (sending the case to arbitration simply because the court found the language of the contract ambiguous and had a policy in favor of arbitration); *Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *7 (W.D. Ark. Nov. 18, 2011) ("The above facts must be viewed in light of the 'liberal federal policy favoring arbitration agreements' found in the FAA.>").

158. See, e.g., *Adler v. Dell Inc.*, No. 08-cv-13170, 2009 WL 4580739, at *4 (E.D. Mich. Dec. 3, 2009) ("It is difficult to justify the abrogation of an entire arbitration agreement, especially when Congress has provided in the Federal Arbitration Act an easy remedy for an arbitrator's unavailability."); cf. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792–93 (7th Cir. 2013) (questioning the Integral-Ancillary Test, but noting that "[i]n recent years the Supreme Court has insisted that the Act not be added to in a way that overrides contracts to resolve disputes by arbitration" and ultimately sending the case to arbitration).

159. See generally Hal Neth, *The Federal Arbitration Act and How It Grew* 12–13 (May 2011) (unpublished M.S. essay, University of Oregon), available at <http://adr.uoregon.edu/files/2012/01/federalarbitrationact.pdf> (discussing the history and the development of the FAA).

160. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 *BUS. LAW.* 55, 58 (2007); see also Neth, *supra* note 159, at 12–13 (discussing how American courts generally refused to enforce arbitration agreements).

161. Neth, *supra* note 159, at 13.

162. Wilson Daniel "Dee" Miles, III, Partner, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., Address at the Conference on Life and Health Insurance Litigation: Arbitration (May 10, 2001), available at SF81 ALI-ABA 157 (Westlaw) ("Historically, our courts were rightly opposed to arbitration, and the [FAA] was intended to overcome the longstanding judicial hostility to arbitration provisions that had existed at English common law and had been

of the [Federal Arbitration] Act was to make agreements to arbitrate ‘valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”¹⁶³

Thus, Congress enacted the FAA in order to ensure the enforceability of arbitration agreements.¹⁶⁴ Still, the history of the FAA does not suggest that Congress intended the courts to send all parties with contracts containing any sort of arbitration clause to arbitration. Indeed, the text of the FAA suggests otherwise; 9 U.S.C. § 4, for example, only gives the courts power to remand any arbitral issue to arbitration “in accordance with *the terms* of [the parties’] agreement.”¹⁶⁵ In fact, the Supreme Court has recognized this latter point, even in spite of its liberal policy in favor of arbitration.¹⁶⁶ Rather, the legislative history of the FAA indicates that Congress simply wanted to ensure that courts do not invalidate arbitration agreements just because they are arbitration agreements.¹⁶⁷

That is not the issue in exclusive arbitration forum disputes. A party with an exclusive arbitration forum dispute is not trying to persuade the court that the provision is and always has been unenforceable.¹⁶⁸ That situation is more directly covered by the FAA’s policy.¹⁶⁹ Instead, the party is trying to

adopted by American courts and to place arbitration agreements upon the same footing with other contracts.” (citation omitted) (internal quotation marks omitted).

163. Neth, *supra* note 159, at 13–14 (quoting 9 U.S.C. § 2 (2010)).

164. See *supra* notes 159–63 and accompanying text.

165. 9 U.S.C. § 4 (2012) (emphasis added).

166. See *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 473 (1989) (“But § 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that ‘arbitration proceed *in the manner provided for in [the parties’] agreement.*’” (alteration in original) (quoting 9 U.S.C. § 4)).

167. See Miles, *supra* note 162 (“A review of the legislative history of the Act demonstrates that . . . [i]t was a result of the American Bar Association’s efforts to obtain Congressional authorization for federal courts to enforce arbitration agreements in . . . interstate commercial contracts.”).

168. See, e.g., *In re Salomon Inc. S’holders’ Derivative Litig.*, 68 F.3d 554, 557 (2d Cir. 1995) (“The question we decide, however, is not *whether* shareholder suits [like the present case] are arbitrable, but *where* this dispute—whatever its nature—may be arbitrated under the agreements.”); see also *Khan v. Dell Inc.*, 669 F.3d 350, 353 (3d Cir. 2012) (noting that the plaintiff was not disputing whether the Terms and Agreements governed the contract, just whether the arbitration provision was still enforceable given that the NAF is no longer conducting consumer arbitrations).

169. Despite the policy, however, parties may still argue that an arbitration provision is in itself invalid for reasons that a court may find any contractual provision invalid. These reasons include fraud, forgery, mutual mistake,

convince a court that the arbitration agreement is no longer enforceable *given the current circumstances*—those being that the arbitration forum named in the contract cannot, or will not, arbitrate the parties' dispute.¹⁷⁰ These circumstances are beyond the scope of what Congress intended when it passed the FAA.

