Enforcement Upon the Unwitting: The Overreaching Ability of Courts to Appoint Substitute Arbitration Forums Under the Federal Arbitration Act

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ABSTRACT: Section 5 of the Federal Arbitration Act ("FAA") allows courts to appoint a replacement arbitration forum when the designated arbitration forum is unavailable. However, it is unclear how far the power to replace extends, with the Seventh Circuit in 2013 deepening a current circuit split involving the section 5 replacement power. The Third, Fifth, and Eleventh Circuits recognize the integral-part rule, which does not allow a court to appoint a replacement arbitration forum if the designation of the forum in the contract is considered integral. The Seventh Circuit is the lone circuit that has rejected the integral-part rule in its entirety and allows the appointment of a replacement arbitration forum no matter the contract. Furthermore, of the circuits that recognize the integral-part rule, only the Fifth Circuit has applied the rule in a way that recognizes an arbitration forum designation as integral. This Note recommends that the Supreme Court adopt the integral-part rule and the application of the rule that finds arbitration forum designations integral to a contract. Such action by the Supreme Court would be justified by traditional contract principles and the congressional intent of the FAA.

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I. INTRODUCTION

In modern society, arbitration has a growing presence. While arbitration traditionally existed mainly between commercial parties, consumer arbitrations have now become commonplace.[1] Consumer arbitration agreements usually appear in contracts of adhesion, and many consumers must submit to arbitration because courts find that they have assented to the arbitration in the contract.[2] These arbitration agreements usually contain detailed information on how the arbitration is to be performed, including a specific designation of an arbitration forum whose defined rules and procedures will control the process. Due to the tendency of arbitration forums to favor businesses, consumers are usually disadvantaged in arbitration proceedings and therefore prefer judicial proceedings over arbitration.[3] As such, consumers consistently attempt to invalidate arbitration agreements hoping to have judicial resolutions instead.

Recently, consumers have attempted to invalidate arbitration agreements that designate a specific arbitration forum that is no longer available. These attempts have resulted in a split among circuit courts, with the most recent decision by the Seventh Circuit[4] enforcing arbitration after appointing a substitute arbitration forum, in conflict with other circuits, particularly the Fifth Circuit. The Seventh Circuit, a pro-arbitration court, rejected the integral-part analysis used by the other circuits and used section 5 of the Federal Arbitration Act ("FAA") to justify appointing a substitute arbitration forum.

Part II of this Note discusses the history of the FAA and Supreme Court interpretations of the Act resulting in its current interpretation today. Part II.C focuses specifically on section 5 of the FAA, which is the section at issue in the current circuit split. Part III summarizes the differing circuit interpretations, including the recognition and application of what has been termed the integral-part rule. Finally, Part IV addresses why the Supreme Court should resolve the split in favor of the integral-part rule and the Fifth Circuit's application of the rule.

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1. "Arbitration is no longer the province of sophisticated participants. Instead, individuals pursuing long-established statutory claims . . . [and] consumers who enter into contracts that substitute binding arbitration for the public court system may be required to arbitrate disputes that arise in the course of their relationships with service or product providers." Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 56 (2004).

2. *See generally* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999) (providing an overview of consumer contracts and contracts of adhesion under the Federal Arbitration Act).

3. *See* Eric Turkewitz, *Why Arbitration is Rigged Against Consumers*, N.Y. PERS. INJ. L. BLOG (June 21, 2013), http://www.newyorkpersonalinjuryattorneyblog.com/2013/06/why-arbitration-is-rigged-against-consumers.html (explaining why consumers "hate" arbitration).

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

II. THE FEDERAL ARBITRATION ACT

A. PURPOSE AND HISTORICAL BACKGROUND

Arbitration has a long history, dating back to ancient times as a way for parties to resolve various disputes in private.[5] Historians note that arbitration was widespread in certain business circles throughout the United States stretching back to the colonial period.[6] However, most early courts were reluctant to enforce arbitration agreements due to a desire for jurisdiction over disputes and the associated court fees.[7] This reluctance led courts to adopt a judicial policy that parties to an agreement to arbitrate could revoke or disregard the agreement, thereby allowing disputes to enter into the judiciary instead of arbitration.[8] As such, courts would only enforce arbitration if the parties had already concluded the arbitral process and secured an arbitral award.[9]

During this period of the courts' reluctance to enforce arbitration agreements, the popularity of arbitration grew.[10] As industrialization continued into the 20th century, business people increased their demand for arbitration and started a major lobbying effort for the adoption of a national arbitration act.[11] This lobbying effort finally paid off when Congress

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5. "Arbitration developed as a means for providing private and self-contained dispute resolution that culminates in a third-party determination, independent from the judiciary." Amy Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PENN ST. Y.B. ON ARB. & MEDIATION 52, 56 (2011); *see also* KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW 13–14 (2010) (discussing the history of arbitration in the United States and the prominence of arbitration as an alternative to litigation).

6. Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 144 (2002); Schmitz, *supra* note 5, at 57.

7. 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 4:3 n.4 (1999) (suggesting that early judges worried they would lose fees if they allowed arbitration); Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 483 (1995) (stating that the "common law judges of England saw arbitration as an undesirable threat to their control of dispute resolution" and were "at least partially [motivated] by revenue considerations").

8. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 123–24 (4th ed. 2012) ("[C]ourts in the United States expressed their antagonism toward arbitration by creating a policy pursuant to which the arbitral clause was subject to unilateral recession at any time prior to the rendering of an award.").

9. MACNEIL ET AL., *supra* note 7, § 4:7 ("The judicial hostility . . . respecting agreements to arbitrate did not extend to the enforcement of awards.").

