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WEIGHING (IN) DISCRETION ON A SLIDING SCALE: CALIFORNIA APPELLATE COURT HANDS DOWN AN EXPOSÉ OF MODERN APPROACHES TO JURISDICTION AND UNCONSCIONABILITY

Anthony Rallo*

I. INTRODUCTION

In *Ajamian v. CantorCO2e, L.P.*,[1] the First Appellate District of California affirmed the District Court's decision to deny Appellant's motion to compel former employee, Lena Ajamian, to arbitrate employment related disputes. The Court relied on case law that it believed gave the judiciary jurisdiction over the enforceability of arbitral awards. In analyzing the merits of the dispute, the Court revamps doctrinal approaches to unconscionability derived from cases handed down by the Supreme Court of California over a decade ago. This case runs the gauntlet of judicial devices that both warrant and perform judicial intervention at the outset of arbitration. The result is a forty page opinion reasserting the California Courts' propensity to disrespect the wills of contracting parties seeking to adjudicate outside of the Courts. The decision awards the judiciary vast discretion over subjective questions of unconscionability, mutuality, party intent, and jurisdictional authority. In application, *Ajamian* is now available to parties looking to get out of binding arbitral clauses, and its presence in California jurisprudence will lead to unpredictable jurisdictional variability long since forbidden by the U.S. Supreme Court.

II. BACKGROUND FACTS

Joshua Margolis, CEO of CantorCO2e, L.P., and CantorCO2e, L.P. ("Cantor" collectively), appeal a California District Court's refusal to compel Plaintiff/Respondent, Lena Ajamian, to arbitrate employment claims.[2] In September 2006, Cantor hired Ajamian as an office manager, and presented her with a "Policies and Procedures Manual" containing an employee handbook, an arbitration clause, an acknowledgement form, and nearly 65 pages of policy information (collectively, the "Handbook").[3] Ajamian never signed any portion of the Handbook.[4]

In March 2007, Cantor promoted Ajamian to broker, a two-year contract position.[5] The perquisites were laid out in an Employment Agreement (the "Agreement") Ajamian had to sign as a condition of receiving her promotion. The Agreement contained an arbitration clause, the conscionability of which was the central issue.[6]

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[1] Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771 (Cal. Ct. App. 2012).

[2] *Id.* at 775.

[3] *Id.* at 775–76 (Ajamian was an at-will employee at this time).

[4] *Id.* at 776 (Ajamian did, however, sign an online compliance manual at the start of her employment).

[5] *Id.* at 776–77 (perquisites included a $20,000/year raise and discretionary bonuses).

[6] Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 777-78 (Cal. Ct. App. 2012). The Agreement contained the following salient language:

Ajamian received the Agreement in June 2007, around the time she began working as a broker.[7] She was given time to have an attorney review the Agreement, and although she expressed some discomfort with the arbitration clause and the choice of New York law provision, Ajamian ultimately signed the Agreement "as-is" in December 2007.[8] The Agreement was not the product of negotiation.[9]

In August 2009, Cantor notified Ajamian that it would terminate the Agreement in March 2010.[10] Ajamian continued working as an at-will employee until April 2010.[11]

On September 8, 2010, Ajamian filed a lawsuit against Cantor, seeking recovery for actionable conduct that allegedly occurred "before, during and after the effective dates of the Employment Agreement."[12] Despite informal requests from Cantor, Ajamian refused to submit her claims to arbitration.[13] Accordingly, Cantor motioned the District Court to compel arbitration, relying on the same arguments Cantor posited on appeal.[14]

Section 8 (the arbitration clause): "Any disputes, differences or controversies arising under this Agreement shall be settled…before a panel of three arbitrators in New York, New York, according to [New York law and the] rules of the [NASD] (or, at [Cantor's] sole discretion, the [AAA] or any other [ADR] organization)….The arbitrators shall make their award…based upon all provisions of this Agreement, and judgment upon any award rendered by the arbitrators shall be entered in any court having jurisdiction thereof. However, it is…agreed that the arbitrators are not authorized…to include…special, exemplary, punitive or [double] damages…except that the arbitrators shall be authorized…to include [Liquidated Damages] as part of any award…[favoring CantorCO2e]….It is expressly agreed that arbitration as provided herein shall be the exclusive means for determination of all matters arising in connection with this Agreement and neither party hereto shall institute any action or proceeding in any court of law or equity other than to request enforcement of the arbitrators' award hereunder. The foregoing sentence shall be a bona fide defense to any action or proceeding initiated contrary to this Agreement…"

Section 11 (jurisdictional limitation clause): "In the event that an arbitration panel or court of competent jurisdiction shall determine that any covenant set forth in this Agreement is impermissibl[e]…then the parties intend that such panel or court should limit…such covenant…only to the extent necessary to render [it]…enforceable….Employee agrees that if Employee brings an action, claim or proceeding against [CantorCO2e]…that relates to or implicates this Agreement… in the event that any of such Parties should prevail in such action, Employee shall pay the reasonable attorney's fees of such…Parties." *Id.*

[7] *Id.* at 778.

