

**VIABILITY OF ARBITRATION CLAUSES IN WEST VIRGINIA OIL AND GAS LEASES: IT IS ALL ABOUT THE LEASE!!!**

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## I. INTRODUCTION

The law of oil and gas in West Virginia, at its core, is the law of contracts. This area of the law has its own vocabulary, almost as if the parties are speaking a foreign language. But, like normal contract law, litigation in this area is generally resolved by the specific language of the documents. And because leases are used to convey rights pertaining to oil and gas, potential conflicts are generally resolved by the lease itself.

West Virginia is in the midst of a potential economic boom. The recent interest in developing the Marcellus and Utica shale formations has already created great investment in the state. Although oil and gas has been produced in West Virginia since the late 1800s,<sup>1</sup> most of the state's seminal decisions were rendered in the early to mid-1900s.<sup>2</sup> As the industry has changed and developed, language contained in the leases has likewise changed.

Of late, many oil and gas leases contain an arbitration provision. Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators, who make a binding decision on the dispute instead of the conflict being resolved at a jury trial. Most leases use the American arbitration system and mandate arbitration under the Federal Arbitration Act ("FAA").<sup>3</sup> Some provisions also require tripartite arbitration and a specified source for arbitrators. Other provisions require a unanimous decision of the arbitrators for a valid award. The reasons to use an arbitration provision vary and include: expeditious and economical dispute resolution (as arbitration rulings have stringently limited avenues for appeal), a desire for privacy, avoidance of a forum perceived to be hostile, and access to a tribunal with special expertise in oil and gas law. Because lessors and lessees often have differing views towards arbitration, mostly based on the waiver of the trial by jury and the costs associated with arbitration, the ability for a party to compel arbitration is being litigated.<sup>4</sup>

Under West Virginia law, arbitration agreements are presumptively valid and represent the preferred method to resolve disputes.<sup>5</sup> However, recent opinions by the Supreme Court of Appeals of West Virginia have called into

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<sup>1</sup> David L. MCKAIN & BERNARD L. ALLEN, *WHERE IT ALL BEGAN: THE STORY OF THE PEOPLE AND PLACES WHERE THE OIL & GAS INDUSTRY BEGAN: WEST VIRGINIA AND SOUTHEASTERN OHIO: PART I*, at 1 (1994).

<sup>2</sup> *See, e.g.*, *Adkins v. Huntington Dev. & Gas Co.*, 168 S.E. 366 (W. Va. 1932); *United Fuel Gas Co. v. Smith*, 117 S.E. 900 (W. Va. 1923); *Jennings v. S. Carbon Co.*, 80 S.E. 368 (W. Va. 1913); *Hall v. S. Penn Oil Co.*, 76 S.E. 124 (W. Va. 1912); *Core v. N.Y. Petroleum Co.*, 43 S.E. 128 (W. Va. 1903); *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 42 S.E. 655 (W. Va. 1902).

<sup>3</sup> 9 U.S.C. §§ 1–16 (2012).

<sup>4</sup> *See generally* *Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414 (N.D. W. Va. 2012).

<sup>5</sup> *Id.*

question the validity of arbitration provisions in oil and gas leases.<sup>6</sup> Landowners are attempting to invalidate old leases in order to sign new ones so that they can get large bonus payments and increased royalties and avoid arbitration. As a result, West Virginia courts are seeing an increase in litigation. Current operators vigorously defend these suits in order to continue to produce oil and gas in a stable economic and judicial climate.

This Article analyzes the law governing arbitration clauses in oil and gas leases. Part II examines the notion that an oil and gas lease is a contract, and in most instances, arbitration clauses should be enforced as they are contained in bargained for agreements. Part III examines some of the most common arbitrability issues governed at some level by state law. The Supreme Court of Appeals of West Virginia has provided limited guidance on challenges to the validity of arbitration clauses in oil and gas leases. Thus, this area of West Virginia law is left to trial courts, and trial courts have provided conflicting guidance on the continued validity of various lease forms under different factual situations. To sustain West Virginia's development of oil and gas, clearly defined rules are essential to provide comprehensible guidelines for all involved. The Supreme Court of Appeals of West Virginia should recognize the right to contract, the liberality of the FAA, and explain what constitutes permissible arbitration language.

## II. OIL AND GAS LEASE IS A CONTRACT

West Virginia law requires an agreement for the sale or lease of land to be in writing.<sup>7</sup> The Supreme Court of Appeals of West Virginia has stated that a lease is by definition a contract.<sup>8</sup> All rights and protections are controlled by the principles of contract law and depend on the proper construction.<sup>9</sup> “The fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.”<sup>10</sup> Mutuality of assent, or the meeting of the minds, is an essential

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<sup>6</sup> See, e.g., *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550 (W. Va. 2012); *Crayiel v. Appalachian Energy Partners*, 736 S.E.2d 91 (W.Va. 2012); *Brown v. Genesis Healthcare Corp. (Brown II)*, 729 S.E.2d 217 (W. Va. 2012); *Brown ex rel. Brown v. Genesis Healthcare Corp. (Brown I)*, 724 S.E.2d 250 (W. Va. 2011), *rev'd*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909 (W. Va. 2011).

<sup>7</sup> W. VA. CODE ANN. § 36-1-3 (LexisNexis 2012).

<sup>8</sup> See, e.g., *Ohio Fuel Oil Co. v. Greenleaf*, 99 S.E. 274, 277 (W. Va. 1919).

<sup>9</sup> *Id.*

<sup>10</sup> Syl. pt. 9, *Ways v. Imation Enter. Corp.*, 589 S.E.2d 36, (W. Va. 2003) (quotation marks omitted) (quoting Syl. pt. 5, *Virginian Exp. Coal Co. v. Rowland Land Co.*, 131 S.E. 253 (W. Va. 1926)).

element of all contracts.<sup>11</sup> In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other.<sup>12</sup> Consideration has been defined as “some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another.”<sup>13</sup> A benefit to the promisor is sufficient consideration for a contract.<sup>14</sup> This Part analyzes the effect of the express terms of the contract, common arguments made when disputing the enforceability of an arbitration clause, and recent opinions by the Supreme Court of Appeals of West Virginia concerning arbitration generally.

A. *Proper Analysis Looks at the Express Terms of the Contract*

The Supreme Court of Appeals of West Virginia has stated that a “valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.”<sup>15</sup> Further,

[i]n construing a . . . written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith.<sup>16</sup>

A court may look at the lease as a whole, including the consideration provided, the circumstances surrounding its execution, the parties’ bargaining power, and the parties’ conduct to determine the intent of the parties.<sup>17</sup> “It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.”<sup>18</sup> Rather,

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<sup>11</sup> Syl. pt. 4, *Riner v. Newbraugh*, 563 S.E.2d 802 (W. Va. 2002); Syl. pt. 1, *Martin v. Ewing*, 164 S.E. 859 (W. Va. 1932).

<sup>12</sup> Syl. pt. 1, *First Nat’l of Gallipolis v. Marietta Mfg. Co.*, 153 S.E.2d 172 (W. Va. 1967).

