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“Sticky” Arbitration Clauses?:
The Use of Arbitration Clauses after *Concepcion* and *Amex*

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We present the results of the first empirical study of the extent to which businesses have switched to arbitration after *AT&T Mobility LLC v. Concepcion*. After the Supreme Court’s decision in *Concepcion*, commentators predicted that every business soon would use an arbitration clause, coupled with a class arbitration waiver, in their standard form contracts to avoid the risk of class actions. We examine two samples of franchise agreements: one sample in which we track changes in arbitration clauses since 1999, and a broader sample focusing on changes since 2011, immediately before *Concepcion* was decided. Our central finding is consistent across both samples of franchise agreements: the use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration. While our results necessarily are limited to franchise agreements and may not be generalizable to consumer and employment contracts, they nonetheless provide valuable evidence on how businesses are responding to *Concepcion*.

Given our finding that only a handful of franchisors have switched to arbitration clauses since *Concepcion*, the next question is “why not”? We reexamine the assumptions underlying the predictions of a switch to arbitration — that there is no reason for a business not to use an arbitral class waiver and that businesses readily and costlessly can and will modify their form contracts — and find reason to question both. By using an arbitration clause, businesses do more than simply contract out of class actions: they contract for a bundle of dispute resolution services, including, for example, a very limited right to appeal. For businesses that perceive themselves as unlikely to be sued in a class action, these “bundling costs” may discourage them from using an arbitration clause. In

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DRAFT
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addition, even standard form contracts might be sticky — i.e., resistant to change even if change might be in the business’s best interest. We find empirical support for both possible explanations for why many franchisors have not begun using arbitration clauses after *Concepcion*.

Finally, we consider the potential implications of the Court’s subsequent decision in *American Express Cos. v. Italian Colors Restaurant* for the future use of arbitration clauses. To the extent bundling costs deter the use of arbitral class waivers, we still would not expect all or most businesses to switch to arbitration even after *Amex*. Likewise, to the extent contract stickiness explains the limited switch to arbitration, *Amex* will have limited effect. In fact, *Amex* might actually make class action waivers that are not part of an arbitration clause more attractive than before. Although on its facts *Amex* addresses the enforceability of arbitral class waivers, much of the Court’s reasoning applies as well to non-arbitral class waivers, which avoid the bundling costs of an arbitral class waiver. Of course, even after *Amex* much legal uncertainty remains about the enforceability of non-arbitral class waivers. But on this broad interpretation, *Amex* on the margin increases the attractiveness of non-arbitral class waivers and might result in some uptick in their use (an increase that was occurring even before *Amex*, at least in franchise agreements).

I. Introduction

The Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*¹ has been described as a “crushing blow to consumers,”² a “disaster for consumer protection,”³ and “one of the most important and favorable cases for businesses in a very long time.”⁴ In *Concepcion*, the Court held that the Federal Arbitration Act preempts state court decisions invalidating class arbitration waivers as unconscionable.⁵ After *Concepcion*, commentators predicted that every business soon would use an arbitration clause, coupled with a class arbitration waiver, in their standard

¹ 131 S. Ct. 1740 (2011).

² Bob Sullivan, *After High Court Ruling, Firms Divide and Conquer in Consumer Cases*, NBC News (Sept. 21, 2011), available at http://redtape.nbcnews.com/_news/2011/09/21/7863184-after-high-court-ruling-firms-divide-and-conquer-in-consumer-cases?lite (quoting Ed Mierzwinski, U.S. Public Interest Research Group).

³ Bruce D. Greenberg, *A Poor Judicial Product and a Disaster for Consumer Protection: A Lengthy Analysis of AT&T v. Concepcion* (May 5, 2011), available at <http://appellatelaw-nj.com/a-poor-judicial-product-and-a-disaster-for-consumer-protection-a-lengthy-analysis-of-att-v-concepcion/>; see also Ian Millhiser, *The Supreme Court’s One Thousandth Cut Against Consumers* (Nov 9, 2010), available at <http://thinkprogress.org/justice/2010/11/09/176967/att-concepcion/> (“if *Concepcion* turns out badly it will be a disaster for millions of American consumers and a green light for corporate America to scam us all a few dollars at a time”).

⁴ Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration* (Apr. 27, 2011), available at <http://www.nytimes.com/2011/04/28/business/28bizcourt.html> (quoting Brian Fitzpatrick, Vanderbilt University Law School) (“‘The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements,’ Brian T. Fitzpatrick, a law professor at Vanderbilt University, said. ‘This is a game-changer for businesses.’”)

⁵ 131 S. Ct. at 1753.

DRAFT
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form contracts to avoid the risk of class actions.⁶ A “tsunami”⁷ of these arbitral class waivers was coming, such that “[a]fter *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action.”⁸

More recently, a similar chorus of criticisms followed the Supreme Court’s decision in *American Express Co. v. Italian Colors Restaurant (Amex)*.⁹ In *Amex*, the Court rejected the argument that an arbitral class waiver was unenforceable because it precluded the plaintiffs from vindicating their federal statutory rights, even though the lack of class relief arguably made it uneconomical for plaintiffs to prove their federal antitrust claim.¹⁰ This decision ended most if not all remaining uncertainty over the enforceability of arbitral class waivers.¹¹ Reiterating the refrains about *Concepcion*, commentators quickly decried *Amex* as an “unmitigated disaster” and the “worst Supreme Court arbitration decision ever,”¹² and predicted “a new rash of companies issuing arbitration clauses that preclude class actions.”¹³

⁶ See, e.g., Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON. (Nov. 7, 2010), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL> (“Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions [arbitration agreements with class waivers.]”); Nathan Koppel, *Will Federal Consumer Bureau Ride to the Rescue of Class Actions?*, WSJ LAW BLOG (Apr. 29, 2011), available at <http://blogs.wsj.com/law/2011/04/29/will-federal-consumer-bureau-ride-to-the-rescue-of-class-actions/> (“Class-action bans are already pretty common in certain industries, such as consumer credit and cell phones, and they are about to become much more common, lawyers say.”); Steven Berk, *EBay Offering Rare Chance to Opt-Out of Forced Arbitration* (Oct. 1, 2012), <http://www.thecorporateobserver.com/2012/10/01/ebay-offering-rare-chance-to-opt-out-of-forced-arbitration-nov-9th-deadline/> (“At this point, nearly every company that provides consumer goods or services, from Amazon to Verizon, now requires users to agree to an arbitration clause. Companies are wasting no time in taking advantage of the opportunity to smother those pesky class action suits before they even have a chance to breathe.”); Jean Sternlight, *Eliminating Class Actions — A Tsunami in the Wake of AT&T Mobility v. Concepcion Threatens Access to Justice*, SCOTUSBLOG (Sep. 19, 2011, 9:19 AM), <http://www.scotusblog.com/2011/09/eliminating-class-actions-%e2%80%93-a-tsunami-in-the-wake-of-att-mobility-v-concepcion-threatens-access-to-justice/> (“In the future we can expect that far more companies will impose arbitral class action waivers as a means to insulate themselves from class actions.”).

⁷ Myriam E. Gilles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 629 (2012).

⁸ Ian Millhiser, *Supreme Court Nukes Consumers’ Rights In Most Pro-Corporate Decision Since Citizens United*, THINKPROGRESS: JUSTICE (Apr. 27, 2011), available at <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/>.

⁹ 133 S. Ct. 2304 (2013).

¹⁰ *Id.* at 2309-10.

¹¹ *But see infra* note ____.

¹² Paul Bland, *Worst Supreme Court Arbitration Decision Ever* (June 20, 2013), <http://publicjustice.net/blog/worst-supreme-court-arbitration-decision-ever/>; Jean Sternlight, *American Express Co. v. Italian Colors Restaurant Guts Enforcement of Federal Laws*, ADR Prof Blog (June 20, 2013), <http://www.indisputably.org/?p=4750> (same).

¹³ Sternlight, *supra* note ____; Matt Brownell, *Forced Arbitration: Killing the Right to Sue Big Companies, One TOS Agreement at a Time* (Mar 7, 2013), <http://www.dailyfinance.com/on/forced-arbitration-killing-class-action-lawsuits-tos-agreements/> (“If the court does indeed rule in favor of American Express, look for even more businesses to find ways to shield themselves from lawsuits.”); *In Court Rulings, Roberts Takes Long-Term Approach*, Fresh Air with Terry Gross (July 2, 2013) (interview with Adam Liptak), available at <http://m.npr.org/news/Politics/197713270> (“[A]ny smart business today

DRAFT
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Such empirical predictions are based on two, seemingly self-evident, assumptions. First, after *Concepcion* and *Amex* every business will benefit from using an arbitral class waiver to avoid class actions. Businesses want to avoid class actions, and, on this view, there is no downside to using an arbitral class waiver to accomplish that end. The writings of Myriam Gilles exemplify this first assumption:

I regard it as inevitable that firms will ultimately act in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class liability. Why wouldn’t they? Once the [class] waivers gain broader acceptance and recognition, it will become malpractice for corporate counsel not to include such clauses in consumer and other class-action-prone contracts.¹⁴

Second, unlike negotiated contracts between sophisticated parties, which may be “sticky” and resistant to change, consumer contracts can more easily be changed unilaterally by the business party. Gilles makes this assumption explicit as well: “most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop.”¹⁵

It has now been more than two years since the decision in *Concepcion*, long enough to evaluate at least preliminarily how contracting practices have changed in response to the decision. In this paper, we present the results of the first empirical study of the extent to which businesses have switched to arbitration after *Concepcion*. As the basis for our study, we examine two samples of franchise agreements: one sample in which we track changes in arbitration clauses since 1999, and a broader sample focusing on changes since 2011, immediately before *Concepcion* was decided. Commentators have strongly urged franchisors, like consumer businesses and employers, to switch to arbitration clauses after *Concepcion*.¹⁶

puts in a clause that says you must arbitrate, and you can’t join up with other people to do so, you can’t do it in arbitration, you can’t do it in court, you’re on your own.”).

¹⁴ Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005); see also Myriam Gilles, *Gutting the Vindication-of-Rights Challenge to Arbitration Agreements*, 81 GEO. WASH. U.L. REV. __ (forthcoming 2013) (ms. at 1) (predicting that “one day soon, some unfortunate transactional lawyer will be the first to be held liable for failing to insert an arbitration clause banning all aggregate claiming in a standard form agreement”); Gilles & Friedman, *supra* note __, at 629 (same).

¹⁵ Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 846 (2012); see also Jean R. Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice*, 90 ORE. L. REV. 703, 718 (2012) (“For companies that fear being sued in class actions it will be quite easy to insert class action waivers into small-print documents or online provisions that they send or make available to their customers or employees.”); Brownell, *supra* note __ (“It’s easy for tech companies, websites and wireless carriers to insert arbitration clauses into their contracts, because people are used to skipping the terms of service agreements and fine print that accompany these services.”).

¹⁶ Anthony J. Calamunci, *Concepcion v. AT&T: Its Impact on Franchise Law* (June 15, 2001), <http://www.lexology.com/library/detail.aspx?g=bc0de932-81a5-4356-a25d-41d69083f3eb> (“*Concepcion*, when applied to franchise agreements, grants franchisors the authority to draft much stronger language even when the agreement is offered as a “take-it or leave-it” Franchisors should contact counsel and sharpen their pencils. If there was ever a time to test the boundaries of the fine print, the time is now!”); Martin Fern, *Franchise Law*

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Indeed, franchise agreements were among the very first types of contracts as to which lawyers first publicized the use of an arbitration clause as a “class action shield” back in the 1990s.¹⁷ Moreover, franchise agreements exemplify a rare type of standard form contract that is publicly available in a systematic way and for which a reasonably lengthy history of contracting practices is available. While our results necessarily are limited to franchise agreements and may not be generalizable to consumer and employment contracts, they nonetheless provide valuable evidence on how businesses are responding to *Concepcion*.¹⁸

Our central finding is consistent across both samples of franchise agreements: ***the predicted tsunami of arbitral class waivers has not occurred***. The use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration. The reason is not that all franchisors were already using arbitration before *Concepcion*.¹⁹ Indeed, less than half or two-thirds of franchisors (depending on the sample) used arbitration clauses in their standard form contracts immediately prior to *Concepcion*.²⁰ There was plenty of room for franchisors to switch to arbitration, but they have not done so in any substantial way.

Given our finding that only a handful of franchisors have switched to arbitration clauses since *Concepcion*, the next question is “why not”? We examine the assumptions underlying the predictions of a tsunami of arbitration clauses — that there is no reason for a business not to use an arbitral class waiver and that businesses readily and costlessly can and will modify their form contracts — and find reason to question both. By using an arbitration clause, businesses do more

Update: Protecting a Franchisor Against the Risk of System-Wide Class Actions (June 13, 2011), <http://franchiselaw.foxrothschild.com/tags/class-actions/>

(“[T]he AT&T decision ends this debate [over the pros and cons of arbitration], at least for franchisors and companies that provide contractual services to consumers, since it is now clear that a franchisor may both mandate arbitration of franchisor-franchisee disputes and preclude classwide arbitrations. This can effectively eliminate the risk of a class action by franchisees against a franchisor. The AT&T decision now makes a well-drafted arbitration clause an essential feature of every franchise agreement.”); Judy Rost et al., *Comparative International Perspectives of Arbitration in the Franchising Context*, 31 FRANCHISE L.J. 124, 126 (2012) (“In the United States, one compelling reason for franchisors to include an arbitration provision is as a potential means to avoid class actions.”); Kemp Sawers & Paul Russell, *Franchise Report: Avoiding Class Arbitrations* (May 11, 2011) http://www.bakerbotts.com/file_upload/2011MayIPFranchiseReportAvoidingClassArbitrations.htm (“The prudent franchisor should not assume that the absence of express language authorizing class arbitration immunizes the franchisor from class treatment. Instead, the safe course of action for franchisors is to include a class arbitration waiver in franchise agreements.”).

¹⁷ Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).

¹⁸ Anecdotal evidence suggests that some industries have shifted more strongly toward arbitration since *Concepcion*. Thus, Microsoft, Sony, and other software and online companies have announced since *Concepcion* that they were adopting arbitration clauses in their end user license agreements. We seek to reconcile these anecdotal reports with our empirical findings later in the paper. See *infra* text accompanying notes __-__.

¹⁹ By comparison, the limited empirical evidence on the use of arbitration clauses by mobile wireless services providers suggests that almost all facilities-based operators already use arbitration clauses, in which case of course one would not expect a major move toward arbitration by such businesses. See Erin O’Hara O’Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure* (June 14, 2013) (ms. at 35).

²⁰ See *supra* text accompanying notes __-__; see also Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 727; Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 95 (2008).

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than simply contract out of class actions: they contract for a bundle of dispute resolution services, including, for example, a very limited right to appeal. For businesses that perceive themselves as unlikely to be sued in a class action (and hence to receive little benefit from an arbitral class waiver), the other services bundled with the waiver of class actions (what we call “bundling costs”) may discourage them from using an arbitration clause. In addition, even standard form contracts might be sticky — i.e., resistant to change even if change might be in the business’s best interest. We find empirical support for both possible explanations for why many businesses have not switched to arbitration clauses after *Concepcion*.²¹

We then consider the potential implications of *Amex* for the future use of arbitration clauses. Of course, if all businesses switched to arbitration because of *Concepcion*, *Amex* likely would have little additional effect. But given our finding that such a switch has not occurred, the question then is how is *Amex* likely to affect contracting behavior? To the extent businesses have not switched to arbitration clauses because of any residual uncertainty over the enforceability of arbitral class waivers, *Amex* largely removes that uncertainty. The expected result would be an increased use of arbitration clauses. But to the extent businesses have not switched to arbitration clauses for reasons other than legal uncertainty, *Amex* will not make arbitration more attractive. Other characteristics of arbitration (such as the limited right to appeal) might explain franchisors’ decisions not to switch. To the extent such bundling costs deter the use of arbitral class waivers, we still would not expect all or most businesses to switch to arbitration. Likewise, to the extent contract stickiness explains the limited switch to arbitration, *Amex* will have limited effect.

That said, *Amex* might actually make an alternative to arbitral class waivers — what we call non-arbitral class waivers — more attractive than before. By non-arbitral class waivers, we mean waivers of class actions that are not part of an arbitration clause.²² The parties remain in court but by contract seek to waive class actions directly. Such clauses are not as common as arbitral class waivers, but they do exist.²³ Although on its facts *Amex* addresses the enforceability of arbitral class waivers, much of the Court’s reasoning applies as well to non-arbitral class waivers. Indeed, in our view *Amex* might be better understood not as a case about arbitration clauses, but, as a case about class actions. If read broadly, it could be construed as making class actions waiveable even without the use of an arbitration clause. The advantage of non-arbitral class waivers for businesses is that they avoid the bundling costs of an arbitral class waiver: the business can avoid class actions but otherwise have disputes resolved in court (maintaining full appeal rights, for example). Of course, even after *Amex* much legal uncertainty remains about the enforceability of non-arbitral class waivers, and we certainly do not predict a “tsunami” of non-arbitral class waivers. But on this broad interpretation, *Amex* on the margin increases the attractiveness of non-arbitral class waivers and might result in some uptick in their use (an increase that was occurring even before *Amex*, at least in franchise agreements).