[8] *Id.* at 778–79. The parties disagree about the nature of the contract's execution. Cantor claims Ajamian was not presented with a nonnegotiable agreement she had to sign "on a take-it-or-leave-it-basis." Cantor maintains Ajamian was neither coerced into signing the Agreement, nor prohibited from soliciting alterations to its terms. Rather, Cantor merely informed Ajamian that she would need to sign *an Employment Agreement* by the first of the year "if she wanted to be a broker, earn the higher salary and bonus, and receive 'greater job security.'" *Id.* According to Ajamian, however, Cantor was unwilling to consider her proposed alterations to the Agreement, and implied that she had to sign the Agreement by the end of 2007 in order to receive the benefits of working as a broker. She inferred from her allegedly unfruitful attempts to negotiate the terms of the Agreement that the Agreement had to be signed as-is, or she would be denied the promotion and not receive adequate compensation for the work she had already done as a broker. This issue is never adequately resolved, although Ajamian's perceptions were heavily weighed against Cantor in determining that various clauses in the Agreement are unconscionable. *Id.*

[9] *Id.* at 778 (this is a proclamation made by both the District Court and the Appellate Court).

[10] *Id.* at 779.

[11] Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 779 (Cal. Ct. App. 2012).

[12] *Id*.

[13] *Id.* at 780.

[14] *Id.* Cantor argued: (1) the enforceability of the arbitration provision is a question for the arbitrator; (2) Ajamian failed to establish procedural unconscionability; and (3) the Agreement required the Court to sever substantively unconscionable terms and enforce the remaining terms. *Id.*

The Court denied the motion for the following reasons: 1) Ajamian was not bound by the unsigned Handbook; 2) the court determines threshold questions of enforceability; 3) the arbitral clause was unconscionable; 4) the damages limitation and attorney fee provisions were unlawful; and 5) the offending provisions were not severable.[15]

III. ANALYSIS

Division Five of the First Appellate District of the Court of Appeal of the State of California began by iterating that arbitration agreements are governed by contract law: "[To] the extent the parties have agreed…arbitration agreements are valid, irrevocable, and enforceable, except upon grounds that exist for the revocation of a contract generally."[16] One of the grounds for contract revocation is unconscionability, the finding of which comes subsequent to a threshold analysis of substance and formation, and results in unenforceability despite policies favoring arbitration and contract freedom.[17]

A. Who Decides Threshold Questions of Enforceability?

Under the FAA, courts have jurisdiction over threshold matters of enforceability absent party agreement to delegate these questions to the arbitrator.[18] Parties seeking to delegate these questions may do so by contract, and the party alleging delegation must show by "clear and unmistakable" evidence that the parties agreed to grant such authority to the arbitrator(s).[19] The delegation of threshold enforceability matters may not be

[15] *Id.* (the Appellate Court addresses each of these reasons on appeal, and each will be discussed below).

[16] *Id.* 780–81.

[17] *See* Armendariz v. Found. Health Psychare Servs., Inc., 24 Cal.4th 83, 97 (Cal. 2000). Unconscionable arbitral clauses are unenforceable at the outset. Unconscionability is indicated by immutuality, surprise, inadequate discovery, bargaining power disparity, denial of relief otherwise available in court, unreasonable allocation of costs, unwritten decisions, denial of arbitrator neutrality, one-sided arbitrator selection clauses, choice-of-law clauses that circumvent local law, and others. *See generally id.* The conclusion typically drawn from *Armendariz* is that California law has a more stringent due process requirement than federal law as it pertains to the enforceability of arbitral clauses, which, interestingly enough, has not been successfully challenged as violative of federal laws prohibiting greater restrictions on arbitration law than those provided for by the federal law of arbitration. *See generally* THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 517–31 (6th ed. 2012). The *Armendariz* decision is invaluable to the Court's decision in this case. However, the tried and true due process reasoning does not act as the foundational grounds for the Court's disposition. Rather, the Court employs a less frequently celebrated test that will hereafter be referred to as the "sliding scale," which focuses on matters of conscionability rather than due process. *Ajamian*, 203 Cal.App.4th at 795; *see also Armendariz*, 68 Cal.App.4th at 391 (sliding scale first introduced into 1st Appellate District of California Jurisprudence; the scale renders arbitral clauses unenforceable if both procedural and substantive unconscionability are present; greater showing of one requires a lesser showing of the other).