10. Haydock & Henderson, *supra* note 6, at 146–47.

11. *See id.* at 147 ("Business people favored the use of arbitration for resolution of commercial disputes."); *see also* Benson, *supra* note 7, at 482 ("The fact is that government courts of the period did not apply commercial law in what the merchant community considered to be a just and expeditious fashion."); Aaron K. Haar, Note, *Pre-Dispute Binding Arbitration in Consumer Warranties: The Ninth Circuit Concludes Correctly for All the Wrong Reasons*, 13 NEV. L.J. 904, 908

unanimously passed the FAA[12] in 1925.[13] Sponsors of the FAA in Congress assured their fellow representatives that the bill was only aimed at making arbitration clauses enforceable and putting them on the same footing as other clauses in a contract.[14] Leading commentators have stated that the FAA's "objective is to legitimize the recourse to arbitral adjudication and give it the systemic autonomy it needs to function effectively as an adjudicatory process."[15]

Two sections of the FAA, section 1[16] and section 2,[17] create the core of the FAA. The Supreme Court has interpreted section 1 as creating federal preemption of arbitration law and making the FAA binding in a variety of situations, even though the actual text of the statute creates no mandate.[18] Even without the textual mandate, the FAA, through section 1, in addition to applying to all federal cases, "also applies to state courts ruling in state law cases that can be linked to interstate commerce[,] . . . [and] state laws that are antagonistic to arbitration are subject to the federal preemption doctrine."[19] Section 2 "recognizes that both the arbitral clause and the submission agreement are lawful contracts. Neither agreement is deficient nor defective *per se*."[20] Courts will only void arbitration agreements under the FAA on the same grounds that courts void other contracts, such as duress or

(2013) ("[T]he use of arbitration remained popular among business communities because '[m]erchant groups valued arbitrators' specialized understanding of commercial issues and industry norms, and informal procedures that fostered continuing business relationships.'" (quoting Schmitz, *supra* note 5, at 58)).

12. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012). The FAA took effect on January 1, 1926. *Id.* § 14.

13. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 110 (2006).

14. *See* 65 Cong. Rec. 11,080 (1924) (statement of Rep. Mills). "This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can force an arbitration agreement in the same way as other portions of the contract." *Id.*; *see also* 65 Cong. Rec. 1,931 (1924) (statement of Rep. Graham). "[The FAA] does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to . . . [i]t does nothing more than that." *Id.*

15. CARBONNEAU, *supra* note 8, at 124–25. Put simply, the FAA was created with the aim of removing the judicial hostility of courts towards arbitration. *See id.* at 124.

16. 9 U.S.C. § 1 (2012).

17. *Id.* § 2.

18. *See* CARBONNEAU, *supra* note 8, at 127–28 ("The legislative text nowhere mandates that state courts must apply [the FAA], especially in matters governed by state law. The decisional rule, however, attributes a much greater range to the FAA.").

19. *Id.*

20. *Id.* at 147. "[A]n agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

lack of consideration.[21] The FAA is a relatively short statute and does not address many aspects of arbitration. As such, courts determine much of the applicability and scope of the FAA. The Supreme Court's interpretation of the FAA has developed over time, slowly broadening the scope and breadth of the Act.[22] Many commentators have criticized the growth of the FAA, claiming that the current interpretation of the FAA is nowhere near what Congress intended when it adopted the FAA.[23] Justice O'Connor noted that "the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[24] In many ways, Supreme Court interpretations of the FAA have become more important than the actual text of the statute.

B. SUPREME COURT INTERPRETATIONS OF THE FEDERAL ARBITRATION ACT

The Supreme Court has constructed the current rule of the FAA through a number of seminal cases. Overall, the Supreme Court has ruled in favor of enforcing arbitration, and applying the FAA as governing law. In 1984, in *Southland Corp. v. Keating*, the Court struck down a California law that declared arbitration agreements in franchise agreements void.[25] The Court held that the California law directly conflicted with section 2 of the FAA and, under the Supremacy Clause, the Court declared the California law unconstitutional.[26] In finding the law unconstitutional, the Court noted that by creating the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[27] The Court also expanded the applicability of the FAA by stating clearly that "[i]n enacting [the Federal Arbitration Act], Congress declared a *national policy favoring arbitration* and withdrew the power of the states to require a judicial forum for the resolution of claims . . . ."[28] The Supreme Court and lower courts have continually cited

21. CARBONNEAU, *supra* note 8, at 147 ("Arbitration agreements are subject to challenge solely on basis of flaws of formation, such as duress, lack of consideration, a failure of mutuality, or unconscionability.").

22. *See infra* Part II.B.

23. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996) (stating that Congress' "preference for arbitration is a myth that has no historical basis. . . . [I]t intended only to require federal courts to *accept* arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms' length transactions").

24. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

25. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

26. *Id.* at 16. "The California Supreme Court interpreted [the] statute to require judicial consideration of claims . . . and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the [statute] directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id.* at 10.

27. *Id.* at 16.

