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Not Open for Business: A Review of South Carolina's Arbitration Venue Statute, and a Proposal for Reform

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NOT OPEN FOR BUSINESS: A REVIEW OF SOUTH CAROLINA'S ARBITRATION VENUE STATUTE, AND A PROPOSAL FOR REFORM

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I. INTRODUCTION:

Alternative dispute resolution has a long history.[1] Arbitration is a form of alternative dispute resolution where the parties contractually agree to the issues that will be decided, the arbitrators who will resolve the dispute, the rules of arbitration that will be followed, and the arbitration forum that will be used.[2] Today, arbitration is an attractive alternative to litigation in the business context because of the relatively shorter length of time required to resolve disputes, lower costs, greater control over the process, and increased privacy of the process and results.[3]

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1. *See* JEROME T. BARRETT WITH JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION, at xxv–xxx (2004) (providing a timeline of alternative dispute resolution from 1800 B.C. to the modern era); *see also* JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 454 (2005) (noting that "[a]rbitration has a long and venerable history, having been used by many cultures in a variety of contexts over the centuries," and mentioning uses of arbitration from biblical times through the Middle Ages and up to the modern era).

2. *See* FOLBERG ET AL., *supra* note 1, at 455–57.

3. *Id.*

In the United States, federal statutes and case law provide for broad enforcement of arbitration agreements.[4] Federal law requires that arbitration agreements be enforced on their terms unless the agreements violate contract principles.[5] Federal law also provides that where state and federal laws conflict, federal laws prevail.[6]

South Carolina's arbitration venue statute, section 15-7-120(B) of the South Carolina Code states that arbitration agreements requiring arbitration outside South Carolina are not enforceable if the issue could be tried in South Carolina courts.[7] This Note explores South Carolina's arbitration venue statute in light of federal arbitration law, and in contrast with neighboring states' arbitration venue statutes. When measured against federal law and other states' arbitration statutes, South Carolina's statute both violates and is preempted by federal law. South Carolina's arbitration venue statute should be redesigned more narrowly, so as not to violate federal law, and in order to foster a more favorable business climate in South Carolina.

Part I of this Note explores arbitration generally and the federal context for enforcing arbitration agreements. Part I shows that, under federal law, arbitration agreements are to be broadly enforced according to their terms. Further, under federal law, where federal and state laws conflict, federal laws prevail. Part II explores South Carolina's arbitration venue statute and shows how it violates, and is preempted by, federal arbitration law. Part III examines other states' arbitration statutes and arbitration venue clauses, and explores case law reviewing those statutes. By looking at statutes and case law in North Carolina, Virginia, Maryland, West Virginia, and Georgia, Part III provides alternative models to South Carolina's virtual exclusion of out-of-state arbitration. Finally, in light of federal law and other state models, Part IV sets forth proposals for reforming South Carolina's arbitration venue statute. By making South Carolina more arbitration friendly, a revised arbitration venue statute would also make the state more welcoming to businesses.

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4. *See, e.g.*, 9 U.S.C. § 2 (2012) (declaring written arbitration agreements "valid, irrevocable, and enforceable"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 396–407 (1967) (citations omitted) (affirming the district court's decision to stay court proceedings pending arbitration); *see also* FOLBERG ET AL., *supra* note 1, at 521 (citing 9 U.S.C. § 9 (2012)) (noting that parties can agree to court enforcement of arbitration results).

5. *See* 9 U.S.C. § 2 (2012).

6. *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 491 (1987) ("[U]nder the Supremacy Clause, the state statute must give way."); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (footnotes omitted) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

7. S.C. CODE ANN. § 15-7-120(B) (2005).

II. ARBITRATION AND THE FEDERAL CONTEXT FOR ARBITRATION

A. Arbitration: An Appealing Alternative to Litigation

Arbitration is a form of adjudicative private dispute resolution.[8] In arbitration, the parties agree to who will resolve the dispute, to the rules of the dispute resolution process, and, generally, to be bound by the result.[9] Arbitration is an attractive alternative to litigation in the business context.[10] Litigation can be lengthy, costly, hard to control,[11] and both the litigation process and result can easily become public.[12] In arbitration, by contrast, businesses help decide who will resolve their disputes and the rules under which such disputes will be resolved.[13] Arbitration is also generally less expensive and less time consuming than litigation,[14] and unlike litigation, the arbitration process and the resultant arbitral awards can often be kept private.[15] Arbitration thus provides an appealing alternative for businesses that may welcome a method of dispute resolution that, unlike litigation, allows greater control over costs and rules of resolution, and affords them an opportunity to keep their disputes private.

B. The Federal Context for Arbitration

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8. *See* THOMAS E. CROWLEY, SETTLE IT OUT OF COURT: HOW TO RESOLVE BUSINESS AND PERSONAL DISPUTES USING MEDIATION, ARBITRATION, AND NEGOTIATION 171 (1994); FOLBERG ET AL., *supra* note 1, at 453.

9. *See* CROWLEY, *supra* note 8, at 171–73; FOLBERG ET AL., *supra* note 1, at 455–58 (noting the differences between arbitration and litigation).

10. *See* FOLBERG ET AL., *supra* note 1, at 454 ("Binding arbitration has long been an attractive alternative [to litigation] for commercial parties, for whom courts were often too slow and cumbersome, too expensive, too inflexible in remedy-making, and lacking in familiarity with business practices."); *see also* Michael A. Hanzman, *Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Questions*, FLA. B.J., Dec. 199614, 14 (discussing businesses' use of mandatory arbitration clauses).

11. CROWLEY, *supra* note 8, at 171–73.

12. *See* FOLBERG ET AL., *supra* note 1, at 455 (noting that the desire "to escape the glare of a public proceeding" is one reason businesses often prefer arbitration over litigation).

13. CROWLEY, *supra* note 8, at 172–73; FOLBERG ET AL., *supra* note 1, at 457–58 (quoting Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 112–13 (2002)); *see also* Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 364 (2010) ("[In arbitration, d]isputants customize a process suited to their own needs, including the selection of an expert adjudicator.").

14. CROWLEY, *supra* note 8, at 171–72; *see also* Hanzman, *supra* note 10 (noting the perception of arbitration as a means of providing fast and economic remedies); McGill, *supra* note 13, at 364 (describing speed as one of the benefits of arbitration). *But see* FOLBERG ET AL., *supra* note 1, at 456 ("[A]rbitration may end up being just as lengthy or as costly as litigation."); McGill, *supra* note 13, at 364 n.8 (disputing the assumption that going through arbitration is always cheaper than going to court).

15. FOLBERG ET AL., *supra* note 1, at 456.

Under federal statutory and case law, arbitration agreements are to be broadly enforced.[16] Enacted in 1925, the Federal Arbitration Act (FAA)[17] was designed to create national uniformity in the treatment of arbitration agreements and to make agreements to arbitrate as valid as any other contract.[18] Section two of the FAA provides that an agreement to arbitrate can only be invalidated on the same grounds as any other contract:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[19]

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16. *See, e.g.*, Hanzman, *supra* note 10, at 14 (noting that the Supreme Court has interpreted federal arbitration laws as "a congressional declaration of a liberal federal policy favoring arbitration agreements"); *cf.* FOLBERG ET AL., *supra* note 1, at 455 (noting that the courts' increasing acceptance of arbitration is due "in large part . . . [to] legislative approval and encouragement").

17. United States (Federal) Arbitration Act, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

18. Val Stieglitz, *Update on State Statutes Restricting "Out-of-State" Arbitrations*, IADC ALTERNATIVE DISP. RESOL. COMMITTEE NEWSL. (Int'l Ass'n of Def. Counsel, Chicago, Ill.), Feb. 2014, at 1, 2 n.1 (citing 9 U.S.C. §§ 2–4 (2012); AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1748 (2011); EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002)), *available at* http://www.iadclaw.org/assets/1/19/ADR_Feb_2014.pdf; *see also* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) (noting that at the time the Federal Arbitration Act was enacted, Congress faced two problems, "the old common[]law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements"); Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 275 (W. Va. 2011) (quoting Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 270 (2004)) ("'When Congress enacted the FAA, its purpose was twofold: to reverse the longstanding judicial hostility toward arbitration agreements and to place arbitration agreements on equal footing with other contracts.'"), *vacated sub nom.* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012) (per curiam).