These findings carry several implications. First, and most obviously, they call into question some of the empirical predictions following *Concepcion* and *Amex*. So far, at least, it is

²¹ For other possible reasons, see *infra* text accompanying notes ___-___.

²² We elaborate on the importance of this technical distinction in Part II.

²³ See *infra* text accompanying notes ___-___.

DRAFT
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simply not true that all or even most businesses are switching to arbitration clauses after *Concepcion*. To be clear, however, whether businesses have broadly switched to arbitration clauses with class waivers is not the same question as whether courts have applied *Concepcion* to dismiss claims seeking class relief in court, or even whether *Concepcion* (and *Amex*) might result in the end of consumer and other contract-based class actions. We offer no views here on how courts have applied *Concepcion*, and readily acknowledge (as our prior research has found empirically²⁴) that the businesses most likely to be subject to class actions (or at least perceive themselves to be) are the ones most likely to use arbitral class waivers.

Second, the paper cautions against unquestioning acceptance of the common “parade-of-horribles” arguments marshaled in courtrooms around the nation, including the Supreme Court of the United States. At a high level of abstraction, this argument typically takes the following form: if the court decides the case in a certain manner, an avalanche of undesirable behavior will surely follow. In the specific context of contract cases, the argument unfolds in this manner: if the court enforces certain contractual terms in a firm’s contract, similarly situated firms will flock to the approved language, often to the detriment of some other constituency, such as a consumer or an employee. In whatever context, arguments of this sort ultimately entail predictions about human (or firm) behavior. At the time they are advanced, those predictions *should* have some empirical foundation. Yet often they do not. Moreover, after the court decides the case, those predictions *should* be tested empirically. Yet often they are not. Not only does this state of affairs sully the quality of legal argument, it entails the risk that a court may base a decision on an invalid empirical premise.

Third, the paper adds to our understanding of the nature of arbitration as a means of resolving disputes. An arbitration clause is an agreement to a bundle of dispute resolution services — a party-appointed judge, less discovery, a limited right to appeal, and the like. Litigation provides its own bundle of services. While parties can modify the bundles by contract, there are limits. For some parties, all aspects of the arbitral bundle may be preferable to all aspects of the litigation bundle. For others, some characteristics of the arbitral bundle may be advantageous while others are not, but the advantages outweigh the disadvantages. But for still others, the disadvantages may outweigh the advantages of arbitration — even if one of those advantages is avoiding class actions. Stated otherwise, one cannot assume that parties will choose arbitration on the basis of only one characteristic without considering the entire bundle.

Fourth, this paper provides insights into the nature of contract change and innovation. Specifically, it draws on prior scholars’ work about why, under certain circumstances, contract terms might be “sticky” — that is, why parties might be reluctant to modify their contracting behavior even when it might be beneficial for them to do so. We examine several explanations for why contracting parties do not necessarily adopt terms that would be to their benefit, and consider how those explanations apply, if at all, when the contracts involve parties occupying unequal bargaining positions. There certainly is reason to expect some degree of stickiness in franchise agreements, and we find some evidence of stickiness in the contracts we studied. But

²⁴ Christopher R. Drahozal & Peter B. Rutledge, *The Use of Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 540 (2012).

DRAFT
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the evidence does not exclude the possibility of other explanations for the lack of a shift to arbitration by franchisors, such as the bundling theory suggested above. This paper also gives reason to question whether a Supreme Court decision upholding a particular contract provision necessarily is a sufficient “shock” to overcome contract stickiness.

Finally, fifth, we offer a first look at how the Supreme Court’s recent decision in *Amex* might affect contracting behavior. Although on its facts *Amex* involves the enforceability of an arbitral class waiver, the Court’s reasoning might extend as well to non-arbitral class waivers, at least as to certain federal statutory claims. There are, however, important differences between the two forms of class waivers (arbitral vs non-arbitral) that might affect firm behavior. Unlike arbitral class waivers, non-arbitral class waivers likely remain subject to state unconscionability challenges (since *Concepcion* is based on preemption of such challenges by the Federal Arbitration Act and therefore is limited to arbitral class waivers). But for businesses that want to avoid the bundling costs of arbitration (e.g., retain the right to appeal in court), non-arbitral class waivers would become more attractive after *Amex*. Thus, for a firm that favored the most airtight class waiver, an arbitral class waiver might make sense; for a firm that favored a greater opportunity to appeal an adverse decision, a non-arbitral class waiver might make sense.

Part II of the paper provides background on the use of arbitration clauses as class action waivers and on the *Concepcion* and *Amex* decisions. Part III discusses the economics of arbitration and standard form contracts, considering both arbitration as a bundle of dispute resolution services and the “stickiness” of contract terms. Part IV describes our data and methodology and presents our empirical analysis. Part V examines possible implications of *Amex* for the use of arbitral and non-arbitral class waivers. Finally, Part VI summarizes our conclusions and sets out the implications of our empirical findings.

II. Background: *Concepcion*, *Amex*, and the Use of Arbitration Clauses

We begin with terminology and some history. Although many of the cases and much of the commentary speak generically of “class action waivers,” here we use more precise labels. Technically, provisions addressing class relief in arbitration clauses are class *arbitration* waivers, not class action waivers.²⁵ The arbitration clause itself has the effect of avoiding class relief in court because the parties have agreed to arbitrate any dispute instead.²⁶ The additional waiver language precludes the arbitration from proceeding on a class basis, hence the “class arbitration waiver” label.

²⁵ Although sometimes an arbitration agreement will include a non-arbitral class waiver in the event the arbitration clause is invalidated. See David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. ____ (manuscript at 29-30).

²⁶ See, e.g., *Ex Parte Green Tree Fin’l Corp.*, 723 So. 2d 6, 10 & n.3 (Ala. 1998); *Zawikowski v. Beneficial Nat’l Bank*, 1999 U.S. Dist. LEXIS 514 (N.D. Ill. Jan. 7, 1999); *Collins v. International Dairy Queen, Inc.*, 169 F.R.D. 690, 694 (M.D. Ga. 1997); *Hunt v. Up North Plastics*, 980 F. Supp. 1046, 1048 (D. Minn. 1997).

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In this paper, we refer to the combined effect of an arbitration clause and a class arbitration waiver as an “arbitral class waiver.”²⁷ By comparison, we use the term “non-arbitral class waiver” to refer to contract provisions that seek to waive the availability of a class action in court without using an arbitration clause. Such provisions are much less common but do exist, particularly in the franchise setting.²⁸ Finally, we refer to both types of provisions collectively as class action waivers.²⁹

Because the history of arbitral class waivers has been detailed at length elsewhere,³⁰ we provide only a brief overview here. We reiterate the highlights of the events leading up to *Concepcion* in sub-part A, and then discuss *Concepcion* itself in sub-part B. Finally, in sub-part C we consider the *Amex* case and its importance for the enforceability of class waivers.

A. Arbitration Clauses and Class Actions

Lawyers for franchisors were among the very first to recognize (in print, anyway) that an arbitration clause could reduce the risks of class actions faced by their clients.³¹ When a party agrees to have its dispute resolved in arbitration, it necessarily cannot be party to a court action involving that same dispute; it has agreed to proceed in arbitration instead.³² Thus, in a 1997 article in the *Franchise Law Journal*, franchise lawyer Jack Dunham, after explaining that franchisors faced a heightened risk of class actions, concluded that “franchisors with an arbitration clause in their franchise agreements have an effective tool for managing these new class action risks” — in other words, a “class action shield.”³³

²⁷ For prior uses of the phrase, see, e.g., Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 KAN. L. REV. 767, 786 (2012); see also Sternlight, *supra* note __ (“arbitral class action waiver”).

²⁸ See *infra* text accompanying notes __-__.

²⁹ Gilles uses the term “collective action waiver” to the same effect. Gilles, *supra* note __, at 375-76; see also Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 276, 270-80 (2009).

³⁰ See, e.g., Jill I. Gross, *AT&T Mobility and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 51-56 (2012); Sternlight, *supra* note __, at 705-07; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

³¹ For other early publications making the same point, see Michael R. Pennington, *Every Health Insurer's Litigation Nightmare: A Case Study of How One Class Action Affected the Business of One Health Insurer*, BRIEF, Summer 1999, at 46, 52 (“In a further effort to limit litigation exposure in general, and exposure to class actions in particular, many insurance companies in Alabama are presently working to sustain the use of arbitration clauses in insurance policies.”); J.T. Westermeir, *How Arbitration Clauses Can Help Avoid Class Action Damages: Strategies for Managing Risks of Litigation*, COMPUTER L. STRATEGIST, Sept. 1997, at 1; Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May/June 1998, at 24. (“Arbitration is a powerful deterrent to class action lawsuits against lenders because the great weight of authority holds that arbitrations cannot be conducted on a class basis unless the parties have agreed to do so.”). Kaplinsky describes himself as the “pioneer of class action waivers.” See Mickey Meece, *Arbitration Is Here to Stay and One Lawyer Says That Is Good for Consumers*, Forbes.com (Jan. 11, 2012), available at <http://www.forbes.com/sites/mickeymeece/2012/01/11/arbitration-is-here-to-stay-and-one-lawyer-says-that-is-good-for-consumers/>.

³² See *supra* text accompanying note __.

³³ Dunham, *supra* note __, at 141.

DRAFT
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At the time, many courts refused to order arbitration to proceed on a class basis so that the arbitration clause itself “shielded” franchisors from class actions.³⁴ Even so, some franchisors (and other businesses) began coupling their arbitration clauses with provisions precluding arbitration from proceeding on a class basis.³⁵ Such “class arbitration waivers” became more important after the Supreme Court’s 2003 decision in *Green Tree Financial Corp. v. Bazzle*.³⁶ The issue in *Bazzle* was whether the Federal Arbitration Act preempted the South Carolina Supreme Court’s decision compelling arbitration to proceed on a class basis.³⁷ The U.S. Supreme Court was sharply divided, with the plurality concluding that the issue of whether an arbitration clause permitted class arbitration was for the arbitrator to decide.³⁸ (Justice Stevens concurred in the judgment vacating the South Carolina court’s decision so that there would at least be a judgment of the Court.³⁹).

In response to *Bazzle*, the American Arbitration Association promulgated rules for administering class arbitrations,⁴⁰ and indicated that it would administer a class arbitration as long as the parties had agreed to arbitrate under any set of AAA rules and the arbitration agreement was “silent” on class arbitration, consolidation, or joinder.⁴¹ Following the *Bazzle* plurality, the AAA class arbitration rules specified that the arbitrator was to decide in a “clause construction award” “whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”⁴² The arbitration proceedings would then be stayed to permit any party to seek court review of the clause construction award. Assuming the arbitrator construed the agreement as permitting class arbitration, subsequent steps in the process track Federal Rule of Procedure 23 on class actions — i.e., the arbitrator would decide whether to certify a class (the “class determination award”),⁴³ and if the arbitrator does so (and the case does

³⁴ *E.g.*, *Iowa Grain Co. v. Brown*, 171 F.3d 504, 510 (7th Cir. 1999); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274-77 (7th Cir. 1995). *But see* *Keating v. Superior Court*, 31 Cal. 3d 584 (1982), *rev’d on other grounds sub nom.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Bazzle v. Green Tree Fin’l Corp.*, 569 S.E.2d 349 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

³⁵ *See* Drahozal, *supra* note __, at 731-32.

³⁶ 539 U.S. 444 (2003). It is not just parties or commentators that make empirical predictions. *See* Transcript of Oral Argument at 55, *Green Tree Fin. Corp.*, 539 U.S. 444 (No. 02-634), *available* at www.supremecourt.us/oral_arguments/argument_transcripts/02-634.pdf (“Does this case have any real future significance, because isn’t it fairly clear that all the arbitration agreements in the future will prohibit class actions?”).

³⁷ 539 U.S. at 447 (Breyer, J.). A companion case involved a decision by the arbitrator that arbitration could proceed on a class basis. *Id.* at 453-54 (Breyer, J.).

³⁸ *Id.* at 452-53 (Breyer, J.).

³⁹ *Id.* at 454-55 (Stevens, J., concurring in the judgment and dissenting in part).

⁴⁰ Am. Arb. Ass’n, Supplementary Rules for Class Arbitrations (Oct. 8, 2003), http://www.adr.org/aaa/ShowPDF?jsessionid=Q38zRMZQvJFBzn295h3vWxwZDyxRNYqnmT2dlynW2SmlyPCLGRpL!644581746?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf [hereinafter AAA Class Arbitration Rules]. JAMS also has promulgated class arbitration rules. *See* JAMS Class Action Procedures (May 1, 2009), <http://www.jamsadr.com/rules-class-action-procedures/>.

⁴¹ AAA Policy on Class Arbitrations (July 14, 2005), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840 (“[T]he American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Association’s rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.”).

⁴² AAA Class Arbitration Rules, *supra* note __, Rule 3.

⁴³ *Id.* Rules 4-5.

DRAFT
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not settle), proceed to adjudicate the merits.⁴⁴ Since promulgating its rules, the AAA has administered over 350 class arbitration proceedings.⁴⁵

In only a handful of clause construction awards (7 of 135, or 5%) in AAA class arbitrations did the arbitrators decide that the arbitration clause did not permit class arbitration.⁴⁶ In the vast majority, the arbitrators construed the clause as permitting class arbitration (95 of 135, or 70%) or the parties stipulated that it did so (33 of 135, or 24%).⁴⁷ Seeking to avoid the prospect of class proceedings in arbitration, businesses increasingly included class arbitration waivers in their arbitration clauses.⁴⁸ Consumers, employees, and franchisees in turn challenged the enforceability of those class arbitration waivers, most commonly (although not exclusively) on the ground that the class arbitration waiver was unconscionable.⁴⁹ Businesses responded by arguing that the FAA preempted such unconscionability decisions, and the issue made it to the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*.⁵⁰

B. *AT&T Mobility LLC v. Concepcion* and FAA Preemption

The Concepcions were cell phone customers of AT&T Mobility (AT&T), who were charged sales tax on what AT&T advertised as a “free” phone.⁵¹ The AT&T cell phone agreement included an arbitration clause with a class arbitration waiver, but also provided that AT&T was to pay all the customer’s arbitration costs for non-frivolous claims; AT&T could not seek to recover its attorney’s fees from the customer; and if the customer recovered more in arbitration than AT&T’s final written settlement offer, the customer would receive a minimum of \$7500 (a so-called “bonus payment”) plus double attorneys’ fees.⁵²

When the Concepcions filed a class action on behalf of all similarly situated cell phone customers, AT&T filed a petition to compel arbitration. The trial court and the Ninth Circuit held that, under California law, the class arbitration waiver was unconscionable and not

⁴⁴ *Id.* Rule 7.

⁴⁵ Gregory A. Litt & Tina Praprotnik, *After Stolt-Nielsen, Circuits Split, but AAA Filings Continue*, MEALEY’S INT’L ARB. REP., July 2012, at 1.

⁴⁶ Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 22, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198).

⁴⁷ *Id.*

⁴⁸ *See infra* text accompanying notes ___-___.

⁴⁹ *See infra* text accompanying notes ___-___. In addition, arbitration clauses also were challenged on the ground that they precluded the claimant from vindicating his or her statutory rights. *See infra* text accompanying notes ___-___.

⁵⁰ Some of the groundwork for the Court’s decision in *Concepcion* was laid by *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), in which the Court vacated a class arbitration award on the ground that the arbitrators exceeded their powers. *See* 9 U.S.C. § 10(a)(4).

⁵¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

⁵² *Id.*

DRAFT
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severable from the rest of the arbitration clause.⁵³ The lower courts also concluded that the FAA did not preempt California’s application of its unconscionability doctrine.⁵⁴

The Supreme Court reversed, holding that the application of state unconscionability doctrine to invalidate an arbitral class waiver was preempted. The Court began by explaining that while the savings clause of FAA Section 2 permitted the use of general state contract defenses to invalidate arbitration clauses, such use was not unlimited. Citing dicta from two prior decisions, the Court reiterated that “a court may not ‘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 ... the state legislature cannot.’”⁵⁵ The Court continued:

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery....

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed “a panel of twelve lay arbitrators” to help avoid preemption).⁵⁶

Application of state unconscionability doctrine so as effectively to require class arbitration, the Court concluded, likewise “[i]nterfered with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁵⁷

The decision in *Concepcion* has been extremely controversial and widely criticized.⁵⁸ Although a handful of courts have sought to limit the decision to its facts — i.e., to arbitration clauses with a “bonus provision” and other sorts of pro-consumer provisions that the AT&T clause had⁵⁹ — most have not done so.⁶⁰ On the first anniversary of the *Concepcion* decision, in

⁵³ *Laster v. T-Mobile USA, Inc.*, 2008 U.S. Dist. LEXIS 103712 (S.D. Cal. Aug. 11, 2008), *aff’d sub. nom.*, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁵⁴ *E.g.*, *Laster*, 584 F.3d at 857-59.

⁵⁵ 131 S. Ct. at 1746 (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9 (1987)).

⁵⁶ *Id.* at 1747.

⁵⁷ *Id.* at 1748. According to the Court, class arbitration is “inconsistent with the FAA” because (1) “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”; (2) “class arbitration requires procedural formality”; and (3) “class arbitration greatly increases risks to defendants.” *Id.* at 1751-53.

⁵⁸ See *supra* text accompanying notes ___-__.

