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Punitive Damages in Commercial Arbitration: A Due Process Analysis

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PUNITIVE DAMAGES IN COMMERCIAL ARBITRATION: A DUE PROCESS ANALYSIS

I. INTRODUCTION

In the past two decades commercial arbitration has enjoyed steady growth as an informal alternative to civil litigation.[1] The growth stems from the speed and cost efficiency of arbitration in contrast to civil litigation.[2] Arbitration is also strongly favored by the courts to serve the important public policy of reducing the burden on the judiciary.[3] In the last decade, federal and state courts have looked to this policy to permit an arbitrator to punish wrongdoers with punitive damages.[4]

This comment theorizes that awarding punitive damages in commercial arbitration is "state action"[5] requiring due process.[6] Unlike the traditional contract remedy of compensatory dam-

1. R. COULSON, BUSINESS ARBITRATION - WHAT YOU NEED TO KNOW 8-9 (3d ed. 1986) (Commercial arbitration has increased by 250% since 1972).

2. *See* Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 438 (1988).

3. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984) ("One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. The anomaly is that there are better ways of resolving disputes, and we must in the public interest move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration.").

4. *See* Raytheon Company v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988); Singer v. E.F. Hutton & Co., 699 F. Supp. 276 (S.D. Fla. 1988); Peabody v. Rotan Mosle, Inc., 677 F. Supp. 1135 (M.D. Fla. 1987); Ehrich v. A.G. Edwards & Sons, Inc., 675 F. Supp. 559 (D.S.D. 1987); Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985); Baker v. Sadick, 162 Cal. App. 3d 618, 626, 208 Cal. Rptr. 676, 681 (Cal. Ct. App. 1984); Willoughby Roofing & Supply Co. v. Kajima, Int'l, 598 F. Supp. 353, 360 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985); Willis v. Shearson/American Express, 569 F. Supp. 821, 824 (M.D.N.C. 1983).

5. *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 423 (1973) ("[T]he commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority.").

6. U.S. CONST. amend. XIV, § 1 states "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of the law."

ages,[7] punitive damages have for centuries been under the exclusive control of the State.[8] The Supreme Court has found that a traditional and exclusive State power exercised by a private individual is "state action" requiring due process.[9] Therefore when punitive damages are at issue, the arbitration agreement must consist of a minimum quantum of procedures that balance the protection against erroneous punishment with the State's interest in limiting the burden on arbitration.[10]

This comment also theorizes that punitive damages violate due process by giving the arbitrator unfettered discretion in determining punitive damages awards. Unlike the traditional contract remedy of compensatory damages that are calculated based on the amount of harm done,[11] punitive damages are designed to punish and deter wrongful behavior.[12] Punitive damages vastly exceed the amount of harm done and have no objective limits.[13] In describing punitive damages awards inflicted by juries, Justice Rehnquist mentioned "[p]unitive damages are frequently based on the caprice and prejudice of jurors."[14] Justice Marshall described punitive damages as "allow[ing] juries to penalize heavily the unorthodox and the unpopular and exact little from others."[15] And most recently in *Pacific Mutual Life Ins. Co. v. Haslip*[16] the Supreme Court declared "[o]ne must concede that unlimited jury discretion or unlimited judicial discretion for that matter, in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[17] Unlike jury trials, the arbitrator is not required to use the correct punitive damages standard. The arbitrator is also not required to issue a

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7. *See, e.g.*, Hadley v. Baxendale, 156 Eng.Rep. 145 (1854).

8. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354 (1976).

9. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

10. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

11. Hadley v. Baxendale, 156 Eng.Rep. 145 (1854).

12. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

13. *Id.*

14. Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

15. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 83 (1971) (Marshall, J., dissenting).

16. Pacific Mutual Life Ins. Co. v. Haslip, 59 U.S.L.W. 4157 (1991).

17. *Id.* at 4161.

written opinion, therefore judicial review is usually foreclosed. Thus, unfettered arbitrator discretion violates procedural due process.[18]

This comment will begin by discussing the statutory background of commercial arbitration and the limited judicial review of arbitration awards. It will then discuss the evolution of punitive damages in commercial arbitration. This comment will then show that punitive damages are "state action" requiring procedural due process. Finally, it will then use the *Mathews v. Eldridge*[19] calculus created by the Supreme Court and the *Haslip* case to show that a written opinion and enhanced judicial review are needed to satisfy procedural due process when punitive damages are awarded in arbitration.