19. 9 U.S.C. § 2. Note that the FAA thus applies to maritime contracts, as clearly stated in the Act. The FAA also applies to contracts involving commerce, which has been held to mean interstate or foreign commerce. *See, e.g.*, Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001) (noting that to fall under the commerce provision of the FAA, "the transaction must turn out, in fact, to have involved interstate commerce"); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 460, 476 S.E.2d 149, 152 (1996) (citing Timms v. Greene, 310 S.C. 469, 472–73, 427 S.E.2d 642, 644 (1993)) ("For the Federal Act to apply, the commerce involved in the contract must be interstate or foreign."); *see also* 9 U.S.C. § 1 (defining commerce, in part, as "commerce among the several States or with foreign nations").

Federal statute thus mandates broad acceptance and enforcement of arbitration agreements.[20]

Like the federal statute, federal case law supports broad enforcement of arbitration agreements. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[21] the Court upheld a lower court's stay of litigation pending arbitration between the parties, even where a general claim of fraud was involved.[22] Similarly, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[23] the Court found an agreement to arbitrate enforceable, even though abiding by the arbitration agreement would mean resolving the dispute in a forum that might not recognize the antitrust claims at issue.[24]

Other federal cases also uphold broad enforcement of arbitration agreements. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[25] the Court affirmed a lower court that overturned a stay of arbitration pending a state court decision[26] and sought to compel arbitration between parties to a construction contract with an arbitration agreement.[27] In holding that the stay should be overturned and arbitration compelled, the Court said that "[s]ection 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[28] The Court also declared that "[t]he [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[29]

The Supreme Court has specifically addressed the issue of forum selection clauses several times and found that such clauses should be enforced on their terms, as in *Mitsubishi*.[30] In the *M/S Bremen v. Zapata Off-Shore Co.*,[31] the

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20. This broad enforcement of arbitration agreements is required under the FAA in the context of either maritime contracts or interstate or foreign commerce. All cases cited in the remainder of this Note involve maritime contracts, interstate commerce, or both, such that the FAA applied. The FAA does not apply to intrastate, as opposed to interstate, commerce. *See* Stieglitz, *supra* note 18, at 3 (citing 9 U.S.C. § 1; Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458–60, 730 S.E.2d 312, 317–18 (2012)).

21. 388 U.S. 395 (1967).

22. *Id.* at 399, 406–07.

23. 473 U.S. 614 (1985).

24. *Id.* at 636–37.

25. 460 U.S. 1 (1983).

26. *Id.* at 4 (citing 9 U.S.C. § 4 (2012); Will v. Calvert Ins. Co., 437 U.S. 655, 662–67 (1978) (plurality opinion); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–21 (1976); Mercury Constr. Corp. v. Moses H. Cone Mem'l Hosp., 656 F.2d 933 (4th Cir. 1981) (en banc)).

27. *Id.* at 8 (citing 28 U.S.C. § 1291 (2012)).

28. *Id.* at 24.

29. *Id.* at 24–25.

30. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

31. 407 U.S. 1 (1972).

Court held that where parties to an international maritime contract (though not an arbitration agreement) selected a forum for dispute resolution, the forum selection clause should be enforced, stating "[W]e conclude that the forum clause should control absent a strong showing that it should be set aside."[32] In *Scherk v. Alberto-Culver Co.*,[33] the Court stated that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[34] The Court used this reasoning to hold the parties in that case to their agreement to arbitrate a securities dispute.[35] The strength with which the United States Supreme Court has declared that forum selection clauses should be upheld becomes even more important in light of the South Carolina arbitration venue clause discussed in Part III, *infra*, which attempts to void most forum selection clauses in arbitration agreements.

In addition to broadly upholding the enforcement of arbitration agreements and of forum selection clauses within arbitration agreements, federal law also specifies that where federal and state laws conflict, federal law prevails. The Supremacy Clause of the United States Constitution provides that federal law is "the supreme Law of the Land . . . any thing in the Constitution or Laws of any state to the Contrary notwithstanding."[36] In *Southland Corp. v. Keating*,[37] the Supreme Court reviewed a state court ruling that California franchise law required judicial resolution of disputes, despite an arbitration agreement between a franchisor and a franchisee.[38] The Court found that the FAA applied in state as well as federal courts, and that the California law requiring judicial resolution of franchise disputes violated the Supremacy Clause.[39] Referring to the FAA, the Court declared that, "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[40] Likewise, in *Perry v. Thomas*,[41] the Court held that a California law allowing judicial resolution of wage disputes regardless of an arbitration agreement violated the FAA and the Supremacy Clause, and "under the Supremacy Clause, the state statute must give way."[42]

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32. *Id.* at 15.
33. 417 U.S. 506 (1974).
34. *Id.* at 519.
35. *Id.* at 519–20.
36. U.S. CONST. art. VI, cl. 2.
37. 465 U.S. 1 (1984).
38. *Id.* at 5.
39. *Id.* at 10, 16.
40. *Id.* at 16 (footnote omitted).
41. 482 U.S. 483 (1987).
42. *Id.* at 491.

Although federal law prevails, states can create their own arbitration laws.[43] These state laws cannot, however, void valid arbitration agreements. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[44] the Court held that the FAA did not preempt a stay of arbitration under California law to allow related litigation to be resolved[45] because "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[46] The Court added, "But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law . . . ."[47] In *Doctor's Associates, Inc. v. Casarotto*,[48] the Supreme Court found that section two of the FAA preempted a Montana statute that required special notice be placed on contracts subject to arbitration, or the arbitration agreement would be invalid.[49] The Court declared that state "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[50] The Court continued: "By enacting [section] 2 [of the FAA] . . . Congress precluded [s]tates from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"[51]

Federal law provides for broad enforcement of arbitration agreements.[52] Arbitration agreements are to be enforced according to their terms, including their forum selection clauses.[53] States can create their own arbitration laws, but these laws cannot have the effect of singling out or invalidating otherwise valid arbitration agreements.[54] Where state and federal laws on arbitration conflict, the federal laws prevail.[55]

III. SOUTH CAROLINA'S ARBITRATION VENUE STATUTE

> "In enacting [section] 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the

43. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).
44. 489 U.S. 468 (1989).
45. *Id.* at 477–79 (citing Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).
46. *Id.* at 477.
47. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
48. 517 U.S. 681 (1996).
49. *Id.* at 687.
50. *Id.*
51. *Id.* (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).
52. *See supra* notes 16–29 and accompanying text.
53. *See supra* notes 30–35 and accompanying text.
54. *See supra* notes 43–51 and accompanying text.
55. *See supra* notes 36–42 and accompanying text.

contracting parties agreed to resolve by arbitration."[56]

In contrast to the broad acceptance of arbitration agreements, and the enforcement of such agreements on their terms mandated by federal statute and case law, South Carolina's arbitration laws have attempted to single out and void arbitration agreements. South Carolina state courts have held that the FAA preempts South Carolina arbitration laws that effectively invalidate arbitration agreements.[57] Further, state and federal courts have specifically found that South Carolina's arbitration venue statute violates and is preempted by the FAA.[58] The courts have used this finding to compel out-of-state arbitration.[59]

Section 15-48-10(a) of the South Carolina Code provides that "[n]otice that a contract is subject to arbitration . . . shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration."[60] The South Carolina Supreme Court has held that the FAA preempts this statute,[61] using its finding to uphold arbitration agreements that did not meet the statutory notice requirement.[62] In *Soil Remediation Co. v. Nu-Way Environmental, Inc.*,[63] the Court found that the arbitration agreement at issue did not meet the precise notice requirements of the South Carolina statute.[64] However, the Court held that the FAA preempted the state statute, making the agreement enforceable.[65] Similarly, in *Munoz v. Green Tree Financial Corp.*,[66] the Court held that the FAA preempted the South Carolina arbitration notice requirement statute,[67] and compelled arbitration under the agreement.[68] The *Munoz* court said:

> State law remains applicable [to arbitration] if that law . . . arose to govern issues concerning the validity, revocability, and enforceability of

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56. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

57. *See* Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 537–38, 542 S.E.2d 360, 363 (2001); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 461, 476 S.E.2d 149, 153 (1996).