[18] *See* Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 781 (Cal. Ct. App. 2012) (citing AT&T Techs. v. Comm'cns Workers, 475 U.S. 643, 649 (1986)); *see also* 9 U.S.C. §§ 2–4 (2006).

[19] *See Ajamian* 203 Cal.App.4th at 781 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 983 (1995)); *see also* Rent-A-Center, W., Inc. v. Jackson, 130 S.Ct. 2772, 2777 n.1 (2010).

ambiguous, and language that doesn't satisfy the "clear and unmistakable" standard will be interpreted against the party attempting to show the presence of a delegation clause.[20]

On appeal, Cantor argued the language in the arbitral clause regarding the exclusivity of arbitration as a means of dispute resolution, which specifies that Cantor and Ajamian may use the judiciary only to seek confirmation or vacatur *after* arbitration is completed, is clear and unmistakable evidence that the parties sought to delegate threshold matters of enforceability to the arbitrator.[21] The Court agreed that Cantor's interpretation of that language is *one* reasonable way to interpret the provision. Another reasonable interpretation is that the provision refers exclusively to substantive issues and merits disputes, but excludes procedural questions of enforceability.[22] The very existence of more than one reasonable interpretation of the language constitutes failure to satisfy the clear and unmistakable standard.[23] Moreover, the Court found the latter of the two interpretations more likely, because the "usual" course of action is to let the judiciary handle threshold questions of enforceability.[24] Therefore, the District Court did not abuse its discretion by exercising jurisdiction over threshold questions of enforceability.[25]

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[20] *Ajamian*, 203 Cal.App.4th at 782 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 983 1995)).

[21] *Ajamian*, 203 Cal.App.4th at 783; *see supra* note 6 and accompanying text.

[22] *Ajamian*, 203 Cal.App.4th at 783.

[23] *Id.*

[24] Ajamian v. CantorCO2e, L.P., et al., 203 Cal.App.4th 771, 783-88 (Cal. Ct. App. 2012). The Court applied the same line of reasoning to "any-and-all clauses" (*see supra* note 6), finding that such provisions refer to substantive disputes exclusively, because granting arbitrators jurisdiction over procedural matters is too atypical to be merely implied in a catch-all clause. Therefore, for Courts to apply generic any-and-all clauses to procedural matters, they must infer from ambiguous language that the parties intended to do something other than what parties "usually" do. This would be improper. *Id.* (citing Sanchez v. W. Pizza Enters., Inc., 172 Cal.App.4th 154 (Cal. Ct. App. 2009) (any-and-all clauses are not clear and unmistakable evidence of intent to delegate procedural questions to the arbitrator).

[25] *Ajamian*, 203 Cal.App.4th at 783. Despite the fact that the Court found the foregoing reasoning sufficient to justify asserting jurisdiction over threshold matters, the Court spent twelve additional pages explaining its decision and distinguishing the facts of this case from several other relevant cases. *Id.* (citing *Rent-A-Center*, 130 S.Ct. 2772 (2010)) (District Court lacks jurisdiction over threshold matters of enforceability where the parties' arbitration agreement "explicitly assigns that decision to the arbitrator;" where an agreement does delegate "that decision" to the arbitrator, courts must stay out of front end disputes unless a party specifically challenges the validity of the delegation clause). The Court found *Rent-A-Center* antithetical to Cantor's position, because: 1) footnote one of the decision confirms the heightened burden of proof Cantor must satisfy to demonstrate the existence of a delegation clause; 2) the existence of a valid delegation clause is not in dispute in *Rent-A-Center* as it is here; and 3) Ajamian properly challenged what Cantor claims is a jurisdictional delegation clause, therefore validating judicial intervention. *Id.* at 784–85 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)) (agreement to submit "all disputes, claims, or controversies" relating to a contract granted arbitral authority over questions regarding class arbitration). The Court distinguished this case because class arbitration was not an issue here. *Id.* at 785 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)) (judicial authority over threshold matters does not permit judicial review of the contract generally). Here, Ajamian only asked the Court to review the arbitral clause, not the contract generally. *Id.* at 786 (citing Shaw Group, Inc. v. Triplefine Int'l Corp., 322 F.3d 115 (2d Cir. 2003); Bell v. Cendent Corp. 293 F.3d 563 (2d Cir. 2002)). The Court disregards these cases because they are not binding authority.