<sup>13</sup> *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 556 (W. Va. 2012) (quoting *First Nat’l Bank of Gallipolis*, 153 S.E.2d at 177) (quotation marks omitted).

<sup>14</sup> *Cook v. Heck’s Inc.*, 342 S.E.2d 453, 459 (W. Va. 1986).

<sup>15</sup> Syl. pt. 1, *Sally-Mike Props. v. Yokum*, 332 S.E.2d 597 (W. Va. 1985) (citing and quoting Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 (W. Va. 1962)).

<sup>16</sup> Syl. pt. 5, *Hall v. Hartley*, 119 S.E.2d 759 (W. Va. 1961) (citing or quoting Syl. pt. 1, *Maddy v. Maddy*, 105 S.E. 803 (W. Va. 1921)).

<sup>17</sup> *Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414 (N.D. W. Va. 2012).

<sup>18</sup> Syl. pt. 3, *Cotiga Dev. Co.*, 128 S.E.2d 626.

[a]n unambiguous written contract entered into as the result of verbal or written negotiations will, in the absence of fraud or mistake, be conclusively presumed to contain the final agreement of the parties to it, and such contract may not be varied, contradicted or explained by extrinsic evidence of conversations had or statements made contemporaneously with or prior to its execution.<sup>19</sup>

### B. Arbitration

Courts favor arbitration where valid agreements exist that contain arbitration provisions.<sup>20</sup> The FAA reflects the fundamental principle that arbitration is a matter of contract.<sup>21</sup> “A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>22</sup>

“It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract . . . .”<sup>23</sup> Both the Supreme Court of the United States and the Supreme Court of Appeals of West Virginia have held that arbitration agreements should be enforced where the parties knowingly entered into bargained-for contracts containing such provisions—particularly where the parties have equal bargaining power.<sup>24</sup> The Supreme Court of Appeals of West Virginia has stated:

A contract providing a procedure for arbitration of disputes, and providing that: (1) all claims, disputes or other matters in question arising out of, or relating to the contract shall be decided by arbitration, unless the parties mutually agree otherwise; (2) the arbitration agreement shall be specifically enforceable under the prevailing arbitration law; (3) the arbitration award shall be final; and (4) the judgment may be entered upon the award in accordance with applicable law in

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<sup>19</sup> Syl. pt. 2, *Kanawha Banking & Trust Co. v. Gilbert*, 46 S.E.2d 225 (W. Va. 1947).

<sup>20</sup> *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012); *AT&T Techs, Inc. v. Commc’n Workers of Am.*, 475 U.S. 643, 650 (1986); *Gateway Coal Co. v. UMWA*, 414 U.S. 368, 377–78 (1974); *State ex rel. Clites v. Clawges*, 685 S.E.2d 693, 698 (W. Va. 2009).

<sup>21</sup> *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2773 (2010).

<sup>22</sup> 9 U.S.C. § 2 (2012); *see also Rent-A-Center*, 130 S. Ct. at 2776.

<sup>23</sup> Syl. pt. 3, *Clites*, 685 S.E.2d 693 (quoting Syl. pt. 3, *Bd. of Ed. of Berkeley Cnty. v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (W. Va. 1977)).

<sup>24</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55–58 (1995); Syl. pt. 3, *Clites*, 685 S.E.2d 693 (quoting Syl. pt. 3, *W. Harley Miller, Inc.*, 236 S.E.2d 439).

any court having jurisdiction thereof—, creates a condition precedent to any right of action arising under the contract.<sup>25</sup>

Congress enacted the FAA to “reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”<sup>26</sup> As the Supreme Court of the United States recently reiterated, the FAA “establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.”<sup>27</sup> Accordingly, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”<sup>28</sup> And “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .”<sup>29</sup>

The Supreme Court of Appeals of West Virginia has found that the law is clear that when confronted with a motion to compel arbitration, a trial court has no authority to rule on any issue other than whether arbitration of the claims is required.<sup>30</sup> The trial court’s authority is limited to determining the threshold issues of: “(1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred fall within the substantive scope of that arbitration agreement.”<sup>31</sup>

The United States Court of Appeals for the Fourth Circuit has stated that a party can compel arbitration under the FAA by establishing: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal of a party to arbitrate the dispute.<sup>32</sup> In most oil and gas lease cases, there is no dispute that the first, third, and fourth elements are satisfied. First, there is a dispute between the parties and a refusal to arbitrate, as evidenced by the filing of a lawsuit. Second, a contract related to interstate commerce is at issue, as oil and gas leases are generally formed between citizens of different states for oil and gas exploration

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<sup>25</sup> Syl. pt. 3, *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 693 S.E.2d 815 (W. Va. 2010) (quoting Syl. pt. 2, *W. Harley Miller, Inc.*, 236 S.E.2d 439).

<sup>26</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

<sup>27</sup> *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

<sup>28</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>29</sup> *Id.* at 24–25.

<sup>30</sup> Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 692 S.E.2d 293 (W. Va. 2010).

<sup>31</sup> Syl. pt. 5, *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 693 S.E.2d 815 (W. Va. 2010).

<sup>32</sup> *A.T. Massey Coal Co. v. Int’l Union, UMWA*, 799 F.2d 142 (4th Cir. 1986).

using materials likely to be transported in interstate commerce.<sup>33</sup> The issue in most cases is the second element, or whether there is a valid written agreement that includes an arbitration provision purporting to cover the dispute.<sup>34</sup>

Recently, a number of oil and gas leases use a form that contains a clear, unambiguous, and broad arbitration provision covering all disputes that might arise between the parties. The typical language includes a requirement that any question concerning the lease or performance thereof be determined by three disinterested arbitrators. Lawsuits generally pertain to the lease itself, the performance or failure to perform express or implied duties under the lease, or to the circumstances surrounding the formation and alleged termination of the lease. Many lessors attempt to dispute the enforceability of the arbitration provision by arguing: (1) that the arbitration clause is unconscionable; and (2) that the lessors were fraudulently induced to sign the lease which contains unconscionable provisions.<sup>35</sup>

In West Virginia,

[a] contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts apply a “sliding scale” in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.<sup>36</sup>

Procedural unconscionability involves:

inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the

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<sup>33</sup> The question of what constitutes interstate commerce has been broadly interpreted. The Supreme Court of the United States has described the FAA’s “reach expansively as coinciding with that of the Commerce Clause.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 266 (1995). Moreover, “it is perfectly clear that the FAA encompasses a wider range of transactions than those actually ‘in commerce—that is, ‘within the flow of interstate commerce.’” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

<sup>34</sup> See *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–01 (4th Cir. 2002).

<sup>35</sup> *Id.* at 501–04; *Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414 (N.D. W. Va. 2012).