II. COMMERCIAL ARBITRATION BACKGROUND

A. ARBITRATION DEFINED

Commercial arbitration is an informal dispute resolution mechanism created by contract. In the arbitration contract the parties choose a private person to hear their dispute and to resolve it by rendering a binding decision.[20]

The scope of the arbitration agreement determines the remedial options that are available to the arbitrator. The scope is usually found in a clause that refers to the rules of an arbitration organization. For example, if the clause refers to the rules of the American Arbitration Association (AAA),[21] then the scope will be "any remedy or relief which is just and equitable and

18. Although due process can be waived when there is clear and compelling evidence of a voluntary, knowing, and intelligent waiver, *See* D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972), a 'broad' arbitration clause does not rise to the *Overmeyer* standard, especially in light of the Supreme Court's declaration "indulge in every reasonable presumption against waiver of fundamental constitutional rights and. . .not to presume acquiesance in the loss of such rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

19. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

20. KANOWITZ, ALTERNATIVE DISPUTE RESOLUTION, CASES AND MATERIALS 304 (1986).

21. The American Arbitration Association's suggested clause: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof."

within the terms of the agreement of the parties."[22]

B. The Federal Arbitration Act

The arbitration agreement is enforced by statute. The most important statute in this area is the Federal Arbitration Act (FAA).[23] The FAA was established in 1925 as a body of federal substantive law establishing and regulating the duty to honor an arbitration agreement.[24]

The FAA overcomes judicial hostility inherited from England in enforcing arbitration contracts.[25] According to Congress "[t]he need for the law arises from. . .the jealousy of the English courts for their own jurisdiction. . . .This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment. . . ."[26]

The FAA is based on the federal commerce power and makes a written contract to arbitrate "in any. . .contract evidencing a transaction involving interstate commerce. . .valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[27] Therefore the FAA becomes applicable when there is a written agreement to arbitrate and the contract containing the arbitration agreement evidences a transaction involving interstate commerce.

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22. American Arbitration Association, Commercial Arbitration Rules of American Arbitration Association § 43 (1990).

23. 9 U.S.C. §§ 1-14 (1982).

24. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) (The FAA created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement" within its power.).

25. Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (quoting H. R. Rep No. 96, 68th Cong., 1st Sess., 1-2 (1924)).

26. *Id.*

27. 9 U.S.C. § 2 (1982). *See, e.g.*, Prima Paint v. Flood & Conklin, 388 U.S. 395, 401 (1966) (A written arbitration agreement was enforced under the Federal Arbitration Act. Prima Paint serviced 175 clients in numerous states and obtained the consulting services of Flood & Conklin to assist in the transfer of sales and manufacturing operations from New Jersey to Maryland. The Court held the Federal Arbitration Act applicable under § 2. Justice Fortas wrote "There could not be a clearer case of a contract evidencing a transaction in interstate commerce.").

The drafters of the FAA were motivated by the important advantages of arbitration. First, arbitration of contract disputes saves time and money in contrast to litigation.[28] Second, an arbitrator has special expertise to decide contract questions.[29] Third, arbitration reduces the burden on the judiciary.[30] As a result of these advantages, the Supreme Court has declared a strong federal policy favoring arbitration.[31]

C. Limited Judicial Review

The strong policy favoring arbitration has resulted in the insulation of arbitration awards by the judiciary. For example, in *Wilko v. Swan*[32] the Supreme Court created the "manifest disregard" doctrine.[33] This doctrine is an extension of the limited basis for vacating an arbitration award under the FAA.[34]

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28. Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 269 (1926).

29. *Id.*

30. H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924) (According to the House of Representatives the FAA was needed "at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.").

31. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

32. Wilko v. Swan, 346 U.S. 427 (1953).

33. *Id.* at 436-437.