⁵⁹ See, e.g., *Feeney v. Dell, Inc.*, 28 Mass. L. Rptr. 652, at *8 (Super. Ct. 2011) (distinguishing *Concepcion* on ground that unlike the AT&T Mobility clause in *Concepcion*, “[t]he Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in controversy”), *rev’d*, 993 N.E.2d 329, 331 (Mass. 2013).

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April 2012, Public Citizen “reported that 76 court decisions had applied *Concepcion* to stay or dismiss a putative class action.”⁶¹ Courts have applied *Concepcion* to uphold arbitral class waivers in a variety of contracting contexts, including franchise agreements.⁶²

After *Concepcion*, plaintiffs continued to challenge the enforceability of arbitral class waivers on the ground that the lack of class relief precluded the plaintiffs from vindicating their rights under a particular federal statute (so-called “effective vindication” challenges). Building on dicta in a number of Supreme Court arbitration cases, plaintiffs challenged arbitration agreements on the ground that the arbitration clause amounted to an impermissible prospective waiver of a statutory right and hence was unenforceable.⁶³ In simple terms, the argument is that if parties cannot waive a statutory right directly,⁶⁴ they should not be able to do so indirectly — by using an unfair arbitration clause. A common basis for an effective vindication challenge is that the upfront costs of arbitration are too high.⁶⁵ But the challenge has been made against other provisions of arbitration clauses as well, and after *Concepcion* it became the primary basis for challenging arbitral class waivers.

C. American Express Co. v. Italian Colors Restaurant and the Effective Vindication of Federal Statutory Rights

The effective vindication theory — as applied to class waivers — reached the Supreme Court in *American Express Co. v. Italian Colors Restaurant*.⁶⁶ The plaintiffs in *Amex* were merchants that accepted American Express charge cards. They brought a class action alleging that the sales and pricing practices of American Express violated the federal antitrust laws. The agreement between American Express and the merchants included an arbitration clause with a class arbitration waiver, and American Express sought to compel individual arbitration of the merchants’ claims. The merchants opposed individual arbitration on the ground that proof of their antitrust claim was so expensive that the claim could only be brought economically as a

⁶⁰ See, e.g., *Bellows v. Midland Credit Mgmt., Inc.*, 2011 U.S. Dist. LEXIS 48237, at *11 (S.D. Cal. May 4, 2011); *Day v. Persels & Assocs., LLC*, 2011 U.S. Dist. LEXIS 49231, at *15-*16 (M.D. Fla. May 9, 2011); *Zarandi v. Alliance Data Sys. Corp.*, 2011 U.S. Dist. LEXIS 54602, at *4-*5 (C.D. Cal. May 9, 2011).

⁶¹ Public Citizen & National Association of Consumer Advocates, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident 4* (April 2012) (“identify[ing] 76 potential class action cases where judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable”).

⁶² See, e.g., *Muriithi v. Shuttle Express*, 712 F.3d 173 (4th Cir. 2013); *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766 (8th Cir. 2011); *Villano et al v. TD Bank*, 2012 U.S. Dist. LEXIS 123013, at *8 (D.N.J. Aug. 29, 2012); *Kairy v. SuperShuttle Int’l, Inc.*, 2012 U.S. Dist. LEXIS 134945 (Sept. 20, 2012).

⁶³ E.g., *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights”); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985) (“And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”).

⁶⁴ By a “direct” waiver of a statutory right, we mean a contract provision that says something like “the parties agree to waive any claim under the federal antitrust laws.”

⁶⁵ E.g., *Green Tree*, 531 U.S. at 90.

⁶⁶ 133 S. Ct. 2304 (2013).

DRAFT
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class action. Enforcing the arbitral class waiver would prevent them from effectively vindicating their statutory rights under the antitrust laws.

The district court granted the motion to compel arbitration, but the Second Circuit reversed, holding that the class arbitration waiver was unenforceable.⁶⁷ After reconsidering its decision in light of both *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.* and *AT&T Mobility LLC v. Concepcion*, the Second Circuit reaffirmed its decision.⁶⁸ The Supreme Court granted certiorari and reversed.⁶⁹

The Court’s reasoning was twofold. First, the Court recited that the FAA requires enforcement of arbitration clauses, and found “[n]o contrary congressional command [that] requires us to reject the waiver of class arbitration here.”⁷⁰ Nothing in the antitrust laws (which, the Court pointed out, were enacted before adoption of the Federal Rules of Civil Procedure) precludes the waiver of class actions. “Nor does congressional approval of Rule 23,” the Court stated, “establish an entitlement to class proceedings for the vindication of statutory rights.”⁷¹

Second, as for the argument that the arbitral class waiver prevented the plaintiffs from vindicating their federal statutory rights, the Court noted that it had only recognized the argument in dicta. But even assuming such a challenge was available, the Court found it unavailing:

[T]he exception finds its origin in the desire to prevent “prospective waiver of a party’s *right to pursue* statutory remedies.” That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. Or, to put it differently, the individual suit that was considered adequate to assure “effective vindication” of a federal right before adoption of class-action procedures did not suddenly become “ineffective vindication” upon their adoption.⁷²

By rejecting the effective vindication challenge here, *Amex* resolved much of the remaining legal uncertainty over the enforceability of arbitral class waivers, at least pending future statutory or

⁶⁷ In re American Express Merchants’ Litigation, 554 F. 3d 300, 315-16 (2d Cir. 2009).

⁶⁸ *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)*, 667 F.3d 204 (2d Cir. 2012); In re American Express Merchants’ Litigation, 634 F. 3d 187, 200 (CA2 2011).

⁶⁹ 133 S. Ct. at 2312.

⁷⁰ *Id.* at 2309.

⁷¹ *Id.* at 2309-10.

⁷² *Id.*

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regulatory developments.⁷³ We discuss possible implications of the decision for non-arbitral class waivers below.⁷⁴

III. Literature Review: Bundled Dispute Resolution and Sticky Contracts

Predictions that most or all businesses will begin using arbitration clauses after *Concepcion* and *Amex* depend on two key assumptions: that there is no reason for businesses not to use arbitration clauses; and that businesses can and do readily change their standard form contracts in response to favorable court decisions.⁷⁵ In this part, we evaluate those assumptions by examining the literature on arbitration as a bundle of dispute resolution services and on the stickiness of contract terms.

A. The Decision Whether to Use an Arbitral Class Waiver: Arbitration as a Bundle of Dispute Resolution Services

The first assumption that underlies predictions of widespread switching to arbitration clauses after *Concepcion* is that there is no reason for businesses not to switch. Businesses want to avoid class actions, and they can do so — it is assumed — at essentially no cost by using an arbitral class waiver. In other words, the assumption is that the only meaningful consequence of using an arbitral class waiver is getting rid of class actions.

But an arbitration clause does more than simply reduce the risk of class actions; it removes the case altogether from a judicial forum. By using an arbitration clause, parties agree to use a bundle of dispute resolution services, a bundle that includes avoiding class actions but has other features as well.⁷⁶ These features include, for example, decision makers selected by the parties, procedures paid for by the parties, and, importantly, a very limited appeals process that, generally, cannot be altered by contract.⁷⁷ For franchisors, the lack of an appeals process is

⁷³ Congress might enact legislation restricting the enforceability of arbitral class waivers, although the prospects of any statutory change are slight. In addition, the Consumer Financial Protection Bureau has authority to regulate arbitration clauses in consumer financial services contracts under Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, after it completes its statutorily mandated study. *See* 12 U.S.C. § 5518(b).

⁷⁴ *See infra* Part IV(A).

⁷⁵ *See supra* text accompanying notes ___-__.

⁷⁶ *See, e.g.,* Drahozal & Wittrock, *supra* note __, at 300 (explaining that “arbitration clauses bundle a variety of characteristics — including but not limited to acting as a class action waiver — into a single means of dispute resolution. Not all drafting parties will agree to arbitration, even if they might prefer individual arbitrations to class actions.”).

⁷⁷ O’Hara O’Connor & Drahozal, *supra* note __, at __ (ms. at 2). In *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court held that parties could not, by agreement, expand the grounds under Section 10 of the FAA for judicial review of arbitral awards. The Court left open the possibility that such agreements might be enforceable in state court under state arbitration laws, and a few states such as California and Texas have enforced these sorts of agreements. *See, e.g.,* *NAFTA Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011); *Cable Connection Inc. v. DirectTV, Inc.*, 190 P.3d 586 (Cal. 2008).

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a very serious cost of using an arbitration clause — and an arbitral class waiver.⁷⁸ As franchise lawyer Martin Fern explains:

There has long been a debate among lawyers regarding the pros and cons of arbitration in general and in the franchise context in particular. The principal advantages of arbitration include informality, lower costs, greater efficiency and speed, and the ability to choose expert arbitrators to resolve specialized disputes. The principal disadvantage of arbitration is the absence of the availability of multi-layered appeal which can normally be filed to rectify erroneous court decisions, but not arbitration awards. In other words, in arbitration, the principal tradeoff against the many advantages is the inability of the losing party to correct erroneous decisions by the arbitrator.⁷⁹

Franchisors can mitigate some of the costs of an arbitral class waiver by using carve-outs, excluding claims for which arbitration is particularly ill-suited from arbitration such that the claims will be resolved instead in court.⁸⁰ But using carve-outs has its own costs.⁸¹

By comparison, a non-arbitral class waiver avoids the bundling costs of an arbitral class waiver. A party that prefers to have disputes resolved in court can do so but can avoid class actions as well if it uses a clause that affects only the availability of class actions.⁸² The parties still can use public court judges, take advantage of the government subsidy to courts, and appeal on much broader grounds than if their contract contained an arbitral class waiver. While non-arbitral class waivers are much less common than arbitral class waivers, they do exist.⁸³ But using a non-arbitral class waiver poses greater risks of court invalidation. After *Concepcion*, arbitral class waivers have a substantial degree of protection by the Federal Arbitration Act; non-arbitral class waivers have no such federal law backing. As a result, a number of courts — although certainly not all — have refused to enforce non-arbitral class waivers.⁸⁴ We discuss the

⁷⁸ Arguably, such costs are another cost of *Concepcion*, although alternatively one might characterize them as costs of court decisions refusing to enforce non-arbitral class waivers — which result in parties having to choose instead the less efficient arbitral class waiver. See O’Hara O’Connor & Drahozal, *supra* note __, at __ (ms. at 44 n.160).

⁷⁹ Fern, *supra* note __.

⁸⁰ O’Hara O’Connor & Drahozal, *supra* note __, at __ (ms. at 19-36).

⁸¹ *Id.* (ms. at 12-14).

⁸² Assuming, of course, that a court will enforce the non-arbitral class waiver. See *infra* text accompanying notes __-__.

⁸³ See *infra* text accompanying notes __-__.

⁸⁴ Compare *Martrano v. Quizno's Franchise Co., L.L.C.*, 2009 U.S. Dist. LEXIS 52025, at *87 (W.D. Pa. June 15, 2009) (invalidating non-arbitral class waiver); and *Elhilu v. Quizno's Franchise Co., LLC*, No. 06-CV-07855, 2008 U.S. Dist. LEXIS 109435, at *15 (C.D. Cal. April 3, 2008) (same) with *Bonanno v. Quizno's Franchise Co., LLC*, 2009 U.S. Dist. LEXIS 37702, at *69 (D. Colo. Apr. 20, 2009) (enforcing non-arbitral class waiver); see *In re Yahoo! Litig.*, 251 F.R.D. 459, 469-70 (C.D. Cal. 2008) (refusing to hold non-arbitral class waiver enforceable as a matter of law in commercial case and denying motion for summary judgment pending “more developed evidentiary record”). Cf. *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712 (Cal Ct. App. 2001) (refusing to enforce forum selection clause when forum selected does not permit class actions); *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024 (Wash. 2007) (same); *America Online, Inc. v. Pasiaka*, 870 So.2d 170, 171-72 (Fla. Ct. App. 2004) (same); and *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1085 (9th Cir. 2009) (per curiam). But cf. *Koch v. America Online, Inc.*, 139 F. Supp. 2d 690, 695 (D. Md. 2000) (concluding that unavailability of class actions in chosen forum is not reason to refuse to enforce forum selection clause); *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 464-65 (Md.

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possibility in Part V that *Amex* might make non-arbitral class waivers more enforceable. If so, non-arbitral class waivers would become more attractive, at least for those businesses that have other reasons for not using arbitration clauses.

We are not suggesting that all franchisors will avoid arbitration because of the limited right to appeal (or other bundling costs of arbitration). But the limited availability of appeals from arbitration awards certainly is a consideration on the margin. Nor is the limited right to appeal the only reason why a business might not use arbitration. Other possible reasons include less effective interim measures, the lack of summary adjudication, inefficiencies in collection cases, and added uncertainty in the application of otherwise certain legal remedies.⁸⁵ Instead, our point is simply that there are costs to using an arbitral class waiver that result from the bundled nature of arbitration, and that these costs provide a reason for some businesses not to use an arbitral class waiver even after *Concepcion* and *Amex*.⁸⁶

At the same time, not all businesses are equally susceptible to class actions. As one illustration, the Searle study found that while all of the credit card issuers and cell phone companies in a sample of AAA consumer arbitrations included class arbitration waivers in their arbitration clauses, none of the real estate brokerage firms did.⁸⁷ Presumably real estate brokerages are less subject to class actions than mass contracting firms like credit card issuers and cell phone companies, and so had less incentive to include a class arbitration waiver.

The same is true even among businesses that use mass contracts. Our prior research on the use of arbitration clauses in credit card agreements (prior to *Concepcion*) predicted that while “on the margin, issuers likely will respond to *Concepcion* ... by increasing their use of arbitration clauses,” “the significance of other factors in explaining the use of arbitration clauses” suggests that “predictions that all issuers will begin using arbitration clauses are unsupported.”⁸⁸ The other factors found to be related to the use of arbitration clauses in credit card agreements included the riskiness of the issuer’s credit card portfolio, the size of the issuer, whether the

Ct. App. 1997) (same); *America Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Ct. App. 2001) (per curiam) (same); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1012 (D.C. Ct. App. 2002).

⁸⁵ See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (and Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 453-57 (2010). This latter point is exacerbated by, but not coextensive with, the limited right to appeal.

⁸⁶ Reputational constraints provide another possible reason businesses might not use arbitration clauses with class arbitration waivers, even after *Concepcion* and *Amex*. See Gregory C. Cook, *Why American Express v. Italian Colors Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After Concepcion*, 2 U. MICH. J.L. REFORM 104A (Apr. 14, 2013) (“It is also a mistake to assert that corporate America will uniformly modify contracts to include arbitration. Making changes to an existing contract is not simple or costless. Corporate defendants make such changes cautiously and the marketplace can be a discipline on contract changes. In other words, corporations may decide not to include an arbitration clause for marketing reasons or may decide not to amend their contracts because amendment may have a marketing impact.”); Brownell, *supra* note __ (“If the court does indeed rule in favor of American Express, look for even more businesses to find ways to shield themselves from lawsuits. ‘Companies would only be restrained either by their own good conscience, or by their fear that consumers would get mad,’ says [Jean] Sternlight.”).

⁸⁷ Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 349-50 (2012) (publishing results from Searle Civil Justice Institute, Preliminary Report, Mar. 2009).

⁸⁸ Drahozal & Rutledge, *supra* note __, at 540.

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issuer specialized in credit card loans, and whether the issuer was mutually owned (i.e., was a credit union).⁸⁹

When potential bundling costs of arbitral class waivers are taken together with the relatively low risk of class actions some businesses face, it is plausible that some businesses might rationally decide not to use an arbitral class waiver in their standard form contracts. At the very least, it provides a theoretical explanation for the possibility that not all businesses will switch to arbitration after *Concepcion*, and thus presents an empirically testable proposition.

B. Making Changes to Standard Form Contracts: Are Arbitration Clauses Sticky?

The second assumption that underlies predictions of widespread switching to arbitration after *Concepcion* is that businesses can and do quickly and readily amend their form contracts in response to court decisions. Here we consider the possibility that this assumption might not hold — i.e., that contract terms might instead be “sticky.”

The notion of sticky contract terms is hardly new. Numerous scholars have examined why parties may be reluctant to alter contract terms, even when the law might (or clearly does) allow alterations that would benefit the parties. This sub-part reviews that literature and examines how it bears on the particular contracting practice examined here — namely standard form contracts presented to the other party on a take-it-or-leave-it basis. We find that several of the traditional explanations for the stickiness of contract terms likely do not apply in this particular context and, therefore, try to isolate the likeliest explanations. From there, we generate hypotheses in order to ascertain whether (and why) franchisors do not always adapt their contract terms to the extent permitted or encouraged by Supreme Court decisions.

⁸⁹ *Id.* at 559.

DRAFT
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1. Possible Explanations for Contract Stickiness

We do not write on a blank slate. Contracts scholars have offered various explanations for the possible stickiness of contract terms, and some have provided helpful syntheses of existing explanations.⁹⁰ The literature reveals at least eleven different explanations, though not all of them have particularly compelling explanatory force for the types of contracts that we investigate here.