The Court continued by exhausting a Circuit split concerning references to institutional rules, such as those of AAA, NASD, JAMS, etc. Some courts have found references to such rules are clear and unmistakable evidence that jurisdictional matters are arbitrable. Other courts have found to the contrary. *Compare* Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 10–12 (1st Cir. 2009) (incorporation of AAA rules

B. Unconscionability of the Arbitral Clause

When California Courts exercise jurisdiction over threshold matters, a party asserting unconscionability holds the burden of proof.[26] This burden is satisfied by a showing of both procedural and substantive unconscionability.[27] Although both must be proven, the degree to which each must be proven is measured by a sliding scale, wherein a greater showing of one requires a lesser showing of the other.[28]

Procedural unconscionability exists where the drafting and execution of the agreement are wrought with oppression, unequal bargaining power, hidden or misunderstood terms, surprise to the weaker party, a lack of informed choice by the weaker party, or disappointed expectations of the weaker party.[29] California case law supports the proposition that nonnegotiable contracts of adhesion in the employment context are prima facie procedurally unconscionable.[30] Cantor argued the degree of unconscionability was extremely low because the arbitration provision was conspicuous

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satisfies clear and convincing standard) *with* Oblix, Inc. v. Winiecki, 374 F.3d 488, 490 (7th Cir. 1993) (incorporation of AAA rules applies to substantive claims only). Some California courts have rendered decisions supporting Cantor's position as well. *See* Dream Theater, Inc. v. Dream Theater, 124 Cal.App.4th 547, 550 (Cal. Ct. App. 2004); Rodriguez v. Am. Techs., Inc., 136 Cal.App.4th 1110, 1123 (Cal. Ct. App. 2006) (AAA rules satisfy clear and unmistakable test). Nonetheless, the Court ruled against Cantor. The Court noted that the existence of a Circuit split is evidence that multiple inferences can be drawn from the decision to include references to institutional rules in arbitration clauses. Therefore, it cannot be said that including such rules is a clear and unmistakable delegation of jurisdictional authority to the arbitrator. Moreover, AAA rules, which are the rules Cantor relied upon to defend its position, do not state the arbitrator *must* rule on jurisdictional matters. Rather, the AAA rules state only that the arbitrator *may* rule on such matters.

In summarizing its disposition regarding jurisdiction over front end matters of enforceability, the Court invoked Supreme Court precedent that turned the issue on whether the parties actually contemplated delegating jurisdictional matters to the arbitrator. *Ajamian*, 203 Cal.App.4th at 789 (citing *Rent-A-Center*, 130 S.Ct. 2772 (2010)); *see also Kaplan*, 514 U.S. at 944. According to the California Appellate Court, there was ample evidence suggesting this issue was not contemplated by both parties. First, Ajamian never received a copy of any institutional rules prior to the contract's execution, so she could not possibly have contemplated their impact on the contract. *Ajamian*, 203 Cal.App.4th at 788. Second, Cantor reserved the right to choose which institution would administer arbitration, indicating their implication of the AAA rules could not be dispositive of their intentions before an arbitrator. *Id.* at 791. Third, the provision in the agreement instructing courts to sever the impermissibly broad provisions suggests the parties' intended some matters to go to the Courts. *Id.* at 792-93. Finally, even if the AAA rules were informative of the parties' intent, they conflicted with other provisions denying access to judicial remedies available in California. *Id.* at 788-89. These points collectively suggest the parties may not have intended to apply the permissive language in the AAA to grant the arbitrators jurisdiction over matters of enforceability. The fact that this is even a possibility constitutes failure to satisfy the clear and convincing test.

The Court's overkill of this issue validates the forthcoming criticism of the Court's reasoning throughout this opinion. The Court is zealously defending its own authority over front end issues. The Court is on a mission to remind would-be arbitrating parties that the Court is the supreme adjudicatory entity, and absent transparently clear contract language that the judiciary is bound by the Constitution to honor, the judiciary is the default answer to the question, "who decides"?

[26] *Ajamian*, 203 Cal.App.4th at 795 (citing Szetela v. Discover Bank, 97 Cal.App.4th 1094 (2002)).

