

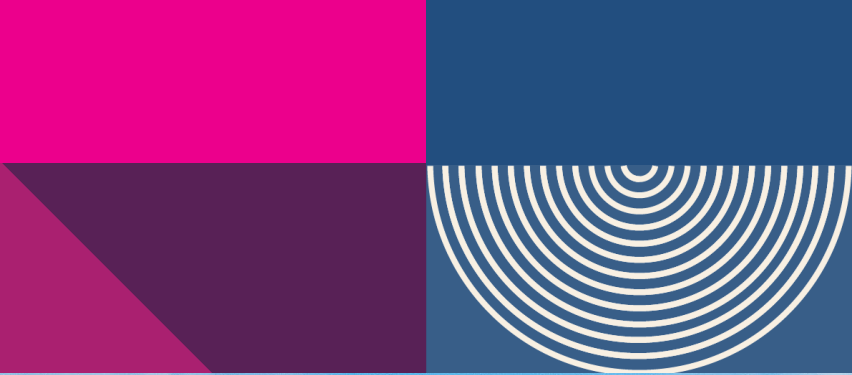


# **ARBITRATION: TRENDS, RECENT DEVELOPMENTS AND THE FUTURE**



# **DISNEY AND CHIPOTLE**

## **ARBITRATIONS THAT CAUGHT THE PUBLIC EYE**



# DISNEY PICCOLO V. GREAT IRISH PUBS FLORIDA, INC., ET AL.

2024-CA-001616-O



# FACTS OF THE CASE

- Dr. Kanokporn Tangsuan died of an allergic reaction when dining at a Disney World restaurant in October 2023
  - o Raglan Road Irish Pub located in Disney Springs
  - o Severely allergic to dairy and nuts
  - o Chose the restaurant because it promised accommodations for patrons with food allergies
  - o Spoke with waiter about the allergies, inquired about particular menu items, and were reassured that the food was allergen free
- Her husband, Jeffery Piccolo, brought suit in Florida for wrongful death

# DISNEY'S ARGUMENT

- Motion to compel arbitration
- In 2019 Piccolo (not his wife) acknowledged the terms and conditions when signing up for a Disney+ month-long free trial
- "Any dispute between You and Us, Except for Small Claims, is subject to a class action waiver and must be resolved by individual binding arbitration."
- "Piccolo ignores that he previously created a Disney account and agreed to arbitrate 'all disputes' against 'The Walt Disney Company or its affiliates' arising 'in contract, tort, warranty, statute, regulation, or other legal or equitable basis.'"





# PICCOLO'S ARGUMENT

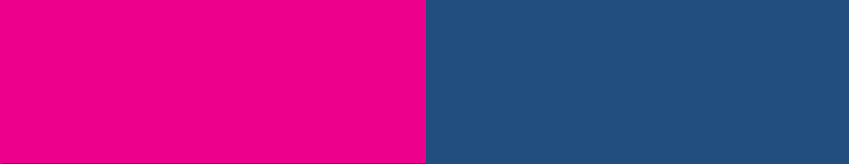


- "The notion that terms agreed to by a consumer when creating a Disney+ free trial account would forever bar that consumer's right to a jury trial in any dispute with any Disney affiliate or subsidiary, is so outrageously unreasonable and unfair as to shock the judicial conscience, and this Court should not enforce such an agreement,"
- Piccolo brought the lawsuit on behalf of his wife's estate, which had not signed the terms of service



# DISNEY CHANGES COURSE

- After immense public backlash, Disney retracted their motion to compel arbitration and agreed to proceed through the court
- Announced on August 19, 2024
- "At Disney, we strive to put humanity above all other considerations. With such unique circumstances as the ones in this case, we believe this situation warrants a sensitive approach to expedite a resolution for the family who have experienced such a painful loss. As such, we've decided to waive our right to arbitration and have the matter proceed in court." Josh D'Amaro, chairman of Disney Experiences



# CHIPOTLE FAMUYIDE V. CHIPOTLE MEXICAN GRILL, INC.

8TH CIR., NO. 23-03201





# FACTS OF THE CASE

- Plaintiff was a Chipotle employee, signed an agreement to arbitrate disputes when she was hired
- Reported months of verbal harassment to her supervisors
- No action was taken
- Plaintiff was subsequently raped in the store's bathroom in Rochester Minnesota in 2021
- Coworker was convicted of felony sexual assault
- Plaintiff sued in July 2022 for hostile work environment, retaliation, failure to provide a safe working environment, and IIED
- Then withdrew the suit to participate in mediation
- Filed new litigation in Minnesota Federal Court in July 2023

