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AN UNCONSCIONABLE APPLICATION OF THE UNCONSCIONABILITY DOCTRINE: HOW THE CALIFORNIA COURTS ARE CIRCUMVENTING THE FEDERAL ARBITRATION ACT

Stephen A. Broome*

I. INTRODUCTION

The United States Supreme Court stated in Moses H. Cone Memorial Hospital v. Mercury Construction Corporation that the Federal Arbitration Act (FAA)¹ “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”² Subsequent decisions of the Court clearly provide that mutually agreed-upon arbitration agreements must be afforded the same judicial deference as ordinary contractual provisions.³ While in most jurisdictions the judiciary has long abandoned its historical hostility to arbitration as an alternative to litigation, deferring to the Supreme Court’s broad interpretation of the FAA and in fact even welcoming arbitration as a practical auxiliary to the judicial system, in California the courts continue to view arbitration agreements critically. Under the unique approach adopted in California, the courts have refused


3. See, e.g., Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (stating that state law may be applied to arbitration agreements only “if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”); Doctor’s Assocs., Inc. v. Cassarotto, 517 U.S. 681, 686-87 (1996).
to enforce multitudes of arbitration agreements. Although ostensibly applying the "generally applicable" contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration.

This Article examines the California courts' unconscionability jurisprudence, highlighting the disparate application of unconscionability doctrine in cases involving arbitration agreements as contrasted with cases involving "ordinary" contracts. Part II provides an historical background in order to give context to the analyses and arguments that follow. An empirical analysis in Part III reveals that unconscionability challenges before the California appellate courts succeed with far greater frequency when the contractual provision at issue is an arbitration agreement.

Part IV provides a substantive analysis of the California appellate courts' unconscionability decisions. The unconscionability test comprises two prongs—one testing substantive unconscionability and the other testing procedural unconscionability. Parts IV.A and IV.B provide analyses of the California courts' substantive and procedural unconscionability jurisprudence, respectively. Part IV.A explains that the California courts routinely employ the "mutuality test," a unique substantive unconscionability test, when the disputed term is an arbitration provision. The mutuality test evidences an overt bias against arbitration by the California courts, as the test begins with the premise that arbitration is inferior to litigation as a method of dispute resolution. In addition, Part IV.A discusses how the mutuality test provides a basis for unconscionability that is entirely different in kind from the basis for unconscionability findings outside of the arbitration context. In the non-arbitration context the basis for an unconscionability finding is invariably the appropriation by the party with superior bargaining power of something of measurable value, unjustified by any legitimate business purpose. In contrast, under the mutuality test the California courts frequently void arbitration agreements as unconscionable on the basis of speculative disadvantages to the party required to arbitrate its claim.

The procedural unconscionability analysis in Part IV.B reveals that the

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4. Section two of the FAA provides that courts may not restrict the enforceability of arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000).

5. The terms "arbitration setting" or "arbitration context" refer to cases where the validity of an arbitration agreement is at issue before a court. The terms "non-arbitration context" or "non-arbitration setting" refer to cases where the validity of a contractual term other than an arbitration agreement is being challenged before a court.

courts impose a lower burden for plaintiffs attempting to demonstrate procedural unconscionability in the arbitration setting. In the non-arbitration context, plaintiffs claiming that a standardized form contract is procedurally unconscionable generally have to demonstrate that they sought to negotiate the disputed terms but were rebuffed and/or that they could not obtain the necessary products, services or employment elsewhere. By contrast, the courts have said that arbitration provisions in standardized form contracts are procedurally unconscionable *per se*.

The Article concludes that the California courts are clearly biased against arbitration as an alternative means of dispute settlement. Their disdain manifests in unique unconscionability requirements applicable solely when arbitration agreements are at issue and in lower standards for demonstrating unconscionability in the arbitration context. It is therefore evident that California's unconscionability jurisprudence violates the basic mandate of the FAA that arbitration agreements be placed on equal footing with ordinary contractual provisions.7

II. BACKGROUND

The proliferation of arbitration agreements in employment and commercial contracts has increased exponentially over the past century as employers and businesses, intent on avoiding the judicial system for resolving disputes, have incorporated arbitration clauses into virtually all of their standardized form contracts.8 Businesses understand arbitration to be faster and less costly than litigation. The speed and cost savings of arbitration derive from a focus on early resolution of the dispute, less formal procedures (arbitrations generally dispense with formal pleading rules and most pre-trial motions), and simplified discovery.9 In addition, repeated use of an arbitral forum generates institutional knowledge over a particular subject matter and enhances the forum's ability to resolve a company's disputes as efficiently as possible.

Critics of arbitration, in contrast, argue that arbitration agreements often are imposed on consumers and employees by businesses and

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7. See H.R. REP. NO. 68-96, at 2 (1924) (In enacting the FAA, Congress sought to place arbitration agreements "upon the same footing as other contracts, where [they] belong.").
9. See generally Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998). Maltby's study compared employment claims filed with the American Arbitration Association with similar claims filed in federal court. He found that, on average, arbitration cases were concluded in about half the time of litigation. Pierce writes that the informal nature of the arbitration process "enhances the behavior of courtroom participants... [and] diminishes the adversarial nature of dispute resolution by encouraging arbitrating parties to work closely together in an effort to seek common solutions." David P. Pierce, The Federal Arbitration Act: Conflicting Interpretations of its Scope, 61 U. CIN. L. REV. 623, 625 (1992).
employers who are generally in a superior bargaining position; the alleged goal of the businesses and employers is to prevent these potential plaintiffs from enjoying the purported advantages of litigation, such as the right to conduct extensive discovery, the right to a jury trial, the possibility of instituting a class action lawsuit and the right to appeal.¹⁰

Until the early-twentieth-century, judges frequently were persuaded that arbitration agreements, despite being formalized in written and valid contracts, should nevertheless be disregarded. “In many jurisdictions, courts once viewed agreements to arbitrate as a ‘lesser caste’ of contract provisions that could be ignored with impunity.”¹¹ In fact, a review of pre-twentieth-century jurisprudence indicates that the voiding of arbitration agreements was routine.¹² This judicial hostility resulted in part from courts’ reluctance to surrender jurisdiction in cases that would otherwise be before them,¹³ and in part because of judges’ paternalistic attitude that only they could ensure that individual plaintiffs would be afforded a fair opportunity to challenge corporate defendants.¹⁴