58. *See* Nat'l Material Trading v. M/V Kaptan Cebi, 1998 A.M.C. 201, 210 (D.S.C. 1997) (quoting 9 U.S.C. § 2 (2012); S.C. CODE ANN. § 15-7-120(B) (2005)); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (per curiam).

59. *See Munoz*, 343 S.C. at 540, 543, 542 S.E.2d at 364, 366 (citing *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 153).

60. S.C. CODE ANN. § 15-48-10(a) (2005).

61. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (citing *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 153).

62. *See id.* at 540, 543, 542 S.E.2d 364, 366 (citing *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 153).

63. 323 S.C. 454, 476 S.E.2d 149 (1996).

64. *Id.* at 456–58, 476 S.E.2d at 150–51 (quoting S.C. CODE ANN. § 15-48-10(a)) (citing Paschal v. State of S.C. Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)).

65. *Id.* at 461, 476 S.E.2d at 152–53 (citing S.C. CODE ANN. § 15–48–10(a) (1976)).

66. 343 S.C. 531, 542 S.E.2d 360 (2001).

67. *Id.* at 540, 542 S.E.2d at 364 (citing *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 153).

68. *Id.* at 543, 542 S.E.2d at 366.

> all contracts generally. A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies. Accordingly, [title 15, chapter 48 of the South Carolina Code], which applies specifically and exclusively to arbitration agreements, is preempted in this case.[69]

Less than a year later, in *Zabinski v. Bright Acres Associates*,[70] the court made a similar finding in relation to an arbitration agreement within a partnership agreement.[71] Although the notice requirement of the South Carolina statute was not met,[72] the court held that "the FAA provisions trump conflicting requirements of South Carolina law, and arbitration is required" because the partnership was involved in interstate commerce.[73]

South Carolina's arbitration venue clause states: "A provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this State."[74] The statute thus means that an arbitration agreement need not be followed if the agreement requires out-of-state arbitration, and the issue could otherwise be heard in South Carolina courts. State and federal courts have specifically found that South Carolina's arbitration venue statute violates and is preempted by the FAA,[75] and courts have used that finding to compel out-of-state arbitration in accordance with arbitration agreements.[76]

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69. *Id.* at 539–40, 542 S.E.2d at 364 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 153).

70. 346 S.C. 580, 553 S.E.2d 110 (2001).

71. *Id.* at 596, 553 S.E.2d at 118.

72. *See id.* at 590, 553 S.E.2d at 115 (citing S.C. CODE ANN. § 15-48-10(a) (2005)).

73. *Id.* at 596, 553 S.E.2d at 118.

74. S.C. CODE. ANN. § 15-7-120(B) (2005).

75. *See* Nat'l Material Trading v. M/V Kaptan Cebi, 1998 A.M.C. 201, 210 (D.S.C. 1997) (quoting 9 U.S.C. § 2 (2012); S.C. CODE ANN. § 15-7-120(B) (2005)); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (per curiam).

Presumably, South Carolina's arbitration venue statute also violates the State Uniform Arbitration Act, found in title 15, chapter 48 of the South Carolina Code, which provides, in part, that written arbitration agreements are "valid, enforceable[,] and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code Ann. § 15-48-10(a). This statutory language clearly parallels the FAA, so to the extent that South Carolina's arbitration venue law violates the FAA, it also violates South Carolina's arbitration law. *Cf.* 9 U.S.C. § 2 (2012) (using identical language). Interestingly, while South Carolina's Uniform Arbitration Act and arbitration venue law are contained in the same title of the South Carolina Code, title 15 on civil remedies and procedure, they are in separate chapters. The Uniform Arbitration Act is found in chapter 48, while the arbitration venue law is found in part of chapter seven on venue. *See* S.C. Code. Ann. §§ 15-7-120, 15-48-10 to -240.

76. *See, e.g.*, *Nat'l Material Trading*, 1998 A.M.C. at 212 (ordering arbitration in London); *Tritech Elec., Inc.*, 343 S.C. at 400, 540 S.E.2d at 866 (citing Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993)) (reversing a trial court decision refusing to compel arbitration).

In *National Material Trading v. M/V Kaptan Cebi*,[77] the United States District Court for the District of South Carolina, sitting in admiralty, explored claims stemming from cargo damaged in maritime shipping.[78] In that case, the parties had contractually agreed to arbitration in London, England.[79] The court held that South Carolina's arbitration venue statute, and its purported avoidance of agreements mandating out-of-state arbitration, did not make the agreement at issue unenforceable, because the FAA controlled.[80] The court noted that in reviewing arbitration agreements in commercial contexts, the United States Supreme Court "has clearly and unequivocally stated that, pursuant to the provisions of the [FAA], such arbitration clauses are valid and enforceable."[81] The court used these findings to compel arbitration between the parties in London, as per their arbitration agreement.[82]

In *Tritech Electric, Inc. v. Frank M. Hall & Co.*,[83] the South Carolina Court of Appeals held that the FAA preempted South Carolina's arbitration venue law for transactions involving interstate commerce.[84] In that case, a Georgia contractor and a South Carolina subcontractor were parties to several contracts that included an agreement to arbitrate in Georgia.[85] When a dispute arose between the parties, the subcontractor sued the contractor, and the contractor filed a motion to dismiss the suit and compel arbitration, based in part on FAA preemption of state laws.[86] The trial court denied the motion, finding that the arbitration agreement violated South Carolina's arbitration venue law.[87] In reversing the trial court, the appeals court held that the FAA preempted South Carolina's arbitration venue law,[88] and that the prohibition against state laws that conflict with the FAA "specifically prevents state courts from requiring a judicial resolution of a conflict which the parties agreed to arbitrate."[89]

Without specifically citing South Carolina's arbitration venue law, the court's decision in *Ashley River Properties I, L.L.C. v. Ashley River Properties*

77. 1998 A.M.C. 201 (D.S.C. 1997).
78. *Id.* at 202–03.
79. *Id.* at 204.
80. *Id.* at 210 (quoting 9 U.S.C. § 2; S.C. CODE ANN. § 15-7-120(B)).
81. *Id.* (citing 9 U.S.C. §§ 1–16 (2012)).
82. *Id.* at 212.
83. 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000) (per curiam).
84. *Id.* at 400, 540 S.E.2d at 866 (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–26 (1983); Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993); Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 104–05 & n.2, 333 S.E.2d 781, 785 & n.2 (1985) (per curiam)).
85. *Id.* at 398, 540 S.E.2d at 864–65.
86. *Id.* at 398–99, 540 S.E.2d at 865.
87. *Id.* at 400, 540 S.E.2d at 866 (quoting S.C. CODE ANN. § 15-7-120(B) (2005)).
88. *Id.*
89. *Id.* (citing *Osteen*, 315 S.C. at 425, 434 S.E.2d at 283).