34. 9 U.S.C.A. §10 (West 1970). The Federal Arbitration Act provides for a modification or correction of an award under the following circumstances:
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.
The Federal Arbitration Act states that an award may be vacated under the following circumstances:
(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly exeuted them that a mutual, final, and definite award upon the subject matter submitted was not made.
(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by

The doctrine dictates that an arbitration award is vacated when an arbitrator understood and correctly stated, yet completely ignored the law.[35] The standard goes beyond mere error in the law or failure of the arbitrator to understand or apply the law.[36] The court cannot vacate an arbitration award just because of an "arguable difference regarding the meaning or applicability of laws urged upon it."[37]

In many instances, an arbitration award is further insulated by a lack of a transcript or written opinion. The policy of the AAA is to insure finality by putting pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts.[38]

In *Wilko*, the Supreme Court legitimized the policy of the AAA by declaring an arbitration award "may be made without explanation of their reasons and without a complete record of their proceedings."[39] The Court reaffirmed this position in *Bernhardt v. Polygraphic Co.*[40] stating arbitrators "need not give their reasons for their results."[41] A federal court justified the insulation of arbitration awards in *Sobel v. Hertz Warner & Co.*:[42]

> [A] requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient, and informal means of private dispute settlement.[43]

Therefore, the courts have found finality is more important than accuracy in preserving the usefulness of arbitration.

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the arbitrators.

35. Saxis Steamship Co. v. Multifacs International Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967).

36. *Id.*

37. Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986).

38. *See* Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 439 (1988).

39. Wilko v. Swan, 346 U.S. 427, 436 (1953).

40. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

41. *Id.* at 203.

42. Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972).

43. *Id.* at 1214.

D. Legislative Intent on the Scope of Arbitrable Issues

Implicit in the insulation of an arbitration award from judicial review is that the scope of arbitrable issues is limited to ordinary contract disputes. The legislative intent is evident in an article[44] written by an FAA drafter:

> Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact- quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law- the questions of law which arise out of these daily relations between merchants as to passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.[45]

Traditionally, ordinary contract disputes consisted of "make whole" remedies such as compensatory damages.[46] Punitive damages were prohibited.[47] The recent introduction of punitive damages into contract disputes[48] created a problem for the courts: In light of the informal procedures and limited judicial review consistent with the arbitration of "ordinary contract disputes," does an arbitrator have the power to punish a party to a contract with punitive damages?

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44. Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926).

45. *Id.*

46. J. Calamari & J. Perillo, The Law of Contracts 589 (3rd ed. 1987).

47. *Id.*

48. *See, e.g.*, Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752 (1984).

III. THE EVOLUTION OF PUNITIVE DAMAGES IN COMMERCIAL ARBITRATION

A. GARRITY PROHIBITS PUNITIVE DAMAGES IN ARBITRATION

In the landmark case of *Garrity v. Lyle Stuart, Inc.*,[49] the New York Court of Appeals found punitive damages in commercial arbitration violate public policy.[50] The court, after finding punitive damages to be non-compensatory and therefore a coercive sanction,[51] based its holding on two factors. First, the use of coercive force is under the exclusive control of the State.[52] Second, arbitration awards are not vacated upon an error in law or fact and therefore "amount to an unlimited draft upon judicial power."[53] The *Garrity* court concluded "[t]he freedom to contract does not embrace the freedom to punish, even by contract."[54]

The *Garrity* court used public policy to balance the weight of promoting arbitration of disputes with the weight of limited judicial review of punitive damage awards. In *Garrity* the balance weighed in favor of the limited judicial review resulting in the prohibition of punitive damages. Other courts, however, have balanced the public policy scale differently.

B. THE SUPREME COURT EXPANDS THE SCOPE OF ARBITRABLE ISSUES

Since *Garrity*, the Supreme Court, without considering the issue of punitive damages, has used the strong policy favoring arbitration to expand the scope of arbitrable issues. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[55] the Supreme Court found that courts must broadly construe the scope of an arbitration agreement in favor of the arbitrator's

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49. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354 (1976).

50. *Id.* at 355. *See also* Fahnstock & Co. v. Waltman, No. 90 Civ. 1792 (S.D.N.Y. 1990); United States Fidelity & Guaranty Co. v. DeFluiter, 456 N.E.2d 429 (Ind. Ct. App. 1983); Shaw v. Kuhnel & Assocs., 102 N.M. 607, 698 P.2d 880 (N.M. 1985).

51. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 355 (1976).

52. *Id.* at 358.