# LEGAL ISSUE

- Enactment of federal act that revised the FAA to exclude claims based on sexual harassment and assault
  - o Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act
  - o Does not apply to other forms of harassment or discrimination
- Chipotle moved to compel arbitration
- Circuit court denied, finding the law applied to disputes arising on or after the effective date and this 'dispute' arose on the filing of the suit
  - o Demand letter sent before the law was effective was not the date the 'dispute' arose



# 8<sup>TH</sup> CIRCUIT COURT OF APPEALS DECISION



- Unanimous three judge panel held the employee is not required to arbitrate her claims
- First decision that examined this issue
- Result: so long as the 'dispute' arose after the effective date, employees can bring claims for sexual assault or harassment that will not be subject to arbitration, even if the underlying conduct took place before the act went into effect
- Open question: what happens when a case alleges a combination of sexual harassment and other forms of harassment or discrimination?

# NEXT UP: PROS AND CONS OF ARBITRATION







# THE POTENTIAL PROS OF ARBITRATION

Katie Mantoan

*kmantoan@orrick.com*

Gus J. Solomon Inn of Court

January 2025

# Historical “hostility” to arbitration

The origins of this hostility can be traced to English common law.... **English judges were paid on the number of cases they handled. The courts at the time were “[o]pposed to anything that would altogether deprive every one of them of jurisdiction,”** and “[t]here has long been a great variety of available reasons for refusing to give effect to the agreements of men of mature age, and presumably sound judgment.”

This “firmly imbedded” hostility of English courts made its way to the American shores, since **“[t]he courts have felt that the precedent was too firmly fixed to be overturned without legislative enactment** although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it.”

- Dimitrios Ioannidis, *Will Artificial Intelligence Replace Arbitrators Under The Federal Arbitration Act?*, 28 Rich. J.L. & Tech. 505, 513-14 (Spring 2022) (citations omitted).

# The Federal Arbitration Act

In 1925, Congress enacted **the Federal Arbitration Act ("FAA")**, 9 U.S.C. §§ 1 to 16.

As the Supreme Court has repeatedly emphasized, the FAA “was enacted in response to judicial hostility to arbitration” (*Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 649 (2022)), and it “embodies the national policy favoring arbitration and places arbitration on equal footing with all other contracts” (*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).



# Potential advantages

- Parties choose their proverbial judge and jury
  - Can customize selection of arbitrators, including their relevant training and experience
- All parties – not just businesses or employers – may desire confidential forum to litigate disputes without public scrutiny
  - Concern for privacy rights of third parties (e.g., avoid public “outing” in sexual orientation discrimination suit, or identifying investigation participants)





# Potential advantages

- Enables parties to design procedures tailored to their particular circumstances , which can be more efficient
- Allows for more proceedings which can reduce costs and yield quicker resolution (in favor of whichever party prevails)
  - See Mark Fellows, *The Same Result As in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, The Metropolitan Corporate Counsel (July 2006) (median duration of 4.35 months for arbitration versus 19.4 months for litigation)



# Potential advantages

- Prevents reputational harm and damage of baseless but salacious allegations (*i.e.*, litigating in the press)
- Avoids jury nullification, judicial determinations influenced by potential electoral consequences (in jurisdictions where judges are elected), or excessively punitive awards untethered to the law



# THE POTENTIAL CONS OF ARBITRATION

Rob Kline

*rob@johnston-lawfirm.com*

Gus J. Solomon Inn of Court

January 2025



# The Cons of Arbitration

- Secret System Forced on Plaintiffs
- No Right to:
  - Go to court.
  - Jury trial.
  - Written record.
  - Discovery.
  - Transparency.
  - Legal precedents to be followed.
  - Class or collective actions.
  - Adjudicator with legal experience.
  - Meaningful judicial review.





# The Deck Is Stacked Against Workers, Patients and Consumers

- Arbitration agreements tend to favor the drafting party.
- Forced arbitration is designed to get rid of claims.
- Consumers and employees rarely win.
- Corporate repeat players have an advantage.
- Nearly twice as likely to prevail as non-repeat players.