28. *Id.* at 10 (emphasis added).

this declaration of a national policy favoring arbitration as rationale for applying the FAA broadly.[29]

In 1995, the Supreme Court furthered the reach of the FAA in *Allied-Bruce Terminix Cos. v. Dobson* by holding that the interstate commerce language in the FAA should be read as reaching the limits of Congress' Commerce Clause power.[30] In doing so, the Supreme Court overturned the Alabama Supreme Court's holding that the FAA only applies when "the parties to a contract . . . have 'contemplated' an interstate commerce connection."[31] Instead of a contemplation-of-the-parties test, the Supreme Court accepted a "'commerce in fact' interpretation, reading the [FAA's] language as insisting that the 'transaction' in fact 'involve' interstate commerce, even if the parties did not contemplate an interstate commerce connection."[32] This "commerce in fact" interpretation has led courts to apply the FAA in the broadest sense to all transactions that involve commerce.[33]

However, even while expanding the reach of the FAA, the Supreme Court has consistently honored the principle that arbitration agreements are contracts and the parties can structure them as they see fit. The Court has stated that "[a]rbitration under the [FAA] is a matter of consent, not coercion" and that "[b]y permitting the courts to 'rigorously enforce' [arbitration] agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties."[34] In enforcing the terms, courts fulfill the purpose of the FAA—that arbitration clauses be put on the same footing as other contractual clauses.[35]

It is under this evolving interpretation of the FAA that a circuit split between courts has developed. Specifically, the courts are divided over the ability of courts to appoint a replacement arbitration forum under section 5 of the FAA when the designated arbitration forum in the arbitration clause is no longer available.

C. SECTION 5 OF THE FEDERAL ARBITRATION ACT

Section 5 of the FAA allows for courts to designate an arbitrator "who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein."[36] A "court shall designate and

29. For a recent example of the Supreme Court emphasizing the national policy favoring arbitration, see *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012).

30. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281–82 (1995).

31. *Id.* at 269.

32. *Id.* at 281.

33. The "commerce in fact" test only requires that the transaction actually involved interstate commerce; the intention of the parties is irrelevant to the satisfaction of the test. *Id.*

34. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) (citation omitted).

35. *See supra* note 14 and accompanying text.

36. 9 U.S.C. § 5 (2012). The full text of section 5 of the FAA is as follows:

appoint an arbitrator" in only three situations:[37] (1) when an arbitrator is not named in the agreement;[38] (2) when a party refuses to follow the agreed-upon procedure;[39] or (3) "if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy."[40] This third situation, the "catch-all" provision of section 5 contains the most ambiguity and is the focus of the current circuit split.

III. THE CURRENT CIRCUIT SPLIT

Currently, the Third, Fifth, Seventh, and Eleventh Circuits are split over the exact powers section 5 of the FAA grants when the designated arbitration forum in the arbitration agreement is no longer available. Given that section 5 of the FAA makes no specific mention of appointment when an arbitration forum is no longer available, courts have focused on the catch-all provision of section 5 for this power.[41] The silence of the catch-all provision on the issue of unavailable arbitration forums has resulted in a distinct split between the circuits concerning the integral-part rule. The Third, Fifth, and Eleventh Circuits all recognize the integral-part rule, whereas the Seventh Circuit explicitly rejects it.[42] Of the circuits that recognize the integral-part rule, the Fifth Circuit applies the rule broadly, while the Third and Eleventh Circuits apply it narrowly.[43]

While the unavailability of an arbitration forum can present itself in a variety of situations concerning arbitration agreements, current litigation and the circuit split have emerged after the National Arbitration Forum ("NAF")

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Id.

37. *Id.*

38. *Id.* (permitting courts to appoint an arbitrator "if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method"); *see also* CARBONNEAU, *supra* note 8, at 169.

39. 9 U.S.C. § 5 (permitting courts to appoint an arbitrator if "any party . . . shall fail to avail himself" of the arbitrator designated in the agreement).

40. *Id.*

41. *See supra* notes 37–40 and accompanying text.

42. *See infra* Part III.A.

43. *See infra* Part III.B.

stopped operating.[44] The NAF, a nationally known arbitration forum, handled hundreds of thousands of consumer arbitrations until it stopped operating in 2009.[45] Due to the NAF's reputation and notoriety as pro-business and pro-creditor, businesses consistently chose the NAF as the designated arbitration forum in arbitration clauses in consumer contracts.[46] Given the NAF's popularity as the designated arbitration forum for businesses, numerous contracts drafted before and after its dissolution still contain the NAF as a designation even though the NAF is no longer available as an arbitration forum.[47] As such, when disputes arise requiring arbitration, many consumers claim that the unavailability of the NAF makes the entire arbitration clause invalid and request court adjudication of the dispute.[48] These lawsuits created the core of the present circuit split.[49]

A. INTEGRAL-PART RULE

In determining if a court can appoint a replacement arbitration forum under section 5 of the FAA, the Third, Fifth, and Eleventh Circuits recognize the integral-part rule, while the Seventh Circuit has rejected the integral-part rule in its entirety. The integral-part rule focuses on whether or not the designation of an arbitration forum is integral to the arbitration clause.[50] If it is integral, then the arbitration clause is invalid and a court may not appoint

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44. The NAF agreed to stop arbitrating disputes after reaching a settlement with the Minnesota Attorney General in 2009. Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BLOOMBERG BUSINESSWEEK (July 19, 2009), http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html. Minnesota accused the NAF of deceptive-trade practices and consumer-fraud. *Id.*; *see also* F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 13–14 (6th ed. 2011).

45. BLAND, ET AL., *supra* note 44, at 336.

46. DOMESTIC POLICY SUBCOMM. MAJORITY STAFF, OVERSIGHT—GOV'T REFORM COMM., ARBITRATION ABUSE: AN EXAMINATION OF CLAIMS FILES OF THE NATIONAL ARBITRATION FORUM 2 (2009) ("[A]lmost all [NAF] consumer arbitrations are decided in the creditor's favor."); PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 2 (2007), *available at* http://www.citizen.org/documents/Final_wcover.pdf ("94 percent of decisions [by the NAF] were for business.").