In fact, these decisions arguably go against the Supreme Court's instruction that "[c]ourts must rigorously enforce arbitration agreements *according to their terms*."¹⁷¹ In an exclusive arbitration forum agreement, the terms indicate that the parties, in some fashion, selected a particular arbitration forum to handle any disputes arising under the contract. Thus, by deciding to send the case to arbitration in another forum simply because of pro-arbitration policy, instead of taking into account the exclusive designation of the original arbitration forum, courts may not be enforcing these exclusive arbitration agreements according to their terms.

2. Courts Are Basing Their Decisions on Precedent, Not on the Text of 9 U.S.C. § 5

Whether the court can use the FAA to appoint a new arbitrator for the parties depends on the court's interpretation of the term "lapse" in 9 U.S.C. § 5.¹⁷² To have the power to appoint a new arbitrator, a court must first make a finding that there was a "lapse in the naming of an arbitrator or arbitrators or umpire."¹⁷³ Courts are to look to the plain language when interpreting a statute.¹⁷⁴ According to the *Merriam-Webster Dictionary*, the meaning of "lapse" is "a slight error typically due to forgetfulness or inattention."¹⁷⁵ The *Oxford English Dictionary*

impossibility, unconscionability, and illegality. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 555 (1995). It is possible that these defenses may apply to exclusive arbitration forum disputes, but that is beyond the scope of this Note.

170. See, e.g., *Wright v. GGNSC Holdings LLC*, 2011 SD 95, ¶¶ 9–10, 808 N.W.2d 114, 117 (noting that the parties "agreed to arbitrate" but that, as the NAF was specified in the contract and is unavailable, the question is whether the court can appoint a substitute arbitrator).

171. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (emphasis added) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)) (internal quotation marks omitted).

172. See 9 U.S.C. § 5 (2012); see also *supra* Part I.B.

173. 9 U.S.C. § 5.

174. See *Lamie v. U.S. Trs.*, 504 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." (citations omitted) (internal quotation marks omitted)).

175. *Lapse*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/lapse> (last visited Apr. 3, 2015).

similarly defines “lapse” as “a mistake, a slight error.”¹⁷⁶ Therefore, based on the plain language of the statute, a court can only appoint a new arbitrator under 9 U.S.C. § 5 if the parties made a small, accidental error in the naming of the arbitrator in the exclusive arbitration forum clause.

One could argue that courts seem to be trying to determine whether there is a “lapse” through the Integral-Ancillary and Exclusivity Tests. This is because one could regard asking whether an arbitration forum is “integral” or “exclusive” as a way to decide whether the parties intended to arbitrate in general or just via the designated forum and mistakenly agreed to a contract that suggested otherwise.¹⁷⁷ However, if this is a situation of semantics, it would be better for courts to be clear about what they are looking for in exclusive arbitration forum clauses rather than leaving that determination up to unclear tests.

Still, there is a larger issue with the tests courts have been using—in particular the Integral-Ancillary Test, which the majority of courts employ.¹⁷⁸ “Integral” and “ancillary” do not appear anywhere in 9 U.S.C. § 5.¹⁷⁹ Courts coined these terms, again presumably as tools for determining whether the contract does contain a “lapse” in naming an arbitrator.¹⁸⁰ Unfortunately, these terms now seem to overshadow the actual language of the statute. For example, when the Third Circuit faced an exclusive arbitration forum dispute for the first time in 2012, the court never explicitly discussed the language of the statute but spent paragraphs discussing the Integral-Ancillary Test.¹⁸¹ This is a problem because courts should not consult precedent before the statutory text and the statute’s purpose or context.¹⁸²

This issue, combined with the problematic ways courts in-

176. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1532 (Lesley Brown ed., 1993).

177. See *supra* Parts I.B.1–2.

178. See *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 567 (W. Va. 2013) (“This [integral-ancillary] formulation of the application of section 5 of the FAA is the majority rule.”).

179. See 9 U.S.C. § 5 (2012).

180. See *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 791 (7th Cir. 2013) (discussing the court’s skepticism with the way that courts have used the Integral-Ancillary Test).

181. See *Khan v. Dell Inc.*, 669 F.3d 350, 354–57 (3d Cir. 2012).

182. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011) (stating that the interpretation of a phrase depends on “reading the whole statutory text” and “considering the purpose and context of the statute” before stating that it depends on “consulting any precedents or authorities that inform the analysis”).

terpret exclusive arbitration forum clauses and pro-arbitration policy, indicates that the precedent on exclusive arbitration forum disputes contains deep flaws. As such, practitioners and courts both need to work to improve the predictability and functionality of this area of law.