Endowment effects — The theory of “endowment effects” postulates that individuals “often place a higher value on retaining the goods that they already possess (their endowments).”⁹¹ For example, if a market would price my rowing club T-shirt at the same level as a kitchen sponge, I nonetheless might subjectively perceive a greater cost in the loss of my T-shirt than whatever gain I might accrue from receiving a sponge. Though a series of psychological experiments, Russell Korobkin extended this theory to contract change and negotiation.⁹² According to Korobkin’s theory of endowment effects, contracting parties accord higher (perhaps irrationally high) value to existing contract terms.⁹³ So if one party aims to change those terms, perhaps in response to an intervening Supreme Court decision, the other party will extract a (perhaps irrationally) high price in order to assent to the change.

Interpretive risk — Closely related to the theory of endowment effects is the idea of interpretive risk. Contracts scholarship tends to conceptualize transactional lawyering as a process of identifying and addressing risk through the design of appropriate contract terms.⁹⁴ Interpretive risk is premised on the idea that changes from preferred language in an industry norm will be met with resistance by the counter-party to the transaction.⁹⁵ Like endowment effects, the notion of interpretive risk rests on the view that the counter-party prefers familiar contract language to unfamiliar language. Unlike endowment effects, the preference flows not from some irrational attachment to the familiar; instead, it flows from the relative lower uncertainty that attaches to using a term that has an accepted meaning within the industry.

⁹⁰ For especially helpful syntheses, see G. MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 32-44 (2012); Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655-60 (2006). For other scholarship on the topic, not cited below, see W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do not) Define the Process*, 40 CREIGHTON L. REV. 655 (2007); Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006); Gus De Franco et al., *Sticky Covenants* (March 1, 2013) (Chicago Booth Research Paper No. 13-61), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288723. See also the articles published by the *NYU Law Review* from a *Conference on Contractual Innovation*, 88 NYU L. REV. 1-285 (2013).

⁹¹ GULATI & SCOTT, *supra* note ___, at 41.

⁹² Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

⁹³ Russell Korobkin, *Behavioral Economics, Contract Formation and Contract Law*, in *BEHAVIORAL LAW AND ECONOMICS* (Cass Sunstein, ed. 2000).

⁹⁴ Weidemaier, *supra* note ___, at __.

⁹⁵ Lisa Bernstein, *Social Norms and Default Rule Analysis*, 3 S. CAL. INTERDISC. L.J. 59 (1993).

DRAFT
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Overhang — Overhang bears a close relationship to the idea of interpretive risk. It reflects a belief that changes in contract terms will affect the interpretation of *prior* contracts before the change was adopted. It is perhaps best explained by reference to an example. Suppose that a contract term “x” is generally understood to mean that risk passes to the buyer once the goods are loaded onto the ship. Suppose further that a court interprets “x” in fact to mean that the risk passes to the buyer only after the goods reach their port of destination. In reaction to this judicial decision, the seller considers changing its contracts to replace term “x” with term “y.” Term “y” somehow makes clearer that risk passes to the buyer at the earlier point in the shipment. If the buyer proposed the inclusion of term “y,” the very fact of this proposal might imply that preexisting contracts (all of which use term “x”) were understood by the seller, as drafted, to reflect the judicial interpretation.⁹⁶ Ideas of overhang, thus, are especially salient in industries that involve high volumes of contracting whereby subtle changes in *new* contracts could have significant impact on the interpretation of a large number of *pre-existing* contracts.⁹⁷ In situations of overhang, as opposed to interpretive risk, the concerns over interpretation stem from the party contemplating the change (as opposed to the expected reaction of the party to whom the change is proposed).

Herd effects — Closely related to the idea of interpretive risk and overhang is the concept of herd effects. This notion stems from the insights of psychological research suggesting that certain individuals tend to be risk-averse.⁹⁸ Translated into the context of contracting practices, the idea of herd effects suggests that lawyers, particularly in-house counsel, engage in risk-averse behavior by repeating what their predecessors have done.⁹⁹ In doing so, lawyers reduce the likelihood that they will be blamed for proposed changes that prove contrary to the firm’s (or client’s) interests. Innovation is discouraged because it isolates the entrepreneurial lawyer from the herd and, thereby, makes him peculiarly vulnerable to blame. Consequently, contract terms remain sticky — not because of the costs to the firm (as would be suggested by a theory like overhang or endowment effects) but instead due to agency problems stemming from the lawyer’s selfish incentives.

Contract Routines — Herd effects are not the only explanation for stickiness rooted in agency problems. Another explanation, identified by Gulati and Scott, is the notion of contract routines.¹⁰⁰ This idea begins from the premise that agents (such as lawyers) are working within a complex set of contractual structures. No single agent may fully understand the relationship between a particular contract provision and the larger contractual (or commercial) structure. Consequently, they are reluctant to make any changes to a particular term for fear of unwittingly upsetting other contractual provisions that may (unbeknownst to the lawyer) have some actual (or potential) relationship to the term that is proposed to be altered. Like the notion of herding,

⁹⁶ See Michelle Boardman, *Contra Preferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006).

⁹⁷ See, e.g., Daniel Kahneman, Daniel & Amos Tversky. *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979).

⁹⁸ GULATI & SCOTT, *supra* note __, at 37; Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH U. L. Q. 347 (1996).

⁹⁹ GULATI & SCOTT, *supra* note __, at 39 & n. 23.

¹⁰⁰ *Id.* at 38-39.

DRAFT
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the idea of contract routines roots the explanation in the incentives of the firm’s agent. Unlike the theory of herding, the agency problem lies not in blame-avoidance but, instead, in a simple reaction to uncertainty over a complex model and a desire to avoid unintended costs to the firm.

Uncertainty — In addition to their theory of contract routines, Gulati and Scott also suggest that the stickiness of contract terms may be attributable to simple uncertainty.¹⁰¹ Boilerplate contracts may have been drafted with a particular allocation of risk in mind. As time passes, the intentions of the original drafters are forgotten (as the drafters themselves move on). So the successors at the firm inherit the clauses without the understanding behind them. They are reluctant to change the clauses not for fear of blame (as the herding instinct would suggest) but simply because they do not know the consequences of the change. Therefore, they “leave well enough alone” and do not question the continued use of a clause in a contract. The theory closely resembles that of “contract routines” except, here, the account trains on the passage of time and the consequent loss of personnel who can explain the particular risk allocation behind a boilerplate term.

Free riders — a final agency-based explanation for the stickiness of contract terms is the idea of free riders. Free riding traces to Mancur Olson’s idea of collective action problems.¹⁰² Firms would prefer not to undertake the cost and investment of innovation if another firm will undertake that cost first. If a competing firm does so, then the first firm can take advantage of whatever benefits accrue from the innovation without having to bear the cost itself. In the context of contracting practices, the theory of free riders would explain stickiness on the ground that firms are unwilling to assume the costs themselves of innovation in contract terms. Instead, they wait for another firm to do so. They then wait and see how that other firm’s innovation holds up in court. If it is interpreted in a manner favorable to the firm, then other firms will employ the new formulation.

Negative Signaling — A series of scholars, including Jason Johnston and Omri Ben-Shahar, explain the stickiness of contract terms in terms of negative signaling.¹⁰³ This theory postulates that contracting parties are reluctant to propose changes to contract terms because such proposals might convey information to their contract partner. The very conveyance of information might then work to the detriment of a proposing party. Writing in this school of thought, the economist Kathryn Spier gives the example of a professional athlete negotiating a contract with her team.¹⁰⁴ Suppose that she requests a special “injury” clause — that deviates from the industry standard by providing her more compensation in the event of an injury. Even if such “insurance” might well be in her economic interest, the very fact of the request might signal to the sports team that she is aware of an exceptional risk of an injury in light of her

¹⁰¹ *Id.* at 42-43.

¹⁰² MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

¹⁰³ Ben-Shahar & Pottow, *supra* note __, at 651; Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Default Rules*, 100 *YALE L.J.* 615 (1990).

¹⁰⁴ Kathryn Spier, *Incomplete Contracts and Signaling*, 23 *RAND J. ECON.* 432 (1992). For an analogous example in the context of Silicon Valley start-ups, see Joseph Bankman, *The Structure of Silicon Valley Start-Ups*, 41 *U.C.L.A. L. REV.* 1737, 1738 (1994). For a skeptical view of the negative-signaling account, at least in the context of employment contracts, see J. Houtt Verkerke, *An Empirical Perspective on Indefinite Employment Contracts: Resolving the Just Cause Debate*, 1995 *WIS. L. REV.* 837.

DRAFT
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physical condition. This could result in a counter-proposal to reduce the athlete’s overall compensation in light of the risk. While Spier’s example provides an instance of a negative signaling effect about the “asset,” other negative signals might come in the form of revelations about a party’s private preferences. For example, if a party to a partnership agreement request an earlier payout than the industry norm provides, this might signal something to the other partners about the proposing partner’s economic interests, private information that they might use to extract some concession from her elsewhere in the negotiations. Due to any of these negative signals, parties might prefer not to deviate from industry norms.

Satisficing — Ideas of interpretive risk and negative signals converge into the theory of satisficing. Satisficing, like herd behavior, traces to psychological research of economists like Herbert Simon.¹⁰⁵ The theory of satisficing begins with the supposition that any individual party has an outcome (or set of outcomes) that would be optimal from the party’s individual perspective. In the context of transactional behavior, like contracting, achieving that optimal outcome may especially (perhaps prohibitively) costly.¹⁰⁶ This may be due to the costs entailed in dickering over every term necessary to achieve the optimal outcome for a party. Rather than incur those costs, parties “satisfice” by reaching agreement over *enough* terms that they are willing to leave the remaining terms unaddressed in the contract (meaning they will be addressed by the parties or, ultimately, a court should questions arise as to the unaddressed topics). Like the theories of interpretive risk and negative signals, the idea of satisficing explains the stickiness of contract terms by reference to the costs of change; here, however, the costs are due to the transaction costs entailed in negotiating out the remaining provisions of the contract.

Learning Externalities — Pioneered by Marcel Kahan and Michael Klausner, the theory of learning externalities (sometimes referred to as “learning effects” or “learning benefits”) suggests that the explanation for the stickiness of contract terms lies in the costs associated with change.¹⁰⁷ To use a non-contract example, a company incurs costs when it has used a PC-platform for many years then shifts to a Mac-based one in its IT department. These learning effects arise from past use of a particular norm within a firm. In the context of contracting practices, the consistent use of the same contract terms “locks in” certain benefits to a party. These may derive from efficiency in drafting, reduced uncertainty in the ambiguity over the judicial interpretation of the term (a variation on the theories of interpretive risk and overhang) and the reduced need to incur the costs of lawyers.¹⁰⁸ Changing contract terms around which these “lock-in effects” have formed surrenders those savings to a firm and forces it to incur new “switching costs” as it develops similar synergies from the new term.¹⁰⁹ When the foregone costs of the “lock-in effect” outweigh whatever savings or advantages might come from the introduction of the new term, the theory of learning externalities suggests that the contract term will remain sticky.

¹⁰⁵ Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCH. REV. 129, 136 (1956).

¹⁰⁶ See generally Patrick Bolton & Antoine Faure-Grimaud, *Satisficing Contracts*, 77 REV. ECON. STUD. 937 (2010).

¹⁰⁷ Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting*, 83 VA. L. REV. 713 (1997).

¹⁰⁸ See Ben-Shahar & Pottow, *supra* note __, at 659-60.

¹⁰⁹ Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard Form Contracts*, 88 N.Y.U. L. REV. 240, 246 (2013).

DRAFT
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Network externalities — In addition to their theory of learning externalities, Kahan and Klausner also hypothesize that some stickiness in contract terms may be due to network externalities. Network externalities capture savings that accrue due to the use of a common term within an industry or network. To take a non-contractual example, the use of compatible telephones (or other communications equipment) yields benefits to individual firms within an industry.¹¹⁰ In contrast to learning effects, network effects derive from the contemporaneous use of a norm within an industry. In the contractual setting, the use of a familiar term may reduce the costs of legal representation (since companies need not invest in educating a lawyer about a term with which he already is familiar).¹¹¹ It also can result in industry-wide standardization, thereby reducing contracting costs for repeat players within the industry. Unlike learning externalities (which result from costs borne due to changes within the firm), network externalities result from costs borne due to departure from accepted terms within the “network” or industry.

Finally, these existing accounts must be tested against a null hypothesis — also identified by Scott and Gulati — namely that stickiness is a myth.¹¹² In other words, contract terms are not sticky. Rather, firms do in fact innovate and respond to changes in the legal landscape. Under this account, change may not occur instantaneously. Instead, in what is sometimes described as the “shock model,” contract terms evolve as a result of shocks.¹¹³ Those shocks may come in the form of a judicial interpretation of a contract term or some other innovation. The second phase of that contract innovation would consist of firms experimenting with new terms after “a series of exogenous shocks.”¹¹⁴ David Hoffman explains: “What would such shocks look like? A Supreme Court decision making terms salient — and explicitly approving their enforceability — would be exemplary. Decisions like *AT&T v. Concepcion* (validating class-arbitration waivers) ... could have spurred attorneys to consider clauses that they previously would have left unused.”¹¹⁵ In response to those shocks, contract terms will change over a period of time during which the shock works its way through a firm’s information network.

This section has reviewed the prevailing accounts for why contracts are sticky and introduced the null hypothesis – namely that they are, in fact, not sticky but respond, albeit sometimes slowly, to systemic shocks. In the next section, we map these accounts onto the particular types of contracts in our study.

¹¹⁰ Ben-Shahar & Pottow, *supra* note __, at 660.

¹¹¹ Sometimes, contracting agents can ameliorate these effects. For example, underwriters and law firms can undertake the front-end investment to change a particular norm within the industry. Not only do these agents absorb these costs (which can then be spread across industry players), but they can serve to bridge the disparate interests of firms within the industry and roll out a new industry standard which firms then replicate.

¹¹² SCOTT & GULATI, *supra* note __, at 43.

¹¹³ Stephen Choi, Mitu Gulati, & Eric Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1 (2013); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929 (2004).

¹¹⁴ Hoffman, *supra* note __, at __ (ms. at 41) (citing Choi et al., *supra* note __). In the first phase, “the standard form dominates” and established contract drafters will resist any change. Only after the exogenous shocks of the second phase does “innovation become standardized” in a third phase. *Id.*

¹¹⁵ *Id.* at __ (ms. at 43-44). Hoffman notes, however, that “proceduralists should expect that even if the Supreme Court were to validate particular new forms of bespoke procedure, ... many contracts would still remain silent about what should happen if the parties go to court.” *Id.* at __ (ms. at 44).

DRAFT
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2. Stickiness and Adhesion Contracts

As noted above, we are interested in examining whether the terms of arbitration agreements prove sticky even after a decision of the United States Supreme Court approves the term (or otherwise interprets the term in a manner favorable to one party). We undertake this examination by focusing on a subset of contracts — franchise agreements, a type of standard form contract presented by the franchisor to the franchisee on a take-it-or-leave-it basis.

We reiterate these parameters of our inquiry here because they shed light on the extent to which certain of the above-described theories might (or might not) have explanatory value. Consider first the aspect of our inquiry placing emphasis on the pronouncements of the United States Supreme Court. This feature affects several of the explanations described in the preceding section. The free rider explanation offers a good example. By definition, if a matter has reached the Supreme Court (or litigation for that matter), at least one firm has chosen to innovate its contract terms. Thus, at least some of the incentive for other firms to retain “sticky” terms has diminished — they can now free-ride on the investment of the innovating firm.

Even after one firm innovates, however, follow-on firms might remain reluctant to change their contract language. The innovating firm not only bears the cost of altering its contract language, it also bears the litigation risk that the contract language might be interpreted by a court in a manner contrary to the interests of an innovating firm. For example, in the case of innovation coming in the form of an arbitral class waiver, a court might find that the FAA does not preempt a state law rule invalidating the class waiver.

But once the Supreme Court rules, the free rider account suggests that firms should adapt. At this point, much — though admittedly not all — of the residual litigation risk has dissipated.¹¹⁶ Consequently, follow-on firms should be more inclined to adopt the innovating firm’s new contract language. On the other hand, if contract terms *remained* sticky even after the intervening Supreme Court decision, this would cast doubt on the validity of the free-rider theory (at least as an explanatory tool for the class of cases we are studying). Thus, our focus on a Supreme Court decision carries force for a variety of explanations that explain stickiness in terms of agency problems or risk avoidance. These include not only the free-rider theory but also theories like uncertainty, contract routines, and herd effects.

¹¹⁶ We acknowledge that there will be residual litigation risk over the scope of the Supreme Court’s holding. This residual risk might have a factual or legal basis. Consider, for example, the AT&T arbitration clause at issue in *Concepcion*. A follow-on firm might adopt some but not all of the incentives contained in the AT&T clause; in that case, it bears a residual risk that a lower court, even after *Concepcion*, would conclude that this lack of incentives distinguishes the instant clause from the AT&T Clause. Alternatively, a follow-on firm in another state might mimic completely the AT&T clause. In that case, it still bears a residual risk that a lower court could construe the applicable unconscionability doctrine in a manner differently from California’s *Discover Bank* rule (the rule at issue in *Concepcion* holding that the presence of the class waiver in the arbitration clause rendered the clause *per se* unconscionable). It might thereby conclude that the state’s unconscionability doctrine did not sweep as broadly as the *Discover Bank* rule and, therefore, was not preempted by the FAA. *See infra* text accompanying notes ___-___.

