

# ARGUMENTS IN FAVOR OF THE TRIUMPH OF ARBITRATION

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## INTRODUCTION

Organized discussions among legal scholars rarely instigate roiling controversies. Truth be told, it is generally deemed an achievement to maintain a wakeful state during these enclaves. The Cardozo Journal of Conflict Resolution Conference gauging the future of arbitration was exceptional in a number of respects. The topics and presentations were invigorating. Several practitioners, in particular, delivered outstanding papers. The sponsoring student journal demonstrated nimble managerial skills. No stone of accommodation or convenience was left unturned for the participants. I was also very impressed with the young academic lawyers who are active in the area of arbitration. Their contribution and commentary bespeak a most promising future for the field. In addition, far from inducing intellectual somnabulence, the proceedings generated in me a need to respond in writing to aspects of the conference, aided by the benefit of distance and further reflection.

In this article, although I include a development on international arbitration, I am responding primarily to the panel discussion on disparate-party arbitration to which I was a participant. The last occasion to move me to write a written response to an academic event was nearly twenty-five years ago when Professors Willis Reese, Charles Szladits, and George Bermann put me through the paces of my doctoral defense at Columbia. The committee's observations inspired me to write an article exploring the analytical implications of the views that were exchanged.<sup>1</sup> The topic under discussion then was also arbitration.<sup>2</sup>

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<sup>1</sup> Thomas E. Carbonneau, *Rendering Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 201 (1985).

<sup>2</sup> My dissertation chapters were: *Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33 (1984); *The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980*, 4 HASTINGS INT'L & COMP. L. REV. 273 (1981); *The Elaboration of A French*

Some aspects of the panel on disparate-party arbitration, however, brought about a type of ‘reverse’ inspiration. The organization of the discussion, unconnected to student efforts, seemed to stifle the full expression of views. In fact, some speakers and their views seemed to be entrapped by the structure of the panel. Moreover, statements were made about arbitration that were, at best, misrepresentations of the process or, at worst, patent disparagements. The impression created by one speaker was that arbitration is not only flawed, but reprehensible as well—an ignoble form of adjudication that achieved contemptible ends. In my view, it was an objectively unsustainable appraisal of arbitration. Advocacy has a place in our society. It is important to the protection of rights. The tunnel vision of zealous representation, however, can constitute a pathway to irresponsible “spin” and defamatory characterizations.

The manipulation of the panel and persistent distortions of arbitration made it difficult to maintain an intellectually sound approach toward the topic. In my opinion, foregone ideological conclusions overwhelmed the aims of salutary professional discussion. Little if any consideration was given to the fact that the U.S. Supreme Court—a mixed political body with the charge of instilling and preserving the rule of the law in our society—envisages arbitration as instrumental to American democracy.<sup>3</sup>

Arbitration is not just another trial procedure. It epitomizes a practical understanding of the purpose and value of adjudicatory procedures. It poses a substantial challenge to adversarial litiga-

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*Court Doctrine On International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 *TUL. L. REV.* 1 (1981).

<sup>3</sup> The U.S. Supreme Court began its endorsement and promotion of arbitration by proclaiming the existence of “a liberal federal policy favoring arbitration agreements. . . .” *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). *See also* *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1986); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). It then introduced a qualified sense of contract freedom in arbitration, providing that the contracting parties were free to structure their transactions however they wished as long as they opted for arbitration. *See* *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Thereafter, the Court expanded the jurisdiction of arbitration to include statutory disputes. *See* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1986). The Court also increased substantially the decisional sovereignty of the arbitrator. *See* *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). The effect of these decisions was to permit arbitration to function with even greater autonomy and, concomitantly, to minimize the role of judicial supervision in the process. They also sought to reduce the volume of litigation pertaining to arbitration. *See* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). In its decisional law, the Court is bent upon delegating as much of the burden of civil litigation as possible to arbitration.

tion by exposing its underlying irrationality and its destructive impact upon society. It guarantees the rule of law domestically and internationally through affordable access, expedited proceedings, expertise, and bridging the gap between national legal systems. It is a valuable institution that should not become a pawn in the tired and unimaginative political discourse that substitutes 'talking points' for genuine reflection and debate. The gravamen of the current attack on arbitration is not the preservation of American constitutional culture, but the advancement of an ideological agenda and the economic self-interest of a special interest group favored by those in power. The high-minded rhetoric simply creates a respectable camouflage for engaging in collusion, greed, and self-serving partisanship.

Arbitration is dangerous because its functionality debunks the myths about judicial litigation. It hinders the selling of protracted legal proceedings and enormous processing fees to the public as an indispensable part of political citizenship. Adversarial adjudication, like government by quarreling cabals, amounts to an act of social suicide. Positing victory at all costs, without the possibility of compromise, clashes with the instinct of self-preservation. In its best manifestation, it induces litigating parties to settle or surrender in order to minimize the wounds and hardship of combat. In effect, access to justice is achieved by denying it. Cynicism reigns and supplants humanity's nobility.

Arbitration embodies a trial process grounded in common sense, flexibility, and an ethic of problem-solving. Arbitral proceedings allow disputing parties and their representatives to assemble the facts, present witnesses, assert and contest positions, and argue about governing predicates. They culminate in a final ruling by the adjudicator on the matters under consideration. Only a true failure in procedural fairness may lead to a viable appeal. In other words, arbitration personifies due process and justice. It enables society to resolve disputes and to prosper by dedicating its resources to other activities.

Arbitration withstood the prejudicial assessments of old. It outlasted judicial animosity. It has discredited the religion of process. It traverses the formidable cultural divides between varying national concepts of justice. It undergirds global economic transactions. One of the critical questions of contemporary arbitration law, effectively identified and voiced at the Cardozo conference, is whether "bilateralism" is essential to the lawfulness of the contract of arbitration and the domestic legitimacy of the arbitral process.

