

**A FEW *CIRCUIT CITY*S BACK, ONE GIANT *LUCE*
FORWARD: A REVIEW OF THE NINTH CIRCUIT'S
INTERPLAY WITH THE NATIONAL POLICY FAVORING
ARBITRATION IN THE EMPLOYMENT CONTRACT
SETTING**

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Arbitration is founded on principles of expediency, economy, and fairness. Merchants have used arbitration to resolve commercial disputes for centuries.¹ Over forty years ago the United States Supreme Court seized on the principles of expediency, economy, and fairness to expand the scope of arbitration far beyond a commercial context.² Arbitration has continued to flourish outside of a commercial setting as United States courts have become increasingly clogged and as market-driven economies force would-be litigants to find a cost-effective means of resolving disputes. American merchants continue to realize the benefits of arbitration; now, other would-be litigants, such as employers, have embraced arbitration as their favored alternative to the judicial system.

Twenty years ago the Supreme Court formally recognized a national policy favoring arbitration.³ At first, the Ninth Circuit Court of

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1. See Sara Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U. MO. KANSAS CITY L. REV. 449, 460 (1996) (discussing the genesis of commercial arbitration); William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 CHI. L. REV. 445 (1958) (comparing the development of commercial arbitration in Great Britain and the United States); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928) (discussing the genesis of commercial arbitration); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934) (providing a history of commercial arbitration).

2. See James P. Buchele & Larry R. Rute, *The Changing Face of Arbitration: What Once Was Old is New Again*, 72 J. KAN. B.A. Aug. 2003 at 36, 39 (discussing the federalization of arbitration); Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 271 (1988) (stating that "several recent cases herald a new era of United States arbitration law and signal the erosion of state authority over arbitration").

3. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Appeals was unwilling to adhere to the Supreme Court's favorable recognition of arbitration, but in the twenty years since, the Ninth Circuit has wound its way down the road toward conformance with national policy. In a series of cases in 2003, the Ninth Circuit seemingly embraced the national policy, although it has still provided safeguards to ensure that the principles of expediency, economy, and fairness remain.

This Note addresses the Ninth Circuit's response to the national policy favoring arbitration, specifically in the employment contract context. It begins with a discussion of how the Ninth Circuit first relied on state contract law principles to curtail the effectiveness of arbitration. In a recent decision, however, the Ninth Circuit has embraced the founding principles of expediency and economy to welcome the national policy favoring arbitration. This Note closes with a discussion of the guiding principles established by the Ninth Circuit in its most recent decisions concerning arbitration clauses in employment contracts. Employment contract drafters in the Ninth Circuit now must find a reasonably precise balance between the economic benefits of arbitration and individual rights, which requires that they be mindful of state contract law.