

The FAA on a Collision Course with the Unconscionability Doctrine

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On March 9, 2001, the California Court of Appeal added to the growing body of precedent on the validity of franchise agreement arbitral forum selection clauses. In *Bolter v. Superior Court*,¹ Division Three of California's Fourth Appellate District declared the arbitral forum selection clause at issue unconscionable, and therefore unenforceable under California law. Three months later, the California Supreme Court denied the Petition for Review and Request for Depublication.² Franchisors should be concerned, and franchisees hopeful, that *Bolter's* unconscionability analysis will subject to attack not only forum selection clauses but also many other common franchise agreement provisions. This article addresses whether *Bolter* runs afoul of the Federal Arbitration Act (FAA),³ a question that, at least in California, remains to be answered.



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The Facts of the Case

The three *Bolter* plaintiffs, franchisees of the *Chem-Dry* carpet cleaning system, sued their franchisor, Harris Research, Inc., in California state court alleging breach of their franchise agreements and the covenant of good faith and fair dealing. The franchisor employed the not uncommon practice of revising its franchise agreements on renewal. Modifications from earlier versions of the contract included requiring franchisees to surrender their customer lists and clients' telephone numbers to the franchisor upon termination of their franchise agreements, requiring franchisees to give the franchisor copies of their income tax returns upon request, and maintaining "strict advertising restrictions." The court made a point that these changes were not uniform among *Chem-Dry* franchisees;⁴ the plaintiffs maintained that these modifications showed a pattern of overreaching by the franchisor.

When the franchisees first joined the *Chem-Dry* system in the early 1980s, and during the period when the alleged

wrongful conduct began, their franchise agreements specified that disputes would be resolved in California.⁵ As a result of the changes on renewal, when the litigation began, the franchise agreements required arbitration of all disputes in Utah, governed by Utah law.⁶

Rather than respond to the lawsuit by petitioning to compel arbitration,⁷ the franchisor filed a demand for arbitration with the American Arbitration Association (AAA) in Utah requesting Salt Lake City as the hearing locale. Soon thereafter, the franchisor removed the franchisees' lawsuit to federal court, where the court issued an Order to Show Cause for one of the plaintiffs⁸ to demonstrate why her claim should not be severed and dismissed without prejudice to its refiling with the AAA in Salt Lake City. The franchisees countered by filing a voluntary dismissal of their action under Rule 41(a) of the Federal Rules of Civil Procedure.⁹

Meanwhile, in the Utah arbitration proceeding initiated by the franchisor, the franchisees objected to Salt Lake City as the venue.¹⁰ That issue was briefed and argued before a hearing officer of the AAA and later before the arbitrators.¹¹ While that was happening, the plaintiffs filed a second complaint in California state court, this time adding a nondiverse party to prevent another removal to federal court.¹² Next, the AAA overruled the franchisees' objection to venue in Utah and ordered the arbitration to go forward there. The franchisees then asked the California court to stay the arbitration. Instead, the California trial court confirmed the Utah arbitration ruling.¹³ However, the plaintiffs then obtained an alternative writ of mandate from the appellate court ordering the trial judge to make an independent determination on arbitrability before proceeding further. The trial court thereupon vacated its earlier order and ordered arbitration in Utah after a "hearing" based on the various papers filed in connection with the franchisor's petition to compel arbitration in Utah and/or to confirm the decision on venue. In its findings of fact and conclusions of law, the trial court held that the franchise agreement's arbitration requirements, even if adhesive, were not unconscionable and did not impose an unreasonable burden on the franchisees. The franchisees then sought, and ultimately received by way of the *Bolter* decision, a writ of mandate compelling the trial court to vacate its order to the extent that it required arbitration in Utah rather than California.¹⁴

At the outset of its opinion, the appellate court noted that both the franchisees and the franchisor argued at length about whether the FAA preempted the California statute prohibiting venue out of California in franchise agreement disputes.¹⁵ Acknowledging that the issue is unsettled, the court nonetheless chose not to address it: "While we recognize the preemption issue has not been resolved in California, we find the answer to this case lays in general contract law prin-

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ciples.”¹⁶ Because § 2 of the FAA requires enforcement of a written arbitration agreement satisfying the interstate commerce requirement “save upon such grounds as exist at law or in equity for the revocation of any contract,” a court can consider state statutes and judicial decisions concerning the validity of, and defenses to the enforcement of, contracts generally when deciding whether to enforce an arbitration clause.¹⁷ The extent of that consideration, however, has generated considerable litigation and debate.¹⁸ In *Bolter*, the court held that under California law the franchise agreements at issue were contracts of adhesion and that the circumstances of the parties were such that to require the “Mom and Pop” franchisees to travel to Utah to have their claims heard would be unconscionable. The court reformed the contract to delete the forum selection clause while leaving the balance of the arbitration provision intact, thereby requiring arbitration but in California.

In order to determine whether the FAA preempts *Bolter*’s unconscionability analysis, it is necessary to review California statutory and common law on adhesion contracts and unconscionability. Before doing so, however, it is important to note that the *Bolter* result likely would have been avoided if Harris had filed in the federal district court in Salt Lake City a 9 U.S.C. § 4 petition to compel arbitration. Under § 4, a federal court having diversity jurisdiction has the power in an independent action to order parties to arbitrate in the district in which it sits in accordance with their agreement. The court also has the power to enjoin prosecution of a lawsuit in order to effectuate the judgment compelling arbitration. Here, there would have been diversity jurisdiction because the franchisor-petitioner was a Utah corporation, the franchisee-respondents were citizens of California, the amount in controversy was in excess of \$75,000, and by agreeing to arbitrate in Utah, the franchisees had consented to venue and personal jurisdiction there, at least in litigation related to the arbitration.¹⁹ Particularly significant is that in federal court, unconscionability attacks on franchise agreement arbitration clauses, including those based on the designation of the arbitral forum, typically fail.²⁰