## THE FAIRNESS OF ADHESIONARY ARBITRATION

The conference proceedings raised a number of substantive issues that deserve further commentary. The panel on disparate-party arbitration drew attention to the fairness of the contractual recourse to arbitration when it involved unequal parties and rulings upon statutory rights. At the outset, it must be established that to describe this process as “mandatory arbitration” is at least misleading, if not wholly inaccurate. The use of that phrase is likely to create confusion with so-called court-annexed arbitration.<sup>4</sup> The latter is indeed mandatory because state legislatures obligate litigants to undergo this process before they can proceed with their lawsuits. This form of arbitration was especially prevalent in the 1970s and 1980s as a means of satisfying the public’s appetite for litigation resources.<sup>5</sup> Recourse was mandatory but the result was not binding for reasons of constitutional due process of law.<sup>6</sup> In her presentation, Professor Amy Schmitz provided a thorough analytical account of contemporary court-annexed arbitration systems.<sup>7</sup>

Arbitration agreements involving consumers and non-unionized employees are not related to the exercise of political authority by state legislatures.<sup>8</sup> They involve parties of disparate power positions and levels of sophistication, who are brought together in the circumstances of adhesion because the transaction harbors mutual benefit. This form of arbitration is “mandatory” only in the sense that it is imposed by the stronger party as a precondition to transacting with the weaker party. It is, therefore, both more accurate and user-friendly to name this form of arbitration “adhesionary” or “disparate-party” arbitration.

The proposed “Arbitration Fairness Act of 2007,” which may yet be enacted, seeks to rectify the equity problems with adhesionary or disparate-party arbitration by voiding arbitration agree-

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<sup>4</sup> Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 *CARDOZO J. CONFLICT RESOL.* 587 (2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See id.* *See also* BARBARA S. MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (1990); A. Leo Levin, *Court-Annexed Arbitration*, 6 *U. MICH. J. L. REFORM* 537 (1983); John P. McIver & Susan Keilitz, *Court-Annexed Arbitration: An Introduction*, 14 *JUST. SYS. J.* 123 (1991); ELIZABETH S. ROLPH, *INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER’S GUIDE* (1985).

<sup>8</sup> *See generally* THOMAS E. CARBONNEAU, *EMPLOYMENT ARBITRATION* (2d ed. 2006).

ments in employment, consumer, and franchise transactions.<sup>9</sup> It also invalidates such agreements in decisional circumstances involving civil rights, or when the litigation involves a law regulating the validity of contracts in transactional situations in which the parties are unequal.<sup>10</sup> Both the political left and right seem to favor the legislative revision of the Federal Arbitration Act (FAA) § 2

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<sup>9</sup> See S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007). The stated purpose of the bills is to dismantle the process of mandatory arbitration in disparate-party transactional circumstances: “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—(1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007). It also eliminates, apparently in all arbitration circumstances, the jurisdictional or *kompetenz-kompetenz* powers of the arbitrator: “[T]he validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.” S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007). The latter provision reverses or eliminates the effect of the separability doctrine. It also seems to eliminate any reference to state contract law and to create—wholesale—a special federal law of contracts applying exclusively to arbitration agreements. This federal contract law for arbitration propounds the limited validity of arbitration contracts and places particular encumbrances upon their range of application. In effect, if the bill is enacted into law, the U.S. Congress will discriminate against arbitration as a form of contract by placing disabling requirements upon it in certain transactions. By so doing, the Congress will be engaging in conduct that the U.S. Supreme Court forbade to the states for years through the federal preemption doctrine.

Finally, in keeping with Justice Douglas’ legacy on arbitration, the proposed legislation “exempts arbitration in collective bargaining agreements” from the regulation established in the legislation. See S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007). Justice Douglas was a virulent critic of arbitration in all circumstances but those of labor-management relations. Like Justice Douglas, the proponents of the legislation approve of the traditional role of arbitration in achieving industrial self-governance in the unionized workplace. In their view, union representation establishes a sufficient level of protection to guarantee the essential fairness of this application of arbitration. It is again interesting to note that the federal decisional law, especially the rulings of the U.S. Supreme Court, arrives at a diametrically opposed conclusion. In the latter, the Court believed that the union’s collective interest prevented union members from asserting their personal acquiescence to the arbitrability of their individual statutory rights through the union. As a result, the individual union member needed to affirm personally the arbitrability of disputes involving citizenship guarantees. In the final analysis, it is difficult to comprehend why an employee’s interests are seen as advantaged in one form of arbitration and not the other.

<sup>10</sup> It should be emphasized that the stated purpose of the proposed legislation not only bans arbitral clauses in the identified transactional circumstances, but it also prohibits the arbitrability of civil rights disputes on the basis of subject matter. Both aspects of the bills stand in contradistinction to the U.S. Supreme Court’s long-standing decisional law on arbitration. The latter provides for a wide, if not unlimited, rule of arbitrability that is not constrained by subject-matter considerations or transactional inequality. The Court’s objective in devising this law was to guarantee citizen access to a functional and effective process of adjudication. The proposed law simply bans arbitration without creating more courts, naming judges to unfilled positions, or correcting the abuses and dysfunctionality of judicial litigation.

on this basis. Their motivation for doing so, however, is quite different.<sup>11</sup> The left is preoccupied with the unfairness associated with a contract imposed unilaterally by the stronger party upon the weaker party on a take-it-or-leave-it basis.<sup>12</sup> The need of the left to rescue its traditional constituencies from ‘monstrous’ corporate practices is compelled by its history, ideology, and the dictates of electoral advantage. The right propounds a position based upon the sanctity and freedom of contract.<sup>13</sup> Parties in the marketplace should be at liberty to agree to any exchange to which they mutually consent and which complies with the minimal requisites of public policy. Once established, party commitment to a mutual agreement is binding and enforceable law between the parties. Coerced agreements are not consensual undertakings; the authority of law cannot be used to give them effect. The rightist critique of disparate-party arbitration is an objection based upon fundamental, albeit abstract, principles. Like its leftist counterpart, it ignores practical consequences and is seemingly unmindful of the interests of average Americans. In the final analysis, both positions are ide-

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<sup>11</sup> The pre-conference e-mail exchange between participants indicated strong opposition from both ideological sectors to the use of contract to achieve the ends of consumer arbitration. The exchange motivated the subsequent discussion in the text.