DRAFT
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Focus now on the nature of the contract we are studying — contracts between franchisors and franchisees. Because these contracts typically are adhesive — that is, they are offered to the franchisee on a take-it-or-leave-it basis — individualized dickering over the terms does not occur.¹¹⁷ This suggests that theories like endowment effects, satisficing, and negative signaling do not have much explanatory value in this context. A new franchisee does not really have an “endowment” in the terms of an existing franchise agreement.¹¹⁸ Moreover, drafters of the contract are unlikely to encounter “satisficing” problems because a single party controls the terms of the agreement and, therefore, ordinarily does not encounter substantial transaction costs by contracting with specificity.¹¹⁹ Indeed, franchise agreements would seem to be easier to change than negotiated corporate contracts. Precisely because it is an adhesion contract, the franchisor drafts the form contract and (subject to market and regulatory constraints) has unilateral control over the terms. Finally, drafters are unlikely to encounter negative signaling problems, either because their counterparty cannot dicker over the terms or, in some cases, because the counterparty does not read the terms at all.

That said, franchise agreements are distinguishable from and may be stickier than consumer contracts.¹²⁰ First, franchise agreements have higher stakes than virtually all consumer contracts.¹²¹ The higher stakes may induce franchisees to read franchise agreements more carefully and invest more in understanding the terms to which they are agreeing.¹²²

¹¹⁷ Clayton Gillette, *Standard Form Contracts*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374990.

¹¹⁸ It might, of course, be the case that endowment effects work in the opposite direction. That is, the franchisor (or, more abstractly, the party in the superior bargaining position) attaches significance to the chosen form of dispute resolution even where, as a matter of rational choice theory, another option would be in the franchisor’s interest.

¹¹⁹ That said, even for adhesive contracts, changes in terms are not necessarily costless. For example, franchisee organizations have some bargaining power vis-à-vis franchisors, which might increase the stickiness of the contract. Moreover, changes may be subject to regulatory oversight. Even if the franchisor does not need to dicker with the franchisee, it may incur costs placating a regulator. See *infra* text accompanying notes __-__.

¹²⁰ Prior scholarship has demonstrated that credit card agreements can be modified through the simple act of conveying the modification by means of a bill stuffer or electronic communication followed by some period for the consumer to opt-out (or, alternatively, accept the proposed modification by conduct through the use of the card). See David Horton, *The Shadow Terms of Contract Procedure and Unilateral Amendments*, 57 U.C.L.A. L. Rev. 605 (2010). Insofar as this is true — again we do not independently test the validity of the proposition in this paper — this premise too casts doubt on several theories. In particular, overhang theory lacks much explanatory value under this condition of easy modification. Under conditions where contracts are easily modified, the bank can simultaneously alter the terms for future transactions as well as the terms governing the repayment of debts for prior transactions. (Again, while overhang risk can be reduced, it cannot be eliminated entirely. Consider a company that is in litigation over the meaning of term “A.” If, during the litigation, it proposes to modify that term, the proposed modification still carries overhang risk in the pending litigation.)

¹²¹ See Adam B. Badawi, *Relational Governance and Contract Damages: Evidence from Franchising*, 7 J. EMPIRICAL LEGAL STUD. 743, 753 table 3 (2010) (reporting average start up cost in sample of franchise agreements of \$571,000, with range across types of franchise from low of \$55,150 for home care franchises to high of \$5,459,643 for lodging franchises).

¹²² By comparison, some scholarship, including empirical research, suggests that consumers often do not read their contracts. See Yannis Bakos et al. *Does Anyone Read the Fine Print?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256. For a literature survey, see Gillette, *supra* note __ at 5-7. Assuming this is valid (we do not attempt to make an original contribution on that question), this phenomenon suggests that several other explanations described in the previous section lack much explanatory value here. For example, there would not be much of a concern about negative signaling because the consumer would not perceive

DRAFT
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Second, franchise agreements tend to have longer terms than consumer contracts.¹²³ The ability to turn over only a fraction of the total stock of contracts in any given year necessarily affects the franchisor’s incentives to modify its contracts. Not only does it take time for the parties (or the franchisor) to realize fully the benefits of the new contract terms, but during the interim it faces the prospect of nonuniform contract terms, posing a greater risk of overhang, for example.¹²⁴ Third, franchise agreements are more heavily regulated than many consumer contracts. State franchise laws provide for disclosure requirements, substantive regulation, and agency oversight, which may increase the stickiness of the terms of franchise agreements.¹²⁵ (This last feature of franchise agreements may impose a form of network externality, albeit one created by public regulation rather than a privately developed industry norm.)

In sum, the salience of the accounts for contract stickiness depends critically on the sort of contract under study. For the type of contract we are studying (adhesive contracts) and the phenomenon we are studying (the effect of intervening Supreme Court decisions), theories that presuppose parties of equal bargaining power (or at least parties in a position to react to changes in contract language) largely drop out. These includes theories like endowment effects, satisficing and negative signaling. By contrast, other theories, which depend on firm-specific behavior, like free riders, herd effects, learning externalities, contract routines and uncertainty remain more relevant. And of course all of these theories are tested against the null hypothesis – namely that contract terms, including in this context, are not “sticky” but respond (eventually) to shocks.

For our purposes here, we are interested less in what particular explanation for stickiness does or does not apply than that at least some explanation for stickiness might hold, which certainly is the case. We leave distinguishing among these (and other) possible explanations for contract stickiness for future research.

C. Hypotheses

With these parameters of our study and phenomena of the specific form of contracting laid plain, we can begin to generate hypotheses regarding the predicted response to *Concepcion*.

The first set of hypotheses focuses on the predictions that *Concepcion* will result in all or at least most businesses using arbitration clauses in their standard form contracts. Those

the “signal” communicated by a change in the contract language. For similar reasons, interpretive risk, endowment effects and satisficing again lose some explanatory value. In short, the “unread” nature of many consumer contracts — again assuming the validity of this proposition — casts doubt on the explanatory value of theories that assume parties have symmetrical information and actually perceive the signal sent by a proposed modification. See Scott & Triantis, *supra* note __, at __. Franchise agreements seem likely to differ from consumer contracts in that the stakes are much higher and franchisees are more sophisticated contracting parties than consumers.

¹²³ See Badawi, *supra* note __, at 753 table 3 (reporting average term in sample of franchise agreements of 12.3 years).

¹²⁴ See *supra* text accompanying notes __-__.

¹²⁵ Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193 (2013).

DRAFT
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predictions are subject to question both because using an arbitration clause does more than contract out of class actions and because contracts may be sticky. Accordingly, the first set of hypotheses tests the basic assumptions about firm behavior that animate criticisms of decisions like *Concepcion*:

Hypothesis 1: Many or most firms that did not use arbitration clauses prior to *Concepcion* will not switch to arbitration after the decision.

Hypothesis 1A: The firms most likely to switch to arbitration clauses are ones that previously switched away from arbitration or otherwise are on the margin between arbitration and litigation.

If the data support these hypotheses, the next question is why have firms not switched to arbitration. The second set of hypotheses considers the two possible explanations we have suggested:

Hypothesis 2: Using arbitral class waivers is not costless because arbitration is a bundle of dispute resolution services not just a class action waiver. To the extent this is true, firms will not switch to arbitration after *Concepcion*, especially firms that face little risk of class actions or place a high value on court procedures such as the right to appeal.

Hypothesis 3: The use of a dispute resolution clause (or lack of one) is sticky. The accounts of stickiness suggest that if a firm previously does not use an arbitration clause, then they would not be affected by a Supreme Court decision even if the Supreme Court decision might encourage the use of such a clause.

Hypothesis 3A: A modified version of this hypothesis, building on Choi and Gulati’s theory of “shock effect,” suggests that the use of arbitration resolution clauses should increase over time. As Supreme Court decisions like *Concepcion* filter through a firm’s network, the firm will eventually invest the resources necessary to make a change.¹²⁶

IV. Methodology and Findings

¹²⁶ Possible questions for future research include, to the extent stickiness appears to be playing a role, which theoretical explanations for contract stickiness seem to be at play. For franchise agreements, our discussion of the literature suggests limited explanatory value of several theories in the franchise contracting context (including negative signaling, interpretive risk, endowment effects, network externalities and satisficing). This leaves learning externalities, overhang, herding, free riders, contract routines and uncertainty. These varying theories give rise to possible hypotheses, such as the following: If free rider theory or herding explained stickiness, we would expect to see more change after the Supreme Court blessed a clause than beforehand; if learning externalities explained stickiness, then we would expect to see more change among larger firms than smaller ones; and if contract routines or uncertainty explained the stickiness of terms within arbitration clauses, then we would expect to see more change among agreements that had simpler (i.e., shorter) clauses.

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In this part, we present the results of our empirical study of changes in the use of arbitration clauses since *AT&T Mobility LLC v. Concepcion*. Examining two samples of franchise agreements, we find evidence of at most a slight shift to arbitration following *Concepcion*, and certainly not the “tsunami” predicted by some commentators. We begin by describing our data and methodology. We then present our basic findings, and seek to reconcile those basic findings with other reports about the use of arbitration clauses after *Concepcion*. We conclude with evidence on whether the limited move to arbitration can best be explained by the stickiness of franchise agreements or by the nature of arbitration as a dispute resolution process.

A. Data and Methodology

A number of states — including Minnesota, which is the source for the franchise agreements studied here — require franchisors to file Franchise Disclosure Documents (FDDs) annually before they can sell franchises in the state.¹²⁷ The standard form franchise agreement (typically redlined to indicate any changes from the previous year¹²⁸) is attached to the FDD.

We used two samples of franchise agreements in this study. The first sample consists of franchisors that were among the top franchise opportunities listed in Entrepreneur Magazine’s *Franchise 500* in 1999 (the “panel sample”).¹²⁹ The sample originally consisted of 75 franchisors; due to business attrition our current sample now is 67 franchisors.¹³⁰ For these franchisors, we collected the dispute resolution clauses from their franchise agreements in 1999, 2007, 2011, 2012, and 2013,¹³¹ which enables us to track changes in the dispute resolution clauses over time — including before and after *Concepcion*.

¹²⁷ Minnesota Department of Commerce, *Franchise Registration Information*, http://mn.gov/commerce/images/Franchise_Registration_Info.pdf (last visited June 20, 2013). For discussion of the representativeness and other uses of the *Franchise 500* as a source of data for research on franchises, as we do here for the cross-section sample, see Drahozal, *supra* note __, at 723-24; O’Hara O’Connor & Drahozal, *supra* note __, at __ (ms. at 32-35).

The proportion of arbitration clauses in our cross-section sample might be affected by our sampling of agreements filed with the Minnesota Department of Commerce. If, for example, we had instead selected a random sample of franchisors that filed in California, where courts have been less willing to enforce arbitration clauses, we might find a smaller proportion of franchise agreements with arbitration clauses before *Concepcion*. But that bias should decrease if not largely disappear after *Concepcion* and *Amex*. Moreover, as noted above, while California also makes Franchise Disclosure Documents available online, exemptions from the California franchise registration statute exclude most established franchisors from the filing requirement, thus biasing the sample in a different way. By comparison, our panel sample was selected from a national list of franchisors and should not be subject to significant geographic biases.

¹²⁸ North American Securities Administrators Association, Inc, 2008 Franchise Registration and Disclosure Guidelines ¶ II(c)(1) (July 1, 2008), available at <http://www.nasaa.org/wp-content/uploads/2011/08/6-2008UFOC.pdf>.

¹²⁹ The 2013 *Franchise 500* is available at *Entrepreneur 2013 Franchise 500*, <http://www.entrepreneur.com/franchise500/index.html> (last visited June 18, 2013).

¹³⁰ The franchisors no longer in the sample include ones that went out of business, merged into other franchisors, or apparently stopped doing business in Minnesota.

¹³¹ For a description of the data collection for the 1999 agreements, see Drahozal, *supra* note __, at 722-26; for a description of the data collection for the 2007 agreements, see Drahozal & Wittrock, *supra* note __, at 90-94.

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In addition, we collected a random sample of 214 franchise agreements from all franchisors that filed an FDD with the Minnesota Department of Commerce both before and after *Concepcion* (the “cross-section sample”).¹³² The cross-section sample does not overlap with the panel sample; none of the franchisors in the panel sample is in the cross-section sample. For the cross-section sample, we collected the dispute resolution clause as it was immediately before the decision in *Concepcion* — i.e., prior to April 27, 2011 — and the dispute resolution clause in franchise agreements filed after *Concepcion*.¹³³ This dataset gives us a broader view of how franchisors are responding to *Concepcion*, but without the historical context.

As indicated, for both samples, the dispute resolution clauses were collected from the franchise agreements as filed with the Minnesota Department of Commerce.¹³⁴ Prior to 2010, franchise agreements were only available on paper from the Minnesota Department of Commerce. For 2011 through 2013, we collected the FDDs online from the Minnesota Department of Commerce web site, and then extracted information about the franchise agreement from the FDD.¹³⁵ The FDD also serves as the source for data on the numbers of franchised units of the franchise.¹³⁶ We give little emphasis to the number of franchised units in our analysis, however, because of various uncertainties in that data.¹³⁷ Because the franchise agreement in the FDD typically is red-lined to show changes from the prior year, we are able to examine the extent to which franchisors make changes their franchise agreements, as discussed below.¹³⁸

As noted above, using franchise agreements as a source of data has advantages over other form contracts. The agreements are publicly available and have been for a number of years, so that a reasonable degree of historical information is available.¹³⁹ However, we recognize the

¹³² We began with a sample 239 franchises, and then excluded 25 franchisors that did not make filings in Minnesota in 2013. Of the excluded franchisors, one switched to arbitration between 2011 (i.e., before *Concepcion*) and 2012 (i.e., after *Concepcion*) and one switched away from arbitration.

¹³³ For simplicity in data collection, we treated franchise agreements filed with the Minnesota Department of Commerce on or before April 30, 2011, as filed before *Concepcion*. But we also verified that the dispute resolution clauses in those agreements had not changed since the previous version, usually sometime in 2010.

¹³⁴ On a handful of occasions, when the agreement was not available from the Minnesota Department of Commerce, we obtained a copy of the franchise agreement from a database maintained by the California Department of Corporations. See California Department of Corporations, *California Electronic Access to Securities & Franchise Information*, <http://www.corp.ca.gov/CalEASI/caleasi.asp> (last visited June 18, 2013). While including more years’ worth of agreements, the California database has limited coverage of franchisors because established franchisors are generally exempted from filing in California.

¹³⁵ Minnesota Department of Commerce, *Welcome to CARDS — Commerce Actions and Regulatory Documents Search*, <https://www.cards.commerce.state.mn.us/CARDS/> (last visited August 1, 2013).

¹³⁶ Item 20 of the FDD reports this information. For 1999, the data were derived primarily from the *Franchise 500*, and occasionally we used the *Franchise 500* as the source for more recent years to maintain consistency or to fill gaps.

¹³⁷ First, it is not clear that the number of franchises is an appropriate proxy for size of the franchise chain, because number of units does not necessarily correlate with total sales. Second, some franchisors may report in the FDD only the number of units of the type of franchise they are selling at the particular time, not the total number of units of any type in the chain. Third, franchisors report the number of units as of the end of their fiscal year, which varies by franchisor.

¹³⁸ See *infra* text accompanying notes ___-__.

¹³⁹ See *supra* text accompanying notes ___-__.

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limitations of using franchise agreements as well, which we discuss at length below.¹⁴⁰ Because of those limitations, our findings here may not be generalizable to other settings in which standard form contracts are used, such as consumer and employment contracts. In sub-part D below, we attempt to reconcile our findings here with other reports of changes in the use of arbitration clauses following *Concepcion*.¹⁴¹

¹⁴⁰ See *infra* text accompanying notes ___-__.

¹⁴¹ See *infra* text accompanying notes ___-__.

B. Changes in the Use of Arbitration Clauses After *Concepcion*: Empirical Findings

In this sub-part, we report our empirical findings on changes in the use of arbitration clauses in franchise agreements following *AT&T Mobility LLC v. Concepcion*. We find:

- In the panel sample, the use of arbitration clauses increased from 40.3% of franchisors immediately before *Concepcion* to 44.8% by 2013 (**Hypothesis 1**). Of the four franchisors that have switched to arbitration since *Concepcion*, three had used arbitration clauses at some point prior to the decision and switched back afterwards, while the fourth used arbitration to resolve some disputes before *Concepcion* and expanded its use to all disputes afterwards (**Hypothesis 1A**).
- In the cross-section sample, the net use of arbitration clauses increased only slightly after *Concepcion*, with 62.6% of franchisors using arbitration clauses before *Concepcion* and 63.6% after the decision. Five franchisors actually switched to arbitration after *Concepcion*, but four others switched away from arbitration, resulting in a net increase of one (**Hypothesis 3**).
- In the panel sample, the use of class arbitration waivers by franchisors using arbitration clauses has increased substantially since 1999, with most of the increase coming before 2011. In 1999, 51.6% of franchisors with arbitration clauses also used class arbitration waivers. By 2011, immediately before *Concepcion*, that percentage had increased to 77.8%, with an additional increase to 86.7% by 2013 (**Hypothesis 3A**).

1. Changes in the Use of Arbitration Clauses in Franchise Agreements

Contrary to the predictions that all businesses would soon use arbitration clauses in their standard form contracts after *Concepcion*, we find only a slight change in the use of arbitration clauses in both of our samples of franchise agreements.

