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Inetianbor and Green: How Two Payday Loan Disputes Illustrate the Integrality Rule's Incompatibility with the FAA

Inetianbor v. CashCall, Inc., 768 F.3d 1346 (11th Cir. 2014).

CAMERON C. LINCOLN*

I. INTRODUCTION

The integrality rule¹ is a rule grounded in the analysis of party intent and allows for an arbitration agreement to be vitiated if the selected forum is unavailable and the forum was integral to the agreement. The integrality rule, conceived in 1990, has a short history, and while it is followed by several federal appellate circuits, it is not consistently named or referenced.² The Eleventh Circuit applied the rule in *Inetianbor v. CashCall, Inc.*,³ where the court precluded arbitration due to the integrality rule.⁴ This case raises questions of whether the integrality rule contradicts the Federal Arbitration Act (FAA),⁵ whether it overrides the parties' decision to arbitrate their disputes, and whether it runs counter to the Supreme Court's insistence that courts should not add obstructions to arbitration beyond the FAA.⁶ When *Inetianbor* is contrasted with the Seventh Circuit's conclusion in *Green v. U.S. Cash Advance Ill, LLC*,⁷ the integrality rule's incompatibility with the FAA is evident. Further, the integrality rule acts as a non-textual addition to the FAA which creates unnecessary delay, expense, and ambiguity in dispute resolution.

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1. The integrality rule is not officially named outside of this note, but is named the integrality rule for the purposes of both brevity and specificity. The integrality rule allows for arbitration to be precluded in its entirety if the forum selected in the arbitration clause is unavailable and the forum was integral to the agreement to arbitrate. *See Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359 (N.D. Ill. 1990).

2. *Id.*

3. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), *cert. denied*, *Cashcall, Inc. v. Inetianbor*, 135 S. Ct. 1735 (2015).

4. *Id.* at 1354.

5. *Id.* at 1349; 9 U.S.C. §§ 1-16. The FAA governs arbitration and has provisions for correcting deficiencies in an arbitration agreement, which the use of the integrality rule potentially overrides.

6. *See Am. Express v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013).

7. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013). The Seventh Circuit declined to follow the integrality rule, instead utilizing the FAA's § 5 substitution clause to replace the forum provision with a different forum. *Id.*

II. FACTS AND HOLDING

Abraham Inetianbor borrowed \$2,600 from Western Sky Financial, LLC in January 2011.⁸ CashCall, Inc. (CashCall), served as loan servicer and collector.⁹ Inetianbor paid \$3,252.65 to CashCall over a one-year period in monthly installments.¹⁰ Inetianbor believed he had fully repaid the loan, but CashCall disagreed and sent a bill the following month, which Inetianbor refused to pay.¹¹ CashCall reported Inetianbor's default to credit agencies, which resulted in a significant decline in Inetianbor's credit score.¹²

Inetianbor sued CashCall for defamation, usury, and violations of the Fair Credit Reporting Act (FCRA)¹³ in the United States District Court for the Southern District of Florida.¹⁴ CashCall responded by moving to compel arbitration under the terms of the loan agreement.¹⁵ The loan agreement stated that any dispute would be resolved through arbitration by the Cheyenne River Sioux Tribal Nation (Tribal Nation) via a tribal elder, an authorized tribal representative, or a panel using the tribe's consumer dispute rules.¹⁶ The district court granted CashCall's motion to compel arbitration.¹⁷

Inetianbor attempted to comply with the court's order, but the Tribal Nation sent Inetianbor a letter explaining that it does not authorize arbitrations.¹⁸ Since the forum selected in the loan agreement was unavailable, Inetianbor brought the case in the United States District Court for the Southern District of Florida.¹⁹ The district court ruled that the forum selection clause was integral to the agreement to arbitrate and that the unavailability of the specified forum rendered the arbitration clause unenforceable.²⁰ The district court reversed its previous holding, deeming that the forum was available because CashCall showed that the Tribal Nation allowed arbitration in a contractual agreement, but the Tribal Nation did not involve itself in the actual arbitration process.²¹ Inetianbor again attempted to comply with the district court's order and again was confounded.²² He returned to the district court with evidence that the Tribal Nation was completely uninvolved in

8. *Inetianbor*, 768 F.3d at 1348.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 15 U.S.C. §§ 1681-1681x (2012).

14. *Inetianbor*, 768 F.3d at 1347. *See also* *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303 (S.D. Fla. 2013).

15. *Inetianbor*, 768 F.3d at 1348.

16. *Id.* "Mr. Inetianbor 'agree[s] that any Dispute ... will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.'" *Id.*

17. *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1305 (S.D. Fla. 2013).

18. *Inetianbor v. CashCall, Inc.* 2013 WL 2156836 at *3 (S.D. Fla. 2013) ("[T]he Cheyenne River Sioux Tribe ... does not authorize Arbitration as defined by the American Arbitration Association ('AAA') here on the Cheyenne River Sioux Reservation located in Eagle Butte, SD 57625.').

19. *Inetianbor*, 768 F.3d at 1348.

20. *Id.*

21. *Id.* at 1348-1349. "The [Cheyenne River Sioux Tribal] Court does not provide arbitration. Arbitration, as in a contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or time for the parties. After there is an arbitration award, the parties may seek to confirm the award in Tribal Court." *Inetianbor*, 2013 WL 2156836 at 7.

22. *Inetianbor*, 768 F.3d at 1349.

the arbitration process.²³ The district court reverted to its original holding that the forum was unavailable and therefore refused to compel arbitration.²⁴

CashCall appealed to the Eleventh Circuit Court of Appeals, challenging the rule established in *Brown v. ITT Consumer Financial Corp.*²⁵ that arbitration cannot be compelled when the forum selection clause is integral to the agreement and when the forum is unavailable.²⁶ Additionally, CashCall argued that the forum selection clause was not integral in this case and that the district court erred in finding that the forum was unavailable.²⁷ The Eleventh Circuit affirmed the district court's decision to preclude arbitration because the forum selection clause was integral to the agreement and the required forum, the Tribal Nation, was not an available forum.²⁸