II, L.L.C.,[90] did cite related clauses, bolstering the argument that South Carolina's arbitration venue clause violates and is preempted by the FAA.[91] In *Ashley River*, the South Carolina Court of Appeals held that South Carolina courts lacked jurisdiction to void or modify an arbitration award made in New York,[92] even where South Carolina law governed the agreement.[93] The award at issue was made pursuant to the parties' agreement, which provided for arbitration and jurisdiction in New York.[94] Exploring the argument that South Carolina law allows for judicial venue in South Carolina regardless of agreements to the contrary,[95] the court stated that "[t]he FAA requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[96] The court further noted that it had previously found that section 15-7-120 of the South Carolina Code violated and was preempted by the FAA.[97]

Unlike the broad acceptance—and enforcement—of arbitration agreements on their terms required by federal statutory and case law, South Carolina's arbitration venue statute attempts to void arbitration agreements that require out-of-state arbitration.[98] The FAA preempts state laws that violate its terms.[99] Since South Carolina's arbitration venue law violates the FAA, state and federal courts have expressly found that the FAA preempts South Carolina's law.[100]

IV. ALTERNATIVE MODELS FOR STATE ARBITRATION VENUE STATUTES

Together with South Carolina, the United States Court of Appeals for the Fourth Circuit covers North Carolina, Virginia, Maryland, and West Virginia. As such, the four other states' arbitration venue statutes, and their respective judicial interpretations, present excellent comparisons to South Carolina. Georgia, the only state bordering South Carolina that is not also in the Fourth

90. 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007).

91. *Id.* at 281, 648 S.E.2d at 300 (quoting S.C. CODE ANN. § 15–7–120(A) (2005); Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)) (citing 9 U.S.C. § 9 (2012); *Tritech Elec., Inc.*, 343 S.C. at 400, 540 S.E.2d at 866).

92. *Id.* at 283, 648 S.E.2d at 301.

93. *See id.* at 275, 648 S.E.2d at 296–97.

94. *Id.* at 275, 648 S.E.2d at 297.

95. In this section of the case, the statute at issue was S.C. CODE ANN. § 15-7-120(A), which attempts to allow causes of action to be brought in South Carolina regardless of contractual agreement to bring them elsewhere and is obviously closely related to South Carolina's arbitration venue statute.

96. *Ashley River*, 374 S.C. at 281, 648 S.E.2d at 300 (citing *Volt Info Scis., Inc.*, 489 U.S. at 478).

97. *Id.* (citing Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (per curiam)).

98. *See supra* note 74 and accompanying text.

99. *See supra* notes 56–73 and accompanying text.

100. *See supra* notes 75–97 and accompanying text.

Circuit, frequently competes with South Carolina for business,[101] and has recently updated its arbitration statutes, providing an interesting contrast with South Carolina.[102]

Unlike South Carolina's arbitration venue statute, which attempts to void all arbitration agreements requiring an out-of-state forum, neighboring states generally put fewer restrictions on arbitrations, specifically on arbitration venue.[103] Arbitration statutes in neighboring states fall along a continuum, from North Carolina, which is nearly as restrictive as South Carolina, to West Virginia and Georgia, where statutes and case law provide for the broadest possible acceptance and enforcement of arbitration agreements.[104] Where other states have attempted to restrict arbitrations or arbitration venue, courts have generally concluded that the FAA preempts such restrictions.

A. North Carolina

North Carolina's arbitration venue statute is almost as restrictive as South Carolina's, providing that out-of-state arbitration of an issue stemming from a North Carolina contract is void in nearly all situations and industries: "Except as otherwise provided . . . any provision in a contract entered into in North Carolina that requires . . . the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable."[105] The statute then exempts from this general prohibition of out-of-state arbitration non-consumer loan transactions and out-of-state arbitration under a forum selection clause with the consent of the parties at the time of dispute.[106] Therefore, except in specific kinds of loan transactions or where at the time a dispute arises the parties reaffirm their commitment to the out-of-state forum they selected in their arbitration agreement,[107] North Carolina's arbitration

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101. *See, e.g.*, Douglas Sams, *Georgia May Benefit as States Look to Trim Tax Incentives*, ATLANTA BUS. CHRON. (May 20, 2011, 6:00 AM), http://www.bizjournals.com/atlanta/print-edition/2011/05/20/georgia-may-benefit-as-states-look-to.html?page=all (discussing the role tax incentives played in Amazon's decision to build a distribution center in Columbia).

102. *See* GA. CODE ANN. § 9-9-20 (Supp. 2014) ("The purpose of this part is to encourage international commercial arbitration in this state, to enforce arbitration agreements and arbitration awards, to facilitate prompt and efficient arbitration proceedings consistent with this part, and to provide a conducive environment for international business and trade.").

103. *Compare id.* (stating that the goal of the law "is to encourage . . . arbitration in this state"), *and* W. VA. CODE ANN. § 55-10-1 (LexisNexis 2008) (stating that any controversy may be submitted to arbitration), *with* N.C. GEN. STAT. § 22B-3 (2013) (stating that any contract provision that requires arbitration out of state is against public policy), *and* S.C. CODE ANN. § 15-7-120(B) (2005) (declaring any provision in an arbitration agreement requiring out-of-state arbitration unenforceable).

104. *See* sources cited *supra* note 103.

105. N.C. GEN. STAT. § 22B-3.

106. *Id.*

107. Of course, at the time a dispute arises, the parties may not be disposed to agree to anything, even something as seemingly innocuous as abiding by the terms of their original

venue statute invalidates out-of-state arbitration for all North Carolina contracts. As in South Carolina, state and federal courts have moved from upholding North Carolina's public policy of requiring in-state arbitration to holding that the North Carolina statute violates the FAA.[108] Courts have used this to uphold arbitration agreements requiring out-of-state arbitration.[109]

In *James C. Greene Co. v. Great American E&S Insurance Co.*,[110] the court held that North Carolina's arbitration venue statute reflected a public policy favoring in-state arbitration.[111] Combining that public policy with the inconvenience of out-of-state arbitration, the court found that the arbitration agreement between the parties to an insurance agreement, requiring arbitration in New York should not be enforced, and the matter should be referred for arbitration in North Carolina.[112] Other cases, including at least one earlier than *James C. Greene Co.*, have held that the FAA preempts North Carolina's arbitration venue statute, and have used that finding to uphold agreements for out-of-state arbitration.[113]

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arbitration agreement. Deciding to reach an agreement in advance of any dispute is motivated in part by the fact that the parties will not have to negotiate when a dispute arises.

108. *Compare* James C. Greene Co. v. Great Am. E&S Ins. Co., 321 F. Supp. 2d 717, 722 (E.D.N.C. 2004) (requiring arbitration within North Carolina, in part because of the state's public policy), *with* Newman *ex rel.* Wallace v. First Atl. Res. Corp., 170 F. Supp. 2d 585, 593 (M.D.N.C. 2001) (citing 9 U.S.C. § 4 (2012)) (enforcing the arbitration venue clause and recognizing that the court could not compel arbitration in a location contrary to that clause). As in South Carolina, North Carolina's arbitration venue statute presumably violates state law on arbitration, which parallels the FAA by providing that an arbitration agreement is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract." N.C. GEN. STAT. § 1-569.6(a) (2013). Also similar to South Carolina, North Carolina's arbitration venue law is separated from the remainder of the state's arbitration law. North Carolina's Revised Uniform Arbitration Act is located in article 45C of chapter 1, the chapter on civil procedure of the General Statutes of North Carolina. *See* N.C. GEN. STAT. §§ 1-569.1 to .31 (2013). The arbitration venue statute is located in chapter 22B of the statutes, the chapter containing laws about contracts against public policy. *See* N.C. GEN. STAT. § 22B-3. This separation of arbitration venue law from the rest of arbitration law is almost unique to South Carolina and North Carolina statutes among the state statutes reviewed in this Note. Virginia puts a venue restriction in construction contracts, see VA. CODE ANN. § 8.01-262.1(A) (2007), in a different chapter of the Code of Virginia title on civil remedies and procedure than the Uniform Arbitration Act, *see id.* § 8.01-581.01 to .03 (2007). The remainder of the state statutes reviewed in this Note, however, are found within the same subject areas of their respective state codes.

109. *See Newman*, 170 F. Supp. 2d at 593 (citing 9 U.S.C. § 4); Goldstein v. Am. Steel Span, Inc., 640 S.E.2d 740, 743 (N.C. Ct. App. 2007).