53. *Id.*

54. *Id.*

55. Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1982).

power.[56]

For example in *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*[57] the Supreme Court, following its own precedent in *Moses H. Cone*, permitted the arbitration of a treble damages antitrust claim.[58] In *Shearson/American Express v. McMahon*,[59] after citing *Moses H. Cone*, the Supreme Court permitted the arbitration of a treble damages RICO claim.[60]

In both *Mitsubishi* and *McMahon* the Supreme Court was careful to note that the treble damages were primarily compensatory.[61] The Supreme Court was therefore speaking to the arbitration of non-punitive claims when they declared "[t]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."[62]

C. The Courts Permit Punitive Damages in Arbitration

Most federal and state courts considering the issue of punitive damages in arbitration have cited the strong policy favoring arbitration and then proceeded to permit the arbitrator to award punitive damages.[63] Unlike *Garrity*, these courts have found the

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56. *Id.* at 24-25 (The strong federal policy favoring arbitration was articulated: "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . ." The Court also mentioned that "under the Federal Arbitration Act. . .arbitration clauses should be read broadly and arbitration should not be denied in the absence of clear and express exclusions.").

57. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

58. Sherman Act, 15 U.S.C. § 1.

59. Shearson/American Express v. McMahon, 482 U.S. 220 (1987).

60. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

61. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (The treble damages "seeks primarily to enable an injured competitor to gain compensation for that injury."); Shearson/American Express v. McMahon, 482 U.S. 220, 240 (1987) ("The legislative history of § 1964 (c) reveals the same [as Mitsubishi treble-damages] emphasis on the remedial role of the treble-damages provision.").

62. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

63. *See* Raytheon Company v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988); Singer v. E.F. Hutton & Co., 699 F. Supp. 276 (S.D. Fla. 1988); Peabody v. Rotan Mosle, Inc., 677 F. Supp. 1135 (M.D. Fla. 1987); Ehrich v. A.G. Edwards & Sons, Inc., 675 F. Supp. 559 (D.S.D. 1987); Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985); Baker v. Sadick, 162 Cal. App. 3d 618, 626, 208 Cal. Rptr. 676, 681 (Cal. Ct. App. 1984); Willoughby Roofing & Supply Co. v. Kajima, Int'l, 598 F. Supp. 353, 360 (N.D.

public policy balance weighs in favor of promoting arbitration by including a broad range of remedies.

For example, in *Willis v. Shearson/American Express, Inc.*,[64] the federal court after looking to the Supreme Court principle articulated in *Moses H. Cone*, that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,"[65] found punitive damages were included in the broad arbitration agreement.[66] The *Willis* court did not find any "public policy reason persuasive enough to justify prohibiting arbitrators from resolving issues of punitive damages submitted by parties."[67]

The court in *Willoughby Roofing & Supply v. Kajima International*[68] agreed with the *Willis* court. The *Willoughby* court reasoned that arbitration can only be viable if it can handle all the disputes that arise under the agreement. The *Willoughby* court concluded "[t]o deny arbitrators the full range of remedial tools generally available under the law would be to hamstring arbitrators and to lessen the value and efficiency of arbitration as an alternative method of dispute resolution."[69] Unlike *Garrity*, the *Willoughby* court found the public policy of promoting arbitration, by including a full range of remedies, outweighed the limited judicial review of punitive damages awards.

Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985); Willis v. Shearson/American Express, 569 F. Supp. 821, 824 (M.D.N.C. 1983). *But see* Fahnstock & Co. v. Waltman, No. 90 Civ. 1792 (S.D.N.Y. 1990); United States Fidelity & Guaranty Co. v. DeFluiter, 456 N.E.2d 429 (Ind. Ct. App. 1983); Shaw v. Kuhnel & Assocs., 102 N.M. 607, 698 P.2d 880 (N.M. 1985).

64. Willis v. Shearson/American Express, Inc., 569 F.Supp. 821 (M.D.N.C.1983).

65. *Id.* at 823 (citing Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1982)).

66. *Id.* at 823.

67. *Id.* at 824.

68. Willoughby Roofing & Supply Co., Inc. v. Kajima, 598 F.Supp 353 (N.D.Ala 1984). *See also* Raytheon Company v. Automated Business Systems, Inc., 882 F.2d 6 (1989) ("Where such conduct could give rise to punitive damages if proved to a court, there is no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the same damages.").