III. LEGAL BACKGROUND

A. *The FAA and the Enforcement of Arbitration Agreements*

The Federal Arbitration Act (FAA) states that any written agreement to arbitrate is "valid, enforceable, and irrevocable," unless grounds for revocation of contract under law or equity apply.²⁹ As with all valid contracts, courts are tasked with enforcing arbitration agreements according to their terms.³⁰ When a party refuses to proceed with arbitration, the FAA provides that district courts must order the parties to proceed to arbitration "in accordance with the terms of the agreement."³¹ If the agreement does not contain a method for selecting an arbitrator, if a party fails to use that method, or if lapses occur in obtaining an arbitrator, the FAA allows the courts to designate an arbitrator whose participation is governed by the terms of the agreement as if the arbitrator had been designated by the agreement.³² The FAA, however, does not contain a provision detailing how to proceed when the arbitration agreement designates a specific arbitration forum in the terms of the arbitration agreement and that forum is unavailable.³³ In certain

23. *Id.* Mr. Chasing Hawk (the chosen arbitrator) stated at a preliminary arbitration hearing: "...because 'this is a private business deal, [t]he Tribe has nothing to do with any of this business.'" *Id.* at 1354. See also *Inetianbor*, 2013 WL 2156836 at *2 (indicating that Robert Chasing Hawk was selected by the Tribe to arbitrate the dispute).

24. *Inetianbor*, 768 F.3d at 1349.

25. *Id.* *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) ("Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration.") (quoting *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990) (internal citations omitted)).

26. *Inetianbor*, 768 F.3d at 1349.

27. *Id.*

28. *Id.* at 1354.

29. 9 U.S.C. § 2 (2012).

30. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011). See also *Am. Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013). The Court expressed in both cases the requirement that courts enforce arbitration agreements according to their terms, rendering their interpretation essentially the same as any other contractual agreement.

31. 9 U.S.C. § 4 (2012).

32. 9 U.S.C. § 5 (2012).

33. *Inetianbor*, 768 F.3d at 1349 ("The question this case presents is what to do when the principle that arbitration is a matter of contract comes into conflict with §5's substitution provision."). Section 5

instances, federal circuit courts have deemed the entire arbitration agreement unenforceable.

B. When Arbitration is Precluded

The Eleventh Circuit addressed the issue of arbitration preclusion in *Brown v. ITT Consumer Financial Corp.*³⁴ In *Brown*, plaintiff Stanley Brown filed a complaint against ITT for racial discrimination with the Employment Equal Opportunity Commission (EEOC) in early 1993.³⁵ Brown was terminated in August 1993 and was offered a severance package if he signed a release of his claims against ITT.³⁶ Instead of signing the release, Brown brought suit, and ITT moved to compel arbitration under the terms of Brown's employment agreement. The employment agreement required disputes between employees and ITT to be resolved through arbitration under the rules supplied by the National Arbitration Forum (NAF).³⁷ Brown argued that the employment agreement had been superseded by the benefits summary he had received at his termination and also by several bulletins released by ITT during his employment.³⁸ Additionally, Brown argued that arbitration should be precluded because NAF no longer existed.³⁹ The district court ordered the case to proceed to arbitration where Brown's claims were denied.⁴⁰ Brown then moved to vacate the award, and the district court denied his motion.⁴¹

On appeal to the Eleventh Circuit, Brown argued that the arbitration agreement should be void because the specified arbitrator and the specified arbitration procedure no longer existed.⁴² The court found Brown's argument unpersuasive because the FAA's substitution clause allowed courts to name substitute arbitrators.⁴³ The court, following the United States District Court for the Northern District of Illinois's decision in *Zechman v. Merrill Lynch, Pierce, Fenner & Smith*,⁴⁴ concluded that the unavailability of the specified forum will only preclude arbitra-

of the FAA does allow substitution for deficiencies in an arbitration agreement, but does not specifically state what a court should do if the forum is stated in the agreement but is unavailable.

34. *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000). The Eleventh Circuit provides the most thorough cases on the subject, but other circuits followed roughly the same analysis. See, e.g., *Khan v. Dell, Inc.*, 669 F.3d 350 (3rd Cir. 2012), *Ranzy v. Tijerina*, 393 Fed.Appx. 174 (5th Cir. 2010), and *Reddam v. KPMG*, 457 F.3d 1054 (9th Cir. 2006). The Second Circuit utilized the same reasoning, though never using the word "integral." *In re Salomon, Inc. Shareholders' Derivative Litigation* 91 Civ. 5500 (RRP), 68 F.3d 554 (2d Cir. 2012).

35. *Brown*, 211 F.3d at 1220.

36. *Id.*

37. *Id.* "ITT and the employee 'agree that any dispute between them or claim by either against the other or any agent or affiliate of the other shall be resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum . . .'" *Id.*

38. *Id.*

39. *Id.* at 1220-21.

40. *Brown*, 211 F.3d at 1221.

41. *Id.*

42. *Id.*

43. *Id.* at 1222. See 9 U.S.C. § 5 (2012).

44. *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990). ("If, on the other hand, it is clear that the failed term is not an ancillary logistical concern but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.")

tion when the forum is an integral part of the arbitration agreement.⁴⁵ The Eleventh Circuit determined that there was no evidence to suggest that the NAF was an integral part of the agreement to arbitrate between Brown and ITT.⁴⁶

C. *When the Forum is Integral to the Arbitration Agreement*

The question of whether a specified forum or procedure is an integral part of the arbitration agreement rather than “an ancillary logistical concern”⁴⁷ may be answered by reading the language of the arbitration agreement to determine whether the parties intended the arbitration to be performed exclusively by the forum or process specified.⁴⁸ In the Eleventh Circuit, the language of the contract is considered the best evidence of the intent of the parties to an agreement and is interpreted based on its plain meaning.⁴⁹ Further, the intent of the parties supercedes the federal policy favoring arbitration.⁵⁰

Zechman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. addressed whether a specified forum is integral to an arbitration agreement.⁵¹ In *Zechman*, the plaintiff was terminated from his employment at Merrill Lynch.⁵² Zechman filed suit, alleging his termination was retaliation for his objection to certain practices he believed violated federal commodities exchange regulations.⁵³ Merrill Lynch moved to compel arbitration pursuant to the Chicago Board of Trade’s (CBOT) Rule 600, to which both parties were subject, and to dismiss Zechman’s claims.⁵⁴ Since the motion to compel arbitration, if granted, would have made the motion to dismiss moot, the court addressed the arbitration motion first.⁵⁵

The CBOT’s Rule 600 stated, “[a]ny controversy between parties who are members and which arises out of the Exchange business of such parties shall, at the request of any such party, be submitted to arbitration in accordance with regulations prescribed by the Board.”⁵⁶ Both parties conceded that Rule 600 was a valid arbitration agreement, and Zechman filed a claim with the CBOT, submit-

45. *Id.*

46. *Brown*, 211 F.3d at 1212. The court seemed reluctant to state that the court may *always* substitute a different arbitrator or rule, and instead opted to refrain from overriding the intent of the parties to the contract.