# Lack of Fairness in Employment Cases

- Arbitrator selection process is skewed in favor of employers.
- Employment and consumer arbitrators at AAA and JAMS are:
  - 88% White
  - 77% male
- Individuals who identify as BIPOC are tiny portion of National Academy of Arbitrators

# NEXT UP: FEDERAL ARBITRATION ACT HISTORY



An abstract geometric design on the left side of the slide. It features a dark blue background with various geometric shapes and patterns. A white circle is positioned near the top left. Below it, a light blue semi-circle is visible. To the right of the semi-circle, there is a pattern of concentric circles. Further down, there are several overlapping triangles and squares in shades of blue, purple, and pink. A prominent pink triangle is located in the bottom right corner of the design area. The overall design is modern and geometric.

# **HISTORY OF FEDERAL ARBITRATION ACT**



# ECONOMIC CHANGES

- Rapid industrialization at turn of 20<sup>th</sup> century increased complexity of commercial transactions.
- Between 1900 and 1920 value of manufactured goods in US doubled, railroad networks expanded to over 250,000 and the Panama Canal was build allowing more ship born and global commercial transactions.
- More efficient means became necessary to accommodate the accompanying rise in commercial conflicts than an inefficient, cumbersome and tradition bound court could resolve.

# New York's Precursor to the FAA

New York passed the NY Arbitration Act in 1920. It's impact was immediate. The NYAA created a way to compel arbitration, stay litigation, and enforce arbitration awards. By 1925, more than a 1,000 commercial cases a year were being arbitrated. The Feds took notice and the NYAA was frequently cited as a basis for the federal act.



# PROBLEMS ADDRESSED BY THE FAA

- Judicial Hostility to Arbitration Agreements
- Inefficiency in the courts
- Costs and delays caused by litigation



# SUPPORT FOR THE FAA

Many business, trade and manufacturing organizations supported the FAA. The New York Chamber of Commerce lobbied hard for its passage. The American Bar Association also supported passage of the FAA.





# OPPOSITION TO THE FAA

Labor and consumer groups expressed concerns. However, the use of arbitration clauses in consumer agreements was not yet widespread.



# PASSAGE OF THE FAA

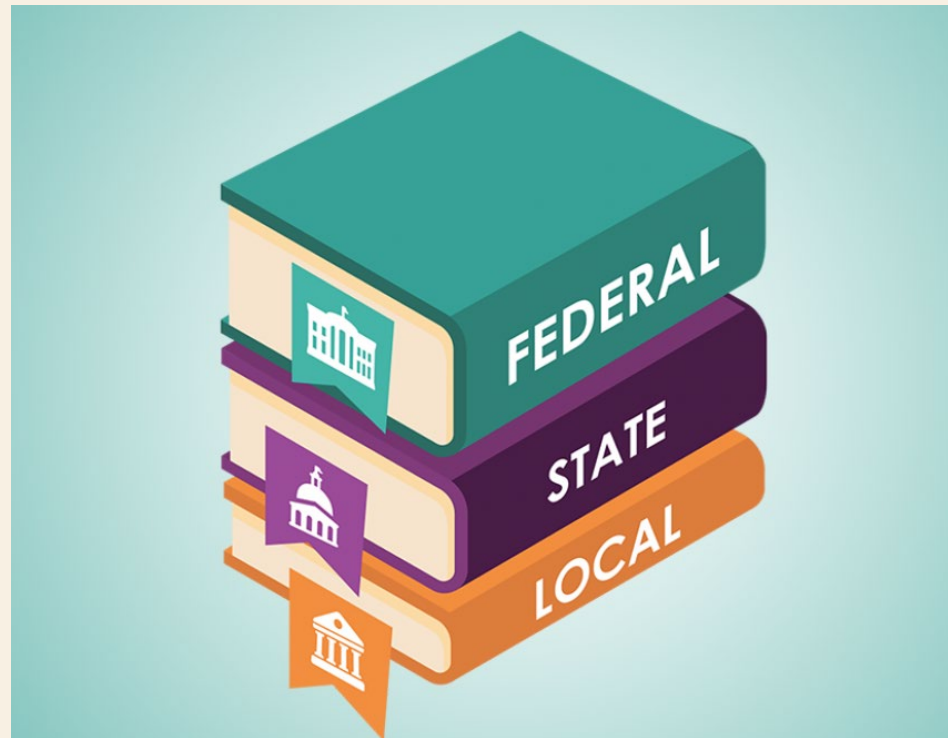
President Calvin Coolidge signed the FAA into law on February 12, 1925.