By the turn of the century, however, growing industrialization and the accompanying increase in the frequency of labor and business disputes changed the general attitude of the judiciary.¹⁵ Arbitration came to be seen as a system of adjudication built, like the public justice system, on the foundation of fundamental fairness.¹⁶ Judges came to accept arbitration as a welcome supplement to the overworked judicial system.¹⁷ Congress also took this view and, in 1925, enacted the FAA, placing arbitration agreements on an equal footing with other valid contractual provisions.¹⁸

¹⁰. Pierce, supra note 9, at 625.
¹². See McGuinness & Karr, supra note 6, at 63.
¹³. Wigner has suggested that American judicial hostility towards arbitration agreements flowed from a similar hostility displayed by English courts. English judges were paid fees based on the number of cases they decided. Arbitration therefore infringed their livelihood. See Preston D. Wigner, The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2, 29 U. RICH. L. REV. 1499, 1502 (1995).
¹⁴. See generally Petition of Pahlberg, 43 F. Supp. 761, 762 (S.D.N.Y. 1942) (“Prior to 1925 there was no federal legislation on the subject of arbitration and it is an historical fact that our courts, generally speaking, had not looked with favor upon arbitration agreements. They had never denied that an agreement to arbitrate created a right but public policy was thought to forbid specific performance.”), appeal dismissed, 131 F.2d 968 (1942).
¹⁶. Stipanowich, supra note 11, at 6.
¹⁷. Id.
¹⁸. H.R. REP. No. 68-96, at 2 (1924) (In enacting the FAA, Congress sought to place arbitration agreements “upon the same footing as other contracts, where [they] belong.”).
Section 2 of the FAA makes "valid, irrevocable, and enforceable"\textsuperscript{19} written arbitration provisions in commercial transactions,\textsuperscript{20} "save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{21} In essence, section 2 serves as an equal protection clause for arbitration provisions, ensuring that arbitration clauses are subject to the same principles of contract law as ordinary contractual provisions. The Supreme Court has interpreted the language of the FAA broadly,\textsuperscript{22} and subsequent lower court decisions demonstrate that section 2 requires courts, in most circumstances, to enforce arbitration agreements irrespective of context, be it an employee action against an employer,\textsuperscript{23} a consumer product dispute,\textsuperscript{24} a franchise dispute,\textsuperscript{25} a dispute between a bank and its customer,\textsuperscript{26} or an investor action under the securities laws.\textsuperscript{27} The Court has also clearly stated that the FAA applies in state courts and preempts any conflicting state law.\textsuperscript{28}

With respect to the so-called "savings clause" of section 2, the Court has noted that state law may be applied to arbitration agreements only if that law was intended to govern issues concerning the enforceability of contracts \textit{generally}.\textsuperscript{29} The Court warned that section 2 precludes courts

\begin{itemize}
\item \textsuperscript{19} 9 U.S.C. § 2 (2000).
\item \textsuperscript{20} The FAA also applies to "maritime transaction[s]," but such transactions are outside the scope of this Article. 9 U.S.C. § 2 (2000).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Court determined the FAA to be a source of substantive federal law governing arbitrability issues under any agreement within its coverage. 460 U.S. 1, 24 (1983). The Court declared that the FAA superceded contrary "state substantive or procedural policies" concerning arbitrability and applied in state as well as federal courts. The Court also stated that doubts concerning arbitrability are to be resolved in favor of arbitration. \textit{Id}. \textit{See also} Southland Corp. v. Keating, 465 U.S. 1, 11, 16 (1984) (mandating arbitration of claims under a state franchise investment statute, reasoning that the FAA preempted provisions of the statute that required judicial resolution of claims).
\item \textsuperscript{23} \textit{See, e.g.}, Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1463 (D. Minn. 1996) (enforcing agreement to arbitrate in employment contract with respect to claims and disputes governed by ERISA and state and local antidiscrimination laws and ordinances).
\item \textsuperscript{24} \textit{See, e.g.}, ProCD Inc. v. Ziedenberg, 86 F.3d 1447, 1445 (7th Cir. 1996) (holding that terms inside box of software bind customers who use software after foregoing opportunity to read the terms and reject them by returning the software).
\item \textsuperscript{25} \textit{See, e.g.}, Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 689 (1996) (holding franchisee-franchisor arbitration agreement could not be rendered unenforceable under the FAA based on Montana statute discriminating against arbitration agreements).
\item \textsuperscript{26} \textit{See, e.g.}, Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F. 3d 868, 883 (11th Cir. 2005) (enforcing arbitration agreement between bank and borrower).
\item \textsuperscript{28} Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984).
\item \textsuperscript{29} \textit{Doctor's Assocs., Inc.}, 517 U.S. at 686-87 (citing Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).
\end{itemize}
from invalidating arbitration agreements under state laws that are applicable solely to arbitration provisions. Thus, courts may apply generally applicable contract defenses—such as fraud, duress or unconscionability—but may not void arbitration agreements pursuant to statutory or judge-made laws that govern only arbitration provisions. Absent a generally applicable contract defense, privately negotiated agreements to arbitrate, like ordinary contracts, must be enforced in accordance with their terms.