47. *Id.*

48. *In re Salomon, Inc. Shareholder’s Derivative Litigation* 91 Civ. 5500 (RRP), 68 F.3d 554, 560-561 (2d Cir. 2012). This Second Circuit case is cited by the Eleventh Circuit in support of its holding in the instant decision. Additionally, the Second Circuit discusses several Eleventh Circuit cases in reaching its conclusion in *In re Salomon*. See e.g. *Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509 (11th Cir. 1993).

49. *Rose v. M/V “Gulf Stream Falcon”*, 186 F.3d 1345, 1350 (11th Cir. 1999) (“It is well settled that the actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls.”).

50. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) (“Even though there is a presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.”).

51. *Zechman v. Merrill Lynch, Pierce, Fenner & Smith*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990). While not an Eleventh Circuit case, *Zechman* is cited in both *Brown* and *Inetianbor* as well as the Second Circuit. See *In re Salomon, Inc. Shareholder’s Derivative Litigation* 91 Civ. 5500, 68 F.3d 554 (2d Cir. 2012)

52. *Zechman*, 742 F.Supp. at 1361.

53. *Id.* at 1362.

54. *Id.*

55. *Id.*

56. *Id.* at 1362-63.

ting the dispute to arbitration by the CBOT.⁵⁷ Merrill Lynch urged the CBOT not to hear Zechman's claims due to CBOT's direct financial interest in the dispute's resolution.⁵⁸ CBOT declined to arbitrate the dispute, and Merrill Lynch moved to compel arbitration of all of Zechman's arbitrable claims under Rule 600 before a neutral arbitrator rather than the CBOT.⁵⁹ Zechman argued that both parties were governed by the terms of Rule 600, and therefore the court could not substitute another arbitrator.⁶⁰

The court looked to the intent of the parties and interpreted the language of the agreement to discern whether the CBOT was integral to the agreement to arbitrate.⁶¹ The court concluded that, "to the extent the court can infer that the essential term of the provision is the agreement to arbitrate," the agreement would be enforced despite any deficient terms.⁶² The agreement did not specifically state that the CBOT must be the arbitrator, only that the dispute be arbitrated according to the regulations "prescribed by" the CBOT.⁶³ Therefore, naming a neutral arbitrator would not necessarily violate the agreement's requirement that arbitration be conducted according to the CBOT's regulations.⁶⁴ The court concluded that the agreement was foremost an agreement to arbitrate, rather than an agreement to have the arbitration before a particular arbitrator.⁶⁵ Therefore, the court granted Merrill Lynch's motion to compel arbitration.⁶⁶

Three additional cases, *Reddam v. KPMG, LLP*,⁶⁷ *Khan v. Dell*,⁶⁸ and *Blinco v. Green Tree Servicing LLC*,⁶⁹ help to clarify the manner in which courts determine whether a forum can be substituted. In all three cases, the forums were found to be non-integral, and arbitrators were substituted by the courts.⁷⁰ In *Reddam* and *Khan*, only the procedural rules for forum selection were stipulated in the arbitration agreements, but no forums were actually selected.⁷¹ In *Blinco*, the arbitration agreement lacked any specific rules, procedures, or specified forum, and the Eleventh Circuit supplied those specifics under the FAA's § 5 substitution provisions.⁷²

57. *Id.* at 1363.

58. *Zechman*, 742 F.Supp. at 1363. What this financial interest entailed is not explained in the published opinion.

59. *Id.*

60. *Id.* at 1364.

61. *Id.*

62. *Id.*

63. *Id.* at 1365.

64. *Zechman*, 742 F.Supp. at 1365.

65. *Id.*

66. *Id.* at 1374.

67. *Reddam v. KPMB, LLP*, 457 F.3d 1054 (9th Cir. 2006) *abrogated by* *Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010). *Reddam* was abrogated with regard to the post-removal-event doctrine for reviewing remands due to a lack of subject matter jurisdiction when the remand is due to events that occurred post removal to a federal court.

68. *Khan v. Dell*, 669 F.3d 350 (3d Cir. 2012).

69. *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308 (11th Cir. 2005).

70. *Reddam*, 457 F.3d at 1061; *Khan*, 669 F.3d at 357; *Blinco*, 400 F.3d at 1313.

71. *Reddam*, 457 F.3d at 1059; *Khan*, 669 F.3d at 355.

72. *Blinco*, 400 F.3d at 1312-13.

D. History and Criticism of the Integrality Rule

The integrality rule's first appearance was in *Zechman*,⁷³ and was derived from the holding of *National Iranian Oil Co. v. Ashland Oil, Inc.*⁷⁴ *Iranian Oil* involved a contract dispute between two oil companies, National Iranian Oil Co. (NIOC) and Ashland Oil, Inc. (Ashland).⁷⁵ NIOC and Ashland had an arbitration provision that required arbitration to be conducted in Iran under Iranian law.⁷⁶ Due to the 1976 coup in Tehran and the danger to Americans that persisted at the time, Ashland refused to arbitrate in Iran, and NIOC instead attempted to compel arbitration in Mississippi.⁷⁷ The task for the Fifth Circuit was to determine whether the forum selection clause was severable from the rest of the arbitration agreement.⁷⁸ To reach a conclusion, the court relied on the Restatement (Second) of Contracts⁷⁹ which required that NIOC show that the forum selection was merely a minor consideration while the essence of the provision was the agreement to arbitrate their disputes.⁸⁰

The court concluded that the contract's language showed a clear intent to arbitrate under the laws of Iran with Iran as the situs of the arbitration.⁸¹ Therefore, the forum selection clause was not severable, and the arbitration agreement was unenforceable.⁸²

Zechman took the analysis in *Iranian Oil* a step further and applied the term "integral" to the determination of whether the choice of forum is more than a minor consideration or "ancillary logistical concern."⁸³ The court in *Zechman* actually distinguished its case from that of *Iranian Oil*, noting that the distinct nature of the circumstances surrounding the agreement between NIOC and Ashland,

73. *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990) ("Where one term of an arbitration agreement has failed, the decision between substituting a new term for the failed provision and refusing to enforce the agreement altogether turns on the intent of the parties 'at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances.'") (quoting *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 333 (5th Cir. 1987)).