[27] Armendariz v. Found. Health Psychare Servs., Inc., 24 Cal.4th 83, 114 (Cal. 2000).

[28] Armendariz v. Found. Health Psychcare Servs., Inc., 68 Cal.App.4th 374, 391 (Cal. Ct. App. 1998).

[29] *Ajamian*, 203 Cal.App.4th at 795; *see also* Dotson v. Amgen, Inc., 181 Cal.App.4th 975 (Cal. Ct. App. 2010); Higgins v. Superior Court 140 Cal.App.4th 1238 (Cal. Ct. App. 2006).

[30] Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 796 (Cal. Ct. App. 2012); (citing *Armendariz*, 24 Cal.4th at 115); *see also* Wisdom v. AccentCare, Inc. 202 Cal.App.4th 591 (Cal. Ct. App. 2012).

and brief, Ajamian was not under duress, she is well educated, and she had the aid of an attorney.[31] The Court did not disagree, but noted the adhesive and nonnegotiable nature of the Agreement indicates the minimum requisite degree of procedural unconscionability was present.[32] Therefore, the Court found it "need not quibble over whether there was a moderate level of unconscionability, a low one, or just the required minimum … [because] the degree of substantive unconscionability [renders] the provision unenforceable."[33]

Substantive unconscionability exists where a contract is unduly harsh, oppressive, one-sided, illegal, or fails "the reasonable expectations of the …'adhering party.'"[34] The Court found the arbitration clause unenforceable as substantively unconscionable for the following reasons: 1) the damages limitation is illegal; 2) the attorney fees clause is one-sided; 3) New York law requires forfeiture of California's statutory rights; [35] 4) Cantor's discretion over the arbitration rules is one-sided;[36] and 5) the three arbitrator panel and New York location is unduly harsh.[37] Together, these reasons constitute a degree of substantive unconscionability that warrants unenforceability.

C. Severability

To no avail, Cantor argued that the Court should sever the offending provision from the arbitral clause and enforce what remains. Regarding severability, the Court reasoned, "the overarching inquiry is whether the interests of justice would be furthered

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[31] *Ajamian*, 203 Cal.App.4th at 796.

[32] *Id.* at 797.

[33] *Id.*

[34] *Id.* (citing *Armendariz*, 24 Cal.4th at 97).

[35] Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 778-79 (Cal. Ct. App. 2012). For the first three reasons, the Court relied on California's policy against contractual waivers of statutory remedies and punitive damages. *Id.* (citing Gentry v. Superior Court, 42 Cal.4th 443 (2007) (employees may not contractually waive the right to overtime); *see also Armendariz*, 24 Cal.4th at 103–04 (statutory remedies available under California's Fair Labor Employment and Housing Act are unwaivable in an arbitral clause). The overriding justification for these laws is to protect parties with little bargaining power from being forced to waive statutory protections. Under the Agreement, Cantor retains access to punitive damages and legal remedies while Ajamian forfeits the same. This is precisely what the policy is designed to avoid. Cantor may not require, as a condition of employment, that Ajamian enter an agreement wherein Cantor retains "a greater potential for recovery than" Ajamian with respect to damages, remedies, and attorney fees. *See* LAB. CODE, §§ 226, subd. (e), (h) (2012) (prohibiting waiver of the right to recover attorney fees); LAB. CODE § 1194 subd. (a) (2012) (prohibiting imposition of attorney fees over employees under various circumstances); *see also* Wherry v. Award, Inc., 192 Cal.App.4th 1242, 1249 (Cal. Ct. App. 2011) (in certain cases brought under California law, plaintiff should be entitled to attorney fees unless unjust, while defendant may receive fees *only* where the case is frivolous or brought in bad faith). Moreover, Cantor may not employ choice-of-law provisions to circumvent California's rules against statutory waivers. *See, e.g.*, Narayan v. EGL, Inc., 616 F.3d 894 (9th Cir. 2010) (Texas law inapplicable to California law claims). The requirement that Ajamian arbitrate in New York violates this law.

[36] *Ajamian*, 203 Cal.App.4th at 778–79; *see also Armendariz*, 24 Cal.4th at 117–18 (immutuality indicates substantive unconscionability).