<sup>36</sup> Syl. pt. 9, *Brown II*, 729 S.E.2d 217 (W. Va. 2012) (quoting *Brown I*, 724 S.E.2d 250, 262 (W. Va. 2011), *rev’d*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012)).

contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.<sup>37</sup>

Substantive unconscionability involves:

unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.<sup>38</sup>

Assuming the truth of the lessor's allegations regarding the formation of the lease and that those allegations constitute procedural unconscionability, even a sliding scale requires a lessor to identify a commercially unreasonable term within the arbitration provision to support a finding of substantive unconscionability. Lessors frequently dispute enforceability by asserting claims concerning: (1) the cost-sharing provision; (2) the framework for the arbitration process; (3) the relief available at law; (4) the waiver by both parties of the right to trial by jury; and (5) fraudulent inducement or other unconscionable principles. However, as detailed below, if a clear and unambiguous arbitration provision that was bargained for is used, there should be no viable argument that the arbitration provision is unconscionable.

#### 1. Cost-Sharing Provision

The cost-sharing provisions often require the equal sharing of arbitration costs. “[T]he responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court [to decide].”<sup>39</sup> Lessors often argue that an equal cost-sharing provision might force the payment of thousands of dollars in up-front fees and costs before the start of litigation, effectively precluding the vindication of rights or pursuit of claims in arbitration. Courts have found this conclusory allegation, without more,

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<sup>37</sup> Syl. pt. 10, *id.* (quoting Syl. pt. 17, *Brown I*, 724 S.E.2d 250).

<sup>38</sup> Syl. pt. 12, *id.* (quoting Syl. pt. 19, *Brown I*, 724 S.E.2d 250).

<sup>39</sup> Syl. pt. 13, *id.* (quoting Syl. pt. 4, *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002)).



inadequate to show that the costs likely to be imposed with the application of a cost-sharing provision are an unconscionably impermissible burden.<sup>40</sup>

## 2. Framework for the Arbitration Process

Some arbitration provisions do not define a framework for the arbitration process, omitting items like: the rules and procedures of arbitration; discovery rights or remedies; appointment of mediators; the arbitrator's duties and responsibilities; whether the evidentiary rules apply; the form of any award; the scope of the award; what constitutes costs, fees, and expenses of arbitration; and who should pay those items. However, courts have found that the absence of these items does not render the challenged arbitration clause substantively unconscionable.<sup>41</sup> Courts often reference section 5 of the FAA which provides in pertinent part:

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 . . . 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.<sup>42</sup>

## 3. Relief Available at Law

Some arbitration provisions fail to provide that arbitrators can award all relief that might be available in a court of law.<sup>43</sup> Invalidating an arbitration provision on this basis, no matter the remaining incentives to arbitrate, would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA and would be preempted under the doctrine of conflict preemption.<sup>44</sup> Accordingly, courts have found standard arbitration provisions found in oil and gas leases not to be substantively unconscionable on these grounds.<sup>45</sup>

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<sup>40</sup> See, e.g., *Heller*, 877 F. Supp. 2d at 431.

<sup>41</sup> See *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312–13 (11th Cir. 2005); *S. Ala. Pigs, LLC v. Farmer Feeders, Inc.*, 305 F. Supp. 2d 1252, 1261 (M.D. Ala. 2004); *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1166–68 (D.S.D. 2010).

<sup>42</sup> 9 U.S.C. § 5 (2012); see also the discussion of § 5 *infra*.

<sup>43</sup> See, e.g., *Heller*, 877 F. Supp. 2d at 431.

<sup>44</sup> *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotations and citations omitted).

<sup>45</sup> *Heller*, 877 F. Supp. 2d at 431.

#### 4. Waiver by Both Parties of the Right to Trial by Jury

It is axiomatic that “[w]hen parties agree to resolve their disputes through arbitration, they concomitantly agree to *not* resolve their disputes by going to court.”<sup>46</sup> Accordingly, courts have found that arbitration clauses are not substantively unconscionable merely because they include an express waiver of a jury trial provision.<sup>47</sup>

#### 5. Fraudulent Inducement or Other Unconscionable Principles

[I]f a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an arbitration provision on any grounds that “exist at law or in equity for the revocation of any contract,” the grounds “must relate specifically to the arbitration clause and not just to the contract as a whole.”<sup>48</sup>

In fact, “when claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement.”<sup>49</sup> Similarly, the FAA “does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”<sup>50</sup> Accordingly, courts have found a plaintiff’s claims of fraudulent inducement and unconscionability that pertain to the contract as a whole are required to be decided by an arbitrator and, thus, cannot preclude application of an otherwise enforceable arbitration clause.<sup>51</sup> The courts specifically state that because the leases are bargained for, lessors are unable to identify an adequate state law defense to the enforcement of the arbitration clauses contained therein. As such, those clauses should be enforced as written pursuant to section 4 of the FAA.<sup>52</sup>

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<sup>46</sup> *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 615 (S.D. W. Va. 2004).

<sup>47</sup> *Id.* (quoting *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001)).

<sup>48</sup> *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002) (citation omitted) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

<sup>49</sup> *Sydnor*, 252 F.3d at 305 (citing *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986)).

<sup>50</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)).

<sup>51</sup> *Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414, 433 (N.D. W. Va. 2012).

<sup>52</sup> *Id.*

C. *The Brown v. Genesis Trilogy*

In *Brown I*, the Supreme Court of Appeals of West Virginia held that “[w]hether an arbitration agreement was validly formed is evaluated under state law principles of contract formation.”<sup>53</sup> Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.<sup>54</sup>

*Brown I* was a consolidation of three separate wrongful death lawsuits. Each lawsuit arose from a nursing home’s attempt to compel arbitration pursuant to a clause in the nursing home’s admission contract. The Supreme Court of Appeals of West Virginia ruled that the arbitration clauses were unconscionable and unenforceable in two of the cases, and held that the Nursing Home Act<sup>55</sup> could not be relied on to bar enforcement of the arbitration clause in the third case. The Supreme Court of the United States reversed and remanded, instructing the Supreme Court of Appeals of West Virginia to consider whether the arbitration clauses were enforceable under state common law principles that were not specific to arbitration and thus was not preempted by the FAA.<sup>56</sup> On remand, in *Brown II*, the Supreme Court of Appeals of West Virginia (1) held that the doctrine of unconscionability explicated in *Brown I*<sup>57</sup> was a general, state, common-law, contract principle that was not specific to arbitration and did not implicate the FAA; (2) reversed the trial courts’ orders compelling arbitration in two of the cases and permitted the parties to raise arguments regarding unconscionability before the trial court; and (3) found the issue of unconscionability in the third case was not considered by the trial court but could be raised on remand.<sup>58</sup>

Since the holding of *Brown II*, lessors continue to argue that arbitration provisions contained in oil and gas leases are unenforceable under West Virginia law as they are both procedurally and substantively unconscionable.<sup>59</sup> Lessors attempt to use the *Brown II* holding to argue that discovery is needed concerning the formation of the lease.<sup>60</sup> Further guidance is needed from the Supreme Court of Appeals of West Virginia as to how the holdings in *Brown I* and *Brown II* apply to arbitration provisions in oil and gas leases.

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<sup>53</sup> *Brown I*, 724 S.E.2d 250, 278 (W. Va. 2011), *rev’d on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).

<sup>54</sup> *See id.* at 281.

<sup>55</sup> W.VA. CODE ANN. §§ 16-5C-1–20 (LexisNexis 2012).