Franchise Agreements as Adhesion Contracts

California courts have described a contract of adhesion²¹ as “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”²² Earlier California cases concerning adhesion contracts turned principally on issues of contract interpretation²³ or contracts affecting the public interest or necessity.²⁴ While some other jurisdictions have not viewed franchise agreements as inherently adhesive,²⁵ California courts have

found to be contracts of adhesion those franchise agreements that they analyzed for that purpose.²⁶

A key question in any adhesion case is whether the weaker party was in a position to reject the contract and take its business elsewhere or to negotiate away or modify supposedly unacceptable terms. The *Bolter* plaintiffs complained that they were “all suffering from severe financial hardships,” making out of state arbitration unduly burdensome. The court, emphasizing that the franchise agreements were signed upon renewal, found that the franchisees could not reasonably have walked away from businesses that they had taken many years to establish. The court said: “Only a person contemplating whether to purchase a franchise for the first time would have been in the position to reject Harris’s ‘take it or leave it’ attitude.”²⁷ In fact, not renewing the franchise agreements may have been a viable option for the franchisees since, under California law, they would have been free to engage in the carpet cleaning business after their Chem-Dry contracts expired.²⁸ While they would have abandoned any goodwill associated with the franchisor’s name and marks, and lost access to the franchisor’s proprietary cleaning method, by not renewing their franchise agreements, the franchisees would have escaped the future effects of the contractual provisions they challenged.²⁹

Many established franchisors have evolved their contract terms over a long period and are usually reluctant to negotiate or alter them except in extraordinary circumstances. In California, the state’s burdensome statutes³⁰ and regulations³¹ dissuade franchisors from entertaining changes to their franchise agreements proposed by prospective or existing franchisees. Nevertheless, if the franchisor offers agreements on a take-it-or-leave-it basis and also has superior bargaining strength over its prospective franchisees, California courts probably will label the franchise agreements contracts of adhesion. The danger is that that finding is the first step toward invalidating the agreements, or some of their terms, on the ground of unconscionability.³²

Unconscionability

A 1979 California statute extended the doctrine of unconscionability to all contracts.³³ The principle of refusing to enforce contracts found to be unconscionable preceded the doctrine’s codification, although often under different guises.³⁴ In the leading California case on contract unconscionability³⁵ involving an arbitration clause, *Graham v. Scissor-Tail, Inc.*,³⁶ the California Supreme Court held that “. . . a contract of adhesion is fully enforceable according to its terms [citations omitted] unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise.”³⁷ The court explained:

**California courts have found
[franchise agreements] to be
contracts of adhesion.**

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or “adhering” party will not be enforced against him. [Citations omitted.] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable.³⁸

Ultimately, *Scissor-Tail* held that the contractual designation of the union to which the defendant belonged as the arbitrator of any dispute under the contract deprived the plaintiff “of any realistic and fair opportunity to prevail in a dispute.” Because that provision denied the plaintiff “minimum levels of integrity” in the arbitration process, the California Supreme Court declared the contract both adhesive and unconscionable and refused to enforce the arbitration clause in its entirety.³⁹ While acknowledging that the parties to an arbitration agreement may select an arbitrator who “can be expected to adopt something other than a ‘neutral’ stance in determining disputes,”⁴⁰ the court concluded that imposition of a biased arbitrator via an adhesion contract “must be scrutinized with particular care to insure that the party of lesser bargaining power, in agreeing thereto, is not left in a position depriving him of any realistic and fair opportunity in a dispute under its terms.”⁴¹

The year after *Scissor-Tail*, a California Court of Appeal decided *A & M Produce Co. v. FMC Corporation*,⁴² and defined unconscionability as consisting of two elements: “procedural” and “substantive.”⁴³ The procedural element involves the manner in which the agreement came about, while the substantive element concerns the degree of oppression that the challenged contract terms impose. In analyzing the procedural element, California courts examine the degree to which the complaining party was compelled to enter the agreement—whether it was an adhesion contract, whether there was an opportunity to negotiate the terms of the agreement,⁴⁴ and the weaker party’s surprise at the existence of the complained-of terms, such as where the terms are buried in a lengthy, not reader-friendly, form.⁴⁵ California courts also describe the latter consideration as a matter of the “reasonable expectation of the parties.”⁴⁶

A & M Produce’s substantive element involves the harshness of the contract terms. Judicial attempts to define how to determine the degree of severity needed to satisfy this standard have contributed to uncertainty. In *A & M Produce* the test was defined as one of mere “reasonability.” However, a later case discussing *A & M Produce* declared that “[s]uch an amorphous standard is far too subjective to provide adequate guidance.”⁴⁷ Rather, this court believed, higher standards such as “shock the conscience,” “confound the judgment of

any man of common sense,” “so extreme as to appear unconscionable according to the mores and business practices of the time and place,” “gross,” and “overly harsh” should be used.⁴⁸ Unfortunately, these terms may be no less amorphous to those attempting to draft enforceable franchise agreements, and to those who must pass on their enforceability, although any of these alternatives clearly sets a higher threshold than mere unreasonableness. Although *Scissor-Tail* and *A & M Produce* phrased their unconscionability tests somewhat differently, the results should be the same.⁴⁹ Under *A & M Produce*, the elements of procedural and substantive unconscionability need not be present to the same degree: “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”⁵⁰ That means that the more pressure there is for the weaker party to enter into the agreement, the lower the required showing of severity; the more voluntary the transaction, the test of harshness will be more stringent.