69. *Id.* at 362.

IV. PUNITIVE DAMAGES IN COMMERCIAL ARBITRATION VIOLATE DUE PROCESS

A. PUNITIVE DAMAGES IN COMMERCIAL ARBITRATION IS "STATE ACTION" REQUIRING DUE PROCESS

There must be "state action"[70] for the due process clause[71] to be invoked. Although an arbitrator is considered to be a private party, "state action" exists when private conduct involves the exercise of power that was "traditionally the exclusive prerogative of the state."[72] In *Flagg Bros. Inc. v. Brooks* the Supreme Court was careful to emphasize that although "many functions have been traditionally performed by governments, very few have been exclusively reserved to the state."[73]

An arbitrator awarding punitive damages is a good example of a private party exercising traditional and exclusive State power.

Garrity supports this view. The public policy concerns in *Garrity* were based on a private arbitrator using a traditional and exclusive State power in the form of punitive damages:

> [If an arbitrator was to award punitive damages] a tradition of the rule of law in organized society is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State. In a highly developed commercial and economic society the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions in private arrangements. For centuries the power to punish has been a monopoly of the State, and not that of any private individual. The day is long past since barbaric man achieved redress by private punitive measures.[74]

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70. District of Columbia v. Carter, 409 U.S. 418, 423 (1973) ("[T]he commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority.").

71. U.S. CONST. amend. XIV, §1 states "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of the law."

72. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

73. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

74. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 359 (1976).

An arbitrator awarding punitive damages can be understood only by State delegation of this traditional and exclusive power. This can be seen in the distinction between an arbitrator awarding compensatory damages and punitive damages. Compensatory damages are a result of the interaction between autonomous parties'. Claims based on personal interaction can be removed from judicial administration.[75]

Punitive damages, on the other hand, use the breaching party's liability as a means of achieving the extrinsic social goal of punishment and deterrence.[76] Punitive damages can be seen as having been grafted onto the contractual relationship by the State.[77] The parties to an arbitration agreement "have no power to structure, even indirectly, an autonomous resolution to an issue whose contours. . .go distinctly beyond their own interactions."[78] Punitive damages must therefore be imposed from without, by the State, as it is not within the domain of the parties direct interchange.[79]

Therefore, the removal of punitive damages from the judiciary into a private arbitral forum can only be explained and permitted by State conferral.[80] "Absent legislative conferral of [punitive damages] authority on some other [forum], removal of the distributive power from the judiciary is inconceivable as, say, an attempt to establish the private assessment and collection of tax."[81]

The courts by enforcing an arbitration award of punitive damages remove the traditional State monopoly on the use of punitive damages. The arbitrator's use of this traditional and exclusive State power constitutes "state action" invoking the due process clause.

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75. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1075 (1987).

76. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979). *See, e.g.*, Gertz v. Robert Welch, Inc. 418 U.S. 323, 350 (1973) (Punitive damages are not compensation for injury. "Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

77. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1080 (1987).

78. *Id.* at 1081.

79. *Id.* at 1075.

80. *Id.*

81. *Id.*

B. Mathews Calculus Requires Additional Procedures in Arbitration

In *Mathews v. Eldridge*[82] the Supreme Court created a balancing test for determining the constitutional adequacy of a particular set of procedures. The following factors are weighed: First, the private interest that will be impacted by the official action.[83] Second, the risk of erroneous deprivation of the private interest through the procedures used and the probable value of enhanced procedural safeguards.[84] Third, the Government's interest, including the function involved and the fiscal and administrative burdens that the enhanced procedural requirement would entail.[85]

1. *The Private Interest at Stake is Enormous*

The property and liberty interests at stake are enormous. The property interest in the form of a monetary penalty has no limit. Unlike compensatory damages that correlate with the harm done, punitive damages are based on highly discretionary standards of punishment and deterrence.[86] As a result, the arbitrator can bankrupt a party.[87]

A liberty interest is involved since punitive damages can harm reputation.[88] Punitive damages have been described as quasi-criminal,[89] and some commentators have even proposed

82. Mathews v. Eldridge, 424 U.S. 319 (1976).

83. *Id.* at 335.