110. 321 F. Supp. 2d 717 (E.D.N.C. 2004).

111. *Id.* at 722.

112. *Id.* Although the court ordered arbitration in North Carolina, it recognized that federal law governs the applicability of forum selection clauses and a state policy favoring in-state arbitration is not enough, by itself, to declare an agreement to arbitrate elsewhere invalid. *Id.* at 721 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30–32 (1988)).

113. *See Newman*, 170 F. Supp. 2d at 593 (citing 9 U.S.C. § 4 (2012)); *Goldstein*, 640 S.E.2d at 743.

In *Newman ex rel. Wallace v. First Atlantic Resources Corp.*,[114] the court held that despite the strong public policy of North Carolina requiring in-state arbitration,[115] the FAA preempted the state statute's attempt to void the parties' arbitration agreement.[116] The court used this finding to uphold the parties' agreement to arbitrate in Miami-Dade County, Florida.[117] Similarly, in *Goldstein v. American Steel Span, Inc.*,[118] the court upheld the agreement of the parties to arbitrate in North Dakota, despite North Carolina's arbitration venue law.[119] The court stated:

> It is uncontested that the FAA applies to this case. Because the FAA preempts North Carolina law through the Supremacy Clause of the United States Constitution, thus rendering the forum designation enforceable, we hold that Fargo, North Dakota, as agreed upon in the parties' contract, is the appropriate locale for arbitration.[120]

In *United States ex rel. TGK Enterprises v. Clayco, Inc.*,[121] the court held that the FAA preempted North Carolina's arbitration venue law, thus requiring the parties to arbitrate in Missouri per their arbitration agreement.[122] In making this finding, the court distinguished between state laws that void arbitration agreements altogether, and those that merely delay arbitration.[123] State laws in the former category, including North Carolina's arbitration venue law, are preempted by the FAA because they "'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[124] Laws in the latter category, like the state law at issue in *Volt Information Sciences, Inc.* that required a stay of arbitration pending litigation are not preempted by the FAA when the agreement is subject to state law because enforcing the state law also enforces the parties' agreement, which is the purpose of the FAA.[125]

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114. 170 F. Supp. 2d 585 (M.D.N.C. 2001).

115. *See id.* at 592.

116. *Id.* at 593 (citing 9 U.S.C. § 4).

117. *Id.*

118. 640 S.E.2d 740 (N.C. Ct. App. 2007).

119. *Id.* at 743.

120. *Id.*; *see also* Aspen Spa Props., L.L.C. v. Int'l Design Concepts, L.L.C., 527 F. Supp. 2d 469, 473 (E.D.N.C. 2007) (holding that the FAA preempts North Carolina's arbitration venue statute and upholding an agreement to arbitrate in Washington state on that basis).

121. 978 F. Supp. 2d 540 (E.D.N.C. 2013).

122. *Id.* at 548 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477–78 (1989); Southland Corp. v. Keating, 465 U.S. 1, 10 (1983)).

123. *Id.* at 548–49 (quoting *Volt Info. Scis., Inc.*, 489 U.S. at 471, 478–79) (citing S. Concrete Prods., Inc. v. ARCO Design/Build, Inc., No. 1:11–cv–194, 2012 WL 1067906, at *2, *6 (W.D.N.C. Mar. 29, 2012)).

124. *Id.* at 548 (quoting *Southland Corp.*, 465 U.S. at 10).

125. *See id.* at 548–49 (quoting *Volt Info. Scis., Inc.*, 489 U.S. at 471, 479).

North Carolina's arbitration venue statute attempts to void out-of-state arbitration for nearly all North Carolina contracts.[126] Earlier courts reasoned that this statute, and the state public policy of rejecting out-of-state arbitration, could be used to refuse enforcement of an agreement for out-of-state arbitration.[127] More recently, however, state and federal courts have held that North Carolina's statute, like South Carolina's, is preempted by the FAA because it attempts to invalidate the arbitration terms to which the parties agreed.[128]

B. Virginia

Virginia's arbitration statute requires broader enforcement of arbitration agreements than either South Carolina's or North Carolina's statute. In language that mirrors the FAA, Virginia provides for broad enforcement of arbitration agreements, with exceptions where certain industries or parties are involved.[129] The courts have held that the FAA preempts provisions of the Code of Virginia that attempt to restrict arbitration venue.[130]

In language paralleling the FAA, Virginia law provides that arbitration agreements are "valid, enforceable[,] and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract."[131] Virginia then exempts from this general rule enforcing arbitration agreements any dispute about employment or terms of employment involving an officer or employee of the Commonwealth of Virginia.[132] Virginia creates a further exception for parties with a principal place of business in Virginia who are engaged in construction in Virginia.[133] In such a case, "[t]he forum for any arbitration proceedings required . . . shall be in [Virginia]. If the contract provides for arbitration proceedings outside [Virginia], such provision is unenforceable," and arbitration can take place in the city or county where the work is located, or elsewhere in Virginia if the parties agree.[134] Virginia's statutes therefore seem to broadly uphold arbitration agreements, except as they pertain to state employees. Virginia's statutes also preclude out-of-state arbitration for Virginia parties engaged in construction within the state.

At least one federal district court has held that the FAA preempts the Virginia statute attempting to invalidate arbitration venues outside Virginia in

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126. *See* N.C. GEN. STAT. § 22B-3 (2013).

127. *See supra* notes 110–12 and accompanying text.

128. *See supra* notes 114–24 and accompanying text.

129. *See* VA. CODE ANN. § 8.01-581.01 (2007)

130. *See, e.g.*, M.C. Constr. Corp. v. Gray Co., 17 F. Supp. 2d 541, 548 (W.D. Va. 1998) (quoting Glass v. Kidder Peabody & Co., 114 F.3d 446, 452 (4th Cir. 1997)) (citing 9 U.S.C. § 4 (2012); VA. CODE ANN. § 8.01-262.1 (2007)) (concluding that a Virginia law requiring in-state arbitration is preempted because it frustrates the objectives of the FAA).

131. VA. CODE ANN. § 8.01-581.01.

132. *Id.*

133. *See id.* § 8.01-262.1(A).

134. *Id.* § 8.01-262.1(B).

the construction context.[135] In *M.C. Construction Corp. v. Gray Co.*,[136] the court held that the FAA preempted the Virginia statute and used that conclusion to uphold an agreement to arbitrate in Kentucky.[137] In *M.C. Construction Corp.*, the parties entered into two contracts for construction in Virginia, each containing an agreement to arbitrate under the laws of Kentucky either at the location of the project or in one of several Kentucky locations as chosen by Gray, a Kentucky company.[138] The court found that section 8.01-262.1 of the Code of Virginia reflected a public policy that Virginia construction contracts should be arbitrated in Virginia, making arbitration in Kentucky contrary to Virginia public policy.[139] Nonetheless, the court concluded that the FAA preempted the Virginia statute, and thus the arbitration should take place in Kentucky.[140] The court concluded that "[b]ecause it effectively negates arbitration forum selection clauses in construction agreements, such as the one at issue here, [the Virginia statute] 'obstruct[s] the realization and execution of [c]ongressional objectives regarding the [FAA].'"[141] Even though they are limited to specific parties and projects within one industry, Virginia's restrictions on arbitration venue in construction have thus been held preempted by the FAA.

C. Maryland

In Maryland, arbitration agreements are valid, except for agreements between employers and employees.[142] The Maryland Court of Appeals, the highest court in the state, has further narrowed the scope of even this minimal restriction on arbitration agreements.[143] Mirroring the FAA, the Maryland statute provides that agreements to arbitrate are "valid and enforceable, and . . . irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract."[144] The Maryland statute then provides that this general rule of enforceability "does not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in the agreement that this subtitle shall apply."[145] Thus, the

135. *See M.C. Constr. Corp.*, 17 F. Supp. 2d at 548 (citing VA. CODE ANN. § 8.01-262.1).