It is not uncommon for contracting parties to have unequal bargaining strength and for one party to impose conditions of its choosing on the other. However, especially with contracts that do not involve consumers, courts usually leave the parties to make their own deal without interfering in the transaction, even when the final contract terms ultimately prove to be overly arduous for one of the parties.⁵¹ Even when dealing

with a contract of adhesion, courts have found that it is not unconscionable for the parties to allocate unequally the risks inherent in the agreement.⁵² With arbitration clauses, even in cases of employment agreements that courts tend to examine more strictly,⁵³ if the clause applies equally to the parties and does not give the

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stronger party the right to avoid arbitration while forcing it on the weaker party, or provide the more powerful party with preferences or remedies not afforded the weaker party, California courts have generally upheld the provisions as meeting the *Scissor-Tail* standard of “minimum levels of integrity.”⁵⁴ At least one California court has said that an examination of an arbitration clause for unconscionability should be limited to whether the clause provides the required “minimum levels of integrity” for the arbitration process, an examination far short of the extensive unconscionability review often performed on other contract terms.⁵⁵

Both under the California statute applying the unconscionability doctrine to all contracts,⁵⁶ and under the judicial tests for unconscionability, the complained-of provisions are tested as of the date the parties executed the contract at issue.⁵⁷ Moreover, a court should always start with the presumption that the contract is fair and regular.⁵⁸ In order to make the required determination, the court then must give the parties a reasonable opportunity to present evidence of the contract’s

“commercial setting, purpose, and effect.”⁵⁹ In *Bolter*, the standard of review was whether substantial evidence supported the trial court’s factual determinations.⁶⁰ The *Bolter* trial court concluded that the forum selection clause was not unconscionable and did not impose an unreasonable burden on the plaintiffs,⁶¹ but the appellate court brushed aside those findings.⁶²

Did the *Bolter* Court Improperly Try to Avoid the Preemptive Effect of the FAA?

The *Bolter* court may have decided to rely on the unconscionability doctrine, in order to avoid holding that the FAA preempted § 20040.5 of the California Franchise Relations Act (CFRA).⁶³ Federal courts addressing this issue under similar circumstances have concluded that the FAA preempts statutes, regulations, and judicial decisions invalidating forum selection provisions in arbitration agreements.⁶⁴ As the United States Supreme Court observed in *Southland Corp. v. Keating*: “In enacting § 2 of the FAA Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements.”⁶⁵

The only limitations on enforceability under FAA § 2 are that the transaction be in interstate commerce and that the arbitration agreement can be revoked on such “grounds as exist at law or equity for the revocation of any contract.” Chief Justice Burger wrote for the *Southland* majority that “[w]e see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.”⁶⁶ In *Southland*, the Court held that § 31512 of the California Franchise Investment Law (CFIL)⁶⁷ was “not a ground that exists at law or in equity ‘for the revocation of any contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.”⁶⁸ Consequently, the Court ruled that the FAA preempted § 31512: “In creating a substantive rule applicable in state as well as federal courts [footnote omitted], Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”⁶⁹

In *Doctor’s Associates, Inc. v. Hamilton*,⁷⁰ the Second Circuit held that the FAA preempted the New Jersey Supreme Court’s decision in *Kubis & Perszyk Assocs. v. Sun Microsystems*,⁷¹ which voided on public policy grounds a judicial forum selection clause requiring litigation outside New Jersey. Deciding that *Kubis* did not satisfy § 2 of the FAA as a “ground . . . at law or equity for the revocation of any contract,” the *Hamilton* court relied on the explanation of the FAA § 2 “savings” clause found in *Perry v. Thomas*:⁷² “[S]tate

law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”⁷³ As Judge Meskill wrote for the unanimous *Hamilton* panel,

Kubis did not establish a “generally applicable” contract defense that applies to “any” contract; it invalidated a franchise agreement’s forum selection clause under the New Jersey Franchise Practices Act because it required the franchisee to sue in another jurisdiction. The *Kubis* decision applies to one sort of contract provision (forum selection) in only one type of contract (a franchise agreement). Therefore, to the extent that *Kubis* can be read to invalidate arbitral forum selection clauses in franchise agreements, it is preempted by the FAA.⁷⁴

In *KKW Enterprises, Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*,⁷⁵ the First Circuit held that a forum selection clause was an essential term of the agreement to arbitrate and had to be enforced under the FAA and the dictates of *Volt Information, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*⁷⁶ Based on *Hamilton*, *KKW*, and United States Supreme Court FAA jurisprudence starting with *Southland*, there is little doubt that the FAA preempts the antiforum selection provision of the CFRA.

There is no question that unconscionability is a recognized state contract law defense under § 2 FAA.⁷⁷ In *Doctor’s Associates, Inc. v. Casarotto*,⁷⁸ the Supreme Court held that the FAA preempted a Montana statute that conditioned enforceability of arbitration agreements on the appearance of a special notice on the first page of the agreement. The Court acknowledged that under § 2 of the FAA “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2,”⁷⁹ but concluded that the FAA preempted the Montana statute because it “places arbitration agreements in a class apart from ‘any contract,’ and singularly limits their validity.”⁸⁰

The dispositive question about *Bolter* is whether its application of the doctrine of unconscionability, like the statutes at issue in *Casarotto* and *KKW*, and the judge-made public policy that *Hamilton* rejected, targeted “one sort of contract provision, forum selection clauses, in only one type of contract, franchise agreements.” In answering this question, a court should be guided by these principles from *Perry v. Thomas*:⁸¹

We note, however, the choice-of-law issue that arises when defenses such as . . . unconscionability arguments are asserted. In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, see *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9

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U.S.C. § 2 (emphasis added). Thus state law, whether of legislative or judicial origin, is applicable, if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. See *Prima Paint, supra*, at 404; *Southland Corp. v. Keating*, 465 U.S., at 16–17, n.11. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.⁸²

The *Bolter* court, in determining unconscionability, was obviously aware that it was considering a franchise agreement with an arbitration clause that contained a forum selection provision that on its face was covered by CFRA § 20040.5, the statute prohibiting the restriction of California franchise agreement disputes to an out of state forum. That statute was the centerpiece of the briefs on appeal, but the court discussed it only in passing, declining to reach the preemption issue. This could raise a red flag to a reviewing court that the appellate court was attempting to enforce indirectly the policy behind § 20040.5 by holding the forum selection clause unconscionable. Nevertheless, more would be needed to conclude that the court used the unconscionability doctrine to single out arbitral forum selection clauses. To reverse, a reviewing court would have to find that there was such a departure from existing California common law and equity jurisprudence that the holding was specially tailored to fit franchise agreement arbitral forum selection clauses. In this regard, few California decisions have held arbitral forum selection clauses unconscionable and they have done so only on unusual, compelling facts. In *Patterson v. ITT Consumer Fin. Corp.*,⁸³ for example, the court refused to enforce a clause calling for arbitration in Minnesota before a tribunal requiring the payment of significant fees in a consumer dispute over minor amounts of money.