III. EMPIRICAL ANALYSIS

This empirical study collects all cases in the California Courts of Appeal (the intermediate appellate courts in California) that involved analysis of an unconscionability challenge to a contractual provision. The study reveals that unconscionability challenges succeed more frequently when the contractual provision at issue is an arbitration agreement. A Westlaw search revealed 114 cases in which the California Courts of Appeal analyzed whether the terms of an arbitration agreement were unconscionable. In fifty-three of those cases the arbitration agreement was held to be unconscionable and therefore unenforceable. In an

30. Id. at 687; see also Perry, 482 U.S. at 492 n.9 (“A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.”).
31. See Doctor’s Assocs., Inc., 517 U.S. at 687.
33. The study reviewed all Court of Appeal cases decided between August 27, 1982 and January 26, 2006. The significance of August 27, 1982, is that it marks the introduction of the modern unconscionability test to California. Under the modern test, a determination that an agreement is unconscionable rests on findings of both substantive and procedural unconscionability. In A&M Produce v. FMC Corp., 135 Cal. App. 3d 473, 486 (1982), the Court of Appeal established the two pronged unconscionability analysis as precedent in California, citing, inter alia, the landmark unconscionability case Williams v. Walker-Thomas Furniture Company, 350 F.2d 445 (D.C. Cir. 1965). The surge in unconscionability challenges to arbitration agreements occurred after the introduction of the modern test. In order to permit an apples-to-apples comparison (i.e. comparing substantive unconscionability jurisprudence in the arbitration and non-arbitration contexts, and then comparing procedural unconscionability jurisprudence in the arbitration and non-arbitration contexts), the period before A&M Produce is excluded from this study.
34. See infra notes 35, 36 and 37.
additional thirteen cases a particular aspect of the arbitration agreement was held to be unconscionable and severed from the arbitration agreement, while the remainder of the arbitration agreement was enforced. In forty-


eight cases the arbitration agreement was found not to be unconscionable
and the agreement was enforced according to its terms.37

In the non-arbitration context (where an ordinary contractual provision
is at issue), by contrast, the incidence of successful unconscionability
challenges is significantly lower, in both absolute and relative terms. A
Westlaw search revealed forty-six cases in the California Courts of Appeal where a non-arbitration contractual provision was alleged to be unconscionable. In forty-one of those cases, the contractual provision was upheld by the court.\(^{38}\) In only five ordinary contract cases was the contractual provision held to be unconscionable and unenforceable.\(^{39}\)

In other words, when one includes the cases in which a particular provision of an arbitration agreement was held unconscionable and


severed, unconscionability challenges succeeded in about fifty-eight percent of cases in the arbitration context. In the non-arbitration context, by contrast, unconscionability challenges succeeded only eleven percent of the time. Thus, as a purely empirical matter, unconscionability challenges succeed with far greater frequency when the contractual provision at issue is an arbitration agreement.

The following table summarizes the outcomes of unconscionability challenges in the California Courts of Appeal:

<table>
<thead>
<tr>
<th>Unconscionability Challenges to Contracts Reviewed by California Courts of Appeal</th>
<th>Agreement Unconscionable</th>
<th>Unconscionable Provision Severed</th>
<th>Agreement Enforceable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitration Agreement</td>
<td>53 (47%)</td>
<td>13 (11%)</td>
<td>48 (42%)</td>
</tr>
<tr>
<td>Ordinary Contract</td>
<td>5 (11%)</td>
<td>0</td>
<td>41 (89%)</td>
</tr>
</tbody>
</table>

Numbers, however, provide only a starting point. The significance of these numbers might be diminished by positing that arbitration agreements more frequently include truly unconscionable provisions. As will be demonstrated below, however, the empirical data are in fact the natural consequence of the unique standards to which arbitration agreements are held by the California courts as they apply the unconscionability doctrine.

**IV. SUBSTANTIVE ANALYSIS**

The following Part provides a substantive analysis of the application of unconscionability doctrine by the California appellate courts in both the arbitration and non-arbitration contexts. The doctrine of unconscionability comprises two elements, one substantive and one procedural. Substantive unconscionability focuses on “overly harsh” or “one-sided” results. Procedural unconscionability focuses on “oppression” or “surprise” attributable to unequal bargaining power in the negotiating process. Both elements must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause. The elements need not be present

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41. Id.
42. Id.
43. Id.
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to the same degree, however.44 “Essentially a sliding scale is invoked
which disregards the regularity of the procedural process of the contract
formation, that creates the terms, in proportion to the greater harshness or
unreasonableness of the substantive terms themselves.45 Thus, “the more
substantively oppressive the contract term, the less evidence of procedural
unconscionability is required to come to the conclusion that the term is
unenforceable, and vice versa.”46

The substantive and procedural inquiries involve different standards
and requirements. To determine whether the California courts apply
unconscionability doctrine disparately to arbitration agreements, it is
necessary to analyze the courts’ treatment of the substantive and procedural
elements separately.

A. SUBSTANTIVE UNCONSCIONABILITY

Section 2 of the FAA provides that written arbitration agreements
“shall be valid, irrevocable, and enforceable, save upon such grounds as
exist at law or in equity for the revocation of any contract.”47 The U.S.
Supreme Court has noted that the text of section 2 declares that state law
may be applied “if that law arose to govern issues concerning the validity,
revocability, and enforceability of contracts generally.”48 The Court,
however, cautioned that courts “may not invalidate arbitration agreements
under state laws applicable only to arbitration provisions.”49 The Court also
stated that “[a] state-law principle that takes its meaning precisely from the
fact that a contract to arbitrate is at issue does not comport with this
requirement of section 2.”50 Nevertheless, the California Courts of Appeal
routinely strike down arbitration agreements by applying the “mutuality
test”—a unique test applicable only to arbitration agreements.

The mutuality test was first announced as part of California
unconscionability analysis in Stirlen v. Supercuts, Inc.51 The Court of
Appeal held in that case that an arbitration agreement in a standard
employment contract was unconscionable because it lacked even a
“modicum of bilaterality.”52 At issue in Stirlen was an arbitration
agreement that required employees to arbitrate their wrongful termination
claims against the employer but specifically excluded other types of

44. Id.
45. Id. (citing 15 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 1763A (3d ed. 1972)).
46. Armendariz, 24 Cal. 4th at 114.
Perry v. Thomas, 482 U.S. 482, 492 n.9 (1987)).
49. Id. (emphasis in original).
50. Perry, 482 U.S. at 492 n.9.
52. Id. at 1540.
disputes—such as those relating to the protection of the employer’s intellectual property and the enforcement of a post-employment covenant not to compete—from the scope of arbitration. The court held that these exceptions made the agreement “one-sided,” and rendered the arbitration agreement unconscionable and unenforceable. Two years later, in Kinney v. United Healthcare Services, the Court of Appeal was faced with a similar arbitration agreement that required the employee, but not the employer, to submit claims to arbitration. The court stated, “Faced with the issue of whether a unilateral obligation to arbitrate is unconscionable, we conclude that it is.”