III. BETTER CONTRACTS AND BETTER RULINGS

As the previous discussions demonstrate, there are issues with how courts reach decisions on exclusive arbitration forum agreements. This Note proposes a two-part solution. First, Section A discusses how practitioners may be able to fix some of these problems by drafting exclusive arbitration clauses more clearly. Better drafting would generally prevent these complicated disputes from arising in the first place. Second, because it is unlikely that better drafting will solve these issues fully, courts need to take a more just and consistent approach to interpreting exclusive arbitration forum agreements, as discussed in Section B. Only then will parties have the predictability that they need in this area of contract law.

A. THE ATTORNEYS' PART: DRAFTING CLEARER EXCLUSIVE ARBITRATION FORUM CLAUSES

Practitioners can resolve a portion of exclusive arbitration forum disputes by drafting better exclusive arbitration forum agreements. This might sound obvious, but it is clear from the number of exclusive arbitration forum disputes that have arisen since 2009 that many attorneys are drafting poor arbitration clauses.¹⁸³ As such, when drafting exclusive arbitration forum agreements, attorneys can learn a few lessons from the mistakes of their colleagues.

First, attorneys should be explicit in their contracts as to the parties' expectations for arbitration. If the parties have only agreed to arbitration in a single forum, the attorney should make that clear in the contract. He or she can do so in several ways. Even though courts have interpreted exclusive arbitration forum language differently,¹⁸⁴ an attorney stands the best chance of keeping the language unambiguous if he or she mentions the forum repeatedly throughout the contract.¹⁸⁵ Fur-

183. See discussion *supra* Part I.A.

184. See discussion *supra* Part II.A.1.

185. See, e.g., *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 38, 150 N.M. 398, 259 P.3d 803 (holding that the pervasive references to the NAF throughout the contract compelled the conclusion that the parties intended the NAF to be the exclusive arbitrator); *Riley v. Extendicare Health Facilities*,

thermore, the attorney should indicate that the parties wish to use that forum with strong and mandatory language.¹⁸⁶ As to what constitutes mandatory language, courts have generally accepted the use of “shall,” i.e., “[the designated forum] shall govern the arbitration.”¹⁸⁷ The attorney should avoid boilerplate phrases like “under the procedure of” a particular forum, as courts have ambivalently interpreted this language.¹⁸⁸ On the other hand, if the parties wish to resolve disputes via arbitration regardless of whether a preferred forum is available, the contract should indicate this. The attorney should make this clear by emphasizing the parties’ desire to arbitrate generally, rather than through a particular forum, throughout the agree-

Inc., 826 N.W.2d 398 (Wis. Ct. App. 2012); *see also supra* note 91 and accompanying text; *cf. Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *6 (W.D. Ark. Nov. 18, 2011) (finding the NAF not integral to the contract partially because “reference to the NAF was minimal in the Arbitration Agreement”).

186. *See Rivera*, 2011-NMSC-033, ¶ 31, 150 N.M. 398, 259 P.3d 803 (“Mandatory, as opposed to permissive, contractual language further demonstrates that a specifically named arbitration provider is integral to the agreement to arbitrate.”); *see also supra* note 92 and accompanying text.

187. *See Rivera*, 2011-NMSC-033, ¶ 31, 150 N.M. 398, 259 P.3d 803 (reviewing caselaw on mandatory language in exclusive arbitration forum disputes and, in doing so, repeatedly indicating that “shall” constitutes mandatory language); *see also Inetianbor v. CashCall, Inc.*, No. 13-60066-CIV, 2013 WL 1325327, at *4 (S.D. Fla. Apr. 1, 2013) (stating that the agreement, which used “shall” to designate the arbitrator, used mandatory language); *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 686 (Ga. Ct. App. 2013) (indicating that the contract’s use of the mandatory words “shall” and “exclusively” to indicate arbitration under the NAF Code of Procedure helped persuade the court to find that the parties had an exclusive agreement to arbitrate); *Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195, 1203 (Ind. Ct. App. 2011) (discussing how the contract stated that the plaintiff “shall” submit all claims to the NAF for arbitration” and how that included mandatory language). Of course, it is possible that language other than “shall” may qualify as mandatory language, such as “will” or “must.” *See Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (indicating that the statute used “shall,” “will,” and “must,” which the Court called “language of an unmistakably mandatory character”). However, these types of phrases have not come up significantly before the courts, and the caselaw has shown that it can be difficult to predict how a court will interpret the exclusive arbitration forum language of a contract. *See, e.g., Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 976 (D. Minn. 2012) (suggesting that the court may have adjudicated the case if the contract had used “by and under” instead of “in accordance”).