<sup>12</sup> The leftist criticism is expressed thoroughly in the “Findings” contained in the “Arbitration Fairness Act 2007.” S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007). The statements made in this section of the proposed legislation constitute a veritable “manifesto” against arbitration that distorts the process, as well as the impact of the current governing law. The declarations are built upon a set of false and conclusory assumptions about the functioning of the court system, unabashed ideological and political convictions, and an ill-concealed objective of advancing the individual self-interests of favored groups. The alleged contractual unfairness of arbitration proceeds from a misconception about the purpose and reality of dispute resolution. It is anchored in the contrived reality of an ideological world. The would-be abuse is at best theoretical. The legislative critique mouths the criticism of arbitration advanced by American Trial Lawyers Association (ATLA). Regardless of how justice is defined, arbitration undeniably depreciates the business interest, adversarial skills, and the professional necessity of ATLA members by creating a more effective and efficient civil dispute resolution process. Eliminating the option for arbitration is equivalent to relegating American citizens to the emergency room for their health care needs.

<sup>13</sup> This position was advanced by Professor Huber in his email response to my written remarks on the “Arbitration Fairness Act of 2007.” He also appeared to state that the protection of legal rights in arbitration has been best achieved at the state court level. The latter position coincides to some extent with the views of Justice Scalia and Justice Thomas on the fate of states’ rights in arbitration under the FAA. In this sense, they reflect a rightist position. See *Volt Info. Sciences, Inc. v. Bd. Tr. Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (Thomas, J., dissenting); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (Thomas, J., dissenting); *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996) (Thomas, J., dissenting). In my view, this position does not sufficiently take into account the federal preemption doctrine. On the latter, see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 128 S. Ct. 978 (2008).

ological blatter, statements so detached from actual reality that they fail to elucidate, guide, or proffer effective solutions.

The nullification of arbitration agreements in entire transactional areas is a radical and costly solution to the problem of coerced acquiescence to, or participation in, arbitration.<sup>14</sup> It is a blanket condemnation of adhesionary or disparate-party arbitration that disregards the substantial benefits of the process. The projected law, in effect, states that adhesionary or disparate-party arbitration is an absolute evil in all circumstances and cannot ever be redeemed or justified. By contrast, the right to appear and defend in court is seen as an absolute good and vital to the integrity of society and the deliverance of justice to American citizens.<sup>15</sup>

The position incorporated into the bill is not only impolitic, but impractical as well. In effect, it deprives weaker parties of an opportunity to benefit from arbitration and its advantages. The stigma that this legislation imposes on arbitration will make voluntary recourse by the vast majority of consumers and employees, who are uninformed about the process, extremely unlikely. The proposed law clouds or conceals the irrefutable fact that arbitration can provide access to adjudicatory services that are affordable, professional, expert, and enforceable.<sup>16</sup> It ignores developing and already developed case law that has effectively addressed the fairness concern in adhesionary or disparate-party arbitration.<sup>17</sup> These judicial rulings establish that arbitral proceedings between unequal parties must be administered by a neutral, outside institution, that both parties must be equally obligated to arbitrate disputes, and that the costs of arbitration should be borne by the imposing party or, at the very least, cannot serve to discourage or prevent recourse to the process.<sup>18</sup>

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<sup>14</sup> S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007).

<sup>15</sup> S. 1782, 110th Cong. (1st Sess. 2007); H.R. 3010, 110th Cong. (1st Sess. 2007).

<sup>16</sup> On the virtues of arbitration, see Thomas E. Carbonneau, *The Revolution In Law Through Arbitration*, 56 CLEVE. ST. L. REV. 233 (2003).

<sup>17</sup> See, e.g., *Armendariz v. Found. Health Psychcare Services, Inc.*, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000); *Broughton v. Cigna Healthplans of Ca.*, 90 Cal. Rptr. 2d 334, 988 P.2d 67 (1999); *Engalla v. Permanente Med. Group, Inc.*, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997). See also *Penn v. Ryan's Family Steak House, Inc.*, 269 F.3d 753 (7th Cir. 2001); *Walker v. Ryan's Family Steak House, Inc.*, 400 F.3d 370 (6th Cir. 2005); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998), *aff'd*, 170 F.3d 1 (1st Cir. 1999); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Garrett v. Hooters-Toldeo*, 295 F. Supp. 2d 774 (N.D. Ohio 2003).

<sup>18</sup> See, e.g., *Armendariz*, 6 P.3d 669; *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Walker*, 400 F.3d 370.

Contrary to the myths surrounding it, adversarial judicial litigation is a specialized remedy that is not suitable for all types of disputes. Its utility may be most evident in the prosecution and defense of criminal cases. It is beyond the kin of, and excessive for, modest civil disputes, which are the most common disputes involving American citizens. When the expenses of arbitration are defrayed or subsidized by the stronger party, arbitration becomes a vastly superior means of access to adjudication, even when contingency fee arrangements or *pro bono* representation are taken into account.

### DEBT COLLECTION CASES

A number of panelists made much of debt collection cases, portraying them as a decisive illustration of the unfairness of the arbitral process. Statistics were advanced with dizzying speed from the Public Citizen Study<sup>19</sup> that allegedly established beyond any doubt that arbitration in this area favored unequivocally the corporate party. Indebted credit card patrons lost the vast majority of the arbitrations. Imagine that! Nothing, according to these advocates, could be more unjustified than holding a debtor liable for incurred debt. A recent article establishes with substantial credibility that the Study misrepresents its own numbers, that the numbers themselves are misleading, and that diametrically opposite conclusions apply.<sup>20</sup> The simple point made by experienced attor-

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<sup>19</sup> *The Arbitration Trap* (Sept. 2007), [www.citizen.org/publication/release.cfm?ID=7543](http://www.citizen.org/publication/release.cfm?ID=7543).