<sup>56</sup> *Marmet Health Care Center, Inc.*, 132 S. Ct. at 1204.

<sup>57</sup> *See generally Brown I*, 724 S.E.2d 250.

<sup>58</sup> *Brown II*, 729 S.E.2d 217, 222–23 (W. Va. 2012).

<sup>59</sup> *See Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414 (N.D. W. Va. 2012); *Davis v. EQT Prod. Co.*, 2012 U.S. Dist. LEXIS 179695 (N.D. W. Va. Dec. 10, 2012).

<sup>60</sup> *See Heller*, 877 F. Supp. 2d 414; *Davis*, 2012 U.S. Dist. LEXIS 179695.

## III. STATE LAW

This Part examines some of the most common arbitrability issues governed at some level by state law, including the threshold question of why state law matters.<sup>61</sup>

A. *Why Does State Law Matter?*

As discussed, the FAA reflects “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”<sup>62</sup> Courts must therefore resolve any doubt about the effect of an arbitration clause in favor of arbitration<sup>63</sup> so that the trial court can have an adequate record.

By its terms, however, the FAA supplies only some of the rules of decision for the analysis of arbitration clauses. The FAA requires that a written arbitration clause “in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*”<sup>64</sup> So in a case where state law would otherwise supply the rules of decision, that state law continues—within certain limits—to govern the analysis of whether an agreement to arbitrate exists, is enforceable, and governs the dispute in issue: “When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”<sup>65</sup>

In some states, the source of that law is a combination of cases and a codified arbitration act. Several such states have adopted the 1956 or 2000 version of the Uniform Arbitration Act;<sup>66</sup> others have enacted their own.<sup>67</sup> In

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<sup>61</sup> There are but a handful of reported cases dealing with arbitration clauses in oil and gas leases. This discussion is therefore frequently supplemented by non-energy lease cases.

<sup>62</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>63</sup> *See id.* at 24–25.

<sup>64</sup> 9 U.S.C. § 2 (2012) (emphasis added).

<sup>65</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Because post-formation questions, however, do not fall within the savings clause, federal law requires that such issues (like asking not whether a lease’s arbitration agreement was ever formed, but whether a lease containing an arbitration agreement has expired) are properly decided by the arbitrators, not by the courts. *See, e.g., Alexander v. Chesapeake Appalachia, LLC*, 839 F. Supp. 2d 544 (N.D.N.Y. 2012); *Beinlich v. Chesapeake Appalachia, LLC*, No. 3:11-CV566 (M.D. Pa. May 31, 2011).

<sup>66</sup> *See, e.g., KY. REV. STAT. ANN.* §§ 417.010–.240 (LexisNexis 2005) (adopting Uniform Arbitration Act of 1956); *MD. CODE ANN., CTS. & JUD. PROC.* §§ 3-201 to 234 (LexisNexis 2006) (adopting Uniform Arbitration Act of 1956); *N.C. GEN. STAT.* §§ 1-569.1–.31 (2005) (adopting Uniform Arbitration Act of 2000); *42 PA. CONS. STAT. ANN.* §§ 7301–7362 (West 2007)

the remainder, there is no act; only case law governs. Codified or not, many states sensibly attempt to keep their rules harmonious with analogous federal rules.<sup>68</sup>

The FAA and federal common law derived therefrom, though, always remain in the background, poised to constrain application of arbitration-hostile state law: “Th[e] [FAA’s] saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>69</sup>

This federal pro-arbitration policy is so strong that the FAA precludes application of any state rule “that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>70</sup> Federal law thus preempts even a facially neutral state rule on contract interpretation if it is “applied in a fashion that disfavors arbitration”<sup>71</sup> or “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>72</sup>

The role of a court ruling on a motion to compel arbitration, then, is quite narrow:

In ruling upon a motion to compel arbitration, the court first determines whether the parties agreed to arbitrate the particular type of dispute at issue. Answering this question requires considering two issues: “(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.”<sup>73</sup>

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(adopting Uniform Arbitration Act of 1956); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (West 2005) (adopting Uniform Arbitration Act of 1956); VA. CODE ANN. §§ 8.01–581.01 to –581.016 (West 2001) (adopting Uniform Arbitration Act of 1956).

<sup>67</sup> See, e.g., N.Y. C.P.L.R. §§ 7501–7514 (McKinney 1998); OHIO REV. CODE ANN. §§ 2711.01–.24 (LexisNexis 2000).

<sup>68</sup> See, e.g., *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 510 n.3 (3d Cir. 1990) (“Fortunately, the federal [sic] Arbitration Act and the Pennsylvania Uniform Arbitration Act, and the case law that has developed under each, are functionally equivalent as regards the authority of a district court to review an agreement to arbitrate and to stay or compel arbitration . . . [B]ecause the relevant federal and Pennsylvania case law is so clearly established and has evolved essentially in unison, we will refer to them interchangeably where helpful.”), *overruled on other grounds by implication by* *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002).

<sup>69</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citing *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)); see also *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

<sup>70</sup> *Concepcion*, 131 S. Ct. at 1748.

<sup>71</sup> *Id.* at 1747.

<sup>72</sup> *Id.* at 1748.

<sup>73</sup> *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012) (citation omitted); *accord* *Gay v. CreditInform*, 511 F.3d 369, 386–87 (3d Cir. 2007) (cataloguing cases); *Glass v.*

Given this narrow framework, a party seeking to avoid his promise to arbitrate commonly will attempt either (1) to avoid application of the FAA altogether by arguing, for example, that interstate commerce is not involved<sup>74</sup> (questions ostensibly governed purely by federal law), or (2) to show that no such agreement was ever formed or that if it was formed, it is unenforceable (questions governed by FAA-constrained state law).<sup>75</sup>

*B. Is the Dispute Severable?*

Regardless of a state's rules on severance, the FAA requires that arbitration clauses be treated as severable from their containing agreement.<sup>76</sup>

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Kidder Peabody & Co., Inc., 114 F.3d 446, 457 (4th Cir. 1997) (“When faced with an arbitration case, . . . the district court’s role is limited to determining whether the contract to arbitrate is valid and whether the dispute involved in the arbitration is within the subject matter of the contract to arbitrate. Once having made those determinations, the district court’s role ends and the Act mandates that the district court enter an order of arbitration.”); *see also* Stout v. J.D. Byrider, 228 F.3d 709, 714 (6th Cir. 2000) (“When considering a motion to stay proceedings and compel arbitration under the Act, a court has four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.” (citation omitted)).

<sup>74</sup> *But see, e.g.*, McCoy-Elkhorn Coal Corp. v. United States Env’tl. Prot. Agency, 622 F.2d 260, 265 (6th Cir. 1980) (“It is beyond question that the sale of coal or other energy sources is in the stream of interstate commerce.”); Alexander v. Chesapeake Appalachia, LLC, 839 F. Supp. 2d 544, 550 (N.D.N.Y. 2012) (rejecting oil and gas lessors’ argument that where land was entirely within New York and no wells had been drilled, interstate commerce was not involved); Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917, 920 (Ky. 1984) (holding, for several reasons, that coal mining lease involved interstate commerce).