74. *Nat'l Iranian Oil Co.* at 333.

75. *Id.* at 328.

76. *Id.*

77. *Id.* at 328-31. Additionally, due to Iran not being a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the court could not compel Ashland to arbitrate in Iran. *Id.* at 331. *See generally*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517 (Iran is not listed as a signatory to the treaty).

78. *Nat'l Iranian Oil*, 817 F.2d at 333-34.

79. RESTATEMENT (SECOND) OF CONTRACTS §184 cmt. a & § 185(1) cmt. B (1981).

80. *Nat'l Iranian Oil*, 817 F.2d at 333-34 ("NIOC must therefore show that the essence, the essential term, of the bargain was to arbitrate, while the situs of the arbitration was merely a minor consideration."). *See* RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. a & § 185(1) cmt. b (1981).

81. *Nat'l Iranian Oil*, 817 F.2d at 334. "The language of the contract thus makes self-evident the importance of Iranian law and Iranian institutions to NIOC. Therefore, the document plainly suggests that the situs selection clause was as important to NIOC as the agreement to resolve disputes privately through arbitration." *Id.*

82. *Id.* at 334-35.

83. *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1365 (N.D. Ill. 1990) ("Indeed, it is possible that the regulations in place when Merrill Lynch and/or Zechman first became members did not even contemplate the CBOT mechanism that Zechman now insists is so integral to the agreement. It hardly seems likely, then, that the notion of CBOT-coordinated arbitration proceedings motivated the arbitration agreement; the only 'intent' that emerges from the face of Rule 600.00 is an intent to resolve disputes through arbitration.").

including the political concerns and international law considerations, was not present in *Zechman*.⁸⁴ However, *Zechman* did not explicitly state what would occur if the CBOT's involvement had actually been essential under the terms of the arbitration agreement. The Eleventh Circuit provided that answer in *Brown*.⁸⁵ Regardless, the court in *Zechman* held that the selection of a neutral arbitrator was allowed under the FAA's § 5 substitution provision.⁸⁶

The integrality rule has been recognized in the Third, Fifth, Ninth, and Eleventh Circuits.⁸⁷ In *Green v. U.S. Cash Advance Ill., LLC*,⁸⁸ the Seventh Circuit decided not to adopt the integrality rule and instead held that arbitration preclusion is counter to the FAA's policy favoring arbitration and § 5's substitution provision.⁸⁹ Joyce Green, the plaintiff, borrowed money from U.S. Cash Advance (Cash Advance), a loan provider.⁹⁰ She claimed that Cash Advance misstated the loan's interest rate in violation of the Truth in Lending Act⁹¹ and filed suit in the Northern District of Illinois.⁹² The loan agreement contained an arbitration provision that required the parties to arbitrate under the procedural codes of the NAF.⁹³ The district court held that the NAF was the exclusive arbitral forum, that it was integral to the agreement, and that the NAF was unavailable as a forum.⁹⁴ On appeal, the Seventh Circuit examined the practice of precluding arbitration where a forum is unavailable and found it to be invalid.⁹⁵

Principally, the Seventh Circuit looked at the history of the integrality rule and found that the rule originates in the dicta of *Zechman*, rather than any provision of the FAA.⁹⁶ Additionally, the Seventh Circuit found that, contrary to the United States Supreme Court's recent line of cases,⁹⁷ including *American Express Co. v. Italian Colors Restaurant*,⁹⁸ precluding arbitration on the basis of an unavailable forum is an invalid addition to the FAA that unnecessarily impedes the arbitration process.⁹⁹ The Seventh Circuit proffered an alternative method. In-

84. *Id.* at 1365-66.

85. *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221 (11th Cir. 2000). If the forum is found to be essential to the agreement, then arbitration is precluded.

86. *Zechman*, 742 F.Supp. at 1365-67.

87. The Seventh Circuit declined to adopt the integrality rule. See *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013). The Third, Fifth, Ninth, and Eleventh Circuits have all utilized the integrality rule. See *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012), *Ranzy v. Tijerina*, 393 Fed.Appx. 174 (5th Cir. 2010), *Reddam v. KPMG*, 457 F.3d 1054 (9th Cir. 2006), *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014). The Second Circuit utilized the same reasoning, though never using the word "integral." See *In re Salomon, Inc. Shareholders' Derivative Litigation* 91 Civ. 5500 (RRP), 68 F.3d 554 (2d Cir. 2012).

88. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013).

89. *Id.* at 792.

90. *Id.* at 788.

91. 15 U.S.C. § 1606 (2012).

92. *Green v. U.S. Cash Advance Ill., LLC*, 2013 WL 317046 (N.D. Ill. 2013).

93. *Green*, 724 F.3d at 788-89 ("All disputes. . . shall be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum.").

94. *Id.* at 789.

95. *Id.* at 790-93.

96. *Green*, 724 F.3d at 792 ("As far as we can tell, no court has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes, such an approach.").

97. *Id.* ("In recent years the Supreme Court has insisted that the Act not be added to in a way that overrides contracts to resolve disputes by arbitration.") (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2014)).

98. *Am. Express*, 133 S.Ct. at 2304.