<sup>20</sup> Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15-1 *DISP. RES. MAG.* 30, 31-32 (2008):

A July 2008 study that Navigant Consulting performed at the behest of the Institute for Legal Reform analyzed the same data set that Public Citizen considered, but found major discrepancies between the underlying data and Public Citizen's statistical analysis of it. According to Navigant's report, Public Citizen's numbers are quite misleading. Navigant reported that Public Citizen slanted its numbers by omitting from its analysis more than 8,000 cases that were dismissed without an award before an arbitrator was selected because the creditor decided not to pursue charges for lack of evidence or otherwise. When the dismissed cases are included in the data set where the prevailing party is identified, the analysis reveals that consumers prevailed in initiated arbitration cases 32.1 percent of the time. According to Public Citizen's own spreadsheet, consumers prevailed in nearly every case that Public Citizen omitted from its percentages. Moreover, even in the cases where Public Citizen identifies the business as the prevailing party, the consumer was frequently successful in reducing the amount the business sought. Consumers won reductions in 37.4 percent of the cases that went to hearing, with a median reduction of \$824. More impressive, in 3,632 of the 16,054 cases where there was no hearing because the respondent defaulted, the arbitrator refused to award the entire amount the business requested.

neys during the conference debate was that debt collection is no different in arbitration than in court or through small claims procedures.<sup>21</sup> No one likes to be held accountable or confirmed to be in financial straits. Often, the last resort is to blame someone else. The most probative cause of these financial difficulties probably resides with the lack of household budgets, instances of economic misfortune sometimes associated with the accumulation of uninsured medical costs, or uncontrolled, pathological, personal spending habits.

The leftist critique sought to reinterpret the reality of circumstances in order to privilege the standing and interest of parties or positions that its agenda required it to endorse. The Bill of Rights does not mandate a “make-over” of indebted consumers or a “redoing” of their practices any more than an abnegation of legitimate majoritarian interests. It may, in fact, impose a principle of accountability for individual conduct within the context of sufficient and suitable adjudicatory procedures. Shifting the blame for human misfortune and personal anguish to arbitration is simply untenable and, ultimately, absurd. Sales and marketing practices are more likely culprits, as are choices regarding individual behavior.<sup>22</sup>

#### CORPORATE DUALITY IN THE USE OF ARBITRATION

The critics further distorted the issues by contending that companies which imposed arbitration on their employers and customers refused to use the process to resolve their own disputes. The assertion was intended to foster the impression that companies espoused a duplicitous view of arbitration. Their goal was to show

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The median reduction for consumers was \$599. This may be because “[i]n cases administered under the NAF Code of Procedure, the arbitrator considers all evidence, whether or not there is a response to the claim.” This added layer of protection is unavailable to consumers in civil litigation, where default judgments are entered on sums certain without consideration of the underlying evidence. The average consumer thus comes out ahead in arbitration, compared to court.

*Id.* See also SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION (Prelim. Rep. Mar. 2009), available at <http://www.searlearbitration.org/report/pr.php>. The report presents a generally favorable view of AAA consumer arbitration. See *id.* It has already been attacked by left-leaning groups. See American Association for Justice, *Searle Institute Report Shows Mandatory Arbitration Favors Corporations Over Consumers*, available at, [http://www.justice.org/resources/searle\\_arbitration\\_rebut.pdf](http://www.justice.org/resources/searle_arbitration_rebut.pdf).

<sup>21</sup> See Robert Davidson, Esq., Remarks at the Benjamin N. Cardozo School of Law Symposium: Wither Arbitration? (Nov. 6, 2008).

<sup>22</sup> See Robert Manning, *Credit Card Nation*, CENTER FOR RESPONSIBLE LENDING, Dec. 1, 2000, <http://www.responsiblelending.org/issues/credit/reports/>.

that it functions as an instrument of repression of the dispossessed members of society. The inexorable conclusion was that arbitration represented substandard and illegitimate adjudication. The assault, however, was unsuccessful. Several panelists demonstrated convincingly that companies were not migrating to the courtroom for their own disputes.<sup>23</sup> The statistical suggestions to the contrary were simply mistaken.

The recourse of arbitration in matters of transborder commerce for instance, is a virtual necessity. As long as there is lucrative global business, multinational commercial enterprises see arbitration as a supplier of the dispute resolution stability and consistency demanded by their transactions.<sup>24</sup> Arbitration is a unique process. It may not be “a formula for world peace,”<sup>25</sup> but it supplies a neutral transnational venue, commercial expertise, and binding results. It thereby enables global merchants to transcend the conflicts of law and the jurisdictional paralysis of private international law.<sup>26</sup> Arbitration’s ability to transcend systemic differences among legal systems explains its enormous transborder success.<sup>27</sup> It has cemented the rule of law in a sphere of activity in which attempted global governance has always met with failure. It is therefore inconceivable that international merchants would abandon their allegiance to, or use of, such a remarkable process that so effectively allows them to engage in commerce.

Domestic companies are no less aware of the value and virtues of arbitration. Though their concerns are not due to the venue’s parochial character, crossborder enforcement, or the disarray among legal traditions, managers of domestic corporations seek to avoid the inefficiencies and the expensive histrionics of potentially commercially inexpert judicial trials. They mightily resist reconceptualizing commercial problems into a legal language.<sup>28</sup> They

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<sup>23</sup> See Christopher Drahozal & Peter Rutledge, Remarks at the Benjamin N. Cardozo School of Law Symposim: *Wither Arbitration?* (Nov. 6, 2008).

<sup>24</sup> See Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002).

<sup>25</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614.665 (1986) (Stevens, J., dissenting).

<sup>26</sup> See Carbonneau, *The Ballad*, *supra* note 24.