The California Supreme Court affirmed the mutuality test in Armendariz v. Foundation Health Psychcare Services, where it concluded that “Stirlen and Kinney are correct in requiring this ‘modicum of bilaterality’ in an arbitration agreement.” The court stated that arbitration agreements lacking mutuality are unfairly one-sided and therefore unconscionable absent a “reasonable justification for such one-sidedness based on ‘business realities.’” The court supported this conclusion by discussing the numerous disadvantages arbitration would impose on an employee pursuing a claim under the Federal Employment and Housing Act (FEHA) against his employer, and referred to “[v]arious studies [that] show that arbitration is advantageous to employers.” Although Armendariz involved an arbitration provision in an employment contract, numerous subsequent opinions of the Courts of Appeal have applied the mutuality requirement to arbitration agreements in a diverse group of contracts.

The mutuality test is now the most common means employed by the Courts of Appeal to void arbitration agreements: in more than two-thirds of the Courts of Appeal cases finding arbitration provisions unconscionable, the basis was lack of mutuality.

53. Id. at 1527-30.
54. Id. at 1549-50.
56. Id.
58. Id.
59. Id. at 115 (citing Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997); David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33, 60-61 (1997)).
Other jurisdictions have refused to adopt a requirement of mutuality for arbitration agreements.\(^6\) The Alabama Supreme Court rejected a mutuality requirement, stating that such an approach relies on the “uniqueness of the concept of arbitration,” “assigns a suspect status to arbitration agreements,” and therefore “flies in the face of [the U.S. Supreme Court’s holding in] Doctor’s Associates.”\(^6\) Another court similarly held that “lack of mutuality arising from the fact that Defendants may go to court while Plaintiffs must arbitrate does not render the clause unconscionable.”\(^6\) Two arguments support this conclusion. First, general principles of contract law provide that a non-mutual contract is valid “so
long as there is consideration on both sides." 

Second, a contrary rule would place a unique burden on agreements to arbitrate and therefore would conflict with the FAA. The Armendariz decision itself has been criticized by at least one California federal court: “Under California law, other non-mutual provisions are valid and not unconscionable. The language used by the California Supreme Court in the Armendariz opinion itself demonstrates that the rule singles out and imposes a special burden on arbitration agreements . . . .”

Whether the principle of mutuality is generally a sound contract law doctrine is beyond the scope of this Article. If mutuality of obligation were a basic requirement for all contracts in California, there would likely be no conflict with the FAA. However, as in fact applied by California courts, the mutuality test violates the FAA because: (1) it is an arbitration-specific test premised on the inferiority of arbitration as compared with litigation; and (2) it provides a basis for finding substantive unconscionability—lack of mutuality—that is substantially different in kind from the basis used to support substantive unconscionability findings for ordinary contractual provisions.

1. The Mutuality Test Is An Arbitration-Specific Test Premised On The Inferiority Of Arbitration

Outside of the arbitration context, California law does not require mutuality of obligation as a precondition to enforcement of contracts. Nevertheless, the court in Armendariz insisted that the mutuality test does not single out and impose a heightened burden on arbitration agreements:

The ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context. One such form is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. The application of this principle does not disfavor arbitration. It is no disparagement of arbitration to acknowledge that it has both advantages and

65. Gray, 2000 WL 1480273, at *4; see also Wilson Elec. Contractors, Inc., v. Minnotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989) (“Because the contract as a whole did not lack consideration, we see no grounds justifying the district court’s decision, which appears to be pervaded by the ‘the old judicial hostility to arbitration.’”).
67. See, e.g., Gray, 2000 WL 1480273, at *4; McNaughton, 728 So.2d at 598.
68. Gray, 2000 WL 1480273, at *4 (citation omitted).
disadvantages. 70

The court acknowledged that lack of mutuality is not normally problematic, but maintained that "in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." 71

While a typical unconscionability analysis requires a court to assess whether an agreement is so one-sided as to "shock the conscience," 72 California courts have indicated that, in the arbitration setting, this standard is satisfied per se where the plaintiff demonstrates that an arbitration agreement lacks mutuality. 73 The mutuality test does not require a case-by-case evaluation of the strengths or weaknesses of the arbitral forum contemplated by the particular agreement. Under California jurisprudence the party seeking to avoid arbitration need not show, for example, that the particular forum is impartial or provides for unreasonably limited discovery or excessive arbitration costs. The California courts assume under the mutuality test that the agreement is substantively unconscionable if one party’s claims are subject to arbitration while the other party’s claims may be litigated. As the Court of Appeal stated in Ramirez v. Circuit City Stores, Inc., "It is by now well-settled that an agreement that requires the weaker party to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts, is presumptively unconscionable." 74 Although there is language in Armendariz that suggests that lack of mutuality can be justified by "business realities," 75 no lower court has yet identified a business reality sufficient to justify lack of mutuality in an arbitration agreement. 76

The fact that no substantive inquiry of the particular arbitral forum is necessary is evidence of the assumption underlying the mutuality test—that arbitration is inferior to litigation as a means of dispute resolution. Under the mutuality test, the courts assume that being required to arbitrate is always a disadvantage—no matter the character of the particular forum—because of the inherent limitations of arbitration. The California Supreme Court revealed its bias in Armendariz, stating, "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to

71. Id. at 117.
73. See infra note 74.
75. Armendariz, 24 Cal. 4th at 117.
76. McGuinness & Karr, supra note 6, at 81.
prosecute a claim against the employee..."\textsuperscript{77} If a court assumes arbitration is inferior to litigation, it is easy to see why it would then view a unilateral agreement to arbitrate as unfair. The problem, of course, is that the FAA prohibits the courts from making such an assumption.\textsuperscript{78}

It is noteworthy that the assumption underlying the mutuality test creates a significant burden-shifting effect. Normally, the burden of proving unconscionability rests on the party challenging the agreement.\textsuperscript{79} Under the mutuality test, by contrast, a unilateral agreement to arbitrate is presumed to be unconscionable unless the party seeking to compel arbitration can identify a legitimate business justification for the arrangement. As of yet, there is no case where this burden has been satisfied.\textsuperscript{80}

In sum, the mutuality test disfavors arbitration agreements and significantly increases the ability of a party to avoid arbitration. As an arbitration-specific requirement premised on the inferiority of arbitration in relation to litigation, the mutuality test clearly violates section 2 of the FAA.