There are not many California cases discussing arbitral forum selection clauses in a commercial setting and they are unclear about whether the clauses will be enforced as written. In *Player v. Geo. M. Brewster & Son, Inc.*,⁸⁴ in dicta, the court stated: “We think the courts should scan closely contracts which bear facial resemblance to contracts of adhesion and which contain cross-country arbitration clauses before giving them approval.”⁸⁵ This conclusion was based on a then-current ALR annotation that concluded that most courts do not require the resident of the forum state to go into another state to arbitrate, because federal courts can only

compel arbitration in their own jurisdictions and state courts are loath to force their citizens to go before a foreign sovereign to arbitrate their disputes. This view, of course, has been severely undermined by later cases, including several from the U.S. Supreme Court, and is no longer an accurate statement of the law. In *Bos Material Handling, Inc. v. Crown Controls Corp.*,⁸⁶ the Court said that the party seeking to avoid out of state arbitration was entitled to a hearing to determine whether the contract was adhesive and, if so, whether the choice of forum comports with the reasonable expectation of the parties or is unduly oppressive.⁸⁷ The California unconscionability statute also includes this procedure.

There is a well-defined body of law, both federal and state, on the enforceability of *judicial* forum selection clauses that the *Bolter* court declined to apply, presumably because it then could not have reached its desired result.⁸⁸ California courts dealing with enforceability of judicial forum selection clauses have followed the reasoning of the federal cases and enforced the clauses unless they are unfair or unreasonable—unless “the forum selected would be unavailable or unable to accomplish substantial justice.”⁸⁹ Another measure of reasonableness that California courts have adopted for testing judicial forum selection clauses is

that the chosen forum have some rational relationship to the parties and transaction.⁹⁰ Inconvenience and additional expense in litigating in the chosen forum are generally not factors in determining the reasonableness of judicial forum selection clauses.⁹¹

In addition to their general law on forum selection clauses, California courts

have crafted a special body of law for such provisions in franchise agreements. In *Wimsatt v. Beverly Hills Weight Loss*,⁹² the court departed from the normal rules on the enforceability of forum selection clauses and placed the “burden on the franchisor to show that litigation in the contract forum will not diminish in any way the substantive rights afforded California franchisees under California law.”⁹³ Although *Wimsatt* was decided after the enactment of CFRA § 20040.5, that statute was inapplicable because the franchise agreement predated the statute. The court, instead, focused on the CFIL’s announced policy to protect franchisees, citing the antiwaiver provisions of § 31512. The court was concerned that a forum selection clause coupled with a foreign choice of law clause would effectively “waive” the franchisee’s right to obtain proper redress under the CFIL. Accordingly, before transferring a case involving CFIL claims, the court wanted to ensure that the franchisee would not lose in the foreign forum any of the protections of the CFIL.

The *Bolter* court did not analyze the arbitral forum selection clause under these traditional principles. One likely explanation is that because the agreements at issue postdated

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enactment of CFRA § 20040.5, *Wimsatt's* reasoning would not apply. If the court had analyzed § 20040.5, and followed the clear precedent of *Doctor's Associates, Inc. v. Hamilton* and *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, it would have been compelled to hold that the FAA preempts the statute. Even if *Wimsatt* were on point, moreover, it would likely run afoul of the FAA when directed to an arbitral forum selection clause because *Wimsatt*, like the New Jersey Supreme Court's decision in *Kubis*, is not applicable to contracts generally, but only to franchise agreements.

The California cases dealing with judicial forum selection clauses might support an argument that they establish a body of common law or equity to come within the FAA § 2 exception for revocation of contracts in general, but for the fact that these doctrines have been developed only for judicial forum selection clauses and have no application to other contract terms. In addition, judicial forum selection clauses are assessed for their "reasonability" and not by the higher standard that should govern unconscionability. If California precedent on judicial forum selection clauses did establish the test of enforceability for an arbitral forum selection clause, it is now fairly well established that inconvenience or financial hardship in having to travel to a distant forum is not, standing alone, sufficient to void the choice of forum.⁹⁴ In fact, as the appellate court recognized in *Cal-State Business Products & Services, Inc. v. Ricoh*,⁹⁵ "[t]hat a business with transactions in multiple jurisdictions might insist on one forum in all its contracts is not of itself objectionable."⁹⁶

To the authors' knowledge, no California court before *Bolter* ever held a forum selection clause in a *commercial* contract unconscionable.⁹⁷ If inconvenience and expense do not make a judicial forum selection clause unreasonable, it is hard to see how they can make an arbitral forum selection clause unconscionable, since unconscionability should be a substantially higher standard.

As noted above, the California cases holding arbitration clauses unconscionable have focused on the integrity of the arbitration process itself and have found that where "minimum levels of integrity" exist, the arbitration agreement should stand. In *Bolter*, the perceived unconscionability did not go to the integrity of the arbitration process—the parties had selected the AAA, a well-regarded neutral arbitration provider, but only to the geographic location of the arbitration. In this day and age, Salt Lake City does not seem to be too distant or inconvenient a forum for parties from Orange County, California.⁹⁸ Moreover, the franchisees would have to devote the same amount of time at the arbitration hearing whether it took place in Salt Lake City or Orange County. In short, the facts before the *Bolter* court hardly "shock the conscience." Nevertheless, the *Bolter* court used the uncon-

scionability doctrine to strike down an arbitral forum selection clause in a manner not utilized generally in reviewing other contracts, an impermissible action under the FAA.