<sup>75</sup> State law on scope determinations has not proven an especially ripe area for parties wishing to avoid arbitration. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Coviello, 233 F.3d 710, 713 n.1 (3d Cir. 2000) (“[T]here is no meaningful difference between federal and Pennsylvania law when reviewing the scope of an arbitration clause.” (citations omitted)). As they should, courts must apply their contract interpretation rules neutrally. *See, e.g.*, Robbins v. Chesapeake Appalachia, LLC, No. 3:12-CV-1788, 2012 WL 6012344, at \*2 (M.D. Pa. Dec. 3, 2012) (holding that putative tort claims of trespass and conversion were within oil and gas lease’s clause requiring arbitration of “[a]ny questions concerning this lease or performance thereunder” (citation omitted)); Roman v. Chesapeake Appalachia, L.L.C., No. 3:11-CV-1614, 2012 WL 2076846, at \*4–5 (M.D. Pa. June 8, 2012) (same); Twin Head Recovery v. JHJ, L.L.C., No. 5:09-CV-00572, 2010 WL 3361241, at \*4 (S.D. W. Va. Aug. 20, 2010) (similar, and applying Fed. R. Civ. P. 19-like analysis to require non-signatory to be party to arbitration because of relationship between his and signatory’s claims to be arbitrated).

<sup>76</sup> *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (“First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” (citations omitted)); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

Thus, a party wishing to resist arbitration cannot merely argue that the entire contract containing that clause is, for example, unconscionable under state law. Instead, he must show that the arbitration clause itself is independently unconscionable under state law.<sup>77</sup>

Some courts, however, have distinguished the severability of state-law, whole-contract formation challenges like illegality or unconscionability, which must be referred to arbitration, from the severability of state-law contract formation issues like lack of mutual assent, which, they hold, courts may decide. In *Eisenberger v. Chesapeake Appalachia, LLC*,<sup>78</sup> the district court recounted two cases where it had followed the severance doctrine and referred contract-as-a-whole challenges to arbitration.<sup>79</sup> Nevertheless, the court adjudicated a challenge to the formation of the entire contract based on lack of offer and acceptance:

Unlike [the earlier cases], this Court *can* see a reason to distinguish between claims of illegality, fraud, duress, and unconscionability on the one hand, and claims that there was never an offer and acceptance on the other. In the former, there was a meeting of the minds between the parties on at least some provisions in the contract, including the arbitration agreement, and therefore it is reasonable for both parties to have anticipated submission to arbitration. In the latter, there was no agreement regarding any of the provisions of the contract and it would be unfair to force a party into an arbitration that was never agreed to, thereby denying them access to the courts.<sup>80</sup>

Similarly, in *Cleveland v. Taylor*,<sup>81</sup> the Texas Court of Appeals held that a person who could not produce an agreement signed by the parties against whom it was to be enforced, arguing only that that agreement contained an arbitration agreement, was not entitled to compel arbitration of any issue.<sup>82</sup>

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<sup>77</sup> *Buckeye Check Cashing, Inc.*, 546 U.S. at 445–46 (2006).

<sup>78</sup> No. 3:09-CV-1415, 2010 WL 457139 (M.D. Pa. Feb. 4, 2010).

<sup>79</sup> *See id.* (discussing *Ulmer v. Chesapeake Appalachia, LLC*, No. 4:08-CV-2062, 2009 U.S. Dist. LEXIS 124650, at \*1, \*8–9 (M.D. Pa. Jan. 16, 2009) (compelling arbitration where plaintiff sought declaratory judgment that oil and gas lease be declared void because it violated Pennsylvania’s minimum royalty rate)); *Hayes v. Chesapeake Appalachia, LLC*, No. 3:09-CV-619, 2009 U.S. Dist. LEXIS 124653, at \*1–2, \*6 (M.D. Pa. May 15, 2009) (compelling arbitration where Plaintiffs sought “to have court declare lease void because statutorily mandated one-eighth royalty payment for gas recovered” should not be subject to deduction of post-production costs (citations omitted)).

<sup>80</sup> *Id.* at \*4.

<sup>81</sup> No. 01-11-00227-CV, 2012 WL 2455170 (Tex. Ct. App. June 28, 2012).

<sup>82</sup> *Id.* at \*7.

C. *How Will Arbitration Be Conducted?*

Parties wishing to avoid arbitration commonly point to problems with the chosen arbitration forum or selected arbitration rules as a reason not to enforce arbitration at all. Claims that the chosen professional arbitrators no longer accept cases of the type at issue, for example, are becoming popular.

Unless the chosen arbitrator is “integral” to the parties’ bargain, however, the FAA has an express solution to the unavailability of the named arbitrator:

As the Eleventh Circuit has articulated the standard: “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.” In other words, a court will decline to appoint a substitute arbitrator, as provided in the FAA, only if the parties’ choice of forum is “so central to the arbitration agreement that the unavailability of that arbitrator [brings] the agreement to an end.” In this light, the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable.<sup>83</sup>

“To take a narrower construction of Section 5 [of the FAA],” the Third Circuit concluded, “would be inconsistent with the ‘liberal federal policy in favor of arbitration’ articulated in the FAA.”<sup>84</sup>

D. *Is It “Arbitration”?*

For the purposes of applying their own arbitration-specific laws, states follow their own rules to decide whether an agreement was an agreement to arbitrate or something else. In *Unit Collieries, Inc. v. Rogers*,<sup>85</sup> for example, the

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<sup>83</sup> *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012) (citations omitted). *See also, e.g.*, 9 U.S.C. § 5 (2012) (providing for court appointment of substitute arbitrator); *Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 613–14 (S.D. W. Va. 2012) (rejecting unavailable forum challenge and applying § 5). *But see In re Salomon Inc. S’holders’ Derivative Litig.*, 68 F.3d 554, 559–61 (2d Cir. 1995) (holding that § 5 does not apply to unavailability of arbitrator). The Third, Seventh, Ninth, and Eleventh Circuits and district courts in several other circuits, at least, have declined to adopt *In re Salomon*’s position.

<sup>84</sup> *Khan*, 669 F.3d at 356. A few courts have concluded that the mere selection of a particular forum is enough to find that selection “integral.” *See, e.g.*, *Stewart v. GGNCS-Canonsburg, L.P.*, 9 A.3d 215, 219–21 (Pa. Super. Ct. 2010). That position is not well-reasoned and, more importantly, is inconsistent with the FAA’s broad policy. In fact, at least one of the cases on which the *Stewart* court based its conclusion—*Khan v. Dell, Inc.*, No. 09-CV-3703, 2010 WL 3283529 (D.N.J. Aug. 18, 2010), *vacated sub nom. Khan*, 669 F.3d 350—was subsequently vacated on precisely that issue. *See Khan*, 669 F.3d 350.

<sup>85</sup> No. 2009-CA-001328-MR, 2010 WL 4137442 (Ky. Ct. App., Oct. 22, 2010).