99. *Green*, 724 F.3d at 792.

stead of asking whether a particular forum is integral to the agreement, the Seventh Circuit stated that a court should assume that an unavailable forum is essentially the same as having selected no forum, in which case the court should substitute an arbitrator under the FAA's § 5.¹⁰⁰ This approach coincides with the FAA and the Supreme Court's policy favoring arbitration.¹⁰¹

The *Green* court's conclusion relied heavily on several Supreme Court decisions and on three in particular. First, the *Green* court cited the Supreme Court's holding in *Hall Street Associates, LLC v. Mattel, Inc.*,¹⁰² which determined that the FAA's vacatur and modification provisions were exclusive and admonished courts to neither add to nor depart from the FAA.¹⁰³ Second, the Seventh Circuit relied on *CompuCredit Corp. v. Greenwood*,¹⁰⁴ where the Supreme Court enforced an arbitration agreement despite the forum's unavailability,¹⁰⁵ implying the need to select an arbitrator via the FAA's § 5 upon remand.¹⁰⁶ Third, the *Green* court relied on *Concepcion's* holding that § 2 of the FAA establishes a liberal policy favoring arbitration and that arbitration is fundamentally a matter of contract to be enforced according to the agreement's terms.¹⁰⁷ The *Concepcion* case, much like *Green*, also relied on the history of the FAA, including its purpose: to elevate arbitration agreements to the same level as other contracts and to eliminate judicial hostility to arbitration.¹⁰⁸ Based upon these three cases, the Seventh Circuit concluded that the integrality rule is an invalid judicial addition to the FAA as the FAA provides a means for a court to correct a deficient arbitration agreement by substituting an arbitrator.¹⁰⁹ Further, rendering an arbitration agreement unenforceable when both parties agreed to arbitrate runs counter to the policy favoring arbitration.¹¹⁰ The drawbacks of following the integrality rule, as opposed to the FAA's substitution provision, are apparent when contrasted with the holding in *Inetianbor*.

100. *Id.* ("Instead of asking whether one or another feature is 'integral,' a court could approach this from a different direction and assume that a reference to an unavailable means of arbitration is equivalent to leaving the issue open. What if an arbitration clause were shorn of details? What if it did not specify how many arbitrators, what forum, or any other administrative matters? Suppose ¶ 17 read, in full: 'Any disputes arising out of this contract will be arbitrated.' Could a court then use § 5 to supply particulars? If it could, then it would be hard to see any problem using § 5 the dispute between Green and U.S. Cash Advance. The answer is yes.").

101. *Id.* at 792-93.

102. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

103. *See generally id.* at 578-84 (holding the FAA is controlling for arbitration agreements and the judiciary's power to supplement or restrict it is quite limited).

104. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012).

105. *Id.* at 677, n.2.

106. *Id.* at 673.

107. *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011) ("We have described this provision as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.' In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.") (citations omitted).

108. *Id.*

109. *Green v. U.S. Cash Advance III, LLC*, 724 F.3d 787, 791-92 (7th Cir. 2013).

110. *Id.*

IV. INSTANT DECISION

In *Inetianbor v. CashCall, Inc.*, the Eleventh Circuit reviewed the district court's interpretation of the arbitration agreement *de novo* but accepted the district court's findings of fact.¹¹¹ The Eleventh Circuit began its analysis with the issue of whether the forum selection clause was integral to the agreement to arbitrate.¹¹² The court analyzed the language of the arbitration agreement to determine the intent of the parties.¹¹³ The arbitration agreement stated that arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation."¹¹⁴ Further, the court noted that the Tribal Nation was referenced repeatedly throughout the agreement, including the first provision of the contract, which expressly stated the entire agreement was "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation."¹¹⁵ Since the Tribal Nation was included in five of the nine paragraphs of the contract, the court concluded that Western Sky, the drafter of the contract, considered arbitration by the Tribal Nation to be an integral part of the agreement to arbitrate.¹¹⁶

CashCall relied on several cases to support a contrary conclusion, which the court addressed individually. First, CashCall relied on *Brown v. ITT* to support substituting an arbitrator.¹¹⁷ The court distinguished the instant case from *Brown*, where only the procedural rules were specified in the arbitration agreement, not the forum.¹¹⁸ The court found two other cases offered by CashCall, *Reddam v. KPMG, LLP*¹¹⁹ and *Khan v. Dell*,¹²⁰ unpersuasive for the same reasons.¹²¹ CashCall also relied on *Reddam* for the proposition that the arbitration agreement did not explicitly state that the Tribal Nation was the "exclusive" forum.¹²² The court found this argument unpersuasive for two reasons.¹²³ First, the arbitration agreement in *Reddam* did not name any forum at all, whereas the agreement in the instant case contained multiple references to the Tribal Nation as arbitrator.¹²⁴ Second, while the agreement in the instant case did not use the word "exclusive," it did use the word "shall," which indicated that disputes must be arbitrated by the Tribal Nation.¹²⁵

CashCall also offered *Blinco v. Green Tree Servicing LLC*, in which the Eleventh Circuit ordered arbitration and substituted the arbitrator, the forum, and the allocation of costs.¹²⁶ The court distinguished the instant case from *Blinco*

111. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350 (11th Cir. 2014).

112. *Id.*

113. *Id.*

114. *Id.* at 1348, 1351.

115. *Id.* at 1351.

116. *Id.*

117. *Inetianbor*, 768 F.3d at 1351.

118. *Id.*

119. *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006) (The arbitration agreement in *Reddam* required arbitration to be conducted under the rules of the Nat'l Assoc. of Securities Dealers).

120. *Khan v. Dell, Inc.*, 2010 WL 3283529 (D.N.J. 2010) (The specified forum was only referenced once in the arbitration agreement in *Khan*).

121. *Inetianbor*, 768 F.3d at 1351.

122. *Id.*

123. *Id.*

124. *Id.* See *Reddam*, 457 F.3d at 1060.

125. *Inetianbor*, 768 F.3d at 1351.

126. *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312-13 (11th Cir. 2005).

because the *Blinco* arbitration agreement only contained a general arbitration clause without a specified forum.¹²⁷

Finally, CashCall argued that the inclusion of a severance provision in the arbitration agreement indicated an intent to arbitrate even if the agreement's terms were unenforceable.¹²⁸ The court turned to the Restatement (Second) of Contracts § 184(1), which allows for terms to be severed only if they are not integral to the agreement.¹²⁹ Given that the Tribal Nation's selection as the arbitral forum "permeates the entire arbitration agreement," the court determined that it could not sever the provision from the contract without "undermining the express, repeated intent" of the parties.¹³⁰ Therefore, the court concluded that the forum selection provision was integral to the arbitration agreement.¹³¹

The court next considered whether the forum was unavailable.¹³² CashCall argued that, first, the contract should not be interpreted to require the tribe to be involved, and second, that even if the tribe's involvement was required, the district court's ruling was clearly erroneous.¹³³

CashCall's first argument required the Eleventh Circuit to review the language of the contract.¹³⁴ The court reviewed the contract's provision that arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an *authorized representative*."¹³⁵ The court decided that the only reasonable interpretation of this provision required the involvement of the tribe.¹³⁶ Additionally, the first provision of the agreement placed the agreement under the "sole subject matter and personal jurisdiction" of the Tribal Nation.¹³⁷ Therefore, the court concluded that the Tribal Nation's involvement was required.¹³⁸

Having determined the necessity of the Tribal Nation's involvement, the court considered whether the district court's determination that the Tribal Nation was unavailable was clear error.¹³⁹ The appellate court began its clear error review by noting the letter sent from the Tribal Nation to the plaintiff which stated that the tribe does not authorize arbitration.¹⁴⁰ The court also considered the statement made by one of the Tribal Nation elders whom CashCall had selected as arbitrator: "The Tribe has nothing to do with any of this business."¹⁴¹ Finally, the court concluded that since the agreement calls for arbitration to be conducted according to the Tribal Nation's rules for consumer dispute resolution, which did not exist,

127. *Inetianbor*, 768 F.3d at 1352 (quoting *Blinco*, 400 F.3d at 1310).