<sup>27</sup> *Id.*

<sup>28</sup> See CPR Law Firm Policy Statement On Alternatives To Litigation, <http://www.cpradr.org/Portals/0/lawfirmpledge.pdf> (last visited March 1, 2009); see also Vince Vitkowsky, *The Global Litigation Lottery*, MARKET WATCH, Mar. 28, 2008, <http://www.marketwatch.com/news/story/global-litigation-lottery/story.aspx?guid=%7BF4E1F6F8-4296-8F63-225784>.

are generally unwilling to cede control of their destiny to the judicial apparatus and fight their battles on alien turf.<sup>29</sup>

Nonetheless, there are other, nonstatistical indications that arbitration could be subject to domestic re-evaluation or retrenchment. One current belief is that federal judges, many of them weary of presiding over criminal proceedings involving drug dealers, are hankering for more commercial law and contract cases.<sup>30</sup> In effect, judges resent that arbitrators get all the “good” cases. Standard commercial law cases pose no security risk and require adjudicators to engage in traditional analytical thinking that reminds legal actors of the reasons for their choice of vocation. Also, a few business parties have recently expressed a favorable view of using settlement in judicial litigation to resolve disputes.<sup>31</sup> When litigation is conducted through arbitration, the process ordinarily goes through to completion and the matter in dispute is decided by the arbitrators.<sup>32</sup> The advantage of settlement, it is argued, is that it provides greater control over the outcome and its timing. In effect, a judicial proceeding is a third-party framework in which the litigating commercial parties can define and evaluate the problems and engage in negotiations to find a mutually acceptable resolution of their conflicts.

Despite the lack of statistical foundation, the foregoing developments attest to real domestic misgivings about the continued use of arbitration. The disposition of the users of and players in the process are an accurate benchmark of the process’ standing. Statistical analyses often reflect particular interests and are no better or worse than well-paid expert witnesses. They provide a window to reality, but the pane of glass can magnify or shrink objects or, at times, inaccurately represent them. Optical illusions can occur, structures can be misrepresented and shadows may be ignored. Even though they may be short-lived and are simple hearsay, emergent perceptions within the process may be more accurate indicators of the factors that bear upon the operation and fate of the process. Despite the threat of reevaluation, the intrinsic appeal of

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<sup>29</sup> *Id.*

<sup>30</sup> Interviews with Morey L. Sear, former Chief Judge of the U.S. District Court for the Eastern District of Louisiana, Oct. 15, 2001; The Honorable Peter Beer, Senior Judge, U.S. District Court for the Eastern District of Louisiana, Nov. 19, 2001; The Honorable James L. Dennis, Circuit Judge, U.S. Court of Appeals for the 5th Circuit, April 6, 2002 by the author.

<sup>31</sup> Interviews of Douglas Cheney, California Business Executive, in Bethesda, MD. (Sept. 20, 2005).

<sup>32</sup> THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 655 (2d ed. 2007) (citing the observation of John Borgo, Esq.).

arbitration to commercial interests and to the judiciary at this stage remains profoundly compelling.

*La Bête Noire*

One of the persistent themes of the first panel was the unstated and unexplained contempt in which the critics of adhesionary or disparate-party arbitration held the National Arbitration Forum (“the Forum”).<sup>33</sup> It was never made evident that the assault was based upon and reflected a reiteration of the highly questionable Public Citizen Study. By definition, ideologues need a target, a *bête noire*, upon which to foist their invectives. For the critics of adhesionary or disparate-party arbitration, the Forum is as the French say, “a bon dos.”<sup>34</sup> This critique of the Forum coincided with the parade of horrors from the debt collection cases, and the linkage between the Study, the Forum, and animosity towards arbitration eventually became clearer.<sup>35</sup> More neutral observers claimed that the Forum does not have a due process protocol for consumer and employment arbitration cases such as other arbitral service-providers.<sup>36</sup> Even that perception, however, is questionable. The Forum’s website contains an Arbitration Bill of Rights and Code of Conduct for Arbitrators.<sup>37</sup> Another speaker asserted—in a display of tautologous reasoning—that the Forum must favor employers and manufacturers because too many companies bring their dispute resolution business to the organization. For some, success and the profitability that proceeds from it always generate suspicions, unless you are a State-owned or nationalized company, in which case your business practices are always beyond reproach or, at the very least, presumed to be in the public interest.

The Forum has created a niche in the competitive business of arbitral service-providing by using legal professionals as its neu-

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<sup>33</sup> See National Arbitration Forum, <http://www.adrforum.com/main> (lasted visited Feb. 27, 2009).

<sup>34</sup> Generally translated, to state that the Forum “a bon dos” means the Forum bears the burden of having all the animosity to arbitration directed against it. See *Liternaute Encyclopedie, Expressions: Avoir Bon Dos*, <http://www.liternaute.com/expression/langue-francaise/565/avoir-bon-dos> (last visited Mar. 2, 2009); WordReference Forum, <http://www.forum.wordreference.com/showthread.php?t=117464> (Mar. 2, 2009).

<sup>35</sup> See *supra* notes 19–22 and accompanying text.; *infra* notes 41–71 and accompanying text.

<sup>36</sup> The accuracy of the comment may depend on what is meant by a due process protocol. It is difficult to believe that the Forum operates without any real standards of integrity.

<sup>37</sup> See National Arbitration Forum, <http://www.adrforum.com/main> (last visited Feb. 27, 2009).

trials, requiring them to apply the law in their awards, and making substantive appeals to the courts possible for errors of law.<sup>38</sup> The Forum, in effect, establishes a unique link between the arbitral process and legal values. It is, like other similar organizations,<sup>39</sup> acutely aware of the need to maintain the integrity and professionalism of its adjudicatory tribunals. It could not, and would not, continue to survive as a player by supplying corrupt services that favor the stronger of two parties. The law of vacatur is available to nullify awards that are rendered by biased arbitrators. In fact, the most likely ground for nullifying an award is “evident partiality” as reinterpreted by the contemporary decisional law.<sup>40</sup> If hundreds of Forum arbitrators were reaching tainted determinations, a large number of awards would have been set aside.