Kentucky Court of Appeals held that a clause in a “lease [that] does not explicitly contain the word ‘arbitration,’ but [that] describe[s] and constitute[s] that very procedure”<sup>86</sup> was indeed an agreement to arbitrate, and so Kentucky’s arbitration act applied.<sup>87</sup> But in *Steiner v. Appalachian Exploration, Inc.*,<sup>88</sup> the Ohio Court of Appeals held that “[i]n an oil and gas lease which requires the lessee to pay damages to growing crops caused by its operations, a provision calling for damages not agreed upon to be ascertained by a panel of disinterested persons is a contract for appraisal, not for arbitration.”<sup>89</sup> The court, therefore, applied Ohio’s rule on setting aside an appraisal rather than its rule on setting aside an arbitral award.<sup>90</sup>

The question, however, of whether an agreement constitutes “[a] written provision . . . to settle by arbitration a controversy thereafter arising . . . or an agreement in writing to submit to arbitration an existing controversy”<sup>91</sup> is undoubtedly one of federal statutory interpretation and, thus, purely a question of federal common law. So even if state law requires that a case does not involve “arbitration” for the purposes of applying that state’s remaining arbitration law, the FAA’s requirements would nonetheless still apply if, by federal common law, the agreement was indeed one to arbitrate.

*E. Who May Compel or Be Compelled by Another To Arbitrate?*

“[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide.”<sup>92</sup> And in diversity cases, state law will typically supply that governing law.<sup>93</sup>

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<sup>86</sup> *Id.* at \*1.

<sup>87</sup> *Id.* at \*2 (citing *City of Covington v. Limerick*, 40 S.W. 254, 256 (Ky. 1897) (holding that “a stipulation in a contract . . . that the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal, is binding upon the parties, and **constitutes the engineer the arbitrator** or umpire between them” (citation omitted))).

<sup>88</sup> 509 N.E.2d 1271 (Ohio Ct. App. 1986).

<sup>89</sup> Syl. pt. 1, *id.*; *see also id.* at 1273 (“Unfortunately, the words ‘arbitration’ and ‘appraisal’ are frequently used interchangeably without regard to their underlying legal meaning. Paragraph 15 [of the parties’ agreement] clearly provides only for the valuation of any damage done to crops by the drilling operations and no more. As such, the trial court was correct in finding that Paragraph 15 provides for an appraisal and not for an arbitration.” (citations omitted)).

<sup>90</sup> *Id.*

<sup>91</sup> 9 U.S.C. § 2 (2012).

<sup>92</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citations omitted). The parties can refer any “gateway” questions of arbitrability to arbitration. *See Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010). In *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008), for example, the parties made the following agreement: “All disputes arising out of or relating to the McAllen Ranch Leases, including, without in any way limiting the foregoing, disputes relating to this Agreement or disputes over the scope of this arbitration clause, will be resolved by arbitration in Houston, Texas, using three neutral arbitrators.” *Id.* at 61 n.37. The court held that:

Generally, a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate.<sup>94</sup> “While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate,” however, “[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.”<sup>95</sup> “Rather,” the Fourth Circuit concluded, “a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause.”<sup>96</sup> Thus, “[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.”<sup>97</sup>

In *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*,<sup>98</sup> for example, the Fourth Circuit explained that when allegations against “a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.”<sup>99</sup>

In *Olshan Foundation Repair & Waterproofing v. Otto*,<sup>100</sup> Olshan had entered into a contract with a homeowner to perform certain home repairs.<sup>101</sup> The homeowner subsequently sold his home, and the new buyer also contracted

[t]his arbitration agreement . . . removes the ‘scope determination’ from the court and places it with the arbitration panel. This provision, shrinking the court’s traditional role and expanding the arbitrators’, is not challenged on legal or public policy grounds. Accordingly, we have no discretion but to direct the trial court to compel arbitration and stay McAllen’s litigation.

*Id.* at 61 (footnotes omitted). Delegation of arbitrability questions can even be by incorporation where the parties agree to arbitrate according to rules (like the American Arbitration Association rules) that contain a self-delegation clause: “The majority of courts have concluded that express incorporation of rules empowering the arbitrator to decide arbitrability (including ruling upon his or her own jurisdiction) clearly and unmistakably evidences the parties’ intent to delegate issues of arbitrability to the arbitrator.” *Haddock v. Quinn*, 287 S.W.3d 158, 172 (Tex. Ct. App. 2009).

<sup>93</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>94</sup> *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986) (citations omitted).

<sup>95</sup> *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000) (citations omitted).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 416–17 (footnote omitted).

<sup>98</sup> 863 F.2d 315 (4th Cir. 1988).

<sup>99</sup> *Id.* at 320–21; *see also Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (“A non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract.”); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1280–82 (6th Cir. 1990); *cf. Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395–96 (4th Cir. 2005) (setting out test to determine when equitable estoppel should apply against a signatory to an arbitration agreement).

<sup>100</sup> 276 S.W.3d 827 (Ky. Ct. App. 2009).

<sup>101</sup> *Id.* at 828.

with Olshan to perform more work before selling the home to a final buyer.<sup>102</sup> Both contracts contained a warranty and an arbitration clause.<sup>103</sup> The final buyer sought to enforce the warranty but refused to be bound by the arbitration clause, arguing that he was not a signatory.<sup>104</sup> The trial court denied Olshan's motion to compel arbitration.<sup>105</sup> On appeal, the Court of Appeals reversed, adopting the widely-followed rule from *Thomson-CSF, S.A. v. American Arbitration Ass'n*,<sup>106</sup> setting out "[f]ive theories for binding nonsignatories to arbitration agreements . . . : (1) incorporation by reference, (2) assumption [where subsequent conduct indicates that it is assuming the obligation to arbitrate], (3) agency, (4) veil-piercing/alter ego, and (5) estoppel."<sup>107</sup> The court held that the new homeowner was estopped from denying the arbitration clause by virtue of having sought to enforce the same contract's warranty.<sup>108</sup>

There is the potential for much federal common law on this issue as well. In *Gulf Oil Corp. v. Federal Power Commission*,<sup>109</sup> Gulf and Texas Eastern Transmission Company entered into a gas purchase agreement, which contained an arbitration clause.<sup>110</sup> The Federal Power Commission ("FPC") had issued Gulf a certificate of public convenience and necessity related to Gulf's performance of the gas purchase agreement.<sup>111</sup> A dispute arose, and the FPC ordered Gulf to make certain additional gas deliveries.<sup>112</sup> Before the FPC, Gulf invoked the agreement's arbitration clause and, arguing that its obligations under the gas purchase agreement (presumably as determined by state law) were coextensive with its obligations under the certificate, asked the FPC to hold off its decision until the arbitrators had ruled.<sup>113</sup> The FPC refused.<sup>114</sup> On appeal, the Court of Appeals for the Third Circuit sided with the FPC, holding

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<sup>102</sup> *Id.* at 828–29.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 829.

<sup>105</sup> *Id.* at 828.

<sup>106</sup> 64 F.3d 773 (2d Cir. 1995).

<sup>107</sup> *Olshan*, 276 S.W.3d at 831 (citation omitted).