188. *See, e.g., Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350–51 (11th Cir. 2014) (holding that, in contrast to other cases, the contract before the court designates a particular forum instead of just the procedure for arbitration); *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 789 (7th Cir. 2013) (disagreeing with the district court and finding that “by and under” the NAF’s Code of Procedure does not constitute an exclusive arbitration forum agreement); *see also* discussion *supra* Part II.A.1.

ment.¹⁸⁹

Second, the contract should provide a contingency should the parties' chosen arbitrator become unavailable. If the parties prefer to litigate in that event, the contract should indicate this. If the parties would still prefer to arbitrate, the contract should provide a means for selecting an alternative arbitrator. Although a court could still appoint a substitute arbitrator for the parties under 9 U.S.C. § 5,¹⁹⁰ providing an alternative means in the contract would best serve the parties' intentions. Aside from adding clarity to the agreement, drafting a contingency is also important because courts have interpreted the lack of a contingency varyingly.¹⁹¹

Third, the attorney should discuss exclusive arbitration forum provisions with his or her clients and ensure that they participate in making decisions regarding exclusive arbitration forum agreements. This is especially important if the parties only wish to resolve disputes in a single arbitral forum and litigate otherwise. Some courts have sent cases to arbitration simply because the plaintiff produced no evidence that the arbitration forum indicated in the contract was part of his or her decision to accept the terms of the contract.¹⁹²

Finally, the attorney should ensure that he or she is not specifying a defunct arbitration forum in the exclusive arbitration forum agreement. Although not using a defunct forum may seem readily apparent, this is a recurring cause of exclusive arbitration forum disputes.¹⁹³ Specifically, as discussed earlier, a

189. See, e.g., *Wright v. GGNSC Holdings LLC*, 2011 SD 95, ¶ 27, 808 N.W.2d 114, 122 (sending the case to arbitration after noting that the contract made eighteen references to arbitration).

190. See 9 U.S.C. § 5 (2012); see also discussion *supra* notes 47–49 and accompanying text.

191. Compare *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933, at *4 (W.D. Wash. Oct. 26, 2009) (finding the contract's lack of provision for an alternative arbitral forum as support for the NAF being the exclusive forum), with *Adler v. Dell Inc.*, No. 08-cv-13170, 2009 WL 4580739, at *3 (E.D. Mich. Dec. 3, 2009) (holding that the contract's lack of provision for an alternative arbitral forum only lends ambiguity to the meaning of the arbitration clause).

192. See, e.g., *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) (holding that the plaintiff's testimony supports a finding that the forum was not integral because she testified that "she did not negotiate the Arbitration Agreement, did not remember the Arbitration Agreement itself, but did not doubt that she signed the document").

193. See, e.g., *Green*, 724 F.3d at 794 (Hamilton, J., dissenting) (emphasizing that the defendant, in its contract, provided for arbitration by the NAF in 2012 when the NAF closed in 2009); *Laboratorios Grossman, S.A. v. Forest Labs., Inc.*, 295 N.Y.S.2d 756, 757 (App. Div. 1968) (noting that the parties entered into an agreement for arbitration via a forum that never existed); see *al-*

number of cases have arisen because the parties agreed to arbitration by the NAF *after* it stopped accepting new arbitrations in July 2009.¹⁹⁴ To the mindful attorney, avoiding this problem comes down to being careful about what boilerplate language is (and more importantly is not) included in the contract.

Of course, these recommendations assume three things. First, they assume that the parties are in agreement about arbitration and want to be clear in their contract. Many times, parties intentionally draft contracts with open or vague terms.¹⁹⁵ They may do so because of uncertainty, risk aversion, or a desire to avoid worrying about future contingencies, i.e., a desire to let a court worry about the ambiguity should a problem arise.¹⁹⁶ If keeping an exclusive arbitration forum clause vague is in the client's best interests, then so be it. However, in that situation, the attorney should discuss with his or her client the pitfalls that may arise should the exclusive arbitration forum clause come before a court. Specifically, it may be hard to predict how a judge will interpret the language of a vague exclusive arbitration forum clause.¹⁹⁷

Second, these recommendations assume that attorneys on both sides of a contract strive for ethical representation of their clients. By itself, this assumption is not too disconcerting because there are already checks on an attorney's ethicality. For example, if the client's attorney is doing his job, he should be able to catch anything the other side has placed in the contract

so supra Part I.A.

194. See, e.g., *Green*, 724 F.3d at 789; *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 968–70 (D. Minn. 2012); *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 683 (Ga. Ct. App. 2013); see also *supra* note 38 and accompanying text.

195. See Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71, 76 (2009) (“Scholars have previously given attention to the benefits (especially economic) of lawyers intentionally drafting open, incomplete, and vague contracts . . .”).

196. See H. Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges*, 21 DUKE J. COMP. & INT'L L. 269, 303–04 (2011) (“Contract terms may be precise, vague or anywhere in between. . . . [W]hen parties choose a relatively open-textured standard, they are decreasing their ex ante investment and increasing their expected ex post enforcement costs. Rather than spending time and money worrying about future contingencies and terms specifying precise obligations in light of those contingencies at the front end of the contracting process, parties are choosing to delegate to a future tribunal the task of specifying precise obligations.”); Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1006–07 (1992) (discussing how contracts are written with open terms because of uncertainty, the difficulty of writing and enforcing certain contracts with specific terms, and risk aversion).