### ATTACKING THE BEAST

Left-wing groups, Public Citizen and the City of San Francisco among them,<sup>41</sup> have launched a campaign against the Forum because the organization administers arbitrations between credit card companies and delinquent cardholders, the celebrated debt collection cases referred to earlier.<sup>42</sup> It is always difficult to distil objective information from tit-for-tat adversarial exchanges. There are few visible points of light in the bombardment of allegations and counter allegations. Be that as it may, the Public Citizen Study of the Forum Cases depicts Forum arbitrators as adjudicators who favor the credit card companies in order to feed their addiction to spectacular incomes.<sup>43</sup> Favoring the deep pocket secures reappointment and more revenue. The companies are the arbitrators’ “most loyal customers.”<sup>44</sup> The arbitrators, in effect, have a financial stake in the outcome of the adjudication and are “evidently

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<sup>38</sup> See *id.*

<sup>39</sup> See AAA HANDBOOK ON COMMERCIAL ARBITRATION ch. 4 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006).

<sup>40</sup> See *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217 (E.D. Pa. 2003); *Nationwide Mutual Ins. Co. v. Home Ins. Co.*, 278 F.3d 621 (6th Cir. 2002); *Lucent Techn. Inc. v. Tatung Co.*, 379 F.3d 24 (2d Cir. 2004).

<sup>41</sup> The City of San Francisco is known as a liberal bastion. See Sheldon Alberts, *America A Crossroads San Francisco: California City Practices Politics Its Own Way*, CANWEST NEWS SERVICE, Oct. 27, 2008, <http://www.canada.com/topics/news/world/story.html?id=9769aae7.ba3-bb50-2c7aaa7d6e49>.

<sup>42</sup> See *supra* notes 19–22.

<sup>43</sup> See *The Arbitration Trap*, *supra* note 19.

<sup>44</sup> *Id.*

partial” to one of the litigating parties.<sup>45</sup> Under this reasoning, law enforcement should favor gangs and oncologists should favor tobacco companies. It is inconceivable that this would-be wholesale corruption of the arbitral process should escape the attention of the courts, especially in California where the courts disfavor arbitration and are receptive to challenges against it.<sup>46</sup> Surely, one of the dedicated Public Citizen lawyers would by now have instituted a veritable eternity of vacatur actions. The logic of this accusation fails to account for the arbitrators’ loyalty and allegiance to the integrity of professional adjudication.

Thereafter, the Study claims that “busy” arbitrators can make annual incomes of hundreds of thousands of dollars.<sup>47</sup> There are superstars in every profession. Lawyers also can and do make substantial incomes. Financial success does not imply corruption, but it does breed envy. The broad brushstroke statement suggests much more than it actually establishes. There is no doubt that the business of being an arbitrator can be lucrative. It is, however, a complex area of professional activity, full-time for some and part-time for others. While it can yield large fees, there are operating and transactional costs that greatly reduce net revenues. For many, it is a consulting activity. Few arbitrators charge \$10,000 per day, \$400 or more per hour, or make a million or more dollars a year. If at all realistic, these figures are much more likely to apply to prominent international arbitrators, not arbitrators who do debt collection cases involving credit card companies and cardholders.<sup>48</sup> In any event, by and large, arbitrators are committed to and respect their profession.

The Study claims that California Superior court judges are paid an annual salary of \$170,000.<sup>49</sup> Be that as it may, it is indisputable that a migration has taken place from the state bench in California to private arbitration (or contract arbitration, as it is known in California).<sup>50</sup> As the Chief Justice of California himself noted,

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<sup>45</sup> *Id.*

<sup>46</sup> See *Armendariz v. Found. Health Psychcare*, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000); *Broughton v. Cigna Healthplans of Ca.*, 90 Cal. Rptr. 2d 334, 988 P.2d 67 (1999); *Jones v. Citigroup, Inc.*, 38 Cal. Rptr. 3d 461 (App. Ct. 2006).

<sup>47</sup> See *The Arbitration Trap*, *supra* note 19.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Hon. Ronald M. George, Cal. Chief Justice, State of the Judiciary Address to a Joint Session of the Legislature, Sacramento, California (Mar. 28, 2000), available at <http://www.courtinfo.ca.gov/reference/soj0300.htm>.

We have seen an exodus of experienced judges retiring from the bench at the first opportunity in order to earn more money as private judges. These departures only

the ranks of California judges have been significantly depleted by premature retirements.<sup>51</sup> The retired judges typically become full-time arbitrators and earn significantly more money. They also surrender the security of their civil servant status and engage in the risk of creating a growing economic enterprise. Lawyers who for years have managed trial proceedings are valuable assets in the arbitration industry. The same stream of professional movement occurs in the Washington, D.C. lobbying industry, with results that have a far more questionable character. There, influence-peddling is the purpose of trading on professional expertise and experience. The availability of increased income does not identify a problem with the integrity of arbitration. Rather, it suggests that the public regulation and provision of adjudicatory services may be misguided or ill-conceived.

A contemporary International Chamber of Commerce (“ICC”) study established that attorney’s fees constituted nearly eighty percent of the cost of an ICC arbitration.<sup>52</sup> While the study sustains the ICC’s efforts to amend its reputation as an expensive arbitral service-provider,<sup>53</sup> it indicates that the primary expense for litigation, even in arbitration, rests with attorneys. ICC arbitrators often complain that the ICC’s fee scale, charging a percentage of the amount in dispute,<sup>54</sup> leaves them with a modest hourly rate that

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encourage the further development of a two-track system of justice in which the best and the brightest move to the private track rather than use their experience to serve the public.