84. *Id.*

85. *Id.*

86. *See, e.g.*, Gertz v. Robert Welch, Inc. 418 U.S. 323, 350 (1973) (In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) ("[T]his grant of wholly standardless discretion to determine the severity of when, where, or how much, violates fundamental due process.").

87. *See generally* Pacific Mutual Life Ins. Co. v. Haslip, 59 U.S.L.W. 4157, 4171 (1991) (O'Connor, J., dissenting) ("[A] jury would not exceed its discretion under [Alabama] state law by imposing an award of punitive damages that was deliberately calculated to bankrupt the defendant.").

88. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

89. Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

applying criminal safeguards to punitive damages cases.[90] The serious potential punishment from punitive damages requires a high degree of precision by the arbitrator in his determination.[91]

2. *There is a High Risk of Erroneous Deprivation*

In contrast to the high degree of precision required in the determination of punitive damages, there is practically no protection against erroneous deprivation from an arbitration award of punitive damages. At best an arbitrator is given unfettered freedom to choose a penalty under inherently vague punitive damage laws. At worst an arbitrator can ignore the law completely, and given the lack of written opinion and judicial review, he can act as a super-legislator, rendering punitive awards based on his own value system rather than society's.

The *Garrity* court, in support of its finding that arbitral awards of punitive damages violate public policy, pointed to inadequate judicial review as a critical factor:

> The trouble with an arbitration admitting a power to grant unlimited damages by way of punishment is that if the court treated such an award in the way arbitration awards are usually treated, and followed the award to the letter, it would amount to an unlimited draft upon judicial power. In the usual case, the court stops only to inquire if the award is authorized by the contract; is complete and final on its face; and if the proceeding was fairly conducted.[92]

In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Burke*,[93] Judge Legge was concerned by a punitive damages award that was unaccompanied by an arbitrator opinion and thereby foreclosed judicial review. After following the precedent permitting arbitrators to render awards without a written opinion Judge Legge commented:

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90. *See, e.g.*, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

91. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 584 (1975).

92. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358 (1976) (quoting Matter of Publishers' Association of N.Y. City, 280 App.Div. 500, 503 (1952)).

93. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Burke, 741 F.Supp 191 (N.D.Cal 1990).

> Indeed, some thought about the future of this type of arbitration appears to be necessary. If industry arbitration, such as this within the investment industry, is to become a substitute for civil litigation. . .then the arbitrators and counsel must be aware of the necessity for giving a federal court some record for review that is more than just a statement of the amount of the award. This court does not suggest that arbitrators be obliged to make findings of fact and conclusions of law equivalent to those required of a trial court. But the mere granting of a monetary award, without more, combined with the limited power of a federal court to review it, creates both uncertainty and secrecy which is undesirable as an alternative dispute resolution.[94]

3. *The High Risk of Erroneous Deprivation is Easily Remedied*

The uncertainty and secrecy of a punitive damages award in arbitration can be easily remedied. The arbitrator can use the State standard for punitive damages and then write a brief opinion justifying the punitive damages award. This will permit judicial review. The judiciary can then look at the size of award, and in light of the arbitral opinion, determine if the award exceeds the amount needed to punish and deter the unacceptable behavior.

Although the case dealt with juries instead of arbitrators, the Supreme Court in *Pacific Mutual Life Ins. Co. v. Haslip*[95] placed particular emphasis on the need for judicial review of punitive damages awards. In *Haslip*, after commenting that unfettered jury discretion in determining punitive damages invites "extreme results that jar one's constitutional sensibilities,"[96] the Supreme Court found appropriate jury instructions in combination with heightened judicial review passed the constitutional challenge.[97]

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94. *Id.* at 195.
95. Pacific Mutual Life Ins. Co. v. Haslip, 59 U.S.L.W. 4157 (1991).
96. *Id.* at 4161.
97. *Id.* at 4162.

The Court found three factors to be important. First, the jury instructions were confined to the State policy of punishment and deterrence.[98] Second, the trial court had to give reasons in the record for refusing to lower a jury verdict.[99] Third, there was substantial judicial review using detailed standards to make sure that a punitive damages award does "not exceed an amount that will accomplish society's goals of punishment and deterrence."[100]

These same standards will be useful in the arbitration of punitive damages. An arbitrator, like the *Haslip* jury, must use the State standard for punitive damages. This will limit arbitrator discretion to the specific punitive damages standard in the jurisdiction.