47. BLAND, ET AL., *supra* note 44, at 14.

48. This is the situation in each circuit split case discussed *infra*.

49. It is important to note that all of these cases involve not only consumer arbitration, but also what is known as predispute arbitration. Predispute arbitration is when two parties contract to arbitrate all future disputes, as outlined in and governed by their arbitration agreement. *See generally* Demaine & Hensler, *supra* note 1 (discussing predispute arbitration agreements in consumer contracts, and common experiences involved with such agreements). This Note, when referring to arbitration, is not referring to commercial arbitration or non-predispute arbitration agreements. This Note focuses specifically on predispute arbitration clauses in consumer contracts, which have become commonplace in today's society.

50. "The central inquiry [of the integral-part rule] is whether the identity of the provider is 'integral' to the arbitration clause. If so, the entire arbitration clause is unenforceable; if not, then the obligation to arbitrate persists, and the court itself fills the resulting gap in the arbitration agreement by appointing the arbitrator." Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 334–35 (2012).

a replacement arbitration forum; if it is not integral, then the court will appoint a replacement arbitration forum under section 5 of the FAA.[51]

1. The Eleventh and Third Circuits

The Eleventh Circuit, in *Brown v. ITT Consumer Financial Corp.*, appears to have been the first circuit to recognize the integral-part rule.[52] It gave only a passing reference to the rule, citing to *National Iranian Oil Co. v. Ashland Oil, Inc.*[53] as the Fifth Circuit also does, stating the rule as follows: "Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration."[54]

The Third Circuit recognized the integral-part rule in *Khan v. Dell Inc.*[55] The Third Circuit quoted the integral-part rule expressed by the Eleventh Circuit in *Brown*, and elaborated on it by adding: "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."[56] Once again, the ultimate source for the integral-part rule appears to have come from *National Iranian*.[57]

2. The Fifth Circuit

In *Ranzy v. Tijerina*, the Fifth Circuit examined tangential case law on the designation of an arbitration forum in a contract.[58] In applying that case law to consumer arbitration, the Fifth Circuit came up with the most recognized statement of the integral-part rule: "Section 5 does not, however, permit a district court to circumvent the parties' designation of an exclusive arbitration forum when the choice of that forum 'is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern.'"[59] The Fifth Circuit's rationale for adopting the integral-part rule relied mainly upon an

51. *Id.*

52. *See* Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000).

53. Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326 (5th Cir. 1987). The court refused to appoint a replacement arbitrator and forum due to the forum selection clause being found integral. However, the contract involved international arbitration, with arbitration required to be performed in Iran. As such, the contract fell under the international arbitration provisions of the FAA, and not under section 5. *See id.*

54. *Brown*, 211 F.3d at 1222 (citations omitted).

55. Khan v. Dell Inc., 669 F.3d 350 (3d Cir. 2012).

56. *Id.* at 354 (citation omitted) (internal quotation marks omitted).

57. In *Khan*, the Third Circuit relied on the Eleventh Circuit's articulation of the integral-part rule, which the Eleventh Circuit adopted from *National Iranian. See id.*

58. Ranzy v. Tijerina, 393 F. App'x 174 (5th Cir. 2010).

59. *Id.* at 176 (quoting *Brown*, 211 F.3d at 1222.).

international arbitration case, *National Iranian*,[60] a distinguishable domestic case,[61] and the rules of construction in contracts.[62]

3. The Seventh Circuit

The Seventh Circuit is the lone circuit to have rejected the integral-part rule in its entirety, doing so in 2013 in *Green v. U.S. Cash Advance Illinois, LLC*.[63] In *Green*, a consumer filed suit because the NAF was no longer available to arbitrate the dispute; the consumer claimed that the designation of the NAF was an integral part of the arbitration agreement.[64] The consumer argued that the entire arbitration agreement was therefore void and the case must proceed in the courts.[65] The district court agreed with the consumer and applied the integral-part rule holding that the identity of the arbitration forum "was an integral part of the agreement."[66]

The Seventh Circuit reversed the district court's ruling and described the integral-part rule as "a rumor chain" and pure dictum.[67] The court further stated: "Today opinions such as *Khan* and *Ranzy* proceed as if it were an established rule of law that [section] 5 [of the FAA] cannot be used to appoint a substitute arbitrator when the contractual designation was an 'integral part' of the bargain."[68] The Seventh Circuit went on to say: "As far as we can tell, no court has ever explained what part of the text or background of the [FAA] requires, or even authorizes, such an approach."[69] The Seventh Circuit continued its attack on the integral-part rule by asserting that the Supreme Court would invalidate such an approach, and that an integral-part inquiry would "prevent arbitration from being a fast and economical process," as it should be.[70]

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60. Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326 (5th Cir. 1987).

61. Weiner v. Gutfreund (*In re* Salomon Inc. S'holders' Derivative Litig.), 68 F.3d 554 (2d Cir. 1995). In *Salomon*, the Court refused to appoint a substitute arbitrator after the designated arbitration forum in the contract refused to arbitrate the dispute because the forum determined that the dispute was not arbitrable. *Id.* at 561. The unavailability of the arbitration forum in this case resulted from the designated arbitration forum specifically choosing not to arbitrate one case, in contrast to the closing of the NAF.

62. *Ranzy*, 393 F. App'x at 175.

63. Green v. U.S. Cash Advance Ill., LLC, 724 F.3d 787, 792–93 (7th Cir. 2013).

64. The relevant part of the arbitration agreement is as follows: "All disputes, claims or controversies between the parties . . . shall be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum." *Id.* at 788.

65. *Id.* at 788–89.

66. Green v. U.S. Cash Advance Ill., LLC, No. 12 C 8079, 2013 WL 317046, at *3 (N.D. Ill. Jan. 25, 2013), *vacated*, 724 F.3d 787 (7th Cir. 2013).

67. *Green*, 724 F.3d at 792.