# Key Points of the FAA

- Enforceability of Arbitration Agreements
- Judicial role in Arbitration defined.
- Support for Arbitration Awards

# NEXT UP: FEDERAL ARBITRATION ACT CARVEOUTS AT THE FEDERAL LEVEL







# FEDERAL ARBITRATION ACT CARVEOUTS

Lea K. Schneider

*[lschneider@swlaw.com](mailto:lschneider@swlaw.com)*

Gus J. Solomon Inn of Court

January 2025

# The Federal Arbitration Act ("FAA")

- As a general rule, the FAA preempts state laws that prohibit or limit arbitration.
- The United States Supreme Court has consistently ruled that the FAA preempts state laws that invalidate arbitration agreements or place special burdens on them.



# Exceptions to the General Preemption Rule

- The Federal Arbitration Act exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.



# When the FAA and Oregon Law Conflict

- If the parties are subject to the FAA, Oregon's state law is preempted.
- For example, under ORS 36.620(5), an arbitration agreement may not be enforced by a court unless:
  - 72-hours before the first day of employment, the employee receives notice in a written employment offer from the employer and the employee has been provided with the required arbitration agreement; or
  - The agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

# NEXT UP: FEDERAL ARBITRATION ACT CARVEOUTS AT THE STATE LEVEL








# **STATE-LEVEL PUSHBACK AGAINST ARBITRATION**



# UNDER ATTACK: AREAS OF STATE COURT INTERVENTION

Consumer Disputes  
Homeowner Disputes  
Employment Disputes  
Healthcare Disputes  
Class Actions



# CONSUMER DISPUTES

- Common Provisions for Pushback
  - Cost shifting provisions
  - Limits on remedies
  - One-sided ADR control



# HOMEOWNER DISPUTES

- Unconscionability
- Narrow Construction
- CA and NY Statutes

# EMPLOYMENT DISPUTES

Unconscionability

Public Policy Considerations







# HEALTH CARE DISPUTES

Conflict with statutes

Public policy considerations

Arbitration notice requirements

# CLASS ACTIONS

Argument against mandatory arbitration: smaller claims cannot coalesce into actionable claims. A question of litigation economics.

AL, CA, IL, MO, NJ, NC and WV have all recently struck down arb clauses waiving class action rights.

Courts more likely to strike down class action waivers if individual plaintiffs can recover fees.

# CONCLUSIONS

Judicial “hostility” to enforcing arbitration requirements is the exception, not the rule.

Courts are more skeptical of contracts between parties of unequal power.

One-sided contracts in areas of consumer, employment, homeowner, and health care and (to an extent) class actions, are particularly scrutinized.