136. 17 F. Supp. 2d 541 (W.D. Va. 1998).

137. *Id.* at 548.

138. *Id.* at 543–44 & nn.1–2.

139. *Id.* at 546 (quoting VA. CODE ANN. § 8.01-262.1(B)).

140. *Id.* at 548 (citing VA. CODE ANN. § 8.01-262.1).

141. *Id.* (third alteration in original) (quoting Glass v. Kidder Peabody & Co., 114 F.3d 446, 452 (4th Cir. 1997)).

142. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-206 (LexisNexis 2013).

143. *See* Wilson v. McGrow, Pridgeon & Co., 467 A.2d 1025, 1026 (Md. 1983) (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-206(b)).

144. MD. CODE ANN., CTS. & JUD. PROC. § 3-206(a).

145. *Id.* § 3-206(b).

Maryland statute makes arbitration agreements enforceable, except in employer-employee agreements.[146]

The Maryland Court of Appeals has further narrowed the scope of Maryland's statutory exception to arbitrability. In *Wilson v. McGrow, Pridgeon & Co.*,[147] an employment agreement between an accountant and his employer that was subject to arbitration resulted in a dispute.[148] The employer argued that section 3-206(b) of the Maryland Code excluded an agreement between an employer and a single employee from arbitration.[149] On the other hand, the court held that the statute only made arbitration agreements unenforceable in the context of collective bargaining agreements, not agreements between an employer and a single employee.[150] The court used this determination to uphold the parties' agreement to arbitrate.[151] The Maryland exception to enforcement of arbitration agreements is therefore very narrow in scope.

D. West Virginia

Among Fourth Circuit states, West Virginia provides the broadest possible enforcement of arbitration agreements and restricts parties from revoking their agreements to arbitrate.[152] Case law strongly upholds this broad enforcement.[153] Despite West Virginia's broad acceptance and enforcement of arbitration agreements, the United States Supreme Court has held that a West Virginia ruling violated the FAA by making certain arbitration agreements unenforceable.[154]

West Virginia's statute provides: "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration . . . ."[155] State statute then strongly enforces the agreement of the parties to arbitrate, declaring that "[n]o such submission [of a dispute to arbitration] . . . shall be revocable by any party to such submission, without the leave of . . . [a] court."[156] The West Virginia Supreme Court of Appeals has

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146. *See id.* § 3-206. Maryland statutory law also makes clauses requiring arbitration in consumer insurance contracts void. *See id.* § 3-206.1 (LexisNexis 2013). However, there do not seem to be any cases interpreting this provision, so it is not discussed in this Note.

147. 467 A.2d 1025 (Md. 1983).

148. *See id.* at 1026.

149. *See id.* at 1026 (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-206(b)).

150. *Id.* at 1031 (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-206(b)).

151. *Id.* (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-206(b)).

152. *See* W. VA. CODE ANN. § 55-10-1 (LexisNexis 2008) (stating that "[p]ersons desiring to end any controversy . . . may submit the same to arbitration"); *id.* § 55-10-2 (LexisNexis 2008) (restricting the ability of parties to revoke their decision to arbitrate).

153. *See, e.g.*, Hughes v. Nat'l Fuel Co., 3 S.E.2d 621, 624 (W. Va. 1939) (quoting W. VA. CODE ANN. § 55-10-4 (LexisNexis 2008)) (citing W. VA. CODE ANN. §§ 55-10-2 to -3 (LexisNexis 2008)) (stating that an "agreement to arbitrate . . . cannot be revoked except by leave of court").

154. *See* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1202 (2012) (per curiam).

155. W. VA. CODE ANN. § 55-10-1.

156. *Id.* § 55-10-2.

noted that the "purpose of statutory enactments on [arbitration] is to afford a more efficacious procedure for the arbitration of controversies."[157]

This strong stance towards enforcing arbitration agreements was reinforced when the United States Supreme Court overturned a West Virginia ruling that held certain arbitration agreements invalid.[158] In a case about arbitration clauses in nursing home admission contracts, the West Virginia Supreme Court of Appeals held that the FAA preempted a West Virginia state law that disallowed arbitration agreements in nursing home contracts by requiring legal resolution of injury claims against nursing homes.[159] Despite this preemption, the West Virginia Supreme Court of Appeals stated:

> Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public.[160]

The court used this finding to hold the arbitration agreements in the nursing home contracts at issue unenforceable.[161] The United States Supreme Court overruled the West Virginia Supreme Court of Appeals, finding that the West Virginia court incorrectly interpreted the scope of the FAA.[162] The FAA, the Supreme Court said, "'reflects an emphatic federal policy in favor of arbitral dispute resolution.'"[163] The Court noted that the FAA does not contain an exception for injury or wrongful death claims.[164] Further, when a state law prevents arbitration of a type of claim, the FAA preempts that law,[165] and "[t]hat rule resolves these cases."[166] The Court used this holding to vacate the decision of the West Virginia Supreme Court of Appeals.[167] Thus, even in the context of West Virginia's broad acceptance of arbitration and broad enforcement of arbitration agreements, the Supreme Court has found that an attempt to exempt from arbitration a particular type of agreement that is otherwise subject to the FAA is void.

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157. *Hughes*, 3 S.E.2d at 624.

158. *See Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1202, 1204.

159. Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 263, 282 (W. Va. 2011) (quoting W. VA. CODE ANN. § 16-5C-15(c) (LexisNexis 2011)) (citing 9 U.S.C. § 2 (2012)), *overruled by Marmet Health Care Ctr., Inc.*, 132 S. Ct. 1201.

160. *Id.* at 291.

161. *Id.* at 292.

162. *Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1202.

163. *Id.* at 1203 (quoting KPMG L.L.P. v. Cocchi, 132 S. Ct. 23, 25 (2011) (per curiam)).

164. *Id.* (quoting 9 U.S.C. § 2).

165. *Id.* (quoting AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

166. *Id.*

167. *Id.* at 1204.

E. Georgia

As South Carolina's neighbor and natural competitor for business relocation, Georgia's approach to arbitration agreements presents an interesting comparison with South Carolina, as well as with other states in the Fourth Circuit. Georgia actively recruits arbitration business and strongly upholds arbitration agreements.[168] Nearly three years ago, Georgia overhauled its international arbitration rules[169] to be friendlier to businesses seeking arbitration of their international disputes.[170] The new Georgia International Commercial Arbitration Code now states in part: "The purpose of this part is to encourage international commercial arbitration in this state, to enforce arbitration agreements and arbitration awards, to facilitate prompt and efficient arbitration proceedings consistent with this part, and to provide a conducive environment for international business and trade."[171]

By providing this statutory infrastructure, together with physical infrastructure and legal support, Georgia aims to become a chosen destination for businesses seeking arbitration of their international disputes.[172]

In the domestic arbitration context, Georgia law provides for broad enforcement of arbitration agreements.[173] Where Georgia law has sought to void arbitration agreements, the courts have generally held that such attempts are preempted by the FAA, except in particular industries.[174] Georgia's statute says arbitration agreements are "enforceable without regard to the justiciable character of the controversy."[175] This provision contrasts sharply with South

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168. *See* Stephen Wright, *Georgia Seeks to Be Arbitration Center for International Business Disputes*, SAPORTAREPORT (July 7, 2013), http://saportareport.com/blog/2013/07/georgia-aiming-to-be-an-arbitration-center-for-international-business-disputes/comment-page-1/.

169. Although this Note focuses on arbitration involving commerce (which may be domestic or international), Georgia's experience with international arbitration is noted here to demonstrate how Georgia welcomes and recruits arbitration business.

170. *See Enactment of the New Georgia International Commercial Arbitration Code Solidifies Atlanta's Status as a Hub for International Arbitration*, CLIENT ALERT (King & Spalding, Int'l Arbitration Practice Grp., Atlanta, Ga.), June 5, 2012, at 1, 1 [hereinafter *New Georgia Arbitration Code*] (quoting GA. CODE ANN. § 9-9-20(b) (Supp. 2014)), *available at* http://www.kslaw.com/imageserver/KSPublic/library/publication/ca060512.pdf; Wright, *supra* note 168.