*Id.* *Life’s Tough, Your Honors*, Opinion, L.A. TIMES, Feb. 7, 2003, at B14, available at <http://www.articles.latimes.com/2003/feb/07/opinion/ed-judges7>; Eric Berkowitz, *The Lucrative Business of Arbitration—Judges Reaping the Bounty, Is Justice Served?*, HomeOwners for Better Building Nov. 19, 2006, [http://www.hobb.org/index.php?option=com\\_content&task=view&id=1371&Itemid=197&mosmsg=item+successfully+saved](http://www.hobb.org/index.php?option=com_content&task=view&id=1371&Itemid=197&mosmsg=item+successfully+saved); *Justice, For a Price*, UNIV. SOUTHERN CAL. ANNENBERG FILES, Feb. 10, 2009, [http://www.blogs.uscannenberg.org/annenbergfiles/2007/08/is\\_justice\\_served\\_by\\_eric\\_berk.html](http://www.blogs.uscannenberg.org/annenbergfiles/2007/08/is_justice_served_by_eric_berk.html).

<sup>51</sup> See George, *supra* note 50.

<sup>52</sup> See Report from the ICC Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, available at [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf) (last visited Jan. 10, 2009). In the *Introduction*, the Report expressly provides that eighty-two percent of the average costs of ICC arbitrations that “went to a final award in 2003 and 2004” consisted of “costs borne by the parties to present their cases.” Such costs could include “lawyers’ fees and expenses, expenses related to witness and expert evidence, and other costs . . . .” Arbitrator costs constituted sixteen percent of expenditures and institutional charges two percent. See also Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729 (2006); John Y. Gotanda, *Awarding Costs and Attorney’s Fees in International Commercial Arbitration*, 21 MICH. J. INT’L L. 1 (1999).

<sup>53</sup> See International Chamber of Commerce, International Court of Arbitration, [www.iccwbo.org/court/arbitration](http://www.iccwbo.org/court/arbitration) (last visited Jan. 10, 2009).

<sup>54</sup> *Id.*

hardly compares with the hourly rate for consulting activity by a senior legal person.<sup>55</sup> The “pot of gold” view of arbitration misrepresents the financial realities of the process for arbitrators.

The Study also contends that only a small group of over-employed arbitrators sit in most of the Forum’s credit card debt collection cases and that they rule in favor of the company in more than eighty-five percent of cases.<sup>56</sup> Although expertise and professional experience are prized in adjudication, the Study once again suggests that arbitrator reappointment must be a *quid pro quo* for unabashed corruption.<sup>57</sup> The innuendo transforms indebted cardholders who are unable to pay their bills into the forlorn prisoners of an abusive process that prejudices their interests. In these circumstances, the critical consideration should be how arbitrators are selected.<sup>58</sup> The Study touts the California arbitrator disclosure standards,<sup>59</sup> but they seemingly have been insufficient to safeguard indebted cardholders from the tainted Forum arbitral process. The disclosure standards themselves are not without controversy.<sup>60</sup> They are seen by many as needlessly invasive and overly demanding.<sup>61</sup> Their principal effect is to increase the prospect of vacatur for properly rendered awards.<sup>62</sup> Other state jurisdictions are not as distrustful of arbitration. Legal standards for arbitrator disclosures complicate arbitral procedures and then provide little meaningful protection for the users of the process. They embody a form of

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<sup>55</sup> *Id.*

<sup>56</sup> See *The Arbitration Trap*, *supra* note 19.

<sup>57</sup> *Id.*

<sup>58</sup> The importance of arbitrator selection and quality cannot be overemphasized in any circumstance of arbitral adjudication. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 32, at 628. Giving the weaker party a larger role in the appointment of arbitrators, weighting the tribunal in its favor, or establishing procedural presumptions in its favor might rectify, or help to rectify, the imbalance of the contract relationship. *Id.*

<sup>59</sup> See *The Arbitration Trap*, *supra* note 19 (“Ethics Standards for Neutral Arbitrators in Contractual Arbitration”—California Rules of Conduct app. at div. VI [2003]).

<sup>60</sup> See SEC, Release No. 34-51213, 70 Fed. Reg. (FR) No. 35 at 8862–63 (Feb. 23, 2005).

<sup>61</sup> See Jaimie Kent, *Debate in California Over and Implications of New Ethical Standards for Arbitrator Disclosure: Are The Changes Valid and Appropriate?*, 17 *GEO. J. LEGAL ETHICS* 903 (2004); Bethany L. Appleby, *Are California’s Arbitrator Disclosure Requirements Preempted by the FAA?*, 25 *A.B.A. FRANCHISE L.J.* 187 (2006); Keisha I. Patrick, *A New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards* *J. DISP. RESOL.* 271 (2003). For the decisional law debate, see *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, *amended by* 260 F. Supp. 2d 979 (N.D. Cal. 2003); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (2005); *Jevine v. Superior Court*, 28 Cal. Rptr. 3d 685 (2005); *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117 (Cal. App. 2005).

<sup>62</sup> See Richard Chernick, *Disclosure Rules May Apply to Party-Appointed Arbitrators*, *L.A. DAILY JOURNAL*, Feb. 12, 2003; Richard Chernick, *Decisions Change Arbitrator Disclosure Disqualifications*, *L.A. DAILY JOURNAL*, Nov. 1, 2004, available at <http://www.jamsadr.com>.

regulation that primarily discourages recourse and hinders the process.<sup>63</sup> They do not cure or prevent abuse, thereby failing to deliver on their promised regulatory effect. The integrity, neutrality, and impartiality of arbitrators are vital to the arbitral process. Courts, in California and elsewhere, should be as vigilant about maintaining the professionalism of arbitrators as they are respectful of the arbitrator's decisional and managerial independence.

The remainder of the Study contains equally misleading half-truths presented as fact.<sup>64</sup> Atypical incidents are portrayed as characteristic and described selectively to achieve maximum dis-informational effect.<sup>65</sup> Advances in the case law on adhesionary or disparate-party arbitration are completely ignored, despite the fact that they demonstrate that the partnership between courts and the arbitral process is healthy and can rectify problems. Finally, the Study decries the limited appeal in arbitration.<sup>66</sup> Restricting appeal contributes to the functionality and economy of arbitration. Finality is reached in arbitral proceedings through a reasonable and sensible procedure. As noted earlier,<sup>67</sup> the Forum procedure does an exceptional job incorporating the possibility of appeal for errors of law. It is curious that the Study does not at least account for this feature of the Forum arbitration. Be that as it may, not every—and, quite possibly, very few—“adverse”<sup>68</sup> awards rendered against indebted, delinquent cardholders warrant merits review. The prospect of appeal is often part of the lawyer's game, as it can serve to discount a defendant's liability.<sup>69</sup> It is not part of the concern for fundamental fairness, but rather a means of justifying attorney's fees.<sup>70</sup> Average people, like credit card holders, actually breach agreements and engage in culpable conduct. As stated previ-

<sup>63</sup> See, e.g., Appleby, *supra* note 61.