Conclusion

Bolter shows how at least one court may have attempted to avoid the preemptive constraints of the FAA while trying to do what it perceived to be fair to in-state franchisees. In the process, however, the court ignored the parties' agreement and deviated from established precedent on unconscionability.

It is long-settled that generally recognized defenses to the enforcement of contracts, including unconscionability, extend equally to agreements to arbitrate, but *Bolter* illustrates how application of the nebulous unconscionability doctrine can create a conflict with the FAA. The United States Supreme Court has emphatically stated that a court may not "construe an agreement [to arbitrate] in a manner different from that in which it otherwise construes nonarbitration agreements under state law."⁹⁹ Because of its highly elusive nature, unconscionability is especially susceptible to constructions that run

afoul of the FAA. *Bolter* could be limited to the facts as perceived by the court—franchisees, already locked into a system, having no choice but to accept what the court viewed as onerous new terms: a waiver of punitive damages, nonconsolidation of actions, and an out-of-state forum selection clause.¹⁰⁰ The court's

original decision identified that combination as the basis for unconscionability. When it was pointed out that the first two issues had never even been briefed, the court struck them from its opinion. If the contract only had an arbitral forum selection clause without the other objectionable provisions, it is possible that *Bolter* could have turned out differently. More importantly, this whole imbroglio, and the questionable precedent it could provide, probably would have been avoided if Harris had filed federal court petitions in Salt Lake City to compel arbitration under 9 U.S.C. § 4.

Franchisors should have great concern about the application of the amorphous concept of unconscionability to forum selection provisions, as well as to the other terms of their contracts. The problem highlighted by *Bolter*, and by the myriad other cases that seek to define unconscionability on their specific facts, is that the standards are, to such an unusual degree, in the eyes of the beholder. Despite their language about tests, courts may refuse to enforce an arbitral forum selection clause, or other contract provisions, based on visceral reactions impossible for those drafting the agreements to anticipate. The results of unconscionability attacks on franchise agreements will no doubt vary with the court or arbitration tribunal hearing them. This can only create uncertainty, expense, unpredictability, and, given the judicial power to limit the application of clauses declared uncon-

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scionable, inconsistency and inequality among franchisees in the same system.¹⁰¹ Whether the FAA will ultimately trump, or at least create a higher standard for, arbitration provisions challenged as unconscionable, remains to be seen. *Bolter* opens the door for courts that are so inclined to reject or modify arbitration clauses in franchise agreements without regard to the FAA's strong, and preemptive, policy.

Endnotes

1. 104 Cal. Rptr. 2d 888 (Mar. 9, 2001). The court's initial opinion held unconscionable not only the arbitral forum selection clause, but also the agreement's prohibition on class actions, on consolidating any action by one franchisee with that of any other franchisee, and on the award of exemplary damages in any action against the franchisor. In denying the franchisor's motion for rehearing, the court modified its opinion to limit its decision to the forum selection clause. *Id.*

2. *Bolter v. Superior Court*, Docket No. S 0968820 (Cal. June 13, 2001).

3. 9 U.S.C. §§ 1 *et seq.*

4. This lack of uniformity was probably because many of the franchise agreements in effect throughout the system had different renewal dates and thus had not yet been updated.

5. The franchisor was originally headquartered in California but later moved its offices to Utah.

6. The arbitration clause in the subject franchise agreements required:

All controversies, disputes or claims between HRI . . . and FRANCHISE . . . arising out of or related to: (1) This [A]greement or any other agreement between the parties or any provision of such agreements; (2) The relationship of the parties hereto; (3) The validity of this Agreement or any other agreement between the parties or any provision of such agreements; or (4) Any specifications, standards or procedures relating to the establishment or operation of the CHEM-DRY business, [s]hall be submitted for arbitration in the Salt Lake City, Utah, office of the American Arbitration Association on the demand of either party.

7. The California Arbitration Act, CAL. CIV. PROC. CODE §§ 1281 *et seq.*, provides in section 1281.2 that a party may petition the court to compel arbitration, and that the court shall grant the petition upon a determination that an agreement to arbitrate exists, unless it determines, *inter alia*, that the right to compel arbitration has been waived or "[g]rounds exist for the revocation of the agreement." Similarly, section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Had such a petition been filed in Utah, it is likely that Harris would have had a federal district court in Utah implement its agreement to arbitrate, rather than having a California state court refuse to enforce it. *See text accompanying note 19.*

8. There were three plaintiffs but the court apparently was unaware that the other two had similar franchise agreements.

9. Under Rule 41(a) of the Federal Rules of Civil Procedure, a plaintiff can voluntarily dismiss an action without court approval at any time "before an answer, motion to dismiss, or motion for summary judgment" has been filed. In this case, no such responsive pleading had been filed, so the dismissal was appropriate. A practice pointer for defense counsel is to file a responsive pleading at the same time as the notice of removal so as to shut the Rule 41(a) door on the plaintiff. If thereafter the plaintiff seeks to dismiss, it must file a motion and obtain court

approval under Rule 41(b), which makes the dismissal much more difficult. A responsive pleading could be an answer reserving the defense of failure to arbitrate and/or a motion directed to the failure to arbitrate, so long as it is keyed to Rule 12(b)(6) or Rule 56 (summary judgment).

10. Under Rule 11 of the AAA Commercial Arbitration Rules, which were incorporated by reference into the franchise agreement, a party has ten days to object to a requested hearing locale after which the AAA determines the appropriate venue.