197. See discussion *supra* Parts I.B, II.A.

in an attempt to “game” the system.

Nevertheless, this second assumption becomes somewhat alarming when combined with a third assumption: both parties are equally represented by counsel. While sophisticated clients may be equally represented, this is generally not true of parties accepting contracts of adhesion.¹⁹⁸ Such parties often have diminished bargaining power as well.¹⁹⁹ Therefore, the drafting recommendations laid out in this Section are probably of limited utility to individuals who accept a contract of adhesion with an exclusive arbitration forum clause. For them, help must come from the courts.

By following these four recommendations gleaned from exclusive arbitration forum dispute caselaw, an attorney can decrease the chances that his or her client’s contract will become the subject of an exclusive arbitration forum dispute. Unfortunately, for a party accepting a contract of adhesion with an exclusive arbitration forum clause, these recommendations probably hold little value since such a party is not represented by counsel. Instead, those individuals must rely on the courts to provide them with an equitable outcome should an exclusive arbitration forum dispute arise. For this reason, courts must do a better job of writing decisions that are fair, predictable, and fully based in the language of 9 U.S.C. § 5.

B. THE COURTS’ PART: WHAT THE COURTS NEED TO DO IN ORDER TO ENSURE PREDICTABLE AND EQUITABLE RESULTS FOR PARTIES WITH EXCLUSIVE ARBITRATION FORUM DISPUTES

Resolving an exclusive arbitration forum dispute requires interpreting the exclusive arbitration clause and applying 9 U.S.C. § 5.²⁰⁰ Accordingly, courts must keep both of these aspects in mind when analyzing and ruling on an exclusive arbitration forum dispute. Along these lines, this Note advances three simple recommendations to courts hearing these disputes that will allow for fairer and more consistent rulings. First, courts deciding exclusive arbitration forum disputes should start applying a new test that is much more in line with the language of 9 U.S.C. § 5 than either the Integral-Ancillary or Exclusivity Test. Second, courts can, and should, use parol evi-

198. See Schwartz, *supra* note 130, at 346 (“A ‘contract of adhesion’ in the parlance of contract law, is a take-it-or-leave-it standard form agreement, usually presented to a consumer by a business entity.”); see also *supra* Part II.A.3.

199. See *supra* Part II.A.3.

200. See *supra* notes 44–50 and accompanying text.

dence when interpreting the contracts of these disputes according to this new test. Finally, courts should start taking consumer protection policies into account when deciding exclusive arbitration forum disputes, particularly when those disputes involve contracts of adhesion.

1. Clearer Application of 9 U.S.C. § 5

The way courts currently apply 9 U.S.C. § 5 is convoluted. Instead of examining the text of the statute directly, courts use judicially-invented tests that (presumably) attempt to get at the underlying meaning of the statute.²⁰¹ However, the disparity in courts' application of these tests demonstrates that the tests themselves are ambiguous.²⁰² Instead of using these tests, a court should simply ask some variation of the following questions:

(1) Did the parties intend to contract for arbitration in general, and mistakenly agree to a contract that suggests they only wanted to arbitrate using a particular forum? or

(2) Did the parties intend to contract for arbitration by a particular forum, and mistakenly agree to a contract that suggests they wanted to arbitrate in general?

After deciding which of these questions better applies to the situation, the court should only appoint a new arbitrator if it finds the parties intended to contract for arbitration in general and only mistakenly agreed to a contract that suggests they wanted to arbitrate using a particular forum.

This approach is much more straightforward and in line with the use of "lapse," which colloquially means "a small mistake," in the statute.²⁰³ Of course, even if courts adopt this "Intention Test" and apply 9 U.S.C. § 5 by asking these questions, deciding which question is applicable to the contract before the court will still require an exercise in contract interpretation, which is where much of the ambiguity in the exclusive arbitration forum caselaw arises.

2. The Courts Should Give More Credence to Parol Evidence and Properly Examine the Context of Such Evidence when

201. See *supra* notes 172–82 and accompanying text.

202. See *supra* Parts I.B., II.A.1.

203. See *supra* notes 172–76 and accompanying text.

Interpreting the Parties' Contract

Whether a court decides to adopt the Intention Test or follows a different approach, the court must employ principles of contract interpretation in deciding the parties' exclusive arbitration forum dispute. Courts may use parol evidence to interpret an ambiguous contract, and in exclusive arbitration forum disputes, increased use of parol evidence would help courts better interpret parties' contracts. Indeed, increasing the use of parol evidence in exclusive arbitration forum disputes would give courts greater insight into the parties' intentions when they entered into the contract and decrease the need for guessing.²⁰⁴ Moreover, by using more parol evidence, courts would be able to justify varying interpretations of the same language; they could point to external evidence demonstrating that the parties had different intentions when entering into the contracts. Thus, even if courts reached opposite conclusions, other parties would be left with some guidance as to why the different decisions occurred and thus how a court would rule on their particular contract.