171. GA. CODE ANN. § 9-9-20(b).

172. *See New Georgia Arbitration Code*, *supra* note 170, at 1 (quoting GA. CODE ANN. § 9-9-20(b)); Wright, *supra* note 168.

173. *See* GA. CODE ANN. § 9-9-3 (2007).

174. *See, e.g.*, Primerica Fin. Servs., Inc. v. Wise, 456 S.E.2d 631, 635 (Ga. Ct. App. 1995) (quoting GA. CODE ANN. § 9-9-2(c)(9) (Supp. 2014); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984); DiMambro-Northend Assocs. v. Blanck-Alvarez, Inc., 309 S.E.2d 364, 366 (Ga. 1983); CCC Builders, Inc. v. City Council, 229 S.E.2d 349, 352 (Ga. 1976)) (concluding that a state law purporting to invalidate arbitration clauses in employment contracts was preempted by federal law); *cf.* GA. CODE ANN. § 9-9-2(c) (Supp. 2014) (listing situations in which the state arbitration code does not apply).

175. GA. CODE ANN. § 9-9-3.

Carolina where, if an issue is otherwise resolvable by the courts and an arbitration agreement requires out-of-state arbitration, the provision requiring an out-of-state arbitration need not be followed.[176] In Georgia, arbitration agreements are enforced regardless of whether the courts could decide an issue.[177] Georgia statute further provides broad arbitrability for issues covered by an arbitration agreement, with exceptions for certain industries.[178] Further, courts are required to broadly enforce arbitration agreements.[179]

In the areas where Georgia has attempted to void arbitration agreements, federal and state courts have held that the FAA preempts Georgia statutes,[180] with the exception of insurance, which is controlled by a federal law that makes state rules the dominant law on insurance.[181] In *Primerica Financial Services, Inc. v. Wise*,[182] the court upheld arbitration in a dispute arising out of an employment contract containing an arbitration agreement despite the lack of initialing on the arbitration agreement as required by the Georgia Arbitration Act.[183] The court added, "[W]e must conclude that 'the state law and policy with respect [to the signature requirement] must yield to the paramount federal law [the FAA].'"[184] Similarly, one year later, the U.S. Bankruptcy Court for the Southern District of Georgia held an arbitration clause in a mobile home sales contract enforceable because the FAA preempted Georgia statutes that attempted to exclude consumer transactions from arbitration.[185] More recently, the Georgia Court of Appeals held that the FAA preempted Georgia statutes that attempt to

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176. *Compare* S.C. CODE ANN. § 15-7-120(b) (2005) (invalidating provisions in arbitration agreements requiring out-of-state arbitration), *with* Haynes v. Fincher, 525 S.E.2d 405, 407 (Ga. Ct. App. 1999) (citing GA. CODE ANN. §§ 9-9-1 to -18 (2007 & Supp. 2014); St. Paul Fire & Marine Ins. Co. v. Barge, 483 S.E.2d 883, 888 (Ga. Ct. App. 1997); Weyant v. MacIntyre, 438 S.E.2d 640, 642 (Ga. Ct. App. 1993)) ("The General Assembly's adoption of the Georgia Arbitration Code establishes a clear public policy in favor of arbitration.").

177. *See* Ga. Code Ann. § 9-9-3.

178. *See* GA. CODE ANN. § 9-9-2(c) (excluding from the state's arbitration code agreements dealing with medical malpractice, collective bargaining, insurance, certain consumer loans, consumer goods, some consumer transactions, sales and financing of residential real estate, employment agreements if the arbitration agreement is not initialed by all parties at the time of signing, agreements to arbitrate future bodily injury and wrongful death claims, and any areas covered by another arbitration statute).

179. *See* GA. CODE ANN. § 9-9-6 (2007).

180. *See* Pate v. Melvin Williams Manufactured Homes, Inc. (*In re* Pate), 198 B.R. 841, 845 (Bankr. S.D. Ga. 1996); Primerica Fin. Servs., Inc. v. Wise, 456 S.E.2d 631, 635 (Ga. Ct. App. 1995).

181. *See* 15 U.S.C. §§ 1011–15 (2012) (codifying the McCarran-Ferguson Act); McKnight v. Chi. Title Ins. Co., 358 F.3d 854, 859 (11th Cir. 2004) (citing GA. CODE ANN. § 9-9-2(c)(3)).

182. 456 S.E.2d 631 (Ga. Ct. App. 1995).

183. *Id.* at 632, 635 (quoting GA. CODE ANN. § 9-9-2(c)(9)) (citing GA. CODE ANN. § 9-9-1 (2007)).

184. *Id.* (second alteration in original) (quoting CCC Builders, Inc. v. City Council, 229 S.E.2d 349, 352 (Ga. 1976)) (internal quotation marks omitted).

185. Pate v. Melvin Williams Manufactured Homes, Inc. (*In re* Pate), 198 B.R. 841, 842–45 (Bankr. S.D. Ga. 1996).

void uninitialed arbitration agreements in employment contracts[186] and arbitration agreements related to future injury.[187] The court used these rulings to uphold arbitration in a claim involving defamation by a past employer where the employment contract contained an arbitration agreement.[188]

Federal and state courts have found that the FAA does not preempt Georgia statutes attempting to void arbitration in the insurance industry.[189] In *McKnight v. Chicago Title Insurance Co.*,[190] the court ruled that the McCarran-Ferguson Act, a federal law which makes states—rather than the federal government—the principal regulators of the insurance industry,[191] prevailed.[192] The court used this holding to find that the FAA did not preempt a Georgia statute which attempted to void arbitration agreements in the insurance industry, and thus arbitration was not required under the arbitration agreement in the insurance contract at issue.[193]

Georgia thus provides broad acceptance and enforcement of arbitration agreements. In the international arbitration realm, Georgia has recently changed its arbitration laws, upgraded physical infrastructure, and created a legal infrastructure that allows businesses to bring their international disputes to Georgia for arbitral resolution.[194] With regard to domestic arbitration, Georgia's statutes uphold arbitration agreements more broadly than South Carolina's statute.[195] Where Georgia statutes have attempted to void arbitration agreements in particular industries, the courts have held that the FAA preempts such statutes,

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186. *See* Davidson v. A.G. Edwards & Sons, 748 S.E.2d 300, 302 (Ga. Ct. App. 2013) (citing 9 U.S.C. §§ 1–16 (2012); Langfitt v. Jackson, 644 S.E.2d 460, 465 (Ga. Ct. App. 2007)).

187. *See id.*

188. *Id.* at 303.

189. *See, e.g.*, McKnight v. Chi. Title Ins. Co., 358 F.3d 854, 859 (11th Cir. 2004) (concluding that the Georgia statute regulating arbitration clauses in insurance contracts was not preempted by the FAA). At least one court has held that the arbitration agreements need not be enforced in the context of future personal injuries or wrongful death, where section 2(c)(10) of the Georgia Code voids such arbitration agreements. *See* Dream Maker Constr., Inc. v. Murrell, 603 S.E.2d 72, 72–73 (Ga. Ct. App. 2004). It is worth noting, however, that the court in that case distinguished the arbitration agreement at issue as one that did not raise FAA issues. *See id.* at 73 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983); Wise v. Tidal Constr. Co., 583 S.E.2d 466, 471 (Ga. Ct. App. 2003); Haynes v. Fincher, 525 S.E.2d 405, 407 (Ga. Ct. App. 1999)).

190. 358 F.3d 854 (11th Cir. 2004).

191. *See id.* at 857 (quoting 15 U.S.C. § 1012(b) (2012)).

192. *Id.* at 859 (citing GA. CODE ANN. § 9-9-2(c)(3) (Supp. 2014); Cont'l Ins. Co. v. Equity Residential Props. Trust, 565 S.E.2d 603, 605 (Ga. Ct. App. 2002)).