68. *Id.*

69. *Id.*

70. *Id.*

B. Application of the Integral-Part Rule

Among the Third, Fifth, and Eleventh Circuits, the circuits that recognize the integral-part rule, differences exist between them on how to apply the rule. The Third and Eleventh Circuits have yet to apply the integral-part rule in a way that finds an arbitration forum integral and therefore invalidates the entire arbitration agreement. Conversely, the Fifth Circuit has used the rule to invalidate an arbitration agreement after finding an arbitration forum designation integral.

1. The Third and Eleventh Circuits

While not rejecting the integral-part rule, both the Third and Eleventh Circuits reached the same result as the Seventh Circuit through application of the rule. The Eleventh Circuit in *Brown* refused to apply the integral-part rule to the arbitration agreement presented.[71] The arbitration agreement stated that the parties "agree that any dispute between them or claim by either against the other or any agent or affiliate of the other shall be resolved by binding arbitration under the Code of Procedure of the [NAF]."[72] The court held that "there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate" and upheld the appointment of a replacement arbitration forum.[73]

In *Khan*, the Third Circuit case, a consumer filed suit hoping to void an arbitration agreement, which stated that any dispute "shall be resolved exclusively and finally by binding arbitration administered by the [NAF]."[74] The Third Circuit recognized the split among circuits using the integral-part rule, and explicitly decided to follow the Eleventh Circuit's approach in *Brown*.[75] The court stated that it would only apply the integral-part rule if it found that "the parties . . . have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable."[76] The Third Circuit went on to state that the arbitration agreement language at issue was ambiguous and therefore, the integral-part rule did not apply.[77] Furthermore, the court held that ambiguities must be resolved in favor of arbitration, and ordered the lower court to appoint a replacement arbitration forum.[78]

71. Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000).
72. *Id.* at 1220.
73. *Id.* at 1222.
74. Khan v. Dell Inc., 669 F.3d 350, 351 (3d Cir. 2012) (emphasis omitted).
75. *Id.* at 356.
76. *Id.* at 354.
77. *Id.* at 356.
78. *Id.* at 356–57.

2. The Fifth Circuit

The Fifth Circuit is the lone circuit to find the designation of an arbitration forum in an arbitration agreement integral and to invalidate the arbitration agreement as a result.[79] The Fifth Circuit in *Ranzy* stated that "[i]n order to determine whether the designation of the NAF as the sole arbitration forum is an integral part of the arbitration agreement, 'the court must employ the rules of contract construction to determine the intent of the parties.'"[80] The court analyzed the arbitration agreement[81] and found, by using rules of contract construction, that the parties use of the term "shall" showed that they explicitly agreed and intended to have NAF as the exclusive forum for arbitration.[82] As such, the court found the designation of the NAF integral to the arbitration agreement, and that the lower court could not appoint a replacement arbitration forum.[83]

IV. THE SUPREME COURT SHOULD ADOPT THE INTEGRAL-PART RULE AND THE FIFTH CIRCUIT'S APPLICATION

The current circuit split involving the integral-part rule developed relatively recently, and it is likely to continue to grow in significance. With the shutdown of the NAF, thousands of consumer contracts have a designated arbitration forum that is no longer available.[84] Currently, depending upon the jurisdiction, courts may force a consumer to enter into arbitration in an arbitration forum the consumer never intended, while other consumers will be able to take the exact same claims with the same arbitration clause to a judicial court instead.

This lack of uniformity requires intervention from the Supreme Court. Congressional intervention amending or clarifying section 5 of the FAA appears extremely unlikely given Congress' historical deference to the Supreme Court's interpretations of the FAA.[85] The Supreme Court should

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79. Ranzy v. Tijerina, 393 F. App'x 174 (5th Cir. 2010).

80. *Id.* at 176.

81. "You and we agree that any and all claims, disputes, or controversies . . . *shall* be resolved by binding individual (and not class) arbitration by and under the Code of Procedure of the [NAF] . . . . This agreement to arbitrate all disputes *shall* apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims *shall* be filed at any NAF office . . . ." *Id.* at 175.

82. *Id.* at 176.

83. *Id.*

84. *See supra* notes 44–48 and accompanying text. Many of these consumer contracts remain in force for years, and even decades, requiring arbitration for all disputes. Therefore, consumers will likely try to invalidate arbitration agreements that designate the NAF for many years to come, as more disputes rise. Furthermore, the closing of another arbitration forum would amplify the amount of litigation on this issue.

85. It is possible that Congress could pass legislation addressing pre-dispute arbitration agreements in consumer contracts, as it has done recently with respect to mortgage agreements. For example, in response to the housing crisis of 2008, Congress, in the Dodd–Frank Act,

intervene and fully adopt the integral-part rule and its application as promulgated by the Fifth Circuit because (1) basic contract principles and the rules of contract construction support the rule; and (2) the congressional intent behind the FAA mandates such an approach.

A. ADOPTION OF THE INTEGRAL-PART RULE

With the exception of the Seventh Circuit, all of the circuits that have addressed the rule have adopted the integral-part rule.[86] Following this lead, the Supreme Court should adopt the integral-part rule because it forces courts to engage in an analysis that respects contract principles and the intent of the FAA.