128. *Id.*

129. *Id.*

130. *Id.* at 1353.

131. *Id.*

132. *Id.*

133. *Inetianbor*, 768 F.3d at 1353.

134. *Id.* ("CashCall's first argument raises an issue of contract interpretation, which we review *de novo*.").

135. *Id.* (Original emphasis).

136. *Id.* ([A]rbitration by the tribe and before an *authorized representative* implies direct involvement.).

137. *Id.*

138. *Id.*

139. *Inetianbor*, 768 F.3d at 1354. A clear error standard of review requires that the district court's ruling stands unless "review of the record leaves" the reviewing court "with the definite and firm conviction that a mistake has been committed." *U.S. v. White*, 335 F.3d 1314, 1319 (11th Cir. 2003) (quoting *Coggin v Comm'r*, 71 F.3d 855, 860 (11th Cir. 1996)).

140. *Inetianbor*, 768 F.3d at 1354.

141. *Id.*

the Tribal Nation was not available as an arbitral forum.¹⁴² Thus, the Eleventh Circuit concluded that the district court's ruling that the forum was unavailable was not clearly erroneous.¹⁴³

Since the forum selection clause naming the Tribal Nation as the arbitral forum was an integral part of the agreement to arbitrate, and because the Tribal Nation was unavailable as an arbitral forum, the Eleventh Circuit held that a substitute arbitrator could not be appointed, and therefore affirmed the district court's ruling that arbitration could not be compelled.¹⁴⁴

V. COMMENT

Inetianbor presents several questions regarding the validity of the integrality rule. First, does the integrality rule contradict the FAA, specifically §§ 2 and 5? Second, does the integrality rule violate the Supreme Court's prohibition on adding obstructions to arbitration that restrict access or add expense and uncertainty? An analysis of the interrelation of party intent, the FAA,¹⁴⁵ and the Supreme Court's holdings on the subject,¹⁴⁶ as well as the Seventh Circuit's opposition to the integrality rule, make it apparent that the integrality rule is an invalid addition to the FAA that obstructs arbitration and adds expense and uncertainty to arbitration.¹⁴⁷

A. *Integrality, the FAA, and Intent*

The integrality rule functions as an exception to the FAA's § 5 substitution provision. The rule provides courts with the opportunity to refuse to appoint a neutral arbitrator and force the parties to proceed in court, effectively adding an additional phrase to § 5 that could read, "unless the arbitral forum was an essential part of the agreement to arbitrate."¹⁴⁸ The Eleventh Circuit in *Inetianbor* had to determine the parties' intent in applying the integrality rule.¹⁴⁹ Some evidence exists that the Tribal Nation's involvement in the arbitration was of great importance to CashCall, the party that drafted the boilerplate contract that Western Sky provided to Inetianbor.¹⁵⁰ However, the Tribal Nation's involvement was likely not essential for Inetianbor. The facts suggest Inetianbor had no connection

142. *Id.*

143. *Id.*

144. *Id.* (Judge Restani entered a concurring opinion stating that the arbitration agreement should be held invalid on grounds of unconscionability).

145. 9 U.S.C. §§ 2-16 (2012).

146. See *Green v. U.S. Cash Advance Ill., LLC*, 2013 WL 317046 (N.D. Ill. 2013); *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013); *Zechman v. Merrill Lynch, Peirce, Fenner & Smith, Inc.*, 742 F.Supp. 1359 (N.D. Ill. 1990).

147. See *supra* part III. sec. D.

148. The modified 9 U.S.C. § 5 would read: ". . . the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein *unless the arbitral forum was an essential part of the agreement to arbitrate*; and. . . ." (emphasis added).

149. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792 (7th Cir. 2013).

150. *Inetianbor v. CashCall, Inc.*, 923 F. Supp. 2d 1358, 1363 (S.D. Fla. 2013) ("Plaintiff asserts that Western Sky affiliates itself with the tribe and uses tribal law in an attempt to evade state and federal consumer protection laws."). See also Nat'l Ass'n of Consumer Bankr. Attorneys as Amici Curiae supporting Appellee, *Moses v. CashCall Inc.*, 781 F.3d 63 (4th Cir. 2015) (No. 14-1195).

to the Tribal Nation. Rather than asking whether the Tribal Nation repeatedly appeared in the contract, the court instead should have asked whether the agreement was written such that the parties clearly preferred litigation to arbitration provided by anyone other than the Tribal Nation. Had the Eleventh Circuit ordered the district court to select a neutral arbitrator, the appellate court would have ensured compliance with the FAA, the parties would have proceeded to arbitration, and they would have been spared the time and expense of more litigation. CashCall petitioned for certiorari,¹⁵¹ adding further delay and further expense to a case arising out of a loan for a mere \$2,525.¹⁵² Further, CashCall's appeal calls into question the court's conclusion that the parties considered the forum integral to the agreement.