In the panel sample, as shown in Table 1, the percentage of franchisors using arbitration clauses increased slightly, from 40.3% in 2011 immediately before *Concepcion* to 41.8% in 2012 and 44.8% in 2013.¹⁴² As a percentage of total franchises, the amount of the shift was similar (from 50.4% of franchises in 2011 to 52.5% of franchises in 2012 and 53.7% of franchises in

¹⁴² Because *Concepcion* was decided in April 2011, we measure each year after the decision as beginning in April. So when we refer to 2012, we mean the year from April 2011 to April 2012, 2013 is the year from April 2012 to April 2013, and so on. At the time this article went to press, only very partial data for the year April 2013 to April 2014 were available because most franchisors file their Franchise Disclosure Documents at the end of March. As a result, we do not include data for 2013-2014 in the tables. We do note in the text, however, that one additional franchisor switched to arbitration between April 2013 and when the article went to press. If we calculated the percentage of franchisors using arbitration clauses by assuming that all franchisors that had not yet filed their FDDs would keep their dispute resolution clause unchanged, the percentage of franchisors using arbitration clauses would have increased to 46.3% (31/67) for 2013-2014.

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2013).¹⁴³ One franchisor switched to arbitration in mid-2012, two more in late 2012 and mid-2013, and a fourth later in 2013. Interestingly, in all four cases the franchisor had had prior experience with arbitration. In 1999, GNC included an arbitration clause in its franchise agreement, but by 2007 had switched to a forum selection clause. It then switched back to arbitration after *Concepcion*, and, indeed, many provisions in its current arbitration clause were identical to those in the 1999 agreement. The pattern for the Rent-A-Wreck franchise agreement is similar — switching from an arbitration clause in 2007 to a forum selection clause in 2011, and then back to arbitration in late 2012. Although not identical, the Rent-A-Wreck arbitration clause in 2012 bears many similarities to the one from 2007. Hungry Howie’s switched to arbitration in 2013 for all disputes; prior to 2013, it used arbitration for some disputes and not others. And Kahala Corp. (the franchisor for Blimpie sub shops) switched back to arbitration in 2013 after having switched away from arbitration in 2008.¹⁴⁴ Stated otherwise, these franchisors were all on the margin between arbitration and litigation — they either had switched away from arbitration or used it for some disputes, and so were among the most likely to switch to arbitration following *Concepcion*.

Table 1. Change in the Use of Arbitration Clauses in Franchise Agreements After *Concepcion*: Panel Sample

	2010-2011		2011-2012		2012-2013	
	Pre- <i>Concepcion</i>		Post- <i>Concepcion</i>		Post- <i>Concepcion</i>	
	Number of Clauses	% of Franchises	Number of Clauses	% of Franchises	Number of Clauses	% of Franchises
Arbitration Clause	27 (40.3%)	47.4%	28 (41.8%)	49.4%	30 (44.8%)	50.6%
No Arbitration Clause	40 (59.7%)	52.6%	39 (58.2%)	50.6%	37 (55.2%)	49.4%

The panel sample also permits us to examine changes in the use of arbitration clauses over a longer period of time — beginning in 1999. Figure 1 summarizes the results.¹⁴⁵ It reveals a slight, long-term decline in the use of arbitration clauses by franchisors from 1999 through 2011, which apparently reverses after the decision in *Concepcion*.¹⁴⁶ Our findings thus might understate the effect of *Concepcion* on the use of arbitration clauses because without *Concepcion*

¹⁴³ Data for 2013-2014 are largely unavailable as yet, as discussed above, so we do not include those data here. See *supra* note __. And data for one franchisor are missing for 2010-11.

¹⁴⁴ See Drahozal & Wittrock, *supra* note __, at 97 n.124.

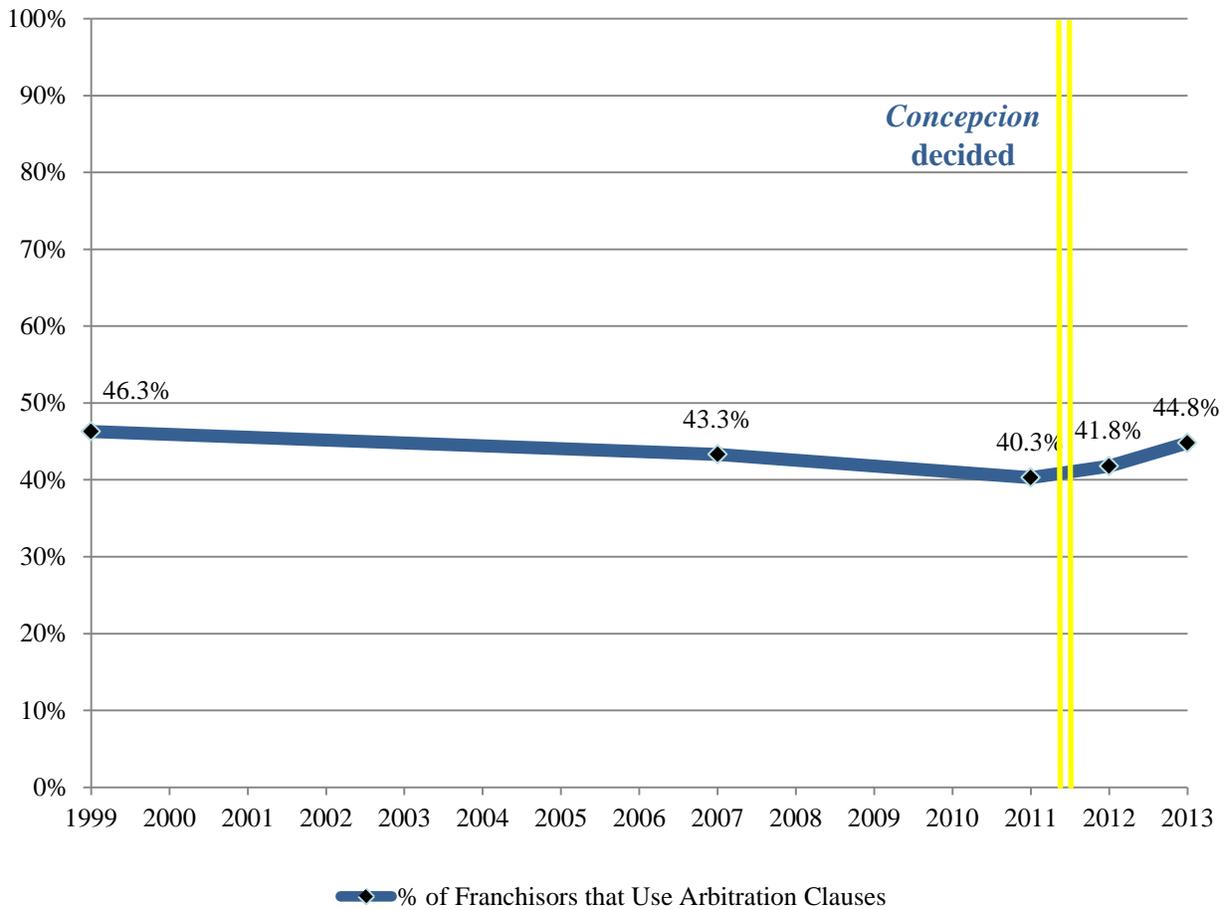
¹⁴⁵ As discussed *supra* note __, one additional franchisor switched to arbitration at the end of the third quarter of 2013. We do not report overall percentages for the year 2013-2014 in Figure 1 because most of the data for that period was not available at the time this article went to press. Given the one switch to arbitration, however, and assuming the franchise agreements for which data are missing remain unchanged, the percentage of franchise agreements using arbitration clauses is now up to 46.3% — i.e., back to its level in 1999.

¹⁴⁶ The percentages differ slightly from those reported for 2007 by Drahozal & Wittrock, *supra* note __, for two reasons: first, because our sample has declined to 68 franchisors from the 71 in that study; and, second, because we were able to add one franchisor (which switched away from arbitration) for that year which previously was unavailable.

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the downward trend might have continued. Or stated otherwise, *Concepcion* not only might have induced some franchisors to switch to arbitration, it also might have induced some franchisors to continue using arbitration who otherwise might have switched away from arbitration. As far as the prediction we are testing here, however, that distinction is immaterial.

Figure 1. Use of Arbitration Clauses in Franchise Agreements, 1999-2013



In the cross-section sample, the overall percentage of franchisors using arbitration clauses was higher than in the panel sample as shown in Table 2,¹⁴⁷ but that percentage changed only slightly between 2011 and 2013. In 2011, before *Concepcion*, 134 of 214 franchise agreements, or 62.6%, included arbitration clauses. In 2013, after *Concepcion*, 136 of 214 franchise agreements, or 63.6%, included arbitration clauses. The very slight shift in the aggregate masks some reshuffling among franchisors: five franchisors in fact switched to arbitration by 2013, but those changes were largely offset by three franchisors that switched away from arbitration during the same period.

¹⁴⁷ These findings are consistent with William L. Killion, *An Informal Study of Arbitration Clauses Reveals Surprising Results*, FRANCHISE L.J., Fall 2002, at 79, 79 (finding higher rate of arbitration clauses by franchisors ranked lower in *Franchise 500*).

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Table 2. Change in the Use of Arbitration Clauses in Franchise Agreements After *Concepcion*: Cross-Section Sample

	2010-2011 <i>Pre-Concepcion</i>	2011-2012 <i>Post-Concepcion</i>	2012-2013 <i>Post-Concepcion</i>
	Number of Clauses	Number of Clauses	Number of Clauses
Arbitration Clause	134 (62.6%)	133 (62.1%)	136 (63.6%)
No Arbitration Clause	80 (37.4%)	81 (37.9%)	78 (36.4%)

Finally, Figure 2 shows the percentage of franchisors using arbitration clauses that also use class arbitration waivers.¹⁴⁸ In 1999, barely half (51.6%) of franchisors using arbitration clauses also used class arbitration waivers. By 2011, the percentage had increased to 77.8%, and then to 86.7% in 2013. The use of class arbitration waivers (in franchise agreements, at least) has increased significantly in the past fifteen years.¹⁴⁹

But even so, not all franchise agreements with arbitration clauses include class arbitration waivers. This result is surprising because the costs of adding a class arbitration waiver to an arbitration clause would seem much lower than the costs of adding an arbitral class waiver to a franchise agreement. Although the benefits of avoiding class actions would be the same as we described before, the bundling costs identified previously do not apply to the decision whether to include a class arbitration waiver in an existing arbitration clause.

We can identify at least three explanations for this less than ubiquitous use of class arbitration waivers.¹⁵⁰ First, it may be evidence of contract stickiness (**Hypothesis 3**). Franchisors simply may not have revised their franchise agreements to include class arbitration waivers, even though it would seem beneficial for them to do so. Second, franchisors may fear a residual risk, even after *Concepcion*, that using a class arbitration waiver might result in the invalidation of the arbitration clause. Given the Supreme Court’s recent decision reversing the Second Circuit in *American Express Co. v. Italian Colors Restaurant*, any such risk has declined

¹⁴⁸ In other words, the denominator for the calculations in Figure 2 differs from the denominator in Figures 1 and 3. Both Figures 1 and 3 present the percentage of franchisors, including those that use arbitration clauses and those that do not. Table 2 presents the percentage of only those franchisors that use arbitration clauses.

¹⁴⁹ Gilles also reports “a clear increase in the popularity of [class arbitration waivers] over the past decade.” Gilles, *supra* note __, at 853. She reaches this conclusion by comparing the use of class arbitration waivers in a non-random sample of recent arbitration clauses to the use of class arbitration waivers reported by studies examining consumer contracts across a range of industries. *Id.* at 853 n.104. Although the conclusion she reaches is consistent with our findings here, her methodology is problematic because she is not comparing the same types of contracts. For example, the Searle study (one of the studies to which she compares her data) found that all or almost all credit card and cell phone contracts in the sample included class arbitration waivers but that no real estate brokerage contracts did. Drahozal & Zyontz, *supra* note __, at 349-50. Gilles does not examine any real estate brokerage contracts, and so her results might simply be due to her comparing different types of contracts rather than any change over time.

¹⁵⁰ By comparison, 93.6% of credit card issuers using arbitration clauses covering 99.9% of credit card loans outstanding used class arbitration waivers as of December 31, 2010. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 39.

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substantially.¹⁵¹ But during the time period studied, there remained some risk that a court would invalidate an arbitration clause with a class arbitration waiver on an effective vindication theory.¹⁵² Third, given the Supreme Court’s decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*,¹⁵³ franchisors might believe that using a class arbitration waiver is not necessary. In *Stolt-Nielsen*, the Court held that a clause that was “silent” on class arbitration could not be construed as authorizing class arbitration.¹⁵⁴ That said, arbitral tribunals continued construing clauses without class arbitration waivers as authorizing class arbitration even after *Stolt-Nielsen*,¹⁵⁵ and franchise lawyers continued to recommend that franchisors use class arbitration waivers.¹⁵⁶ Accordingly, we find this third possible explanation unlikely.

The explanations explored in the foregoing paragraph all treat franchisors as interchangeable. Another set of explanations might differentiate among franchisors, whether with respect to their resources or their interests.¹⁵⁷ For example, large franchisors (measured by sales or number of franchised units) might display a greater tendency to favor arbitration clauses (coupled with class waivers) to the extent they perceive themselves to be a litigation target; by contrast, small franchisors might perceive a lower risk of litigation given that their pockets are not as deep. Along the same lines, larger franchisors might be more likely to have in-house legal counsel attuned to the most significant changes in the legal landscape (and thus more capable of responding quickly to “shocks” that result in changes in contract drafting); by contrast, smaller franchisors may lack the same personnel ranks and, consequently, be less likely to respond to these sorts of shocks. Future research might examine such firm-specific explanations.

¹⁵¹ 133 S. Ct. 2304 (2013).

¹⁵² See *supra* text accompanying notes ___-__.

¹⁵³ 130 S. Ct. 1758 (2010); see also *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013).

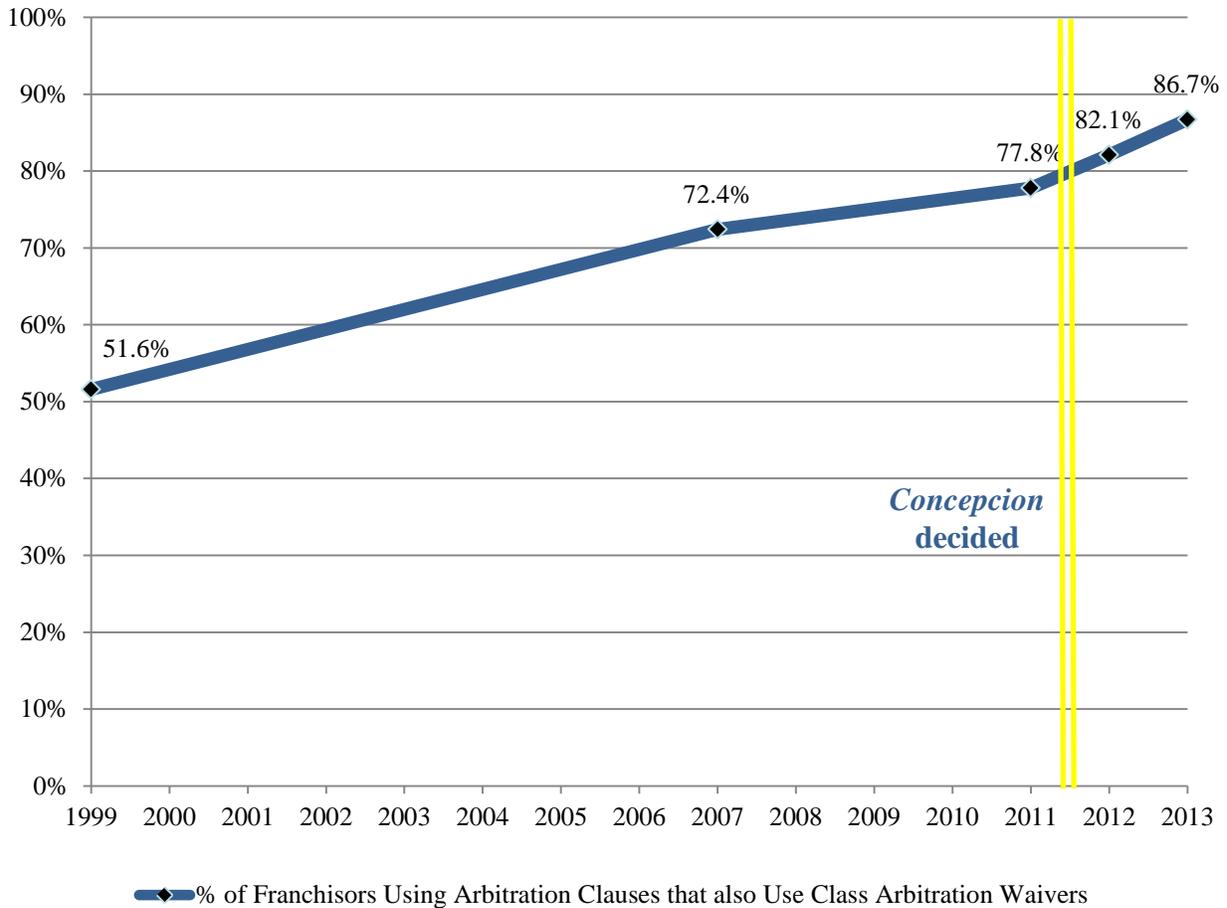
¹⁵⁴ *Stolt-Nielsen*, 130 S. Ct. at 1776 & n.10.