1. Traditional Contract Principles

An agreement to arbitrate, including an arbitration clause in a contract, is merely a product of contracting.[87] The parties agree to the terms by negotiating until the parties reach an agreement with mutually agreeable terms.[88] Parties have freedom in determining and customizing the arbitration terms,[89] just as they do in any other contracting process.[90] Leading commentators on contract law have confirmed that arbitration agreements should be treated the same as other contracts: "The same standards of interpretation and construction apply to arbitration agreements as are applied to contracts generally."[91] As such, the general principles of contract interpretation apply to arbitration agreements, including the overarching

effectively banned pre-dispute arbitration provisions in mortgages. Schmitz, *supra* note 5, at 82; *see also* Catherine Moore, Note, *The Effect of the Dodd–Frank Act on Arbitration Agreements: A Proposal for Consumer Choice*, 12 PEPP. DISP. RESOL. L.J. 503, 514–18 (2012) (discussing the changes the Dodd–Frank Act brought upon arbitration agreements, including pre-dispute agreements). However, this Note takes the position that legislation involving interpretations of section 5 of the FAA is unlikely given the controversy of other sections of the FAA, specifically sections 1 and 2.

86. *See supra* Part III.A.

87. "Arbitration agreements, either in the form of an arbitral clause or a submission agreement, are lawful contracts. Parties have the right to engage in arbitration simply by agreeing to do so." CARBONNEAU, *supra* note 8, at 21.

88. It is important to note that most consumer contracts are contracts of adhesion, so negotiation generally does not occur. However, courts still have a tendency to apply contract principles the same to contracts of adhesion as they do to arm's-length negotiated contracts.

89. While many consumer arbitration clauses are the result of contracts of adhesion, thereby involving no real negotiation, courts have consistently treated contracts of adhesion the same as negotiated contracts. "[C]ontracts [of adhesion] are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances." McInnes v. LPL Fin., LLC, 994 N.E.2d 790, 798 (Mass. 2013). Following the courts' lead, this Note applies traditional contract principles to contracts of adhesion just as a court would.

90. "Freedom of contract allows arbitrating parties to write their own rules of arbitration—in effect, it permits them to establish the law of arbitration for their transaction. The parties can customize the arbitral process to their needs . . . ." CARBONNEAU, *supra* note 8, at 47.

91. 21 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 57:20 (Richard A. Lord ed., 4th ed. 2001).

principle that a court must attempt to effectuate the purported intent of the parties.[92]

The Supreme Court has recognized the contractual nature of arbitration agreements, embracing the idea that parties can specify the terms and rules of arbitration through contract.[93] This type of interpretation of arbitration agreements remains applicable under the FAA, with the Supreme Court stating that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."[94] However, even with the Supreme Court's abundantly clear direction regarding the interpretation of arbitration clauses, the Seventh Circuit has refused to give weight to the parties' designation of an arbitral forum in an arbitration agreement.[95]

The Seventh Circuit in *Green* recognized that the parties agreed to arbitration, but it discounted the terms by which the arbitration was to be conducted.[96] The Seventh Circuit instead used section 5 of the FAA to justify the enforcement of arbitration on terms that the parties did not agree to.[97] The Seventh Circuit ignored the Supreme Court's mandate to respect the "wishes of the contracting parties" in enforcing arbitration agreements.[98] Instead, the Seventh Circuit used the appointment powers of section 5 of the FAA to override the parties' clear intent in the name of encouraging arbitration.[99] Arbitration, as a creature of contract, should not be forced upon parties on different terms than they agreed to.[100] In other words, a court cannot ignore the clear intent of parties to a contract and force upon them a contract with different terms.[101]

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92. "[A] contract must be interpreted in a manner that will best effectuate the intent of the parties and will allow each party to receive the benefit of the bargain. . . . [A]n arbitration agreement should be construed as a whole, and its meaning determined from the context of the entire contract." *Id.* § 57:20.

93. "Just as [parties] may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 479 (1989). "The Supreme Court has said repeatedly that we must rigorously enforce arbitration agreements according to their terms." Green v. U.S. Cash Advance Ill., LLC, 724 F.3d 787, 794 (7th Cir. 2013) (Hamilton, J., dissenting) (citations omitted) (internal quotation marks omitted).

94. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).

95. *See supra* Part III.A.3.

96. *See Green*, 724 F.3d at 789–90.

97. *Id.* at 792–93. "These parties selected private dispute resolution. Courts should not use uncertainty in just how that would be accomplished to defeat the evident choice. Section 5 allows judges to supply details in order to make arbitration work." *Id.* at 793.

98. *See supra* notes 93–95 and accompanying text.

99. *Green*, 724 F.3d. at 793.

100. "We should not read section 5 of the FAA to allow or require courts to decide all of the basic questions about arbitration. The designation of an arbitration forum has wide-ranging substantive implications . . . ." *Id.* at 800 (Hamilton, J., dissenting) (citations omitted) (internal quotation marks omitted).

101. "[T]he primary purpose and function of the court in interpreting a contract is to ascertain and give effect to the parties intention. . . . [T]he cardinal principle of contract

To ensure a proper respect of the parties' intent as mandated by the Supreme Court under the FAA, the Supreme Court should adopt the integral-part rule. The integral-part rule allows for courts to examine an agreement to arbitrate to determine which parts of the agreement the parties intend as integral.[102] The Seventh Circuit, by not even engaging in this analysis, subverts the intent of the parties.[103] The Supreme Court's adoption of the integral-part rule will ensure that future courts do not follow the path of the Seventh Circuit and use the FAA as a means for ignoring the clear intent of the parties who created the arbitration agreement.

The Seventh Circuit also ignores another contract principle—the doctrine of impossibility. As Samuel Williston explained, "[i]mpossibility excuses a party's performance under a contract when destruction of the subject matter of the contract, or of the means of performance, makes performance objectively impossible."[104] The impossibility must arise from an unanticipated event, and performance must be absolutely impossible.[105] Put another way, courts developed the doctrine of impossibility based upon the idea that certain subject matters and means of performance are so *integral* to a contract that courts should excuse performance of the contract when those matters and means are no longer feasible.[106] The doctrine of impossibility applies directly to the current circuit split.