2. \textbf{Lack of Mutuality is Different In Kind From the Basis Used To Find Ordinary Contractual Provisions Unconscionable}

Contract terms, other than arbitration clauses, are rarely held to be unconscionable. A Westlaw search reveals only five such cases in the California Courts of Appeal.\textsuperscript{81} The dearth of such cases is explained by the fact that the basis for a substantive unconscionability finding is normally limited to contractual terms that are: (1) clearly included in the contract by the superior bargaining party in an attempt to appropriate from the weaker party something of substantial economic value; and (2) not justified by any legitimate business interest of the superior bargaining party.\textsuperscript{82} Courts identify an unfair and unjustified impairment of the weaker party's

\textsuperscript{77} Armendariz, 24 Cal. 4th 83 at 117 (emphasis added).

\textsuperscript{78} See De Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 487 (1989) ("The act of replacing an employee's access to the courts for airing employment-related disputes with access to an arbitral forum, provided it appears unfair and impartial, cannot be viewed as a penalty or the like.").

\textsuperscript{79} See E. Allen Farnsworth, \textit{Farnsworth on Contracts} § 4.28 (2 ed. 2001). \textit{See also} Woodside Homes of Cal., Inc. v. Super. Ct., 107 Cal. App. 4th 723, 727-28 (2003) ("The party asserting unconscionability as defense has the burden of establishing that condition."); In re First Merit Bank, N.A., 52 S.W.3d 749, 756 (Tex. 2001) ("Since the law favors arbitration, the burden of proving a defense to arbitration is on the party opposing arbitration.").

\textsuperscript{80} See McGuiness & Karr, \textit{supra} note 6, at 81.


\textsuperscript{82} See Carboni, 2 Cal. App. 4th at 82-83.
substantive economic rights, and it is upon this finding that unconscionability is based. Because mutually agreed upon contracts are generally presumed to be valid, the party asserting an unconscionability challenge normally has a substantial burden in establishing that the term is unfair and unjustified. As research reveals, this burden is rarely satisfied.

A brief description of the contracts in the five successful non-arbitration unconscionability challenges will help illustrate the distinction between the normal basis for substantive unconscionability and lack of mutuality.

In Phoenix Leasing Inc. v. Johnson, the loan agreement at issue included a default term that permitted the lender both to accelerate payments upon default, and to include in the amortization all the interest payments that the lender would have been entitled to if the loan had been paid out over the full term.83 Experts testified at trial that when a loan is accelerated, the borrower does not have the use of the money for the duration of the loan term and therefore the lender does not earn the interest. The court found that Phoenix had no legitimate business interest in receiving the approximately $208,000 of unearned interest and accordingly that the amortization provision was substantively unconscionable.84

In Ilkhchooyi v. Best, the plaintiff was duped into signing a lease agreement that entitled the landlord, upon assignment of the lease, to three quarters of any consideration the tenant received for promising not to compete with the sub-lessee.85 When plaintiff sold his business and assigned the lease to the buyer, the sales contract stipulated that $40,000 of the sales price would be allocated as consideration for a covenant not to compete.86 The landlord claimed $30,000 under the terms of the lease and refused to assent to the assignment until that sum was paid.87 The court noted that the lease afforded the landlord the right to refuse to consent to the assignment, and if the landlord did consent, to increase the rent to market value.88 The landlord’s legitimate interest in the possible escalation in market rent was amply protected by the consent-to-assignment provision.89 Therefore, the landlord’s “attempt to appropriate a portion of the sales price for the business was blatant overreaching.”90

In Carboni v. Arrospide, Arrospide signed a $4000 note in favor of Carboni that carried an interest rate of 200% per annum, was due in three

84. Id. at *6.
86. Id. at 402.
87. Id.
88. Id. at 775.
89. Id. at 411.
90. Id.
months, and was secured by a deed of trust on a residence which had an unencumbered value of $57,000. Over the next four months, Carboni continued to make cash advances to Arrospide that were secured by the original note and deed of trust. Ultimately, the principal amount of the note grew to $99,346, all of which carried an interest rate of 200% per annum. By the time of trial, the principal and accumulated interest was approximately $390,000. The court found that Carboni had no legitimate business interest in a 200% interest rate, which was ten times the prevailing market rate for similar loans. The court stated, "We have little trouble concluding that an interest rate of 200% on a secured $99,000 loan is substantively unconscionable."

In *Ellis v. McKinnon Broadcasting Co.*, an advertising account executive’s sole compensation was the twenty percent commission he earned on advertising sales. Ellis signed an employment contract that stipulated he would not receive commissions on fees collected by the employer after Ellis’ final date of actual employment. When Ellis voluntarily terminated his employment, the employer collected $100,000 in fees generated from Ellis’ earlier work. Ellis claimed that the contract was unconscionable and that he was entitled to $20,000 worth of commissions. The court found that to the extent the disputed provision was included in the employer’s contracts to account for the post-sale services employees would normally render, the employment contract could instead include a percentage deduction on uncompleted contracts. As written, the court found the provision to be "a commercially unreasonable forfeiture clause, exacting a penalty far in excess of any potential detriment suffered by [the employer]."

Finally, in *Johnisee v. Kimberlite Corp.*, the court considered a forfeiture clause similar to the clause in *Ellis*. The court found that to the extent the forfeiture clause deprived former employees of all their commissions on sales not collected before the employee’s date of departure (as opposed to merely a deduction for post-sale services that would not be

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92. Id.
93. Id.
94. Id.
95. Id. at 849.
96. Id.
98. Id. at 82.
99. Id.
100. Id.
101. Id. at 806 n.4.
102. Id. at 807.
rendered), the provision was unconscionable. The court stated, "[The employer] reaps the benefit of the sales consultant’s legwork and persistence in obtaining a customer—who is, after all, the indispensable threshold element for providing revenue to the company—without having to compensate the sales consultant who did so on its behalf."