[37] *Ajamian*, 203 Cal.App.4th at 797–98 n.14; *see also Armendariz*, 24 Cal.4th at 110–11 (substantively unconscionable to impose costs beyond those sustained in litigation; parties must share costs); Lucas v. Gund, Inc. 450 F.Supp.2d 1125, 1134 (C.D. Cal. 2006) (costly geographic locations are unenforceable); Parada v. Superior Court 176 Cal.App.4th 1554, 1574, 1585–87 (Cal. Ct. App. 2009) (prohibitively expensive three arbitrator panel indicates substantive unconscionability).

by severance; the strong preference is to sever *unless* the agreement is 'permeated' by unconscionability."[38] Clauses are permeated by unconscionability where more than one unconscionable provision is present, indicating an effort by an employer to disadvantage an employee in adjudication.[39] Here, as previously discussed, the District Court found upwards of five provisions that were affirmed unconscionable by this Court on appeal. Therefore, the District Court did not abuse its discretion in refusing to sever the offending provisions.[40]

D. Conclusion

For the forgoing reasons, the Court affirmed the District Court's denial of Cantor's motion to compel arbitration.[41] The Court Found the issue of enforceability is a matter for the Court, the arbitral clauses are both procedural and substantively unconscionable, and the offending provisions are not severable from the contract.

IV. SIGNIFICANCE

This case is significant for two reasons. First, it catalogues a number of losing arguments against judicial jurisdiction over threshold matters of enforceability, informing

[38] *Ajamian,* 203 Cal.App.4th at 802 (citing Harper v. Ultimo, 113 Cal.App.4th 1402, 1411 (2003)).

[39] *Ajamian,* 203 Cal.App.4th at 803 (citing *Armendariz*, 24 Cal.4th at 124-25); *see also* Murphy v. Check 'N Go of Cal., Inc., 156 Cal.App.4th 138, 149 (Cal. Ct. App. 2007).

[40] Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 801, 803 (Cal. Ct. App. 2012). Seemingly without connecting the two, Cantor invoked Pearson Dental Supplies, Inc. v. Superior Court, 48 Cal.4th 665 (2010) to make a series of compelling (yet unavailing) policy arguments that parallel the severability argument. In *Pearson,* the California Supreme Court ruled that the judicial policy favoring arbitration necessitates that the judiciary interpret ambiguous provisions in a manner that renders them lawful. Cantor argued *Pearson* warrants the following conclusions: 1) the AAA rules, which state that arbitrators may grant any remedy available to the parties in Court, mitigate the unlawful remedy limitations; 2) the remedy limitations apply *only* where they do not violate any California laws; and 3) the attorney fee provision should apply *only* to claims relating to the contract itself, not to claims arising from Cantor's work-related conduct. *Ajamian,* 203 Cal. App. 4th at 800-01. The Court rejected this argument despite the Supreme Court's clear mandate that arbitral clauses be interpreted to favor the recourse to arbitration. The Court noted that, like in the severability discussion, the *Pearson* rule applies only to cases that don't have multiple unconscionable terms. Moreover, the terms disputed here are more egregiously prohibitive to Ajamian's access to remedies than the single term disputed in *Pearson,* and nothing in the contract suggests the arbitrator can render an award contrary to the terms of the Agreement. *Id.* at 801.

[41] Although the bulk of the Court's discussion related to the Agreement, Ajamian was not forced to arbitrate claims arising from conduct occurring before or after the Agreement applied. Regarding conduct occurring before the Agreement, Ajamian simply never signed the Handbook. Cantor argued that the Handbook was, however, in effect from March 2010-April 2010, and because Ajamian acknowledged that she received the Handbook by that time. The Court disagreed because she never signed any *submission* to arbitration. *See* Mitri v. Arnel Mgmt. Co., 157 Cal.App.4th 1164 (Cal. Ct. App. 2007); Romo v. Y-3 Holdings, Inc., 87 Cal.App.4th 1153 (Cal. Ct. App. 2001) (signing an acknowledgement of receipt of an Employee Handbook is not de facto submission to the terms of that Handbook). Cantor argued that Ajamian was bound by the Handbook because she received benefits under the Handbook's policies. *See* NORCAL Mutual Ins. Co. v. Newton, 84 Cal.App.4th 64 (Cal. Ct. App. 2000) (availing oneself to the benefits of a Handbook subjects oneself to its policies). The Court disagreed because the Handbook offers no benefits greater than those available under California Law.

practitioners that courts will strongly defend their own jurisdiction. Despite FAA preemption of state law, the public policy favoring arbitration, and general principles of contract freedom, the Court enumerates several justifications for exercising jurisdiction over front end matters. While frustrating to Cantor in the short term, the case ultimately seems to subject jurisdictional disputes to a simple "magic words" test contract drafters should have little problem satisfying. The Court states that, although the Agreement fails in this regard, "something short of express delegation" *may* satisfy the clear and unmistakable standard.[42] This implies that express delegation *will* satisfy the clear and unmistakable standard. Thus, to avoid litigating (and losing) disputes over jurisdiction, practitioners in California should write contracts that are explicit on the matter. It may even be worth extracting language from *Ajamian,* so as to be clear to the reviewing court that *the parties contemplated the issue and deliberately delegated it to the arbitrator*. Then, even litigating the issue is violative of the parties' contractual autonomy.