To ensure proper application of the doctrine of impossibility, which commentators consider a tightly circumscribed doctrine,[107] the Supreme Court must adopt the integral-part rule in its entirety. The integral-part rule allows courts to determine if a term is so integral to an arbitration agreement that performance of the arbitration is no longer feasible.[108] Without the

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interpretation is that the intention of the parties must prevail unless it is inconsistent with some established rule of law." 21 WILLISTON, *supra* note 91, § 32:2 (footnote omitted). "[Appointing a substitute arbitration forum] puts courts in the business of crafting new arbitration agreements for parties who failed to come to terms regarding the most basic elements of an enforceable arbitration agreement. . . . [The FAA] should not be read to authorize such a wholesale re-write of the parties' contract." *Green*, 724 F.3d at 793 (Hamilton, J., dissenting).

102. *See supra* Part III.A.

103. The Seventh Circuit's rejection of the integral-part rule, and therefore any analysis concerning the importance of the terms of the contract, shows that the Seventh Circuit views the intent of the parties as inferior to the FAA.

104. 21 WILLISTON, *supra* note 91, § 77:78.

105. *Id.* "[T]he impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. . . . Impossibility of performance is a strict standard that can be maintained only where circumstances truly dictate impossibility. Impossibility of performing a contract must be real, and not a mere inconvenience." *Id.*

106. *Id.* § 77:89. "The unavailability of the necessary means for fulfilling a contract can excuse performance. For instance, the destruction of a factory, which the parties contemplated as the means of fulfilling a contract for goods, excused performance, although the contract did not mention the factory." *Id.*

107. *Id.* § 77:78.

108. *See supra* notes 50–51 and accompanying text.

integral-part rule's analysis, a court, under the FAA, may force arbitration upon parties where the doctrine of impossibility should excuse the arbitration.[109]

2. Congressional Intent of the FAA

The Supreme Court's adoption of the integral-part rule would effectuate Congress' intent in adopting the FAA. In enacting the FAA, sponsors of the bill explained that the goal of the FAA was to put arbitration contracts on the same level as other contracts.[110] Furthermore, many commentators have asserted that Congress intended for the FAA to apply between merchants and commercial parties, and not in consumer situations.[111] The current broad interpretation of the FAA also ignores the intent of Congress in passing the FAA. Looking at the text of section 5,[112] it becomes clear that section 5 likely should not even apply to unavailable *arbitration forums*: "By its very terms, [section 5] only applies when the arbitrator is unavailable, not when the arbitration forum is unavailable, and the provision only authorizes the court to appoint an alternative arbitrator, not an alternative arbitration forum."[113] By designating an arbitration forum, parties are designating more than a specific arbitrator. An arbitration forum controls the rules and procedures of the actual arbitration, in addition to the appointment of an actual arbitrator. As such, the synonymous use of the terms arbitrator and arbitration forum by courts discredits the importance of a designated arbitration forum. A designated arbitration forum involves more than a simple choice of an arbitrator, and a court should not replace such a designation without proper deference to the parties of the arbitration contract.

The recognition of the integral-part rule by the Supreme Court would be the first step in upholding Congress' intent in passing the FAA.[114] The integral-part rule forces courts to treat arbitration contracts the same as other contracts, as intended by Congress.[115] Furthermore, Congress did not intend the FAA to cover consumer arbitration agreements and unavailable

109. The doctrine of impossibility is commonly referred to as a defense. A party must raise the defense of impossibility to a contract, and prove that performance as envisioned under the contract is impossible. Without raising the defense, a court will not consider its applicability. 21 WILLISTON, *supra* note 91, § 77:78.

110. *See supra* note 14 and accompanying text.

111. "Most commentators have concluded that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer." Sternlight, *supra* note 23, at 647.

112. *See supra* note 36.

113. BLAND, *supra* note 44, at 142.

114. The recognition of the integral-part rule would only affect the interpretation of section 5 of the FAA. Other sections of the FAA, which many commentators also believe courts apply too broadly, would not be affected.

115. *See supra* note 14 and accompanying text.

arbitration forums.[116] While not addressing the full overextension of the FAA in all areas, the integral-part rule is a small step towards ensuring proper application of the FAA as intended by Congress.

B. Adoption of the Fifth Circuit's Application of the Integral-Part Rule

When the Supreme Court adopts the integral-part rule, it should also adopt the Fifth Circuit's application of the rule because such an application gives proper deference to the rules of traditional contract principles and the intent of the FAA. More specifically, the Supreme Court should apply the rule in a way that invalidates the arbitration contract if the designated forum is no longer available.

1. Traditional Contract Principles

As discussed above, the Supreme Court has recognized that courts must consider the intent of parties in contracting an arbitration agreement when interpreting such an agreement.[117] Parties manifest their intentions in the language of the contract itself, such as the specific designation of certain clauses and means in the contract.[118] In an arbitration contract, if the parties intended to have a specific arbitration forum perform the arbitration, the parties explicitly mention that forum.[119] When the parties mention such an arbitration forum, the parties clearly state their intentions in the language of the contract, and courts must abide by these intentions and designations.[120] If the parties intended to have arbitration no matter the arbitration forum, then they would not mention an arbitration forum.[121]

The Fifth Circuit properly recognized the intentions of contracting parties by applying the integral-part rule in a way that invalidated the arbitration contract if the named arbitration forum was unavailable.[122] The Fifth Circuit acknowledged that the intention of the parties was to have a specific arbitration forum (the NAF) perform the arbitration, not any

116. *See supra* notes 11–14, 113 and accompanying text.

117. *See supra* Part IV.A.1.