# THANK YOU

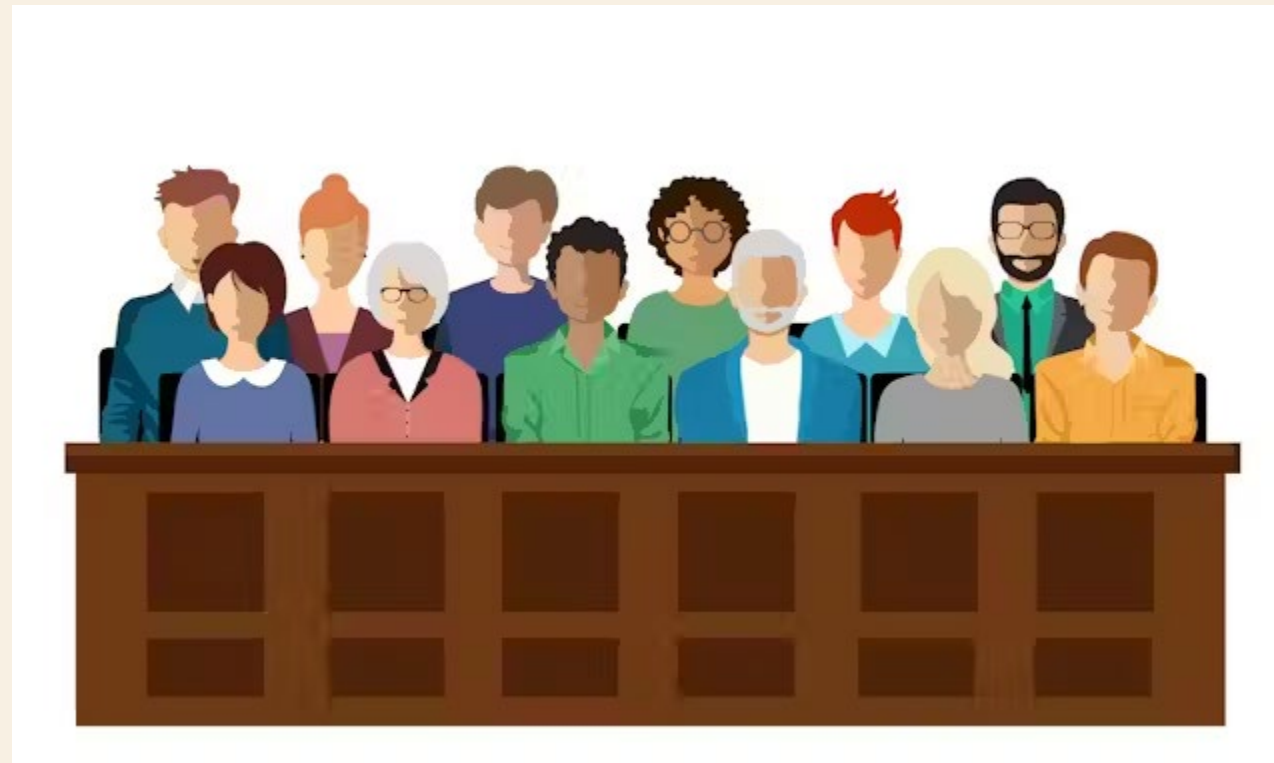
**Nels Vulin, Vulin Wilkinson LLC**

[nvulin@vulinwilkinson.com](mailto:nvulin@vulinwilkinson.com)

**Gloria Trainor, Trainor Law PC**

[gloria@trainorlawpc.com](mailto:gloria@trainorlawpc.com)

# NEXT UP: SO WHAT'S THE IMPACT? JURY VERDICTS VERSUS ARBITRATION AWARDS







# **JURY VERDICTS VS. ARBITRATION AWARDS**



# DIFFERENCES DEPEND ON AREA OF LAW

Several studies comparing award differences and win rates between juries and arbitrators

- Employment litigation
- Automobile accident litigation



# CASES ENFORCING EMPLOYMENT CONTRACTS

- Lower awards and win rates compared to similarly situated jury verdicts
- Highlights repeat player advantage



# AUTOMOBILE ACCIDENT LITIGATION

- “The average arbitration award was significantly larger in a statistical sense, but not in an economic sense.”
- More balanced
  - Avg. jury award: \$19,227
  - Avg. arbitration award: \$22,522

# THANK YOU

- Donald Wittman, *Arbitration in the Shadow of a Jury Trial Comparing Arbitrator and Jury Verdicts*, 58-JAN DISP. RESOL. J. 59 (2003).
- Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).
- Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58-JAN DISP. RESOL. J. 44 (2003).



# NEXT UP: TECHNOLOGICAL FUTURE OF ARBITRATION





# HOW ARBITRATORS AND MEDIATORS CAN/DO HARNESS AI



# CURRENT APPLICATIONS OF AI IN ADR

Document analysis and comparison

Legal research assistance

Document generation and drafting

Case outcome prediction

Process automation



# DOCUMENT ANALYSIS CAPABILITIES

- Summarize large document sets
- Compare content across multiple documents
- Review contracts with specialized AI tools
- Generate timelines from case materials
- Search and index based on meaning, not just keywords



# LEGAL RESEARCH TOOLS

- CoCounsel: Specialized legal research with current case law
- ChatGPT/Claude: General legal analysis with some limitations
- Ability to analyze multiple jurisdictions
- Direct links to primary sources
- Citation verification