These five cases provide good examples of unconscionable provisions that truly “shock the conscience.” Under normal circumstances, contractual terms are substantively unconscionable only when they constitute an unfair and unjustified burden on the inferior party’s substantive economic rights. Under the mutuality test, by contrast, unconscionability is not based on actual impairment of substantive rights. Rather, the test focuses on the restriction of procedural rights—the inability of one party to pursue its claim in court. The California courts presume that the procedural limitation will have substantive consequences, and the unconscionability finding is based on this presumption. This is surely a more tenuous basis for unconscionability than is normally required.

While it may be true that in some cases the arbitration requirement may result in an unfair benefit that inures to the superior bargaining party, a categorical approach that assumes this is always the case is both erroneous and contrary to the FAA. Whatever “disadvantages” or “limitations” are inherent in arbitration, they will be faced by both parties to any arbitrated dispute. In some cases, these disadvantages and limitations may inure to the benefit of the superior bargaining party; in other cases to the inferior bargaining party. But there is no reliable way to tell at the outset whether arbitration will work a hardship to either party. Even if there is a way to come close to making such a determination, it would at minimum require a case-by-case analysis to determine whether, for a party’s particular claim, the particular arbitral forum would work a hardship to that party. As discussed above, the California courts do not engage in such case-by-case analysis when using the mutuality test.

Under the mutuality test, substantive unconscionability can never be based on more than mere speculation about the possible disadvantages of arbitration. This is because the California courts’ approach to arbitration agreements focuses on the means used to settle the dispute, rather than the substance of the claim. However, “arbitration affects only the choice of

104. Id. at *2.
105. Id.
107. As stated in the previous section, a test that presumes that arbitration will invariably result in inferior outcomes is clearly inconsistent with the FAA. See supra Part IV.A.
109. See supra Part IV.A.
A party asserting a claim against his employer, for example, does not seek as his ultimate redress arbitration or a court proceeding; he seeks legal or equitable relief for his injury. He uses the proceeding simply as a means to obtain that result. Rather than suffering unconscionable treatment, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" A party does not suffer an injury merely because he is required to arbitrate his claim, for he may obtain through arbitration exactly the relief he requests.

Thus, the basis for substantive unconscionability under the mutuality test is different in kind from that under the standard employed to analyze the unconscionability of ordinary contractual provisions. For ordinary contractual provisions, unconscionability is invariably based on an unjustified impairment of substantive economic rights (e.g., the right to the commissions earned from one's own labors, the right to retain the proceeds of the sale of one's own business). Under the mutuality test, by contrast, speculation that the arbitral forum might impede a party's ability to obtain the requested relief is sufficient.

B. PROCEDURAL UNCONSCIONABILITY

Procedural unconscionability focuses on two factors: "oppression" and "surprise." Although often presented in the conjunctive, oppression and surprise are alternative prongs for satisfying the procedural element. Oppression arises from an inequality of bargaining power which results in the absence of meaningful negotiation and choice; surprise arises when the purportedly agreed-upon terms of the bargain are hidden in a prolix, printed form drafted by the party seeking to enforce the disputed agreement.

110. EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 744-45 (9th Cir. 2003) (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 296 n.10 (2002)).
112. See Id.
An adhesion contract is a standardized form contract, drafted and imposed by the superior bargaining party, that "relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Ordinarily, the fact of adhesion is not sufficient to satisfy the standard for procedural unconscionability. In the non-arbitration setting, courts everywhere, including in California, seek to discover in the circumstances surrounding the signing of the contract the presence or absence of facts indicating oppression or surprise. In addition to demonstrating that the contract at issue is one of adhesion, a party is required to show that they had no reasonable option but to consent to the agreement as written (for example, if the party could not obtain the goods, services or employment from another company), or that deceptive tactics were used to prevent the party from discovering the disputed term before signing the contract. This additional burden is significant and, as discussed below, in the non-arbitration context adhesion contracts are frequently held not to be procedurally unconscionable. For arbitration agreements, by contrast, adhesion alone is enough to satisfy the California courts that the agreement is procedurally unconscionable.

1. PROCEDURAL UNCONSCIONABILITY IN THE ARBITRATION CONTEXT

When the California courts evaluate an arbitration agreement, the fact that the agreement is contained in a contract of adhesion is sufficient to establish procedural unconscionability. For example, when an arbitration clause is contained in a standard, pre-printed employment contract, the California courts have said that procedural unconscionability is "easily established." The court stated in Wilson v. Balley Total Fitness Corp., "[t]he fact that [an] [a]greement is an adhesion contract is sufficient to establish that the [a]greement is procedurally unconscionable and there is no need for [the party challenging an arbitration agreement] to present

120. See infra notes 148, 150 and accompanying text.
121. See infra note 131 and accompanying text.
122. See infra notes 132, 139, 144-154 and accompanying text.
evidence showing that she attempted to negotiate the arbitration requirement or other terms of the agreement.\textsuperscript{124}

It is now the norm for standardized employment contracts to contain an arbitration agreement.\textsuperscript{125} Under the California approach, it appears that all of those agreements are procedurally unconscionable, irrespective of the particular circumstances surrounding the signing of the agreement. This approach appears to run counter to the U.S. Supreme Court's statement in \textit{Gilmer v. Interstate/Johnson Lane Corp.}, that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."\textsuperscript{126}

Admittedly, when the arbitration provision at issue is in an employment agreement, there is an additional consideration that might affect the procedural unconscionability analysis: The employee may fear that rejection of the contract will mean unemployment. But this does not appear to be an important consideration in the California courts' procedural unconscionability analysis, as commercial arbitration clauses also have been condemned based on the mere adhesive nature of the contract.\textsuperscript{127} The Court of Appeal stated in a \textit{commercial} arbitration agreement case that "[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability."\textsuperscript{128} This categorical approach makes even less sense in the commercial context, since the inferior party is not susceptible to the same economic pressures as they are in the employment context. In the commercial context, the consumer purchasing discretionary goods or services can simply choose to buy from another vendor in order to obtain more favorable terms of contract, or the consumer can forgo the good or service if they are not amenable to the contract's terms.