<sup>108</sup> *Id.* at 831–32; *see also* *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) ("Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement." (citations omitted)); *Kepler Processing Co., LLC v. New Mkt. Land Co.*, No. 5:08-CV-00040, 2008 WL 4509377, at \*6 (S.D. W. Va. Oct. 2, 2008) (party attempting to enforce agreement is estopped from denying its arbitration clause).

<sup>109</sup> 563 F.2d 588 (3d Cir. 1977).

<sup>110</sup> *Id.* at 596.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

that because the FPC was of course not a party to the gas purchase agreement, it would not be bound by the results of arbitration, so there was no reason to make it wait for the results of that process.<sup>115</sup>

*F. Independent Consideration*

An arbitration clause need not be supported by independent consideration. Although a party may not *attack* an arbitration clause on the grounds that there is something wrong with the whole contract, he may *defend* an arbitration clause by invoking a whole-contract defense.<sup>116</sup>

Similarly, while a party who chooses to attack an arbitration must attack that clause independently, he may not do so by arguing that that clause is unsupported by independent consideration. In other words, the promise to arbitration is severable, but it does not constitute a wholly separate agreement for all purposes. In *Dan Ryan Builders, Inc. v. Nelson*,<sup>117</sup> for example, the Court of Appeals for the Fourth Circuit certified a question to the Supreme Court of Appeals of West Virginia: “Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?”<sup>118</sup> The state court answered the question in the negative, holding that

[t]he formation of a contract with multiple clauses only requires consideration for the entire contract, and not for each individual clause. So long as the overall contract is supported by sufficient consideration, there is no requirement of consideration for each promise within the contract, or of “mutuality of obligation,” in order for a contract to be formed.<sup>119</sup>

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<sup>115</sup> *Id.* at 596–97.

<sup>116</sup> *Compare*, *Forest Oil Corp. v. McAllen*, 268 S.W.2d 51, 56 (Tex. 2008) (“While an arbitration agreement procured by fraud is unenforceable, the party opposing arbitration must show that the fraud relates to the arbitration provision specifically, not to the broader contract in which it appears.” (footnotes omitted)), *with id.* at 56–61 (holding that a whole-contract “waiver of reliance” provision expressly disclaiming any reliance on the other party’s unwritten representations precluded independently attacking integral arbitration clause as having been fraudulently procured).

<sup>117</sup> *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550 (W. Va. 2012).

<sup>118</sup> *Id.* at 552.

<sup>119</sup> Syl. pt. 6, *id.*; *see also* *Senior Mgmt., Inc. v. Capps*, 240 F. App’x 550, 553 (4th Cir. 2007) (applying North Carolina law that “[a] single consideration may support several promises; it is not necessary that each promise have a separate consideration. Hence, a covenant which imposes obligations upon one party only may be enforceable if it is part of an entire contract which is supported by a sufficient consideration.” (citation omitted)); *Glazer v. Lehman Bros., Inc.*, 394

An alternative path to the same result holds that the mutual promises to arbitrate are all the consideration that such an agreement might need.<sup>120</sup> A few states have held otherwise,<sup>121</sup> but the FAA preempts such a rule, especially in states whose rule applies only to arbitration clauses.<sup>122</sup>

*G. Is the Arbitration Clause Itself Unconscionable Under State Law?*

The most commonly seen tactic to avoid one's promise to arbitrate must undoubtedly be the argument that that promise was "unconscionable." "A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms."<sup>123</sup> In theory, "[t]he doctrine of unconscionability has developed as a narrow exception to this

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F.3d 444, 453 (6th Cir. 2005) ("[A]rbitration provisions, although severable insofar as they are considered in determining whether a contractual dispute should be submitted to arbitration, are not 'separate, independent and distinct contracts.' Although *Prima Paint* clearly requires courts to separately examine arbitration clauses, those clauses should not be considered as 'separate contracts' outside of the underlying agreement."); Abdel Hakim Labidi v. Sydow, 287 S.W.3d 922, 926–27 (Tex. Ct. App. 2009) ("[A]n arbitration clause does not require mutuality of obligation, so long as the underlying contract is supported by adequate consideration." (citation omitted)). The Supreme Court of Appeals of West Virginia hedged its position, however, and held that where the parties' agreement to arbitrate *lacked* mutuality (for example, where one party agreed to arbitrate, but the other did not) might such a fact be considered in the overall unconscionable analysis: "In assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation. If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable." Syl. pt. 10, *Dan Ryan Builders*, 737 S.E.2d 550. *But see* Wilkerson *ex rel.* Estate of Wilkerson v. Nelson, 395 F. Supp. 2d 281, 286–87 (M.D.N.C. 2005) (cataloguing federal cases for proposition that "[t]he only reciprocal promise necessary for consideration is that both parties agree to be *bound* by the rules of the arbitration procedure and its result, irrespective of whose claims must be arbitrated" (citations omitted)).

<sup>120</sup> See, e.g., *Holloman v. Circuit City Stores, Inc.*, 894 A.2d 547, 553 (Md. 2006) ("[M]utual promises to arbitrate act as an independently enforceable contract . . . each party has promised to arbitrate disputes arising from an underlying contract, and 'each promise provides consideration for the other.'" (citation omitted)).

<sup>121</sup> See, e.g., *The Money Place, LLC v. Barnes*, 78 S.W.3d 714, 717 (Ark. 2002) ("Contrary to *The Money Place's* argument, mutuality within the arbitration agreement itself is required, and that analysis depends on Arkansas contract law." (citation omitted)).

<sup>122</sup> See, e.g., *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 4:06-CV-0032, 2008 WL 830262, at \*10 (E.D. Ark. Mar. 25, 2008) ("The Court agrees with Defendants' contention that Arkansas law requiring mutuality within the arbitration paragraph itself is preempted by the FAA because it places the arbitration clause on unequal footing with other contract terms that do not each have to be mutual. The Court heeds the Eighth Circuit's warning . . . that a doctrine requiring separate consideration for arbitration clauses might violate federal policy.").

<sup>123</sup> *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. Ct. App. 2001) (footnote omitted).

fundamental rule.”<sup>124</sup> Although the states all allow such a challenge and analyze it under a more or less uniform framework, each state’s judicial hostility toward arbitration varies.<sup>125</sup>

The doctrine of unconscionability “is used by the courts to police the excesses of certain parties who abuse their right to contract freely” and “is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences *per se* of uneven bargaining power or even a simple old-fashioned bad bargain.”<sup>126</sup> An unconscionable contract has been characterized as “one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other.”<sup>127</sup>

Courts typically attempt to measure “procedural” and “substantive” unconscionability, and then ask whether the combination of both crosses some (unstated) threshold.<sup>128</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> One state supreme court, for example, recently stated that after the Supreme Court of the United States’ decision in *AT&T Mobility LLC v. Concepcion* precluding enforcement of a state’s policy invalidating a contractual waiver of class action on grounds of unconscionability, such a waiver would now be subject to *greater* “procedural” scrutiny in that state and so should appear in even larger, even bolder print. *See* *Schnuerle v. Insight Commc’ns Co., L.P.*, 376 S.W.3d 561, 577 (Ky. 2012) (“In light of *Concepcion*, we are constrained to further note that *in future cases closer scrutiny of the positioning and prominence of class action waiver provisions will likely be necessary*. Future application of *Concepcion* may be expected to limit the ability of consumers to band together under state law in a class action to vindicate important rights. It therefore follows that *heightened attention* should be afforded to providing a *full and clear disclosure* when those limitations are placed in adhesion contracts. It is fundamental that the prominence of the disclosure should be commensurate with the importance of the right being taken away.” (emphasis added)).