118. "If the language clearly conveys the parties' lawful intentions, then . . . the court is obligated to enforce the agreement according to its terms. Courts often recite that they cannot make a new contract for the parties, but can only enforce the contract to which the parties themselves have agreed . . . ." 21 WILLISTON, *supra* note 91, § 32:2.

119. If the parties wanted arbitration no matter the arbitration forum, such an intent would need to be provided for in the contract. The designation of an arbitration forum would be deemed superfluous and unneeded if the parties did not care about which arbitration forum would be used.

120. *See* 21 WILLISTON, *supra* note 91, § 32:2.

121. While silence on an arbitration forum designation does not necessarily mean that the parties did not contemplate a specific arbitration forum, it is strong evidence of such an intent as arbitration forum designations are commonplace in arbitration agreements.

122. Ranzy v. Tijerina, 393 F. App'x 174, 175 (5th Cir. 2010).

arbitration forum.[123] The Third and Eleventh Circuits discredited the intention of the parties by finding that the designation of a specific arbitration forum is not integral.[124] To those circuits, such a designation was superfluous, and the intention of the parties did not matter because the FAA overrode such intentions.[125] This interpretation directly conflicts with traditional contract principles.

Considering the doctrine of impossibility, it is clear that the Supreme Court should adopt the Fifth Circuit's application of the integral-part rule. In each case brought before the circuits, the arbitration clause designated the NAF as the arbitration forum decided upon by the parties and inserted it in each arbitration clause.[126] Since the NAF is now permanently unavailable,[127] the manner and means designated in the arbitration clause to perform the arbitration is impossible to fulfill. Given that the "means of performance" of the arbitration clauses became "objectively impossible" upon the NAF's closure, parties are excused from their obligation to arbitrate under standard contract principles.[128]

The Fifth Circuit, in its application of the integral-part rule, is the only circuit that properly recognized that the specific designation of an arbitration forum is integral and a "means of performance" to an arbitration agreement.[129] Therefore, while not explicitly stating that it was following the logic of the doctrine of impossibility, the Fifth Circuit implicitly applied the doctrine in stating that arbitration cannot proceed because an integral part of the arbitration clause could not occur.[130] The Third and Eleventh Circuits failed to properly apply the doctrine of impossibility by not recognizing the designation of an arbitration forum as integral. The unavailability of the arbitration forum made the "means of performance" of the arbitration agreement objectively impossible to fulfill, and the courts therefore should have excused performance.

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123. *Id.*

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

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

126. *See supra* notes 44–49 and accompanying text. These arbitration clauses typically contained language stating that arbitration would be conducted by the NAF under its procedures and rules. These clauses gave more than a passing reference to the NAF as the designated forum; they explicitly showed that the means by which arbitration would be performed would be through the NAF.

127. *See supra* note 44 and accompanying text.

128. *See supra* note 106 and accompanying text.

129. *See supra* Part III.B.2.

130. While most examples of the doctrine of impossibility involve the Uniform Commercial Code, the same principles clearly apply to arbitration contracts. In an arbitration contract context, the designation of an arbitration forum is a means of performance. When the arbitration forum is no longer available, the means of performance are destroyed, therefore making the performance—arbitration conducted in accordance with the contract—objectively impossible. *See generally* 21 WILLISTON, *supra* note 91, § 77:78 (discussing the general doctrine of impossibility for contracts).

2. Congressional Intent of the FAA

Congress' intent in passing the FAA was to treat arbitration contracts the same as other contracts.[131] Only the Fifth Circuit's application of the integral-part rule respects contract principles and treats arbitration contracts the same as other contracts. Other approaches, such as the Third and Eleventh Circuits' approaches,[132] treat arbitration contracts as superior to other contracts in blatant contradiction to the intent of the FAA.[133] By adopting the Fifth Circuit's application of the integral-part rule, the Supreme Court would fulfill the purpose and intent of the FAA by treating arbitration contracts the same as all other contracts.

Furthermore, Congress likely did not intend section 5 of the FAA to provide for a substitute arbitration forum, but instead only for the appointment of a substitute arbitrator.[134] With this in mind, a result that imposes a substitute arbitration forum under the guise of section 5 of the FAA appears inconsistent with Congress' intent. Only the Fifth Circuit's approach does not appoint a substitute arbitration forum, and it is therefore the most consistent with Congress' intent.

V. CONCLUSION

Some circuits have used section 5 of the FAA to justify appointing substitute arbitration forums when the designated arbitration forum in the contract is no longer available.[135] However, other circuits have recognized the integral-part rule.[136] The Fifth Circuit, through its application of the integral-part rule, has invalidated arbitration agreements on the grounds that a court may not appoint a substitute arbitration forum.[137]

The Supreme Court should recognize the integral-part rule and adopt the Fifth Circuit's application of the rule, thereby invalidating arbitration agreements that have specified an unavailable arbitration forum. Recognizing and applying the integral-part rule in this way respects traditional contracts principles,[138] which courts should apply to arbitration contracts, and fully satisfies the congressional intent behind the FAA.[139] While courts are a powerful force in favor of arbitration, they may not use the FAA to justify overriding traditional tenants of law.

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131. *See supra* note 14 and accompanying text.

132. *See supra* Parts III.B.1, IV.B.1.

133. *See supra* notes 14–15 and accompanying text.

134. *See supra* note 113 and accompanying text.

135. Green v. U.S. Cash Advance Ill., LLC, 724 F.3d 787, 792–93 (7th Cir. 2013).

136. *See* Khan v. Dell Inc., 669 F.3d 350, 354–57 (3d Cir. 2012); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000).

137. Ranzy v. Tijerina, 393 F. App'x 174, 175–76 (5th Cir. 2010).

138. *See supra* Parts IV.A.1, IV.B.1.

139. *See supra* Parts IV.A.2, IV.B.2.