# DOCUMENT GENERATION

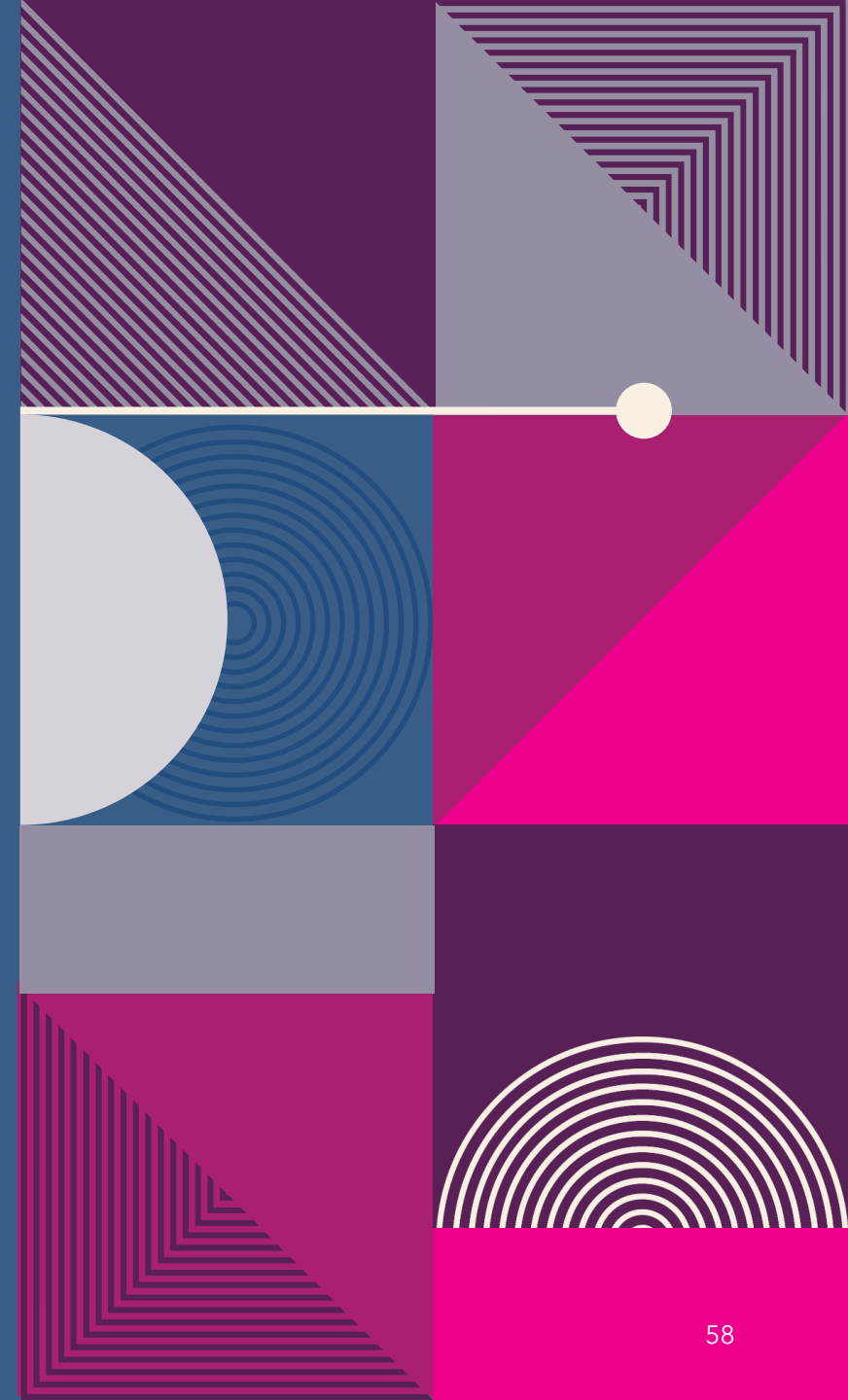
Draft arbitration agreements and clauses

Create procedural orders

Prepare initial awards drafts

Generate Settlement agreements

Develop mediation briefs





# **FUTURE APPLICATIONS (ACCORDING TO THE TECH BROS)**

Automated decision-making for small disputes

Emotion and behavioral analysis during proceedings

Real time fact checking

Predictive outcome analysis

Enhanced data Analytics

# KEY CONSIDERATIONS

AI augments but doesn't replace human judgment

Ongoing technological developments

Need for careful verification of AI outputs

Privacy and confidentiality concerns

Importance of understanding AI limitations