Additionally, the integrality rule's relationship with § 2's policy favoring enforcement of arbitration agreements is complex. The Supreme Court has repeatedly emphasized a "liberal policy" favoring arbitration, but the Court has also stated that arbitration agreements are creatures of contract to be treated equally with other contracts.¹⁵³ The extent to which the common law of contract applies is unclear. The Supreme Court's analysis of § 2 of the FAA concerns enforceability and elevating arbitration to the same status as other contracts.¹⁵⁴ Indeed, the FAA was enacted for that very purpose, and to thereby eradicate judicial hostility to arbitration.¹⁵⁵

The Supreme Court has created boundaries for courts when examining arbitration agreements. In *Concepcion*, the Court held that an arbitration agreement can be declared unenforceable for the same reasons that exist for the revocation of all contracts, such as fraud, duress, or unconscionability, but not for reasons specific only to arbitration.¹⁵⁶ Additionally, as the *Hall St.* decision stated, the judiciary is not allowed to add or take away from the exclusive province of the FAA.¹⁵⁷ The section of the FAA with the most judicial leeway is § 5, which grants district courts discretion to substitute arbitrators in the event that the arbitration agreement does not.¹⁵⁸ Other sections of the FAA are far less open to judicial interpretation, such as §§ 10 and 11, which provide the exclusive means for modifying, vacating, or confirming an arbitration award.¹⁵⁹ Yet, the Supreme Court in *CompuCredit* had no issue remanding the case to the district court for § 5 purposes when the NAF was unavailable.¹⁶⁰ No integrality analysis was performed in *CompuCredit*,

151. CashCall filed a petition for writ of certiorari, Dec. 31, 2014, which was denied. *CashCall, Inc. v. Inetianbor*, 135 S.Ct. 1735 (11th Cir. 2015).

152. *Inetianbor*, 923 F. Supp. 2d at 1360.

153. See *Green*, 724 F.3d at 787-801.

154. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668-669 (2012); *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011).

155. See *CompuCredit Corp.*, 132 S.Ct. at 668; *Concepcion*, 131 S.Ct. at 1745.

156. *Concepcion*, 131 S.Ct. at 1743 ("The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citations omitted).

157. *Green v. U.S. Cash Advance III, LLC*, 2013 WL 317046 (N.D. Ill. 2013).

158. 9 U.S.C. § 5 (2012).

159. 9 U.S.C. §§ 10-11 (2012).

160. *Hall St. Assocs., LLC v. Mattell, Inc.*, 552 U.S. 576, 578-84 (2008).

since the case focused on whether the statutory claims were arbitrable rather than the availability of the forum.¹⁶¹

Taken as a whole, the FAA contains nothing in its text to suggest that a court can preclude arbitration on the basis of an unavailable forum. To the contrary, the FAA includes a provision that allows for deficiencies in the agreement to be rectified so that arbitration may proceed.¹⁶² The justification for the integrality rule is not found in the FAA. Instead, the rule is an addition made through the common law of contract, impermissibly invading the exclusive province of the FAA.

B. *Integrity and Supreme Court Non-Addition Policy*

The Supreme Court has prohibited courts from adding to or departing from the FAA on at least two occasions. In *Hall Street*¹⁶³ and *American Express v. Italian Colors Restaurant*, the Supreme Court prohibited the addition of restrictions or impediments to arbitration that would increase the cost or difficulty of arbitration.¹⁶⁴

The integrality rule does place restrictions on arbitration that increase the cost of resolving the dispute. In the instant case, Inetianbor had been to district court four times¹⁶⁵ and the Eleventh Circuit once,¹⁶⁶ and he must return to the district court again since CashCall's petition for certiorari was denied.¹⁶⁷ Had the district court used its substitution power under § 5 after the first showing that the Tribal Nation was unavailable, the parties could have avoided the expense of multiple appellate processes and might very well have achieved a resolution to their dispute.¹⁶⁸ One of the purposes of arbitration is to avoid the expense of litigation.¹⁶⁹ The integrality rule clearly can increase the expense involved.

161. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012).

162. 9 U.S.C. § 5.

163. *Hall St. Assocs., LLC v. Mattell, Inc.*, 552 U.S. 576 (2008). The Court addressed the exclusivity of the FAA's modification, remittance, and vacating provision and determined them to be exclusive. Other sections of the FAA were examined and it can be interpreted as cautioning against expanding or restricting the FAA's provisions.

164. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311-12 (2013).

165. *Inetianbor v. CashCall, Inc.*, 962 F.Supp.2d 1358 (S.D. Fla. 2013); *Inetianbor v. CashCall, Inc.* 2013 WL 1325327 (S.D. Fla. 2013); *Inetianbor v. CashCall, Inc.*, 2013 WL 2156836 (S.D. Fla. 2013); 962 F.Supp. 2d 1303 (S.D. Fla. 2013). The trial court heard the case four times due to Mr. Inetianbor's attempts to comply with the court's orders but being unable to do so due to the Tribal Nation's inability to provide arbitration.

166. *Inetianbor v. CashCall, Inc.*, 768 F.3d at 1354 (11th Cir. 2014).

167. *CashCall, Inc. v. Inetianbor*, 135 S. Ct. 1735 (2015).

168. It is possible that Inetianbor might have appealed such a substitution, but there is some evidence to suggestion that Inetianbor's issue with arbitration was the Tribal Nation, who had ties with Western Sky and CashCall. *See Inetianbor v. CashCall, Inc.*, 2013 WL 2156836*, 8 (S.D. Fla. 2013) (citations omitted) ("Here, Plaintiff asserts that he has uncovered two new pieces of evidence that indicate that Mr. Chasing Hawk is biased toward CashCall. First, Plaintiff claims that Mr. Chasing Hawk's daughter, Shannon Chasing Hawk, is employed by Western Sky. Plaintiff has attached what he claims is a printout of Ms. Chasing Hawk's Facebook profile page, listing 'Western Sky Financial' as her employer. He further alleges that Mr. Chasing Hawk has "10+ kids and every single one of them has either worked for, currently works at CashCall or one of its subsidiaries ... or had illegally attempted to conduct an unsuccessful arbitration for the defendant.").