An arbitrator, similar to the *Haslip* trial court, must issue written reasons to justify the punitive damages award. This will permit judicial review. The written reasons will also force the arbitrator to reflect on his decision and therefore result in a more accurate punitive damages award.[101] Additionally, written reasons will serve the policy of punishment and deterrence by enabling the wrongdoer to learn with specificity the unacceptable conduct.[102]

The judiciary, as in *Haslip*, can then use the arbitrator's opinion to determine if the punitive damages award is consistent with the State policy of punishment and deterrence. The judiciary will be able to compare punitive damages awards from arbitrators and juries to insure the consistency of all punitive damages awards.

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98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Scauer, *Precedent*, 39 STAN. L. REV. 571, 580 (1987).

102. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 713, 761 (2nd ed. 1988) (describing the "right not to be singled out for hurtful treatment by the state without a chance to talk back, and to be told why").

4. The Additional Procedures of the Correct Punitive Standard, a Written Opinion, and Judicial Review are a Small Burden on Arbitration

The three added procedures-requiring the correct punitive damages standard, a written arbitral opinion, and judicial review, are a small burden on arbitration compared to the added accuracy they bring to the decisionmaking process. First, the requirement of following the correct punitive standard is a very small burden considering that arbitrators already must follow "some" standard in their decision. Second, the written opinion is a small burden since it is only required in the few instances when punitive damages are awarded. Third, although judicial review impacts on the arbitral policy of reducing the burden on the judiciary, judicial review is not mandatory and the review process is quite brief compared to the burden caused by a jury trial determination of punitive damages. Therefore, the burden on the arbitration process is outweighed by the greatly enhanced accuracy of punitive damages awards.

5. The State has no Legitimate Interest in a Speedy and Cost Efficient Arbitration that Results in Arbitrary Punishment

The State has no legitimate interest in a speedy and cost efficient arbitration process that results in erroneous penalties. "It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm. . . ."[103] A written opinion and the subsequent possibility of meaningful judicial review will permit an arbitrator to award a "full range of remedies"[104] and therefore provide the best balance between maintaining the efficacy of commercial arbitration and protecting against erroneous punitive awards.

V. CONCLUSION

Arbitration is a dispute resolution mechanism created by contract and as such can effectuate the intent of the parties. Pu-

103. Smith v. Wade, 461 U.S. 30, 87-88 (1983) (Rehnquist, J., dissenting).

104. Willoughby Roofing & Supply Co., Inc. v. Kajima, 598 F.Supp 353, 362 (N.D. Ala 1984).

nitive damages are a creation of the State and serve the distributive purpose of punishment and deterrance by supercompensating the injured party. When courts permit arbitrators to award punitive damages, they take the traditional and exclusive coercive power of the State and enforce a determination by a private arbitrator. The private use of punitive damages therefore constitutes "state action" and triggers due process protection against arbitrary government action.

An arbitration award of punitive damages violates due process by giving the arbitrator unacceptable discretion. There are virtually no safeguards to protect against an arbitrator making a mistake. An arbitration award will not be disturbed unless there was a "manifest disregard" of the law. Due to the lack of a written opinion, judicial review is usually foreclosed.

The *Mathews* calculus balances the weight of the procedures needed to prevent erroneous deprivation against the weight of preserving the finality and efficacy of arbitration. The balance dictates that the *Haslip* factors must be followed. An arbitrator must use the correct punitive damages standard, and an award of punitive damages must be accompanied by a written opinion. Judicial review will then be available to use objective criteria to insure the punitive damages award does not exceed the amount needed to punish and deter wrongdoers. The burden of these added procedures on arbitration is small in light of the increased accuracy of punitive damages awards. Thus, the *Willoughby* policy of promoting arbitration by making available a "full range of remedial tools,"[105] and the *Garrity* policy of prohibiting an "unlimited draft upon judicial power,"[106] are reconciled.

*Ira P. Rothken**

105. *Id.*

106. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358 (1976) (quoting Matter of Publishers' Association of N.Y. City, 280 App.Div. 500, 503 (1952)).

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