Moreover, as discussed, it is likely that even courts following the conservative version of the parol evidence rule would be able to admit such evidence since these contracts' ambiguity may potentially be established just by the fact that courts cannot seem to agree on how to interpret the same basic exclusive arbitration forum clauses.²⁰⁵ One may argue that such a showing itself constitutes external evidence that these strict courts cannot admit without a showing of ambiguity on the face of the contract, creating a chicken and egg problem. However, that argument seems unlikely to prevail. Parol evidence is "prior or contemporaneous oral agreements, or prior written agreements, whose effect is to add to, vary, modify, or contradict the terms of a writing which the parties intend to be a final, complete, and exclusive statement of their agreement."²⁰⁶ Presenting exclusive arbitration dispute caselaw to a court does not fall into any of these categories. Moreover, it would be poor policy for courts to ignore the fact that exclusive arbitration forum clauses have been interpreted varyingly, as this would perpet-

204. See Ferdinand S. Tinio, *The Parol Evidence Rule and Admissibility of Extrinsic Evidence To Establish and Clarify Ambiguity in Written Contracts*, 40 A.L.R.3D 171, 235 (Supp. 2014) ("Presence of ambiguity in written agreement permits reviewing court to examine extrinsic evidence in effort to clarify intent of parties.").

205. See *supra* notes 124–29 and accompanying text.

206. 11 LORD, *supra* note 126, at § 33.1.

uate the problems that exist in the caselaw and that this Note is trying to address.

Even for those courts currently admitting parol evidence to interpret these clauses, there is still a problem with how they have been using it. Courts that have examined parol evidence when deciding an exclusive arbitration forum dispute have generally looked at the rules or procedures of the forum indicated in the contract,²⁰⁷ or party testimony and the record.²⁰⁸ Courts have relied on forum procedure differently depending on how they have interpreted the procedure's language.²⁰⁹ However, as discussed earlier, nearly all courts have ignored the fact that party testimony or a record showing that the plaintiff(s) did not consider the indicated arbitration forum as important when entering into the contract is often in the context of the contract being a take-it-or-leave-it contract of adhesion.²¹⁰ Courts thus need to take this context into account when deciding an exclusive arbitration forum dispute involving a contract of adhesion.

One may argue that taking this context into account when reviewing party testimony or the record is unfair to the other party. This argument is unfounded. First, taking context into account does not mean that the court should make a presumption in favor of the accepting party to a contract of adhesion. It

207. See, e.g., *Klima v. Evangelical Lutheran Good Samaritan Soc'y*, No. 10-cv-1390-JAR-JPO, 2011 WL 5412216, at *4 (D. Kan. Nov. 8, 2011); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 35, 150 N.M. 398, 259 P.3d 803; see also *supra* notes 95–98.

208. See *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 975 (D. Minn. 2012); *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010); *Ex parte Warren*, 718 So. 2d 45, 49 (Ala. 1998).

209. Compare, e.g., *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 789–90 (7th Cir. 2013) (holding that, even though the NAF Code states that only the NAF can apply it, any arbitrator could actually use NAF Code and so the court could appoint a new arbitrator who would use the NAF Code according to the agreement), with *Rivera*, 2011-NMSC-033, ¶ 35, 150 N.M. 398, 259 P.3d 803 (rejecting this argument).

210. See *Selby v. Deutsche Bank Trust Co. Ams.*, No. 12cv01562 AJB(BGS), 2013 WL 1315841, at *11 (S.D. Cal. Mar. 28, 2013) (“Plaintiff has not established, or even argued, that she would not have entered into the underlying Agreement in the event of the NAF’s unavailability to arbitrate the resulting disputes.”); *Meskill*, 862 F. Supp. 2d at 975 (“[T]here is nothing in the record indicating that [the plaintiff] was even aware of the NAF (or its Code) when he signed the Arbitration Agreement.”); *Jones*, 684 F. Supp. 2d at 1168 (“[The plaintiff] testified that she did not . . . remember the Arbitration Agreement itself, but did not doubt that she signed the document”); *Warren*, 718 So. 2d at 49 (“There is no evidence that [the plaintiff] or [the defendant] intended their choice of an arbitrator to be an essential term of the contract”); see also *supra* Part IIA.2.

simply means that the court should not assume that the parol evidence means more than it does. For example, if the court does take context into account with respect to the plaintiff's testimony, the testimony will probably not advance either side's arguments. It will only stand for the proposition that the plaintiff did not intend anything with regard to the exclusive arbitration forum clause.²¹¹ But even if taking context into account means making a presumption against the party that wrote the contract, doing so would be justified in many cases. Contracts of adhesion are usually slanted toward the drafting party, as that party had expert advice in preparing the contract.²¹² Moreover, the accepting party has no choice but to accept or reject the contract.²¹³ The drafting party thus has the ability (and incentive) to draft terms in his or her favor.²¹⁴ As such, a presumption against the drafting party in considering the context of parol evidence would, at worst, put the parties on equal footing in most exclusive arbitration forum disputes.