\textsuperscript{125} See Shimabukuro, \textit{supra} note 8, at 1.

\textsuperscript{126} 500 U.S. 20, 33 (1991). In a similar vein, the Court of Appeals of New York, that state's highest court, noted that "almost all employment contracts are prepared by the employer; that circumstance cannot render the arbitration clause contained in the contract unconscionable." Sablosky v. Gordon Comp., Inc., 73 N.Y.2d 133, 139 (N.Y. 1989).


\textsuperscript{128} Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th at 853.
Nevertheless, in California, in both the employment and the commercial context, adhesive arbitration agreements are procedurally unconscionable per se.

2. PROCEDURAL UNCONSCIONABILITY AND ORDINARY CONTRACT TERMS

California courts do not, however, view all clauses in adhesive employment contracts as procedurally unconscionable per se. When the adhesive contract clause at issue is anything other than an agreement to arbitrate, California courts apply a demanding test to determine procedural unconscionability. For example, in Robison v. City of Manteca, the Court of Appeal found that a standardized “recovery agreement” form was not procedurally unconscionable even though the agreement bore strong characteristics of a contract of adhesion. The agreement was presented to the employee on a “take it leave it” basis, required that he undertake a substance-abuse recovery plan, and required him to waive his right to appeal any disciplinary action taken against him by the employer, including termination. The court concluded that the agreement was not procedurally unconscionable even though management “coerced him into executing [the agreement]” and “on the date of execution, they did not advise him to seek counsel, they did not review the document’s provisions, and they presented it to him turned to the signature page.”

The Court of Appeal stated that procedural unconscionability “requires an inequality in bargaining power accompanied by a lack of disclosure of material provisions.” The court found that plaintiff’s claim of procedural unconscionability failed based on the mere fact that it was not persuaded by plaintiff’s allegations of surprise. The standard for surprise was notably high. Despite the fact that the provisions were not reviewed with plaintiff and the agreement was presented to him open to the signature page, the court nevertheless stated that “there is no allegation he was prevented from reading the agreement on the day of the execution, only that it was open to the signature page.”

Similarly, in Cabral v. YMCA of Redlands, the Court of Appeal enforced a provision in an employee handbook against an unconscionability challenge even though the employees were told that they were required to sign the acknowledgment when the handbooks were

130. Id.
131. Id.
132. Id. at 753 (emphasis added).
133. Id.
134. Id. at 754.
distributed and that their jobs were in jeopardy if they failed to do so. The Court of Appeal stated, "Although it is undoubtedly true that employers generally have superior bargaining power to employees, there is often room for some employees to negotiate over some terms." The court stated that one would expect that a request from Cabral, a 21-year employee in a senior management position, would be seriously entertained if not ultimately successful. The court also noted that there was no evidence that Cabral or any other employee attempted to negotiate the terms of the agreement and was rebuffed. By comparison, in the employment contract cases where an arbitration provision was challenged as procedurally unconscionable, evidence of attempted negotiation was not necessary. Recall the Court of Appeal's statement in Wilson, a case where an employee challenged an arbitration provision in a standardized employment agreement: "an adhesion contract is sufficient to establish procedural unconscionability and there is no need for [the employee] to present evidence showing that she attempted to negotiate the arbitration requirement or other terms of the agreement."

Outside of the employment context, procedural unconscionability is similarly difficult to establish when the challenged provision is something other than an arbitration agreement. Recall that the Court of Appeal stated in a commercial arbitration case that "[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability." Before procedural unconscionability can be established in the non-arbitration setting, however, the California courts require that plaintiffs demonstrate that the contract was for something of necessity, and that after attempting to negotiate they were left with no option but to agree to the challenged provision.

For example, in AAA 1 RV Center, Inc. v. Nova Information Systems, the Court of Appeal found that a pre-printed form contract was not

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136. Id.
137. Id.
138. Id.
141. See, e.g., Freeman v. Wal-Mart Stores, Inc., 111 Cal. App. 4th 660, 670 (2003) (finding an absence of procedural unconscionability where plaintiff could have simply not purchased the shopping card to avoid the cardholder terms of agreement); see Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 621 (1996) (despite the fact that the waiver provisions in the ski equipment service agreement were industry standard and could not be avoided by taking business elsewhere, the court found no procedural unconscionability because the plaintiff did not need to ski).
procedurally unconscionable because, although there was no evidence the terms were ever negotiated, there was also "no evidence that appellants were forced to enter the contract with Nova."\textsuperscript{143} The court also noted that no evidence was presented that appellants \textit{sought} to negotiate the term.\textsuperscript{144}

In \textit{Eagle High Reach Equipment, Inc. v. Precision Drywall Inc.}, the Court of Appeal found that an equipment lease agreement appearing in relatively small type on a standardized pre-printed form lacked the requisite elements of oppression and surprise.\textsuperscript{145} The court stated there was no indication that this was an oppressive situation since Precision could have dealt with other lessors as it had done on other occasions.\textsuperscript{146} There was no consideration of whether the challenged term was standard in the industry.

In \textit{Freeman v. Wal-Mart Stores, Inc.}, terms printed on the back of a shopping card (a store credit card) were held to not be procedurally unconscionable because "plaintiff was not subjected to a take-it-or-leave-it situation in which there was no reasonable alternative but to accept the shopping card terms. . . . Plaintiff could simply decline to purchase a shopping card and make purchases by other means."\textsuperscript{147}

In \textit{Gary Drilling Co. v. Onesta Corp.}, where an oil well driller brought an action against an operator for breach of contract, alleging failure to pay, and where the operator contended that the contract was unconscionable, the Court of Appeal declined to find procedural unconscionability, stating:

Onesta did not have to contract with Gary Drilling. Onesta contracted with at least two other drilling contractors for the drilling of other wells. Presumably it chose to contract with Gary Drilling because it thought it could get a better price, better service, or both from Gary Drilling . . . .\textsuperscript{148}