11. It appears from the appellate record that plaintiffs' counsel was present during the hearing before the AAA hearing officer, but possibly not at the conference with the arbitrators.

12. In the first complaint, the original parties were presumably a California plaintiff and a Utah defendant, giving the defendant the absolute right to remove under 28 U.S.C. § 1441(b), assuming the matter in controversy exceeded \$75,000. However, when a defendant is named that destroys diversity, as here, where the plaintiffs named a California defendant, the action normally cannot be removed unless the removing party can prove that the nondiverse defendant was "fraudulently joined." Fraudulent joinder is a term of art in removal jurisdiction. Practical application of fraudulent joinder means that the action against that defendant has no basis and should be dismissed. *Dodson v. Spillada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318-19 (9th Cir. 1998).

13. Under CAL. CIV. PROC. CODE § 1286.2 a court must confirm an arbitration decision unless limited grounds exist to vacate the award, such as fraud in its procurement or the corruption or misconduct of the arbitrators.

14. On April 18, 2001, following the *Bolter* decision, Harris Research, Inc., the franchisor, filed a Petition for Review and Request for Depublication with the California Supreme Court. The authors' law firm filed with the California Supreme Court an amicus letter in support of that petition on behalf of the International Franchise Association. On June 13, 2001, the California Supreme Court denied the Petition for Review and Request for Depublication.

15. CAL. BUS. & PROF. CODE § 20040.5 states that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." This statute was held to encompass strong public policy and defeated a judicial forum selection clause specifying an out of state venue in *Jones v. GNC Financing, Inc.*, 211 F.3d 495 (9th Cir. 2000). However, it is doubtful whether section 20040.5 could be used to void an arbitral forum selection clause in a franchise agreement. *See KKW Enter., Inc. v. Gloria Jean's Gourmet Coffees Fran. Corp.*, 184 F.3d 42 (1st Cir. 1999) (refusing to enforce § 19-28.1-14 of the Rhode Island Franchise Investment Act that states: "A provision in a franchise agreement restricting jurisdiction or venue to a forum outside this state or requiring the application of the laws of another state is void with respect to a claim otherwise enforceable under this Act."); *Doctor's Assoc., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999); *Alphagraphics Fran., Inc. v. Whaler Graphics, Inc.*, 840 F. Supp. 708, 710 (D. Ariz. 1993).

16. *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888, 892 (Cal. Ct. App. 2001).

17. For example, California statutes make contracts voidable on the basis of fraud, duress, menace, undue influence, and mistake, among other things. CAL. CIV. CODE §§ 1567, 1689.

18. *See, e.g.*, Jean Sternlight, *Protecting Franchisees from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45 (2000); Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91 (2000); Jonathan David Rapore & Eric Stockel, *Selecting the Proper Forum to Enforce One's Choice of Forum*, 18 FRANCHISE L.J. 7 (1998); Benjamin A. Levin and Richard S. Morrison, *Kubis and the Changing Landscape of Forum Selection Clauses*, 16 FRANCHISE L.J. 97 (1997).

19. *See, e.g.*, *Doctor's Assoc., Inc. v. Stuart*, 85 F.3d 975, 979 (2d Cir. 1996); *Union Mut. Stock v. Beneficial Life Ins. Co.*, 774 F.2d 524, 527 (1st Cir. 1985); *Victory Transport Inc. v. Comisaria General de*

Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

20. *See, e.g.*, *We Care Hair Development, Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999); *Doctor's Assoc., Inc. v. Distajo*, 107 F.3d 126 (2d Cir. 1997); *Doctor's Assoc., Inc. v. Hollingsworth*, 949 F. Supp. 77 (D. Conn. 1996).

21. For a brief history of adhesion contracts, see ARTHUR L. CORBIN, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 1.4, at 13–15 (Rev. Ed. 1993). For a critical analysis, and examples of circumstances in which adhesion contracts have been found, see Richard P. Sybert, *Adhesion Theory in California: A Suggested Redefinition and Its Application to Banking*, 11 LOYOLA L.A. L. REV. 297 (1978).

22. *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 783 (Cal. Ct. App. 1961).

23. *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966); *Steven v. Fidelity & Casualty Co.*, 377 P.2d 284 (Cal. 1962); *Neal*, 10 Cal. Rptr. at 783 (ambiguities to be interpreted against drafting party).

24. For example, *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963) (hospital release from future negligence as a condition for admission held to be invalid); *Steven*, 377 P.2d at 284 (1962) (rejecting terms of vending machine air travel insurance contract); *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985) (bank charges).

25. *See James V. Jordan & Judith B. Gitterman, Franchise Agreements: Contracts of Adhesion?*, 16 FRANCHISE L.J. 1 (1996).

26. *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888, 893 (Cal. Ct. App. 2001); *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285 (9th Cir. 1987); *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

27. *Bolter*, 104 Cal. Rptr. 2d at 893.

28. CAL. BUS. & PROF. CODE § 16600 has been interpreted to prevent the enforcement of post-term covenants against competition in franchise agreements. *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034 (N.D. Cal. 1990).

29. Perhaps a showing that a significant number of new franchisees accepted the terms of the disputed agreement would have had probative value in demonstrating that the terms were not sufficiently oppressive to cause even those who could walk away not to do so.

30. CAL. CORP. CODE § 31125 requires the filing of a notice with the California Department of Corporations showing any material modification of an existing franchise agreement and making disclosure of the modification to the concerned franchisee, whether the modification is made at the behest of the franchisee or the franchisor.

31. 10 CAL. CODE REGS. § 310.100.2 requires the filing of a notice with the California Department of Corporations and the amendment of the Franchise Offering Circular describing each change made as a result of negotiations with a prospective franchisee. Each franchise prospect must receive copies of all notices of negotiated changes filed during the previous twelve months.

32. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 6 P.3d 669 (Cal. 2000); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981); *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775 (Cal. Ct. App. 1976).