As for the mechanics of taking context into account, utilizing the Intention Test discussed above²¹⁵ may inherently help with this issue. As noted, courts usually employ the Integral-Ancillary Test in deciding whether to adjudicate the parties' dispute or send it to arbitration.²¹⁶ In the context of this test, the plaintiff's testimony or a record stating that the plaintiff did not consider the arbitration clause seems to go against the idea that the identity of the forum is integral to the contract. However, the proposed Intention Test advocates for courts to make a ruling by looking directly at the parties' intentions when they entered into the exclusive arbitration forum agreement.²¹⁷ Therefore, by using the questions in the Intention Test,

211. See discussion *supra* note 210 and accompanying text.

212. Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT'L ECON. L. 681, 688 (2006) ("In short, contracts of adhesion allow one party to impose terms on another unwilling or unsuspecting party. This occurs because the party that drafts the contract usually has had the advantage of time and expert advice in preparing the contract, almost inevitably producing a contract slanted in that party's favor.")

213. See *id.* ("Even when the non-drafting party has the opportunity to read the contract, that party usually lacks any meaningful choice but to accept the contract—because of a lack of alternatives and because of the accepting party's severely disproportionate bargaining position.")

214. See Jeffrey C. Bright, *Unilateral Attorney's Fee Clauses: A Proposal To Shift to the Golden Rule*, 61 DRAKE L. REV. 85, 91 (2012) ("[T]he stronger party is able to draft the contract to its advantage without fear of negotiation from the weaker party.")

215. See *supra* Part III.B.1.

216. See *supra* note 51 and accompanying text.

217. See *supra* Part III.B.1.

it may become clearer to courts that the party accepting an adhesion contract may not have understood or even considered the exclusive arbitration forum clause when entering into the contract.

Overall, courts should more frequently use parol evidence to ascertain the parties' intentions in entering into a contract. Doing so would take much of the conjecture out of interpreting exclusive arbitration forum clauses. Moreover, courts should be aware that most of these contracts are contracts of adhesion. Courts should consider this when evaluating parol evidence, instead of just using it as support for a supposition of general arbitration. However, this second point raises a compelling question: If one of the parties did not have any intention when it came to the exclusive arbitration forum clause, how should the court decide?

3. Courts Should Use Consumer Protection Policy To Help Them Decide Exclusive Arbitration Forum Disputes, Especially when the Contract Specifies Arbitration by the NAF

Courts are allowed to use policy to help them decide a case.²¹⁸ Many courts facing exclusive arbitration forum disputes already do so by referencing the fact that there is a liberal federal policy in favor of arbitration.²¹⁹ As discussed above, it is possible that courts may be misapprehending the situation when they apply this policy to exclusive arbitration forum disputes.²²⁰ However, this is less of a concern than the fact that this is often the *only* policy that courts (at least explicitly) apply.²²¹ When the contract is a contract of adhesion, this becomes more problematic because of the power contracts of adhesion give to the drafting party.²²²

Courts should take consumer protection policies into account when dealing with a contract of adhesion including an

218. *Cf.* *Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole *and to its object and policy.*” (emphasis added)).

219. *See, e.g., Khan v. Dell Inc.*, 669 F.3d 350, 356 (3d Cir. 2012); *see also* discussion *supra* notes 157–58 and accompanying text.

220. *See supra* Part II.B.1.

221. *See, e.g., Khan*, 669 F.3d 350 (applying only pro-arbitration policy); *Adler v. Dell Inc.*, No. 08-cv-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009) (same).