Second, this decision sheds new light on the prevalence of the "sliding scale" test in California. The sliding scale has been utilized by courts to scrutinize conscionability in the past, and it has caught the attention of academics who study the devices used by the California Courts to avoid enforcing arbitral clauses. However, while much attention has been paid to the California Courts' analytical approach to unconscionability, little attention has been given to the scale itself as a potential forum for litigious disputes.

The Court uses the scale to quantify "degrees" of unconscionability that render agreements unenforceable. If the Court's analysis of "degrees" of unconscionability catches on as a salient component in enforceability analyses, California Courts will have another discretionary measuring device that begets inconsistent arbitration laws. Judges will disagree about the permissible quantity, quality, and form of unconscionability. Jurisdictional variability will make venue an outcome determinant dispute that will further burden parties at the outset of disputes. Practitioners will be forced to research each potentially litigious local's quantitative approach to unconscionability, and even if armed with extensive knowledge of every possible forum's tendencies, Courts still retain the discretion to manipulate their own dispositions to reach a preconceived conclusion.

V. CRITICISM

From both a practitioner's and an academic's perspective, this case is dangerous for the same reasons it is significant. The Court's extensive analysis of front end jurisdictional matters demonstrates the extent to which California Courts will go to disregard contractual autonomy. The first half of the decision addresses a staggering number of cases and lines of reasoning that run contrary to the Court's decision, none of which persuade the Court in Cantor's favor.

Most curious is the language in the arbitral clause the Court finds problematic. The Court spends ample time addressing any-and-all clauses, choice of law clauses, and allegedly ambiguous institutional invocations, ultimately finding that the offending clauses don't constitute clear and unmistakable evidence of delegation. The Court,

[42] *Ajamian*, 203 Cal.App.4th at 788 ("While there might be something short of an express delegation that constitutes clear and unmistakable evidence of the parties' intent to arbitrate the unconscionability of an arbitration provision, [the any-and-all clause] is not it.").

however, gives no weight to the clause limiting the role of the judiciary to post arbitration disputes.[43] There is nothing unclear or mistakable about this clause. The parties, both of whom were sophisticated, armed with counsel, and mutually autonomous in negotiation,[44] agreed that the courts *only* permissible role in dispute resolution is back end questions regarding the validity of arbitral awards. To this end, the parties included a provision that effectuates the results sought by the inclusion of a jurisdictional delegation clause. Said another way, the parties included a jurisdictional delegation clause. Yet the Court focuses on other provisions they claim have multiple reasonable interpretations *in the absence of an express jurisdictional delegation clause*, and determine the variable interpretations beget ambiguity precluding the satisfaction of the clear and unmistakable standard. The Court, somewhat ironically, fails to recognize that the Agreement does contain a delegation clause that precludes awarding the qualifier "reasonable" to any interpretation of any clause that fails to effectuate the parties' clear and unmistakable intent to delegate jurisdictional matters to the arbitrator.

The result of the Court's reasoning is a denial of justice. The Court allows Ajamian to enjoy the perquisites, benefits, and protections of an Agreement under which she willingly forbore pre-arbitration judicial access as consideration thereof, while denying Cantor one of its own benefits of the bargain. Such an outcome is antithetical to both celebrated notions of contract freedom, and judicial policies favoring arbitration.

This criticism is incomplete absent a discussion of the sliding scale, which deserves criticism for its analytical shortcomings.[45] The scale fosters the appearance of objectivity by creating the impression that the Court is using an established formula to determine whether the Agreement is permissible under the law. The scale treats

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[43] *See supra* note 6 and accompanying text. The provision reads: "neither party…shall institute any action… in any court of law…other than to request enforcement of the arbitrators' award…. The foregoing sentence shall be a bona fide defense to any action or proceeding instituted contrary to this Agreement…."