¹⁵⁵ Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1157-58 (2011).

¹⁵⁶ Sawers & Russell, *supra* note __ (“The prudent franchisor should not assume that the absence of express language authorizing class arbitration immunizes the franchisor from class treatment. Instead, the safe course of action for franchisors is to include a class arbitration waiver in franchise agreements.”).

¹⁵⁷ Research on the use of arbitration clauses in credit card agreements suggests such firm-specific explanations, see Drahozal & Rutledge, *supra* note __, as does prior research on the use of arbitration clauses in franchise agreements, see Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Agreements*, 32 J. LEGAL STUD. 549, 580-81 (2003).

Figure 2. Use of Class Arbitration Waivers in Franchise Agreements with Arbitration Clauses, 1999-2013



2. Caveats

We recognize and reiterate the limitations of our research. Initially, we have only two years of data since *Concepcion*. While that time period would seem to be long enough to detect changes to contracts if businesses could in fact quickly and costlessly change their contracts, to the extent contracts are sticky it may take longer for businesses to implement those changes. That may be particularly true for franchise agreements, given their relatively long terms.¹⁵⁸ At a minimum, the relatively short time frame makes it difficult to distinguish between bundling and stickiness explanations for the limited switching to arbitration we have observed in franchise agreements.

Second, it might be that franchisors anticipated the outcome in *Concepcion* and so had already changed their contracts before the case was decided. If so, we would not observe a

¹⁵⁸ See *supra* text accompanying notes ___-__.

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change in the use of arbitration clauses after the decision because the changes would already have occurred before the decision. But our panel sample finds no evidence of an increase in the use of arbitration clauses leading up to *Concepcion*; to the contrary, the use of arbitration clauses continued its slight, long-term decline up until 2010, and only began to increase after the decision in *Concepcion*.¹⁵⁹ Moreover, even if franchisors anticipated the outcome in *Concepcion*, it remains the case that fewer than half of the franchise agreements studied use arbitration clauses, despite the predictions that all would do so after *Concepcion*.

Finally, and more fundamentally, although often grouped together with consumer and employment contracts in policy discussions,¹⁶⁰ franchise agreements differ in a number of respects from those types of standard form contracts. As discussed above, franchise agreements have higher stakes, longer terms, and are subject to more regulation than the typical consumer or employment contract.¹⁶¹ As a result, one must be cautious not to extrapolate too broadly from our findings here to other standard form contracts.

That said, at a minimum our results provide evidence that not all businesses have so far switched to arbitration after *Concepcion*, even businesses that commentators have argued should do so.

C. Reconciling Our Findings with Other Reports

As noted above, our findings necessarily are limited to franchise agreements, which differ in important ways from other form contracts, in particular consumer and employment contracts.¹⁶² In this section we reconcile our findings with anecdotal press reports of companies that have adopted arbitration clauses since *Concepcion*. The businesses typically reported as adopting arbitration clause after *Concepcion* are computer software companies and online businesses, as shown in Table 3.¹⁶³

These businesses are notable because they are in industries that, prior to *Concepcion*, only rarely used arbitration clauses. Florencia Marotta-Wurgler found that almost no software

¹⁵⁹ See *supra* text accompanying notes ___-__.

¹⁶⁰ George Padis, *Note: Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 669 n.20 (2013) (“Often, franchise agreements are lumped together with employment agreements and consumer contracts as problematic areas of adhesive bargaining, because franchisees are often small businesses dealing with large corporations, and thus lack the bargaining strength to negotiate arbitration clauses in advance.”).

¹⁶¹ See *supra* text accompanying notes ___-__.

¹⁶² See *supra* text accompanying notes ___-__.

¹⁶³ The one exception is Umpqua Bank, which revised its deposit account agreement to include an arbitration clause after *Concepcion*. See *infra* text accompanying note ___. Professor Gilles reports that Regions Bank switched to arbitration after *Concepcion*. Gilles, *supra* note ___, at 853 n.105. By comparison, the *Wall Street Journal* reports that Regions Bank “strengthened the *existing* mandatory-arbitration provision contained in its deposit accounts” after *Concepcion*. Robin Sidel, *No Day in Court for Bank Clients*, WALL ST. J., Aug. 2, 2011 (emphasis added), available at <http://online.wsj.com/article/SB10001424053111904292504576482603037174400.html>.

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license agreements used arbitration clauses or class arbitration waivers in her 2007 study,¹⁶⁴ a situation that had not changed much prior to *Concepcion*.¹⁶⁵ Moreover, at least some of the firms (both Sony and Netflix) had been subject to high-profile class action lawsuits shortly before they switched to arbitration.¹⁶⁶ Finally, the anecdotal reports only highlight the switch to arbitration of several, large players in the market. Without more systematic data, there is no way to know whether arbitration clauses are used by most or all firms in the market, or whether these markets resemble the credit card market, in which small banks and credit unions often do not use arbitration clauses.¹⁶⁷

Table 3. Press Reports of Firms Switching to Arbitration Clauses After *Concepcion*

Company	Product	Date Switch Reported
Sony ¹⁶⁸	Video games	September 2011
Umpqua Bank ¹⁶⁹	Deposit account	January 2012
Netflix ¹⁷⁰	Video rental and streaming	March 2012
Microsoft ¹⁷¹	Video games and software	May 2012
Valve ¹⁷²	Computer games	July 2012
eBay ¹⁷³	Online auction	September 2012
PayPal ¹⁷⁴	Electronic payment service	October 2012
Instagram ¹⁷⁵	Online photo sharing service	December 2012

¹⁶⁴ Florencia Marotta-Wurgler, “Unfair” *Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 45 (Omri Ben-Shahar ed., 2007).

¹⁶⁵ Marotta-Wurgler & Taylor, *supra* note __, at 280.

¹⁶⁶ Michael Liedtke, *Netflix Class Action Settlement: Service Pays \$9 Million After Allegations Of Privacy Violations* (Feb. 10, 2012), http://www.huffingtonpost.com/2012/02/11/netflix-class-action-settlement_n_1270230.html; Winda Benedetti, *Sony Sued, Could Bleed Billions Following PlayStation Network Hack*, *NBCNEWS.COM* (Apr. 27, 2011), <http://www.nbcnews.com/technology/sony-sued-could-bleed-billions-following-playstation-network-hack-123539>.

¹⁶⁷ Drahozal & Rutledge, *supra* note __, at 559-61.

¹⁶⁸ Mark Milian, *Sony: Supreme Court Ruling Spurred Changes to PlayStation Terms* (Sept. 21, 2011), <http://www.cnn.com/2011/09/21/tech/gaming-gadgets/sony-psn-terms/>.

¹⁶⁹ Brent Hunsberger, *Umpqua Bank Joins Wells Fargo and Chase in Requiring Customers to Arbitrate Disputes, Barring Class Actions*, *THE OREGONIAN* (Jan. 23, 2012), http://www.oregonlive.com/business/index.ssf/2012/01/umpqua_bank_joins_wells_fargo_1.html.

¹⁷⁰ Jordan Crook, *Netflix Doesn’t Want You to Sue Them, According to New Terms of Service*, (Mar. 20, 2012), <http://techcrunch.com/2012/03/20/netflix-doesnt-want-you-to-sue-them-according-to-new-terms-of-service/>.

¹⁷¹ Tim Fielden, *Microsoft on the Issues: Consumer Product and Service Agreement Updates* (May 25, 2012), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/05/25/consumer-product-and-service-agreement-updates.aspx.

¹⁷² Chris Morran, *Video Game Publisher/Seller Valve Now Forcing Customers Into Mandatory Binding Arbitration* (Aug. 1, 2012), <http://consumerist.com/2012/08/01/video-game-publisherseller-valve-now-forcing-customers-into-mandatory-binding-arbitration/>.

¹⁷³ Brian Wolfman, *New E-Bay Arbitration Agreements with Its Customers Include Class-Action Ban (but with an Opt-Out)* (Sept. 17, 2012), <http://pubcit.typepad.com/clpblog/2012/09/e-bay-user-aribtration-agreements-include-class-action-ban-but-with-opt-out.html>; Steven Berk, *Ebay Offering Rare Chance to Opt-Out of Forced Arbitration: Nov. 9th Deadline* (Oct. 1, 2012), <http://www.thecorporateobserver.com/2012/10/01/ebay-offering-rare-chance-to-opt-out-of-forced-arbitration-nov-9th-deadline/>.

¹⁷⁴ Greg Blankinship, *PayPal Adds Class Action Arbitration Waiver to Its Contract* (Oct. 10, 2012), <http://classactionblog.mpnsb.com/2012/10/10/paypal-adds-class-action-arbitration-waiver-to-its-contract/>.

All told, the markets for online services and computer software may reflect a different contracting dynamic than the franchise market. Those markets were marked by an initial low usage of arbitration clauses, with a number of large firms switching to arbitration after *Concepcion* and the filing of several high profile class actions. By contrast, the franchise market had a much higher usage of arbitration clauses prior to *Concepcion*, and a slight but not dramatic move to arbitration after that case. More research into the online services and computer software markets would be useful to help provide a better understanding of why firms in those markets behaved differently than those in the franchise market, both before and after *Concepcion*.

D. Are Arbitration Clauses Sticky?

Given our findings above — that, so far, at least in franchise agreements, the predicted switch to arbitration has not yet occurred — the next question is: why not? In our theoretical discussion, we identify two possible reasons. The first is that franchisors in fact have business reasons not to use arbitral class waivers — that by agreeing to arbitrate, the parties agree to a bundle of dispute resolution services, at least some of which may be undesirable from the franchisor’s perspective (**Hypothesis 2**).¹⁷⁷ The second is that form contracts may be sticky — i.e., for various reasons, drafters might not change contract terms even when as a business matter it might make sense to do so (**Hypothesis 3**).

As discussed above, there is reason to believe that franchise agreements may be somewhat sticky, albeit perhaps less sticky than negotiated contracts.¹⁷⁸ Our prior research has found evidence of stickiness in credit card agreements that continued to list the National Arbitration Forum (NAF) as the sole provider of arbitration services several years after the NAF had ceased administering consumer arbitrations.¹⁷⁹ As a result, the agreements risked court appointment of arbitrators at best and invalidation of the arbitration clause at worst.¹⁸⁰ Florencia Marotta-Wurgler and Robert Taylor reported that “[a]lmost forty percent of the contracts [they] examined [end-user license agreements prepared by mass market consumer software companies] saw at least one standard term change over the period between 2003 and 2001; some changed more than ten terms.”¹⁸¹ They explain that “[w]hile this number could be perceived as low,

¹⁷⁵ Chris Morran, *Here’s How to Opt Out of Instagram’s New Arbitration Clause* (Dec. 21, 2012), <http://consumerist.com/2012/12/21/heres-how-to-opt-out-of-instagrams-new-arbitration-clause/>.

¹⁷⁶ Chris Morran, *Now You Can No Longer File Class-Action Suits Against StubHub; Here’s How to Opt Out* (Feb. 22, 2013), <http://consumerist.com/2013/02/22/now-you-can-no-longer-file-class-action-suits-against-stubhub-heres-how-to-opt-out/>.

¹⁷⁷ Or, perhaps, for reputational reasons they might decide not to use arbitration clauses. *See supra* note ____.

¹⁷⁸ *See supra* text accompanying notes ____.

¹⁷⁹ Rutledge & Drahozal, *supra* note ____, at 30.

¹⁸⁰ *Id.*

¹⁸¹ Marotta-Wurgler & Taylor, *supra* note ____, at 274-75.

DRAFT
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especially in an industry as dynamic as software, the results challenge conventional views that a large fraction of consumer fine print is set in stone.”¹⁸²

We develop a simple measure of change in franchise agreements using the redlined versions of the agreements included in the Franchise Disclosure Document.¹⁸³ For each franchise agreement for 2011-12 and 2012-13, we counted the number of provisions of the franchise agreement that were changed substantively. For example, an expansion of the parties subject to an arbitration clause (such as by expressly including affiliates) would count as a substantive change. Renumbering a provision because of the insertion of a new provision earlier in the agreement would not. We included changes to all types of provisions of the franchise agreement, and counted the number of provisions with substantive changes rather than the number of substantive changes. If a single provision was changed in multiple ways, we counted it only as a single change. This measure of contract change necessarily is very approximate and is most useful at the extremes. Nonetheless, it provides at least a rough measure of the extent to which franchisors changed their franchise agreements during the years studied.

Based on the data described above, we categorized each franchisor as to the number of changes in any particular year and the number of years in which changes were made, as shown in Table 4. A franchise agreement with ten or more provisions with substantive changes in any given year was classified as having major changes. If the agreement had major changes in only one year the changes were characterized as periodic; if in both years they were characterized as regular. A franchise agreement with at least one but fewer than ten provisions with substantive changes in any given year was characterized as having minor changes. Again, if the agreement had major changes in only one year the changes were characterized as periodic; if in both years they were characterized as regular. A franchise agreement with no substantive changes in either year was categorized as unchanged.

Table 4. Categorizations for Changes to Franchise Agreements, 2011-12 & 2012-13

Category	Definition
Major — regular	Ten or more changed provisions in both years
Major — periodic	Ten or more changed provisions in one year
Minor — regular	Some but fewer than ten changed provisions in both years
Minor — periodic	Some but fewer than ten changed provisions in one year
Unchanged	No changes in either year

Table 5 summarizes our categorizations of the changes in the franchise agreements in the panel sample, by the type of dispute resolution clause used in the franchise agreement in 2012.¹⁸⁴ Note first that 53 of the 67 franchisors (79.1%) changed at least one provision during the two

¹⁸² *Id.* at 275.

¹⁸³ See *supra* text accompanying notes ___-___. When a franchise agreement did not reflect any changes in red-lining, we compared the agreement to the previous year’s agreement to determine whether in fact it was unchanged from the prior year or whether the version of the franchise agreement we were using was not red-lined.

¹⁸⁴ Two of the agreements switched to arbitration in 2013.

DRAFT
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years we examined, and 7 of the 67 franchisors (10.4%) changed ten or more provisions in both years. These are higher percentages than Marotta-Wurgler and Taylor found for the UELAs they studied, but we use a more generous definition of change than their study so our results are not directly comparable.¹⁸⁵

Table 5. Changes in Franchise Agreements by Type of Dispute Clause, 2011-12 & 2012-13

Category	Arbitration clause (2013)	No arbitration clause (2013)
Major — regular	4	3
Major — periodic	12	15
Minor — regular	7	6
Minor — periodic	1	5
Unchanged	6	8
Total	30	37

No clear patterns emerge by type of dispute resolution clause (or at least none for which we can claim any statistical significance because of the small sample size). The percentage of franchise agreements without an arbitration clause that were unchanged during the period studied was almost identical to the percentage with an arbitration clause that were unchanged. At the other extreme, a higher percentage of franchisors using arbitration clauses were classified as making regular, major changes to the franchise agreement. For those franchisors making major changes, either periodic or regular, it seems less likely that contract stickiness explains the failure to switch to arbitration. Indeed, almost half (18 of 37) of the franchisors that do not use arbitration clauses were classified as making major changes to the franchise agreement. Again, we cannot draw definitive conclusions, but **our data is at least suggestive that something more than contract stickiness is the explanation for why some franchisors have not switched to arbitration after *Concepcion*.**

An alternative possibility is that dispute resolution provisions are stickier than other contract provisions, so that the data above understate the degree of stickiness. We also separately counted the number of franchisors that made substantive changes to the dispute resolution clause itself, such as by switching to (or from) arbitration or otherwise changing the characteristics of the dispute resolution clause. In 2012, eleven of sixty-seven (or 16.4%) of franchisors changed their dispute resolution clauses. In 2011, six of sixty-seven franchisors (or 9.0%) changed their dispute resolution clauses. Six of the eleven used arbitration clauses in 2012, while five of the six in 2011 did so. Not surprisingly, a smaller percentage of franchisors changed the dispute resolution clauses in their franchise agreements than changed some other provision in the franchise agreement. It also is not surprising that franchisors that used arbitration clauses were more likely to change their dispute resolution clause because arbitration clauses tend to be longer and more complex than forum selection clauses. That said, just over thirty-five percent (6 of 17, or 42.1%) of the franchisors that changed their dispute resolution

¹⁸⁵ See *supra* text accompanying notes ___-___.

DRAFT
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clause used forum selection clauses in their franchise agreements, suggesting that forum selection clauses are not necessarily stickier than arbitration clauses.

Overall, we cannot reject the hypothesis that the stickiness of franchise agreements is a partial explanation for the fact that many franchisors have not switched to arbitration since *Concepcion*. Half of the franchisors that do not currently use arbitration clauses made either no changes (8 of 37, or 21.6%) or only minor changes (11 of 37, or 29.7%) to their franchise agreements in 2011-12 and 2012-13. It may be that those franchise agreements are sticky. But a sizable proportion of franchisors that do not currently use arbitration clauses made major changes to their franchise agreements in one (15 of 37, or 40.5%) or both (3 of 37, or 8.1%) of those years. For those franchisors, it seems unlikely that contract stickiness alone explains the fact that they have not switched to arbitration.