222. *See Schwartz, supra* note 130, at 351 (discussing how some scholars have attacked contracts of adhesion because they allow business interests to dominate).

exclusive arbitration forum clause. As examined above, accepting parties may not have even considered the exclusive arbitration forum clause when entering into the contract, which makes finding the intention of the parties difficult.²²³ However, the mere fact that many of these contracts specify arbitration by the NAF, at times even after the NAF stopped accepting consumer arbitrations,²²⁴ is disconcerting. It suggests that the drafting party in these situations may not have had the accepting party's best interests at heart—just the opposite, as the NAF was shut down for fraudulent bias against consumers.²²⁵ Indeed, many of these drafting parties may have designated the NAF because of its bias against consumers. And in the case of drafting parties that designated the NAF as the exclusive arbitration forum after July 2009, it makes one wonder whether such drafting parties were being “negligent or deliberately deceptive.”²²⁶

Yet, many courts do not consider this fact when deciding an exclusive arbitration forum dispute, even though the majority of these disputes in recent years have gone to court because the NAF stopped accepting arbitrations.²²⁷ This is not fair to the accepting party. Moreover, it undermines the consumer protection reasons for which the Minnesota Attorney General shut down the NAF.²²⁸ This is not to say that courts should necessarily adjudicate all and any exclusive arbitration forum disputes that involve the NAF. But courts should at least take note of the reasons why businesses started using the NAF in the first place and be suspicious of a designation of the NAF as the exclusive arbitration forum, particularly in a contract of adhesion.²²⁹ The same holds true for any exclusive arbitration

223. See *supra* notes 150–53 and accompanying text.

224. See, e.g., *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 789 (7th Cir. 2013); see also discussion *supra* notes 38 & 194 and accompanying text.

225. See *Firm Agrees To End Role in Arbitrating Card Debt*, *supra* note 8; see also discussion *supra* notes 22–28 and accompanying text.

226. *Green*, 724 F.3d at 794 (Hamilton, J., dissenting).

227. For example, in *Green*, the dissent complained about how the majority ignored this fact in its decision. *Id.* The dissent expressed similar sentiments in *Khan v. Dell Inc.* 669 F.3d 350, 358–59 (3d Cir. 2012) (Sloviter, J., dissenting) (“The majority avoids any discussion of the underlying reason why arbitration by NAF is unavailable. . . . It cannot be insignificant that Dell named NAF as the exclusive forum in its arbitration clauses.”).

228. See *Berner*, *supra* note 25; see also discussion *supra* notes 22–28 and accompanying text.

229. See generally *Berner & Grow*, *supra* note 28, at 72–74 (discussing the unethical practices of the NAF). In *Meskill v. GGNCS Stillwater Greeley LLC*, the court did discuss the defendant's choice of the NAF as the exclusive arbitration forum in the contract of adhesion and why the NAF stopped accepting

forum clause that specifies a forum that the court notes may be biased in favor of the drafting party.²³⁰

Altogether, courts can start reaching more predictable and equitable outcomes for parties with an exclusive arbitration forum dispute by following the recommendations discussed in this Part. Specifically, courts should look more explicitly at the parties' intentions, use more parol evidence, take into account the context of that evidence, and remember to consult consumer protection policies. When combined with more careful drafting of exclusive arbitration forum clauses, much of the confusion within the field of exclusive arbitration forum disputes can be avoided in the future.

CONCLUSION

Courts are split on how to decide whether to adjudicate an exclusive arbitration forum dispute or appoint a new arbitrator for the parties. Although most use the Integral-Ancillary Test, courts apply the test differently. Moreover, the test itself may be misapplying 9 U.S.C. § 5, from which most courts gain the power to appoint a new arbitrator. Aside from concerns with the Integral-Ancillary Test, courts have interpreted very similar contractual language creating an exclusive arbitration forum clause in contradictory ways. To overcome these issues, practitioners must learn from the mistakes of their colleagues and draft these agreements more carefully. However, since many of these contracts are contracts of adhesion, this suggestion can only go so far. For the sake of accepting parties to contracts of adhesion, courts should be more consistent and equitable when deciding exclusive arbitration forum disputes. Courts can achieve this by focusing on the parties' intentions,

consumer arbitrations. 862 F. Supp. 2d 966, 977 (D. Minn. 2012). The court even considered the fact that the parties entered into the agreement after July 2009. *Id.* Nevertheless, the court decided not to hold these facts against the defendant, reasoning that “[n]othing in the Minnesota Attorney General’s action against the NAF implicated [the defendant].” *Id.* at 977–78. Although this author disagrees with some of the court’s conclusions, at least the court in *Meskill* fully considered the NAF’s history and decided that it wasn’t relevant to the case before it. That is more consumer policy consideration than most courts give to these cases.

230. For example, the arbitration clause in *Inetianbor v. CashCall, Inc.* specified arbitration by a forum that never conducted arbitrations. 768 F.3d 1346, 1349 (11th Cir. 2014). The concurring judge supported the decision because he found the exclusive arbitration forum clause unconscionable “not just because of unequal bargaining power, but because of [the defendant’s] actions [the plaintiff] had no ability or opportunity to understand the forum selection clause.” *Id.* at 1355 (Restani, J., concurring).

using more parol evidence and taking into account the context of such evidence, and remembering to consult consumer protection policies where they apply. By following these recommendations, together courts and attorneys can decrease the number of exclusive arbitration forum disputes and improve the cohesiveness of this field of law.