193. *Id.*; *see also* Love v. Money Tree, Inc., 614 S.E.2d 47, 48 (Ga. 2005) (stating, with regard to an arbitration agreement in an insurance contract, that "[b]ecause the application of the FAA would impair a statute of this State regulating the business of insurance, we conclude that the [McCarran-Ferguson Act] preempts the FAA and prohibits the enforcement of the parties' arbitration agreement").

194. *See supra* notes 168–72 and accompanying text.

195. *See supra* notes 173–79 and accompanying text.

except where another federal act makes state law the predominant law in an industry.[196]

V. A PROPOSAL TO REFORM SOUTH CAROLINA'S ARBITRATION VENUE CLAUSE

When viewed against neighboring states, South Carolina's arbitration venue statute is more restrictive. South Carolina's statute attempts to void all arbitration agreements requiring out-of-state arbitration.[197] Other states in the Fourth Circuit fall along a continuum in regard to upholding arbitration agreements. At one end of the spectrum is North Carolina, which is nearly as restrictive as South Carolina, and where courts, as in South Carolina, have overruled statutory restrictions on enforcement of arbitration.[198] At the other end of the spectrum is West Virginia, which allows for very broad enforcement of arbitration agreements, and where the courts have narrowed any exceptions to such enforcement.[199] In between lie Virginia and Maryland with limited restrictions on arbitration or arbitration venue, which courts have consistently narrowed or overturned.[200] South Carolina's non-Fourth Circuit neighbor, Georgia, has actively sought to become friendlier to international arbitration. Georgia provides broad enforcement of domestic arbitration agreements, and courts have overruled statutes that attempt to void arbitration agreements in specific industries, except where those industries are governed by state law.[201]

South Carolina's arbitration venue law is not only more restrictive than those in neighboring states, but has also been held preempted by the FAA. This holding is not recent. At least since 1997 in the maritime context,[202] and since 2000 in relation to interstate commerce,[203] courts have held that section 15-7-120(b) of the South Carolina Code is preempted by and violates the FAA by attempting to void arbitration agreements.[204] South Carolina is thus long overdue for an update to its arbitration venue statute.

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196. *See supra* notes 180–93 and accompanying text.

197. *See supra* Part III.

198. *See supra* Part IV.A.

199. *See supra* Part IV.D.

200. *See supra* Part IV.B–C.

201. *See supra* Part IV.E.

202. *See* Nat'l Material Trading v. M/V Kaptan Cebi, 1998 A.M.C. 201, 210, 212 (D.S.C. 1997) (citing 9 U.S.C. § 2 (2012); S.C. CODE ANN. § 15-7-120(B) (2005)).

203. *See* Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (citing Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–26 (1983); Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993); Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 104–05 & n.2, 333 S.E.2d 781, 785 & n.2 (1985) (per curiam)).

204. Because the South Carolina Uniform Arbitration Act parallels section 2 of the FAA in calling for broad enforcement of arbitration agreements, South Carolina's current arbitration venue law also presumably violates state arbitration law. *See supra* note 75 and accompanying text.

An improved arbitration venue statute for South Carolina would provide for broad enforcement of arbitration agreements. South Carolina's improved arbitration venue statute should begin by providing the broadest enforcement of arbitration agreements. This could be done by paralleling the language of the FAA itself, as in section 8.01-581.01 of the Code of Virginia or section 3-206(a) of the Code of Maryland. Although section 15-48-10(a) of the South Carolina Code currently parallels the FAA in language similar to the Virginia and Maryland statutes, South Carolina's arbitration venue law directly conflicts with both the FAA and the state arbitration statute. South Carolina's improved arbitration venue law could be incorporated into, and brought into conformance with, the State Uniform Arbitration Act. If that were done, providing for broad enforcement of arbitration agreements in line with the FAA's requirements, South Carolina's arbitration venue statute would no longer be preempted by and in violation of either the FAA or the State Arbitration Act.

An improved South Carolina statute would also need to be responsive to the agreement of the parties and other arbitration related rules. Language could be included in the statute to indicate that if the parties agree to alter their arbitration agreement, the new agreement would be enforced. This would be similar to the provision in section 22B-3 of the General Statutes of North Carolina, which allows the parties to agree to out-of-state arbitration at the time a dispute arises, which is otherwise void under North Carolina statute. By providing that the agreement between the parties as well as any amended agreement will govern disputes, South Carolina's arbitration venue statute would then meet the FAA's goal of enforcing the parties' agreement. Further, a revised arbitration venue statute would have to provide for exceptions from the broad enforcement of arbitration agreements for those parties or industries that may otherwise be exempt. This would parallel the exemption of insurance contracts from arbitration, which has been upheld by courts, found in section 9-9-2 of the Georgia Code.

In revising its arbitration venue law, South Carolina could learn much from Georgia, which has recently updated its arbitration laws. By broadly enforcing arbitration agreements and providing a legal and physical infrastructure to support arbitration, Georgia has become a choice location for businesses to arbitrate.[205] Georgia statute even explicitly welcomes businesses to arbitrate within the state.[206] South Carolina should consider adding similar language welcoming arbitration to a revised arbitration statute.

Not only would these proposed changes to South Carolina's arbitration venue law end South Carolina's violation of the FAA, it would make South Carolina a more attractive location to do business. Arbitration is appealing to

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205. *See New Georgia Arbitration Code*, *supra* note 170, at 1; Wright, *supra* note 168.

206. *See* GA. CODE ANN. § 9-9-20(b) (Supp. 2014) ("The purpose of this part is to encourage international commercial arbitration in this state . . . and to provide a conducive environment for international business and trade.").

businesses as an alternative to litigation for resolving commercial disputes.[207] Compared to litigation, arbitration generally provides lower costs, more control of the dispute resolution process, and more privacy, all of which may be valuable to businesses. Since South Carolina's current arbitration venue statute invalidates all out-of-state arbitration, it makes South Carolina a less attractive place to do business. Businesses in South Carolina know that state statute purports to invalidate an arbitration agreement providing for venue anywhere outside of South Carolina. By updating its arbitration venue statute to welcome arbitration agreements regardless of venue, South Carolina would be more attractive as a business locale, as Georgia has become.[208] If South Carolina becomes a more appealing location to do business by being friendlier towards the arbitration processes that businesses favor, the state's economy may benefit from increased growth.

VI. CONCLUSION

Arbitration is particularly attractive to businesses. Arbitration provides businesses with more control, less costs, and more privacy than does the litigation of disputes. In the United States, federal statute and case law provide that arbitration agreements are to be broadly enforced. South Carolina's arbitration venue statute, by contrast, attempts to void all arbitration agreements requiring out-of-state arbitration. In so doing, South Carolina's statute violates and is preempted by the FAA, a fact that has been judicially recognized for more than fifteen years. In comparison to its neighboring states, South Carolina's statute is more restrictive. Other states broadly welcome and enforce arbitration agreements. Where those states have attempted to void arbitration agreements or restrict venue for arbitration, the courts have generally held such state statutes to be preempted by the FAA unless another law provides that state law predominates in a particular industry. At least one of South Carolina's neighbors, Georgia, actively seeks to be the venue of choice for arbitration and attempts to make it simpler to arbitrate in Georgia.

South Carolina's arbitration venue statute is thus overdue for revision. By making the statute more welcoming, and broadly enforcing arbitration agreements, South Carolina could become a more attractive location for businesses that favor arbitration. If companies choose to do business in South Carolina due in part to more arbitration friendly laws, South Carolina's economy could benefit.

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207. *See supra* Part II.A.

208. *See New Georgia Arbitration Code*, *supra* note 170, at 1; Meredith Hobbs & Julie Kay, Miami Int'l Arbitration Soc'y, *Miami, Atlanta Hustling to Become International Arbitration Hubs*, MIAS BLOG (July 29, 2014), https://miamiinternationalarbitration.com/blog/?p=86; Wright, *supra* note 168.