<sup>126</sup> *Id.* at 575 (citations omitted).

<sup>127</sup> *Id.* (citations omitted).

<sup>128</sup> *See, e.g., id.* at 575–76 (accepting that “review of arbitration clauses for unconscionability involves a two step process—first, a review focused on the procedures surrounding the making of the arbitration clause (procedural unconscionability) and second, a review of the substantive content of the arbitration clause (substantive unconscionability)” (citation omitted)); *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988) (“A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., ‘some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party’” (citations omitted)); *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 20 (Ohio 2008) (“The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable.” (citations omitted)); *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 119 (Pa. 2007) (“The doctrine of unconscionability has been applied in Pennsylvania as both a statutory and a common-law defense to the enforcement of an allegedly unfair contract or contractual provision. This Court, however, has not frequently discussed the common-law application. Nevertheless, we agree with the general formulation which has been applied fairly consistently in the intermediate appellate courts, and which borrows from the statutory version and is largely consonant with the Second

Procedural unconscionability looks at the parties' relative bargaining power, including their relative experience, expertise, sophistication, and so on; whether the contract was one of adhesion;<sup>129</sup> the form of the agreement; etc.<sup>130</sup>

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Restatement of Contracts. Under that formulation, a contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it. The aspects entailing lack of meaningful choice and unreasonableness have been termed procedural and substantive unconscionability, respectively.” (citations omitted)); *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 892 (Tex. 2010) (“Texas law renders unconscionable contracts unenforceable. Texas further recognizes both substantive and procedural unconscionability. ‘Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision.’ . . . Generally, a contract is unconscionable if, ‘given the parties’ general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.’ ‘The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.’” (citations omitted)); *Dan Ryan Builders, Inc. v Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012) (“‘The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lopsidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.’ ‘Under West Virginia law, we analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability.’ To be unenforceable, a contract term must—‘at least in some small measure’—be both procedurally and substantively unconscionable.” (citations omitted)); *Pittard v. Great Lakes Aviation*, 156 P.3d 964, 974 (Wyo. 2007) (“In deciding whether a contract is unconscionable, we consider the claim from two perspectives. First, we consider whether the contract provisions unreasonably favor one party over the other. Second, we consider whether the latter party lacked a meaningful choice in entering into the contract. The first perspective concerns the contract’s substantive unconscionability. The second concerns its procedural unconscionability. . . . [M]ost courts require evidence of both and take a balancing approach in applying them. In other words, both the absence of meaningful choice and the presence of contract provisions unreasonably favorable to one party must be found in order to sustain a claim that a contract is unconscionable.” (citation omitted)).

<sup>129</sup> See, e.g., *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 342 n.20 (Ky. Ct. App. 2001) (“A contract of adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” (citation omitted)); cf. *Schnuerle*, 376 S.W.3d at 576 (“Adhesion contracts are not *per se* improper. On the contrary, they are credited with significantly reducing transaction costs in many situations.” (citations omitted)); *Salley*, 925 A.2d at 119 (“[M]erely because a contract is one of adhesion does not render it unconscionable and unenforceable as a matter of law.” (citations omitted)); *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914, 922 (W. Va. 2005) (recognizing “that it is likely that the bulk of the contracts signed in this country are contracts of adhesion and are generally enforceable” (citation omitted)).

<sup>130</sup> See, e.g., *Schnuerle*, 376 S.W.3d at 576 (procedural unconscionability asks, for example, whether the language at issue was “concealed in fine print and couched in vague or obscure contractual language”); *Conseco*, 47 S.W.3d at 343 (finding arbitration clause not procedurally unconscionable because “[t]he clause was not concealed or disguised within the form; its provisions are clearly stated such that purchasers of ordinary experience and education are likely to be able to understand it, at least in its general import; and its effect is not such as to alter the

Substantive unconscionability looks at the resulting agreement: “As for substantive unconscionability, courts consider ‘the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns.’”<sup>131</sup> “Substantive unconscionability ‘refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.’”<sup>132</sup> An arbitration agreement that only requires one party to arbitrate and allows the other to sue, for example, is commonly alleged (and commonly unsuccessfully) to be substantively unconscionable.<sup>133</sup>

Like every other effort to invoke the FAA’s savings clause, a state’s law on unconscionability must not interfere with the FAA’s goal to put agreements to arbitrate on equal footing with other agreements.

#### IV. WHERE WEST VIRGINIA IS GOING IN THE FUTURE?

The Supreme Court of Appeals of West Virginia will likely decide many cases in the near future challenging oil and gas leases or the arbitration provisions contained in those leases. The court should adopt a bright-line rule in those cases to help lessors and lessees determine the validity of the arbitration clauses contained in their leases. A clear rule will provide much-needed stability to West Virginia’s oil and gas jurisprudence and create an

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principal bargain in an extreme or surprising way”); *Taylor Bldg. Corp. of Am.*, 884 N.E.2d at 22–23 (Procedural unconscionability considers the circumstances surrounding the contracting parties’ bargaining, such as the parties’ age, education, intelligence, business acumen and experience, who drafted the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods in question: “Factors which may contribute to a finding of unconscionability in the bargaining process [*i.e.*, procedural unconscionability] include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.” (citation omitted)).

<sup>131</sup> See, e.g., *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 876 (11th Cir. 2005) (citation omitted).

<sup>132</sup> *Conseco*, 47 S.W.3d at 342 n.22 (citation omitted); see also, e.g., *Holmes v. Chesapeake Appalachia, LLC*, No. 5:11-CV-123, 2012 WL 3647674 (N.D. W. Va. Aug. 23, 2012) (rejecting plaintiffs’ unconscionability arguments and compelling arbitration, even of claims against non-movants); *Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414 (N.D. W. Va. 2012) (rejecting argument that equal-split arbitration cost sharing provision, absence of express “all relief” allowance, and absence of equal waiver to jury are unconscionable; rejecting whole-contract fraudulent inducement argument).

<sup>133</sup> But see *Conseco*, 47 S.W.3d at 343–44 (noting that “there is no inherent reason to require that the parties have equal arbitration rights” and rejecting argument that one-way arbitration is unconscionable); see, e.g., *Hathaway v. Eckerle*, 336 S.W.3d 83, 88–90 (Ky. 2011) (applying *Conseco*).



environment that fosters investment and development in the oil and gas industry. To establish a clear rule, the Supreme Court of Appeals of West Virginia should recognize the fundamental right to contract and the liberality of the FAA. Parties must be told what constitutes permissible arbitration language, and they should be able to rely on bargained-for agreements. Only then can lessors and lessees better protect their respective interests by better defining the rights, responsibilities, and expectations with certainty.