33. CAL. CIV. CODE § 1670.5 states:

- (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

Id. This provision is identical to section 2–302 of the Uniform Commercial Code (UCC). However, California did not enact that section

when it adopted the UCC in 1963. Commentators have opined that section 2–302 of the UCC was not adopted with the balance of the code because of the uncertainty such a vague standard would create in contracts. *See, e.g.*, Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459 (1995).

34. *See Steven v. Fidelity & Casualty Co.*, 377 P.2d 284 (Cal. 1962) and cases cited therein; *Jacklich v. Baer*, 135 P.2d 179 (Cal. Ct. App. 1943). *See also Note, Implementation of Section 5108: An Appendix on Unconscionability in California*, 25 HASTINGS L.J. 53 (1973).

35. The traditional definition of unconscionability is found in *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 28 Eng. Rep. 82 (Ch. 1750) (A bargain is unconscionable if it is “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other,” *quoted in Hume v. United States*, 132 U.S. 406 (1889)). For an interesting discussion of the history of contract unconscionability, see Prince, *supra* note 33. For the Islamic law equivalent of the unconscionability doctrine, and for further comments on the potential abuse of the doctrine, see Comment, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187 (1991).

36. 623 P.2d 165 (Cal. 1981).

37. *Scissor-Tail*, 623 P.2d at 172–73. The *Scissor-Tail* cause of action preceded the enactment of the California unconscionability statute; thus, the statute was not a factor in the decision.

38. *Id.* at 173.

39. *Id.* at 176. The issue in *Scissor-Tail* was not the location of the arbitration but the integrity of the hearing itself. The court said in a footnote: “Enforcement of an agreement to arbitrate should be denied on this ground, we think, only in the clearest of cases, i.e., when the applicable procedures essentially preclude the possibility of a fair hearing. In all other cases the matter should be permitted to proceed to arbitration.” *Id.* at 177 n.23.

40. *Id.* at 175.

41. *Id.* at 175–76.

42. 186 Cal. Rptr. 114 (Cal. Ct. App. 1982).

43. *A&M Produce*, 186 Cal. Rptr. at 121.

44. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 6 P.3d 669 (Cal. 2000); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997).

45. *See, e.g.*, *Villa Milano Homeowners' Ass'n v. Il Davorge*, 102 Cal. Rptr. 2d 1 (Cal. Ct. App. 2000).

46. A party's failure to read a contract does not make the contract any less enforceable or provide the excuse that the contract terms were not within its “reasonable expectation.” *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315 (Cal. Ct. App. 1986).

47. *California Grocers Ass'n v. Bank of Am.*, 27 Cal. Rptr. 2d 396 (Cal. Ct. App. 1994).

48. *California Grocers Ass'n*, 27 Cal. Rptr. 2d at 396, and cases cited therein.

49. *See Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985).

50. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

51. *Walnut Creek Pipe Distrib., Inc. v. Gates Rubber Co.*, 39 Cal. Rptr. 767, 771 (Cal. Ct. App. 1964) (“The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.”).

52. *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285, 1291 (9th Cir. 1987).

53. *See, e.g.*, *McCoy v. Superior Court*, 104 Cal. Rptr. 2d 504 (Cal. Ct. App. 2001); *Armendariz*, 6 P.3d at 669; *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997).

54. *See, e.g.*, *Pichly v. Nortech Waste*, 105 Cal. Rptr. 2d 21 (Cal. Ct. App. 2001); *Armendariz*, 6 P.3d at 669; *Lagatree v. Luce, Forward, Hamilton & Scripps*, 88 Cal. Rptr. 2d 664 (Cal. Ct. App. 1999); *24 Hour Fitness, Inc. v. Superior Court*, 78 Cal. Rptr. 2d 533 (Cal. Ct. App. 1998); *Stirlen*, 60 Cal. Rptr. 2d at 138.

55. *Spinello v. Amblin Entertainment*, 34 Cal. Rptr. 2d 695, n.9 (Cal. Ct. App. 1994).