V. *Amex* and Non-Arbitral Class Waivers

Commentators have predicted that the Supreme Court’s decision in *American Express Cos. v. Italian Colors Restaurant* will result in a new “rash” of businesses switching to arbitration clauses to avoid class actions.¹⁸⁶ Of course, if all businesses already had adopted arbitration clauses after *Concepcion*, as some predicted then, *Amex* would have no additional effect on contracting behavior. Given our finding that such a switch has not occurred, the likely effect of *Amex* remains open.

It is too soon to present empirical evidence on the extent to which businesses switched to arbitration after *Amex*. Instead, we offer some thoughts on the legal implications of the decision and how those implications might affect future contracting behavior.

A. Legal Implications of *Amex* for Class Waivers

In *Amex*, the Supreme Court held an arbitral class waiver enforceable even though the lack of class relief arguably made it uneconomical to pursue a federal antitrust claim.¹⁸⁷ By foreclosing what appears to be the last major court challenge to arbitral class waivers after *Concepcion*, the Court in *Amex* reduced if not eliminated any residual legal uncertainty about their enforceability.

In addition, the dissent in *Amex*, perhaps inadvertently, rejected a variation on the effective vindication challenge. Some courts, typically state courts, had extended the theory to rights arising out of state statutes, rather than limiting it to federal statutory rights. For example, in *Feeney v. Dell, Inc.*, the Massachusetts Supreme Court refused to limit the effective vindication doctrine to federal statutory rights, instead holding that it applied to state statutory

¹⁸⁶ See *supra* text accompanying notes ___-__.

¹⁸⁷ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309-11 (2013).

DRAFT
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rights as well.¹⁸⁸ Justice Kagan’s dissent in *Amex*, however, made clear that such analysis is erroneous:

When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA’s purposes and objectives. If the state rule does so — as the Court found in *AT&T Mobility* — the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective vindication rule serves as a way to reconcile any tension between them.¹⁸⁹

Given that even the *Amex* dissenters would have limited the effective vindication doctrine to federal statutory rights, cases like *Feeney* would seem to be no longer good law.¹⁹⁰

Finally, while on its facts *Amex* addresses an arbitral class waiver, the decision might also increase the likelihood that courts will enforce non-arbitral class waivers.¹⁹¹ Stated otherwise, although the decision has been criticized as the “worst Supreme Court arbitration decision ever,”¹⁹² arguably it is a class action decision more than an arbitration decision.

Most of the reasoning of the Court in *Amex* applies to non-arbitral class waivers as well as arbitral class waivers. Thus, as the Court points out, the effective vindication doctrine essentially is an application of the bar on prospective waivers of statutory rights.¹⁹³ If parties cannot directly waive a statutory right, they also cannot do so indirectly by using an unfair arbitration clause.¹⁹⁴ The Court then goes on to hold that an arbitral class waiver does not amount to a prospective waiver of a statutory right because “the class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal

¹⁸⁸ *Feeney v. Dell Inc.*, 989 N.E.2d 439, 455-56 (Mass. 2013), *rev’d on rehearing*, 993 N.E.2d 329, 331 (Mass. 2013); *see also* *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005); *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006); *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1101 (Ala. 2009). *But see* *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) (“Plaintiffs assert primarily state statutory rights, but *Mitsubishi*, *Gilmer*, *Green Tree* and similar decisions are limited to federal statutory rights.”)

¹⁸⁹ *Amex*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

¹⁹⁰ Of course, *Feeney* would be inconsistent with the majority’s decision in *Amex* even if it had involved federal statutory rights because the basis for the effective vindication challenge was a class arbitration waiver. The Massachusetts court later acknowledged that its decision was incorrect under *Amex*. *Feeney v. Dell*, 993 N.E.2d 329, 331 (Mass. 2013).

¹⁹¹ As noted above, courts currently are split on the enforceability of non-arbitral class waivers. *See supra* text accompanying notes __-__.

¹⁹² *Bland*, *supra* note __; *Sternlight*, *supra* note __.

¹⁹³ 133 S. Ct. at 2310.

¹⁹⁴ As the Court explains in *Amex*: “That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.” *Id.* at 2310-11..

DRAFT
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relief in 1938.”¹⁹⁵ Nothing in that analysis depends in any way on the fact that the class waiver used an arbitration clause. Rather, central to the Court’s analysis seems to be that at the time Congress enacted the antitrust laws class actions under the Federal Rules of Civil Procedure had not yet been adopted, an argument that would apply as well to non-arbitral class waivers.¹⁹⁶

Clearly any effect of *Amex* on the enforceability of non-arbitral class waivers would only be dicta because *Amex* on its facts involved an arbitral class waiver. Moreover, the Court relies on the FAA and its own prior arbitration cases at various points in the opinion. Thus, the Court later explained that the “the FAA does, contrary to the dissent’s assertion, favor the absence of litigation when that is the consequence of a class-action waiver, since its ‘principal purpose’ is the enforcement of arbitration agreements according to their terms.”¹⁹⁷ And the framework the Court applies to reconciling the FAA and the antitrust laws is its usual framework for analyzing whether a federal statute makes a particular statutory claim nonarbitrable.¹⁹⁸ That said, there is at least an argument that the decision in *Amex* enhances the enforceability of both arbitral and non-arbitral class waivers.

B. Arbitral and Non-Arbitral Class Waivers in Franchise Agreements: Predictions and an Empirical Baseline

As stated above, it is too early to evaluate empirically the effect of *Amex* on the use of arbitral class waivers and non-arbitral class waivers. Instead, we offer some predictions about how businesses are likely to respond to that case.

First, to the extent businesses refrained from switching to arbitration after *Concepcion* because of residual legal uncertainty about application of the effective vindication doctrine, those businesses might switch to arbitration after *Amex*. But to the extent businesses avoided arbitration because of its limited right of appeal or other bundling costs, one would not expect all or even most businesses to begin using arbitration even after *Amex*.¹⁹⁹ Likewise, *Amex* will have little effect on the stickiness of franchise agreements, although over time the use of arbitration might nonetheless increase as firms slowly adopt contractual innovations.

¹⁹⁵ *Id.* at 2311. “Or, to put it differently, the individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.” *Id.*

¹⁹⁶ On this view, an open question after *Amex* is how to deal with a statutory right arising out of a federal statute enacted after the creation of class action procedures under the Federal Rules — particularly the adoption of the current version of Federal Rule of Civil Procedure 23 in 1966. For arbitral class waivers, the Court’s analysis suggests that it would use its general framework for non-arbitrability. *See id.* at 2309-10. But that framework presumably would not apply, at least not directly, to non-arbitral class waivers.

¹⁹⁷ *Id.* at 2312 n.5.

¹⁹⁸ *Id.* at 2309-10.

¹⁹⁹ Our hypothesis about arbitration and bundling costs dovetails with some of the arguments of Ted Eisenberg and Geoff Miller about the paucity of arbitration agreements in certain business-to-business contract. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 364 (2007). Here, however, the bundling costs influence the behavior of a single party (the franchisor) as opposed to two equally sophisticated business parties (the subject of Eisenberg and Miller’s research).

DRAFT
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Second, as suggested above, *Amex* might enhance the enforceability of non-arbitral class waivers as well as arbitral class waivers. But because a non-arbitral class waiver does not use an arbitration clause, the Federal Arbitration Act would not apply, so there would be no federal law basis for preempting state law regulation. As a result, even if *Amex* is construed broadly as applying to non-arbitral class waivers, states should still be able to invalidate non-arbitral class waivers as unconscionable (or otherwise regulate those provisions, by statute, regulation, or court decision).²⁰⁰ Thus, one might expect to see varied state approaches to the regulation of non-arbitral class waivers, much as one saw with respect to arbitral class waivers prior to *Concepcion*.²⁰¹

Conversely, unlike arbitral class waivers, non-arbitral class waivers should have no bundling costs. The only change to the litigation process the parties are making is to waive class actions; they are not changing other characteristics of litigation (unlike an arbitral class waiver, which also contracts for a limited appeals process, for example). As such, businesses that want to waive class actions but also maintain their usual appeal rights would prefer non-arbitral class waivers to arbitral class waivers (all else equal).

Whether the legal uncertainty or the absence of bundling costs predominates is an empirical question, and it is difficult to make any definitive predictions. As Figure 3 indicates, prior to *Amex* the enforceability considerations appear to have predominated. More than twice as many franchisors in the panel sample (38.9% versus 16.4% in 2013²⁰²) used arbitral class waivers as non-arbitral class waivers. The ratio is similar for the cross-section sample, although the use of both arbitral (51.4%) and non-arbitral (18.7%) class waivers is higher in that sample. Given the overwhelming predominance of arbitral class waivers over non-arbitral class waivers in other standard form contracts (such as credit card and cell phone agreements²⁰³), our findings here suggest that bundling costs are higher in franchising than in those settings.

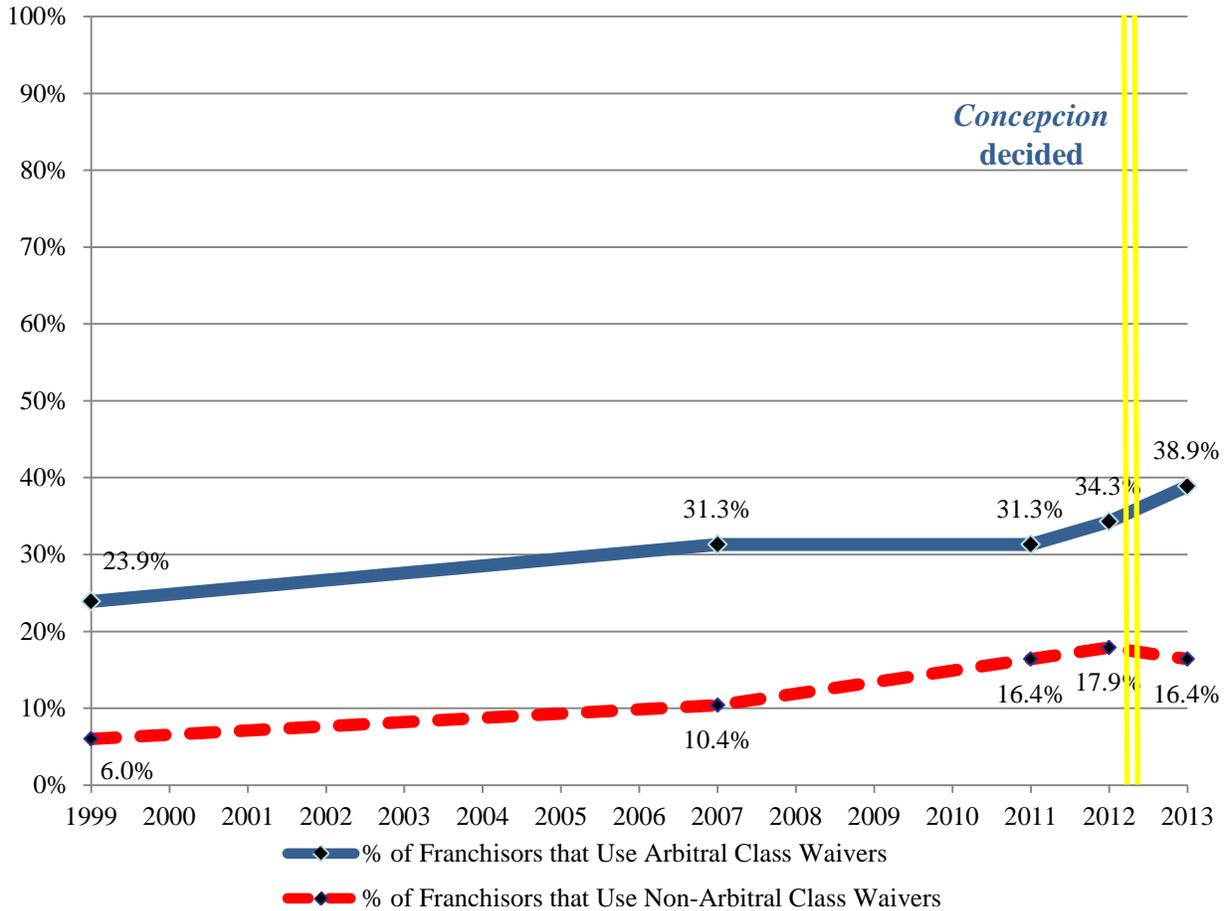
²⁰⁰ In addition, there might be arguments against the enforceability of non-arbitral class waivers in addition to state law unconscionability. *See, e.g.,* Martrano v. Quizno's Franchise Co., L.L.C., 2009 U.S. Dist. LEXIS 52025, at *87 (W.D. Pa. June 15, 2009) (invalidating non-arbitral class waiver as inconsistent with the Federal Rules of Civil Procedure).

²⁰¹ *Cf.* Alan S. Kaplinsky, Scorecard on Where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-Dispute Consumer Arbitration Agreements 42-43 (Dec. 27, 2010), http://www.ballardspahr.com/~media/Files/Alerts/2010-12-27_Scorecard_on_Appellate_Courts_on_Enforcing_Class_Action_Waivers_Pre-Dispute_Consumer_Arbitration.aspx (summarizing “final tally” of different courts on enforceability of arbitral class waivers prior to *Concepcion*).

²⁰² The increase in arbitral class waivers and the decline in non-arbitral class waivers in 2013 offset each other to some extent because of one franchisor that previously used a non-arbitral class waiver switching to an arbitral class waiver.

²⁰³ David Hoffman finds only a small number of non-arbitral class waivers in credit card agreements, all of which appeared in contracts with arbitration clauses. *See* Hoffman, *supra* note __, at __ (ms. at 29-30). Arbitration clauses and class arbitration waivers clearly are dominant in cell phone contracts. *See* O’Hara O’Connor & Drahozal, *supra* note __, at __ (ms. at 35).

Figure 3. Use of Arbitral Class Waivers and Non-Arbitral Class Waivers in Franchise Agreements, 1999-2013



Amex may enhance the enforceability of non-arbitral class waivers while leaving their bundling benefits unchanged, so that on the margin non-arbitral class waivers will become more attractive. Since 1999, the use of non-arbitral class waivers in the panel sample has increased at a faster rate than the use of non-arbitral class waivers, and, in both samples, the overall use of non-arbitral class waivers is higher than one might expect, given the limited attention to such waivers by courts and academics. Whether the enhanced enforceability as a result of *Amex* will be enough to result in a greater use of non-arbitral class waivers is as yet unknown.

VI. Implications and Conclusions

After *AT&T Mobility LLC v. Concepcion*, commentators predicted that all or most businesses would soon switch to arbitration clauses. This paper tests that prediction and finds it

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unsupported. Based on our samples of franchise agreements, we find only a small switch to arbitration, not the widespread switch predicted. In the panel sample, the use of arbitration clauses increased from 40.3% of franchisors immediately before *Concepcion* to 44.8% in 2013. The four franchisors that have switched to arbitration after *Concepcion* all were on the margin between arbitration and litigation: three had used arbitration clauses at some point prior to *Concepcion* and switched back, while the fourth used arbitration to resolve some disputes and expanded its use. In the cross-section sample, the net use of arbitration clauses was virtually unchanged after *Concepcion*, with 62.6% of franchisors using arbitration clauses before and 63.6% after the decision. Five franchisors switched to arbitration after *Concepcion*, while three others switched away from arbitration, leaving a net increase of one franchisor. We also find that the use of class arbitration waivers by franchisors using arbitration clauses has increased substantially over time, with most of the increase coming before 2011 (from 51.6% of franchisors in 1999 to 77.8% in 2011, with a further increase to 86.7% in 2013).

These findings have a number of implications. First, and most obviously, they call into question some of the empirical predictions following *Concepcion* (and *American Express Co. v. Italian Colors Restaurant*). So far, at least, it is not the case that all or even most businesses are switching to arbitration clauses after *Concepcion*. As we have noted before, however, one would expect those businesses most susceptible to class actions to be the most likely to switch. Second, the paper cautions against unquestioning acceptance of the common “parade-of-horribles” arguments often made in litigation. Third, the paper adds to our understanding of the nature of arbitration as a means of resolving disputes. An arbitration clause does more than waive class actions. It brings with it other characteristics of the arbitration bundle of dispute services, which gives businesses a reason not to use arbitration even after *Concepcion* and *Amex*. Fourth, the paper provides insights into the nature of contract change and innovation. We find a significant degree of change in franchise agreements among franchisors in the panel sample, suggesting that contract stickiness is not the sole reason for the limited switching to arbitration clauses after *Concepcion*. Moreover, our findings as to franchise agreements suggest that Supreme Court decisions may not always be the sort of systemic shock likely to result in contract change.

Finally, we offer a first look at how the Supreme Court’s recent decision in *Amex* might affect contracting behavior. Although on its facts *Amex* involves the enforceability of an arbitral class waiver, that the decision could be read as applying to non-arbitral class waivers as well as arbitral class waivers, at least as to certain federal statutory claims. Businesses that want to avoid the bundling costs of arbitration, such as the limited right to appeal, would prefer to use non-arbitral class waivers. *Amex* might enhance the enforceability of non-arbitral class waivers (although they likely remain subject to state unconscionability challenges), and thus to some degree increase their use.