169. Adam Milam, *Comment: A House Built on Sand: Vacating Arbitration Awards For Manifest Disregard of the Law*, 29 CUMB. L. REV. 705, 706 (1999) ("Nevertheless, many courts have stated that they will honor the goal of arbitration - avoidance of delay and cost of lengthy litigation - by providing a quick and informal resolution to disputes between parties."). *See also* Brent S. Gilfedder, *A Mani-*

Further, the rule has the potential to be applied unpredictably.¹⁷⁰ Determining whether a forum selection clause in an arbitration agreement is integral to the agreement does not have the benefit of being a bright line test. Courts have to make this determination subjectively, based on indicia such as the number of times the forum is mentioned, the inclusion of words such as “exclusive” or “only,” and hearings at which the parties testify as to their intent.¹⁷¹ The integrality rule certainly creates additional hurdles for parties who have agreed to arbitrate but whose contracts were not drafted in contemplation of the possibility of an unavailable forum.¹⁷²

C. *The Seventh Circuit’s Green Decision*

The Seventh Circuit’s decision in *Green* to eschew the integrality analysis in favor of meeting the Supreme Court’s insistence that courts not place impediments on arbitration avoids the unpredictable and expensive undertakings of determining integrality while also fully supporting the FAA.¹⁷³ The Seventh Circuit reviewed the history of the integrality rule and likened its acceptance among other courts to a rumor that is given credence without verification.¹⁷⁴ The court proffered an alternative method for reviewing the arbitration agreement’s forum selection that inherently favored enforcement of the arbitration agreement by severing the forum selection clause.¹⁷⁵ In essence, the Seventh Circuit construes the FAA and the Supreme Court’s holdings in their broadest sense and applies them to the subject of arbitration clauses. Rather than adding a non-textual exception to § 5 of

fest Disregard for Arbitration? An Analysis of Recent Georgia Legislation Adding “Manifest Disregard of the Law” to the Georgia Arbitration Code as a Statutory Ground for Vacatur, 39 GA. L. REV. 259, 262 (2004) (“Arbitration was designed to provide a cheaper and more efficient alternative to litigation.”).

170. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1348-51 (11th Cir. 2014). The cases in which the integrality rule have been applied have not been clear-cut in how the integrality of the arbitral forum selection is determined, but rather illustrate why the forum was not integral. The Eleventh Circuit’s analysis in *Inetianbor*, however, could be construed as establishing a set of factors to consider, such as the frequency which the forum appears in the contract, the presence of language that implies exclusivity, and the inclusion of specified rules and procedures. *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011); *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 791-92 (7th Cir. 2013).

171. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1348-51 (11th Cir. 2014). Party intent provides an additional issue. The parties might not have intended a forum to be integral, but due to the way the contract was drafted may have their agreement to arbitrate rendered unenforceable due to poor drafting. See Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007) (Solan contrasts a subjective approach to determining contractual agreement with the objective approach utilized by the courts).

172. This analysis considers an instance where both parties negotiate the chosen forum. However, in a consumer arbitration context, this may not be the case. It is indeed possible that the party who provided the service to the consumer supplied the forum selection clause and the forum selection might actually deprive the consumer of protections available in a different forum. See William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 19, 36-37 (1998) (“In a consumer or employment contract, however, the very same clause might deprive an unsophisticated individual of basic procedural safeguards, imposing a forum that is less accessible, and perhaps less sensitive to mandatory community norms such as non-discrimination laws, than would be a court at the individual’s domicile. Thus, the value of freedom to choose a forum (like any liberty) must be measured against the way it operates in practice.”).

173. *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013).

174. *Id.* at 792 (“[I]n the fashion of a rumor chain, later decisions picked up on and elaborated the language of these two decisions.”).

175. *Id.* See *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 667 (2012).

the FAA, the court can simply sever the incompatible features of the arbitration clause, much like CashCall urged the Eleventh Circuit to do.¹⁷⁶ CashCall's contract even had a severability clause.¹⁷⁷ By contrast, the Eleventh Circuit's use of the integrality rule forbade severing the provision for the same reason the court held arbitration was precluded: the chosen arbitral forum was too pervasive, and therefore too essential, to be severed.¹⁷⁸ Had the case been heard in the Seventh Circuit, the Tribal Nation forum would simply have been severed from the contract and a neutral arbitrator appointed, with much less expenditure of time and finance and no need to engage in the difficult task of determining whether the party intended for a forum to be integral.

The Seventh Circuit's abandonment of the integrality rule poses the risk of frustrating actual party intent, rather than presumed or common law intent. Parties might actually intend for a particular forum to be the exclusive forum, even at the cost of litigating when that forum becomes unavailable. The Seventh Circuit did not address what would happen if an arbitration agreement were written with the explicit language, "The parties agree to arbitrate any and all disputes with [Arbitrator/Forum], unless [Arbitrator/Forum] shall be unavailable. If unavailable, the parties do not agree to arbitrate any dispute that shall arise under this agreement."¹⁷⁹ The language of § 5 of the FAA suggests that such explicit terms would be enforced.¹⁸⁰ Despite the risk, the absence of an integrality rule still provides more certainty in cases where the parties' intent is ambiguous, since the FAA's substitution provision can operate when parties have not provided explicit alternatives in their contract.¹⁸¹ The best solution would be a hybrid approach where courts recognize the exclusivity of a forum where it is explicitly stated, but adopt the Seventh Circuit's approach where the language is not explicit. This hybrid approach would promote clarity in contract drafting while avoiding additional delays, costs, and the difficult task of interpreting contract language to determine party intent.

VI. CONCLUSION

An analysis of the Eleventh Circuit's decision in *Inetianbor* contrasted with the Seventh Circuit's decision in *Green* illustrates the problems inherent in the integrality rule. Had the *Green* decision been controlling in *Inetianbor*, *Inetianbor* and CashCall's dispute would have already been resolved in arbitration rather than remanded to the district court. The integrality rule operates as a non-textual addition to the FAA and places additional delay and expense on dispute resolution. Its foundation in contract interpretation and severability principles is questionable. Further, the rule is arguably counter to multiple Supreme Court rulings and the FAA. While the opposing view in *Green* poses the risk of frustrating actual party

176. See *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1352 (11th Cir. 2014).

177. *Id.*

178. *Id.* at 1352 ("The forum selection provision here is an 'essential part' of the arbitration agreement for the same reason it is integral to that agreement.")

179. See *In re Salomon, Inc. Shareholder's Derivative Litigation*, 91 Civ. 5500 (RRP), 68 F.3d 554, 561 (2d Cir. 2012) (the parties designated the NYSE as the exclusive arbitral forum, arbitrator, and designated the NYSE's rules to govern the arbitration).

180. 9 U.S.C. § 5 (2012) ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.")

181. *Id.*

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intent, it also has the benefit of reducing both delay and expense. Additionally, the *Green* decision coincides with the plain language of the FAA. For these reasons, the Seventh Circuit's decision not to adopt the integrality rule is the better choice, especially if the Seventh Circuit recognizes exclusivity when the contract is explicit.