In \textit{Olsen v. Breeze Inc.}, where a skier brought suit challenging a release of liability he was required to sign as a condition for obtaining

\begin{flushright}
\textsuperscript{144.} Id.
\textsuperscript{145.} \textit{Eagle High Reach Equip., Inc.}, 2004 WL 938428, at \textsuperscript{*}3.
\textsuperscript{146.} Id.
\textsuperscript{147.} See \textit{Freeman v. Wal-Mart Stores, Inc.}, 111 Cal. App. 4th 660, 670 (2003). \textit{See also Greenbriar Homes Cmty.}, 117 Cal. App. 4th at 345 (holding that a judicial reference provision contained in a standardized sale agreement that was used in the sale of sixty-nine homes in a development was not procedurally unconscionable because there was no evidence the purchasers "attempted to negotiate the provision and were rebuffed"); see \textit{Woodside Homes of Cal., Inc. v. Super. Ct.}, 117 Cal. App. 4th 723, 729 (2003) (finding a judicial reference provision in a standardized home sale contract to constitute an insufficient level of procedural unconscionability because purchaser plaintiffs did not allege that any of the purchasers disagreed with or attempted to reject the provision); see \textit{Contreras v. Children's Hosp. of Los Angeles}, No. B156810, 2003 WL 21328937, at \textsuperscript{*}4 (Cal. Ct. App. June 10, 2003) ("[Plaintiff] was not in a 'take it or leave it' situation. . . . [Plaintiff] could choose to reject the admission document by taking her business to another dentist.").
\end{flushright}
service on ski bindings, the Court of Appeal held that “consumers are not
denied a meaningful choice by virtue of the common use of the releases.
Their choice to ski already exposes them to a number of risks inherent in
that activity.”

Cases like Olsen demonstrate the substantial burden a plaintiff bears
in establishing procedural unconscionability when an ordinary contract is at
issue. There the court recognized that the disputed release terms were
industry standard and that the plaintiff could not obtain the services he
sought elsewhere without having to sign an identical release form. Nevertheless, the court found a lack of procedural unconscionability
because Olsen could have chosen not to ski. Similarly, in Freeman, the
adhesive nature of the contract was found not to be procedurally
unconscionable because Freeman could have avoided the contract terms
simply by not buying the card.

This attitude of the Courts of Appeal in non-arbitration cases contrasts
with arbitration cases such as Bucy v. AT&T Wireless Services, Inc.,
where an arbitration agreement in a cell phone service contract was challenged. There the court found the mere fact that the provision was in an adhesion
contract was sufficient to establish procedural unconscionability. The
Bucy court did not require the plaintiff to demonstrate that he could not
obtain a cell phone service plan without an arbitration provision from
another provider, nor that he sought to negotiate terms but was denied.
Nor did the court acknowledge that in order to avoid the terms of the
contract, the plaintiff could simply have opted not to buy a cell phone
service plan. The adhesive form contract was sufficient.

3. PROCEDURAL UNCONSCIONABILITY SUMMARY

The California Courts of Appeal clearly have established a lower
burden for demonstrating procedural unconscionability when the
challenged term is an arbitration provision. The courts have adopted a \textit{per se} rule that adhesive arbitration agreements satisfy the procedural
unconscionability requirement. The courts are more reluctant to find
procedural unconscionability when the contractual provision challenged is
something other than an arbitration agreement. In the non-arbitration

\begin{itemize}
\item 150. Id.
\item 151. Id.
\item 152. See Freeman, 111 Cal. App. 4th at 670.
May 18, 2005).
\item 154. Id.
\item 155. Id. at *9.
\item 156. Id.
\item 157. Id.
\end{itemize}
context the courts engage in a more substantive, fact-based analysis to determine whether plaintiff has met her burden. Courts often require plaintiffs to show that they sought to negotiate the disputed term but were unsuccessful, or that plaintiffs could not have obtained the products, services, or employment they sought from another provider or employer without agreeing to the disputed term. Plaintiffs challenging an arbitration agreement bear no such burden.

V. CONCLUSION

Despite clear direction from Congress and the Supreme Court to treat arbitration agreements no less favorably than ordinary contractual terms, the California courts continue to view arbitration agreements as a “lesser caste” of contract provision to be ignored whenever the court suspects one party may be disadvantaged by having to arbitrate its claims. The courts have attempted to cloak their bias in the generally applicable contract defense of unconscionability, thereby invoking the savings clause in section 2 and purportedly complying with the FAA. However, a review of California unconscionability jurisprudence reveals that “unconscionable” means something quite different when the validity of an arbitration agreement is at issue.

The mutuality test, in addition to evidencing the disfavor with which the California courts view arbitration, supplies a lower standard for establishing substantive unconscionability in the arbitration context. In the five cases in which the California courts voided an ordinary contract term as unconscionable, the disputed term was clearly conscience-shocking and imposed a concrete and unreasonable hardship on the inferior bargaining party. Under the mutuality test, by contrast, mere speculation that the inferior party might be disadvantaged by having to arbitrate its claims is a sufficient basis for substantive unconscionability.

The California courts have similarly distorted the procedural prong of the unconscionability test in the arbitration cases. Under the lower standards established by the Courts of Appeal, without engaging in case-by-case analysis one can confidently predict that millions of arbitration clauses in existence in California today, incorporated in standardized commercial and employment contracts, would be found to be procedurally unconscionable if challenged. In California, arbitration provisions in adhesive form contracts are procedurally unconscionable per se. Ordinary contractual provisions are treated differently. Indeed, the mere fact that an ordinary contract term is contained in an adhesion contract has been considered insufficient to establish procedural unconscionability.159

158. See Stipanowich, supra note 11, at 6.
This Article demonstrates that the standard for establishing unconscionability is more easily satisfied when the contractual term being challenged is an arbitration agreement. An empirical review reveals that unconscionability challenges succeed with far greater frequency when the disputed term is an arbitration provision. Through both empirical and substantive analysis, therefore, the cloak of the "generally applicable" contract defense of unconscionability is removed, and these unique standards and requirements are revealed for what they really are: manifestations of the California courts' ingrained bias against arbitration as an alternative to the judicial forum. Despite the disfavor with which the California courts view arbitration, their current approach is preempted by the FAA.

160. See discussion supra Part II.
161. Article VI of the United States Constitution provides: "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.