[44] The Court, without explanation, states that Ajamian was in no position to leverage her willingness to work as a broker in order to gain a more favorable contract. *Ajamian*, 203 Cal. App. 4th at 795-96. This is a meritless proclamation. Employees who earn contractual job security do so by proving they are irreplaceably valuable to their employer. Employers are not required to contract with their employees, and they do so only when they need to incentivize an employee's good performance and loyalty. Yet the Court treats this Contract, which Ajamian is eligible for because of her value to Cantor, as an adhesive Agreement. The Court goes to incredible lengths to distinguish cases Cantor puts forth in support of its position, but somehow neglects to distinguish sophisticated employment contracts that align employer/employee interests, with condition-of-employment contracts designed to keep at-will employees disadvantaged in adjudication.

[45] The existence of the scale implies a few abstract concepts: 1) there is a linear spectrum ranging from 0% unconscionability (a perfect clause wherein every syllable is mutual and deliberate) to 100% unconscionability (a clause wherein there isn't a single degree of conscionability); 2) every clause in the universe rests on this scale relative to its quantum of unconscionability; 2) a clause's quantum of unconscionability is the aggregate sum of a clause's procedural *and* substantive sub-quantum of unconscionability; 3) on the spectrum, a quantum limit of unconscionability (X%) exists between 0% and 100%, and all unenforceable clauses on the spectrum possess a quantum of unconscionability that is greater than or equal to X% + 1 degree of unconscionability; 4) clauses that do not surpass the quantum limit are not unenforceable on grounds of unconscionability; and 5) clauses that surpass the quantum limit are unenforceable if both sub-quantum are greater than 0%. The scale itself is a tool used in determining a clause's quantum of unconscionability in relation to the quantum limit. According to the Court, clauses are unenforceable when the aggregate of *both* sub-quantum are greater than 0%, and the aggregate quantum of unconscionability is equal to or greater than X% + 1 degree of unconscionability.

unconscionability as a matter of degree that educated judges can quantitatively analyze. With the apparent ease of simple algebra, Judges can tally quantifiable amounts of procedural and substantive unconscionability, add the results, and evaluate the sum in light of uniform notions of justice. Skeptical litigants need not doubt the outcome, because it would have been impossible to alter. Indeed, even if the Court preferred a different outcome, which it very well may have considering the judicial policy favoring arbitration, the numbers wouldn't support one. After all, the learned judge applied the scale, and like all math problems properly executed, the numbers neither lie nor err.

The problem, of course, is the guise of objectivity. The Court is using the abstract formula to cultivate the appearance of objectivity, while actually enhancing its discretion over subjective analyses of unconscionability. The degrees of unconscionability are whatever the court wants them to be, and the permissible limit is set on a case-by-case basis. Moreover, the Court has discretion over the weight to assign the procedural and substantive unconscionability that is present in each clause. Perhaps most problematic is the fact that these abstract quantifications are so intangible they cannot be articulated (much less recorded) in a manner that fosters future predictability. Indeed, the degrees of unconscionability are so subjective that judges could easily avoid accountability for decisions that seem to contradict their own standards. Such vast discretion comes with an equally vast margin of error. It also fosters unpredictable variability, as no two judges are going to quantify procedural and substantive unconscionability uniformly.

The scale is as irrational as it is problematic, because it fosters an environment wherein courts lack the authority to render certain unconscionable clauses unenforceable. Consider the inexplicable requirement that both procedural and substantive unconscionability be present to justify unenforceability. Attaching numbers to the formula will make this easy to understand. Suppose a judge decides the permissible limit is 50% unconscionability. A contract that is 10% procedurally unconscionable and 10% substantively unconscionable possess a 20% quantum of unconscionability, rendering it enforceable. Conversely, a contract that is 25% procedurally unconscionable and 26% substantively unconscionable is 51% unconscionable, and thus is unenforceable. But suppose a contract is 99% procedurally unconscionable but substantively perfect (0%). This contract is 99% unconscionable, but is still enforceable under the logic of the California sliding scale test. On the other end, a judge who sets the permissible limit very low (say 10%), has the authority to find inoffensive contracts unenforceable.

Thorough research on the topics discussed in *Ajamian* indicates the case does not address any nuanced legal concerns. It is precisely that reason why it is worth such extensive study. The *Ajamian* Court reminds its readers exactly where California stands on front-end matters of jurisdiction and unenforceability of arbitral clauses, where the current state of the law comes from, and the extent to which it differs from other interstate and intrastate laws. The decision operates as an exposé of judicial hostility to arbitral recourse, and a warning to counselors with pro-arbitration clients that California law is working against them; offering the judiciary un-impeachable discretion over contract interpretation, jurisdiction, and enforceability.