56. See *supra* note 33.
57. CAL. CIV. CODE § 1670.5(a).
58. CAL. CIV. CODE § 3545; *Pichly*, 105 Cal. Rptr. 2d at 21.
59. CAL. CIV. CODE § 1670.5(b).
60. *Shubin v. William Lyon Homes, Inc.*, 101 Cal. Rptr. 2d 390 (Cal. Ct. App. 2000), affirming the trial court's finding that the arbitration provision of an employment agreement was unconscionable.
61. *Bolter v. Supreme Court*, 104 Cal. Rptr. 2d 888, 892-93 (Cal. Ct. App. 2001).
62. The court quoted a footnote in *Stroitz v. Dean Witter Reynolds, Inc.*, 272 Cal. Rptr. 680, 683 (Cal. Ct. App. 1990), which itself cited *Moseley v. Electronic Facilities*, 374 U.S. 167 (1963), a case that mentioned but did not pass on the enforceability of a New York forum selection clause in an arbitration agreement involving a dispute originating in Georgia.
63. The appellate court could have decided the case in a number of ways other than as it did. The arbitration clause granted the arbitrator the authority to determine "[t]he validity of this Agreement . . . or any provision of such agreement[s]." While courts decide whether the parties have in fact agreed to arbitrate, questions of contractual validity, such as fraud in the inducement, are normally decided by the arbitrators. *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992). See also *First Options of Chicago, Inc. v. Kaplan* 514 U.S. 938 (1985); and *Rosenthal v. Great Western Fin. Securities Corp.*, 926 P.2d 1061 (Cal. 1996). In *Bolter*, the arbitrator was given the explicit power to determine issues of validity, such as unconscionability or arbitrability. Courts should uphold such grants of authority. *Pari-Mutuel Employees' Guild v. Los Angeles Turf Club, Inc.*, 337 P.2d 575 (Cal. Ct. App. 1959); see also *Freeman v. State Farm Mut. Auto. Ins. Co.*, 121 Cal. Rptr. 477 (Cal. 1975); *O'Malley v. Petroleum Maintenance Co.*, 308 P.2d 9 (Cal. 1957). An arbitrator's determination on validity should only be overturned under the limited grounds for setting aside arbitral awards set forth in the California Code of Civil Procedure § 1286.2. *Blue Cross of California v. Jones*, 23 Cal. Rptr. 2d 359 (Cal. Ct. App. 1993). Thus, the issue that the *Bolter* court should have decided was whether the agreement to submit the issue of contract validity to an arbitrator was unenforceable because that provision either did not meet the reasonable expectation of the parties or because the term itself was unduly oppressive or unconscionable. The issue of unconscionability of the forum selection clause should not even have been decided by the court, but rather by the arbitrator, since the parties had agreed that the arbitrator would decide issues of validity. Of note, the *Bolter* court did not strike down the entire arbitration clause even though it was requested to do so. "As explained, we did not find the requirement of arbitration alone to be unduly unfair but rather the 'place and manner' in which the arbitration was to occur Unconscionability can be cured by striking those provisions, leaving an otherwise valid and complete agreement to submit disputes to arbitration." *Bolter*, 104 Cal. Rptr. 2d at 896 (emphasis added).
- Another issue raised by Harris that the appellate court did not address was the impact of the incorporation of Rule 11 of the AAA Commercial Rules into the arbitration agreement of the parties. Harris argued that as a result of the incorporation of those rules, the parties while agreeing to a Utah forum also agreed that the forum could be changed by the AAA. As such, they argued, the contract did not "restrict venue to a forum outside this state" within the meaning of California and Business Professional Code section 20040.5. The recent decision in *Kim v. Colorall Technologies International, Inc.*, Bus. Fran. Guide (CCH) ¶ 11,922 (N.D. Cal. 2000) in large part supports this view.
64. See *KKW Enter., Inc. v. Gloria Jean's Gourmet Coffees Fran. Corp.*, 184 F.3d 42, 52 (1st Cir. 1999); *Doctor's Assoc., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999); *Alphagraphics Fran., Inc. v. Whaler Graphics, Inc.*, 840 F. Supp. 708, 710 (D. Ariz. 1993). See also *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA preempted the antiwaiver provision in section 31512 of the California Franchise Investment Law, CAL. CORP. CODE §§ 31000 *et seq.*).
65. *Keating*, 465 U.S. 1 at 10.
66. *Id.*
67. CAL. CORP. CODE §§ 31000 *et seq.*
68. *Keating*, 465 U.S. at 16, n.11.
69. *Id.* at 16.
70. 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999).
71. 680 A.2d 618 (N.J. 1996).
72. 482 U.S. 483 (1987).
73. *Perry*, 482 U.S. at 492, n.9.
74. *Hamilton*, 150 F.3d at 163.
75. 184 F.3d 42 (1999).
76. 489 U.S. 468 (1989).
77. See discussion in note 63, however, over who should decide that issue.
78. 517 U.S. 681 (1996).
79. *Cassarotto*, 517 U.S. at 687.
80. *Id.* at 688.
81. 482 U.S. 483 (1987).
82. *Perry*, 482 U.S. at 492, n.9.
83. 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993).
84. 96 Cal. Rptr. 149 (Cal. Ct. App. 1971).
85. *Player*, 96 Cal. Rptr. at 155.
86. 186 Cal. Rptr. 740 (Cal. Ct. App. 1982).
87. *Bos Material Handling*, 186 Cal. Rptr. at 744.
88. See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines, Inc. v. Schute*, 499 U.S. 585 (1991); *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206 (Cal. 1976). In *Carnival Cruise Lines*, for example, the U.S. Supreme Court upheld a forum selection clause included on the back of a passenger cruise ship ticket, requiring all passengers to sue in Florida.
89. *Smith, Valentino & Smith, Inc.*, 551 P.2d at 1207.
90. *Furda v. Superior Court*, 207 Cal. Rptr. 646, 651 (Cal. Ct. App. 1984).
91. *Smith, Valentino & Smith, Inc.*, 551 P.2d at 1209.
92. 38 Cal. Rptr. 2d 612 (Cal. Ct. App. 1995).
93. *Wimsatt*, 38 Cal. Rptr. 2d at 618.
94. See *Smith, Valentino & Smith, Inc.*, 551 P.2d at 1207.
95. 16 Cal. Rptr. 2d 417 (Cal. Ct. App. 1993).
96. *Ricoh*, 16 Cal. Rptr. at 425-26.
97. To the contrary, while not a California case, the court in *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999), specifically overruled the claim that the forum selection clause was unconscionable because it required the franchisee to travel to Connecticut.
98. It is not a major undertaking to travel from major California cities to Salt Lake City, generally a ninety-minute flight. Under the court's reasoning, if the franchisees were in San Francisco and required to arbitrate in San Diego, that could be considered unconscionable because San Diego has about the same flight time and about the same airfare from San Francisco as a trip to Salt Lake City.
99. *Perry v. Thomas*, 482 U.S. 483 (1987).
100. Some or all of which are fairly common terms in modern franchise agreements.
101. In speaking about adhesion contracts, and, by implication, the finding of unconscionability, a leading commentator observed that a major fault with the doctrine is that "adhesion theory may afford courts leeway to go further than they should. It offers the possibility of more substantive rewriting of contracts, heavier imposition of transactional costs, and extended judicial interference in nonjudicial processes." Sybert, *supra* note 21, at 318. See also Peter D. Roos, *The Doctrine of Unconscionability: Alive and Well in California*, 9 CAL. W. L. REV. 100 (1972); Charles H. Hurd & Philip L. Bush, *Unconscionability: A Matter of Conscience for California Consumers*, 25 HASTINGS L.J. 1 (1973).