<sup>64</sup> See *The Arbitration Trap*, *supra* note 19.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* notes 33–36 and accompanying text.

<sup>68</sup> See *The Arbitration Trap*, *supra* note 19.

<sup>69</sup> On the function of appeal, see, e.g., Steven Shavell, *The Appeals Process As A Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995); Martin Shapiro, *Appeal*, 14 LAW & SOC. Y REV. 629 (1979); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AMER. L. & ECON. REV. 125 (2001). See generally WAYNE V. MCINTOSH, *THE APPEAL OF CIVIL LAW: A POLITICAL-ECONOMIC ANALYSIS OF LITIGATION* (1990); MARC GALANTER, *A BEGINNER'S GUIDE TO THE LITIGATION MAZE* (1992).

<sup>70</sup> See generally Steven Shavell, *The Appeals Process and Adjudicator Incentives*, 35 J. LEGAL STUD. 1 (2006); Richard Nobles & David Schiff, *The Right to Appeal and Workable Systems of Justice*, 65 MOD. L. REV. 676 (2008); MARC GALANTER, *A BEGINNER'S GUIDE TO THE LITIGATION MAZE* (1992).

ously,<sup>71</sup> the problem with this type of litigation does not reside in arbitration by the Forum or any other arbitral institution, but rather in either the commercial practices of the credit card companies or the nature of debt collection cases. Engulfed by the haze of its own ideology, Public Citizen is shooting at the wrong target.

#### CLASSWIDE ARBITRATION

Both opponents and proponents of arbitration made statements about the case law that misrepresented the U.S. Supreme Court's holding in a landmark arbitration case. On several occasions, speakers contended that the ruling in *Green Tree Financial Corporation v. Bazzle*<sup>72</sup> established the availability of class action litigation in arbitration. The holding actually created a different rule. The Court held that the arbitrator's decisional authority extended to the interpretation of the arbitral agreement.<sup>73</sup> Once a court confirmed the existence of a valid contract of arbitration or that a *First Options of Chicago, Inc. v. Kaplan*<sup>74</sup> jurisdictional directive applied, the arbitrator, as a matter of law, would establish what the arbitral clause provided. The expansion of arbitrator authority was meant to reduce litigation about arbitration.<sup>75</sup> In other words, the arbitrator would decide whether the arbitral clause provided for classwide arbitration proceedings. True class action availability came when service-providers, in response to assertions of the loss of remedial rights, began to administer classwide arbitrations, thereby allowing affected parties the would-be benefit of class procedures and relief in arbitration.<sup>76</sup> Courts remain divided on the issue of the enforceability of class action waivers in adhesio-

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<sup>71</sup> See *supra* notes 19–22 and accompanying text.

<sup>72</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

<sup>73</sup> *Id.*

<sup>74</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (holding that the contracting parties could, in their agreement, authorize the arbitrators to rule on challenges to their own jurisdiction, thereby removing the question from the courts). In effect, the contracting parties could “direct” the arbitrators to resolve challenges to their authority to rule in the agreement to arbitrate. Party choice and provision on this matter preempted the application of the otherwise controlling statutory text, FAA § 3.

<sup>75</sup> *Id.*

<sup>76</sup> *AAA Policy on Class Arbitrations*, <http://www.adr.org/Classarbitrationpolicy> (last visited Apr. 23, 2009); *AAA Supplementary Rules for Class Arbitrations*, <http://www.adr.org/sp.asp?id=21936> (last visited Mar. 2, 2009).

nary arbitration agreements between unequal parties.<sup>77</sup> Proffering all remedial options in arbitration, despite its negative impact upon the operation of the process, is probably the most sagacious policy to pursue in adhesionary or disparate-party arbitration.

### A TRINITY OF INTRACTABLE PROBLEMS

Three of the most insoluble problems in arbitration have a very visible presence in adhesionary or disparate-party arbitration. The problems relate specifically to party inequality. They are inter-related, but are not exclusive to arbitration—they exist among unequal parties in the process of judicial litigation as well. Arguably, the latter has more procedures by which to protect parties against the consequences of such problems. Companies have greater experience with, knowledge of, and resources for litigation; they are more lucid about adjudication and better understand its rules and objectives. The repeat player problem<sup>78</sup> exemplifies the effect of party disparity upon the proceedings and the protection of interests within the process. Arbitrators see companies and their representatives more frequently than individual employees or consumers. Not only are the corporations more aware of, and familiar with, the arbitral process, but the process and its agents are more familiar with them. This circumstance could breed either an underlying contempt or a procedural or psychological advantage. Once the company agrees to pay the costs of arbitration to avoid attacks on the validity of the arbitration agreement,<sup>79</sup> the possibility of collusion between the arbitrators, the arbitral service-provider, and

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<sup>77</sup> See *Pedcor Mgmt. Co., Inc. v. Nations Personnel of Texas*, 343 F.3d 355 (4th Cir. 2003); *Jones v. Citigroup, Inc.*, 38 Cal. Rptr. 3d 361 (App. Ct. 2006); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). See also Pamela A. Maclean, *Class Action Waivers Hit A Wall*, 29 NAT'L L.J. 5, col.1 (2007).

<sup>78</sup> See Carrie Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Judicial Systems: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999); Edward A. Dauer, *Judicial Policing of Consumer Arbitration*, 1 PEPP. DISP. RESOL. L.J. 91 (2000).

<sup>79</sup> The current case law encourages, and may require, companies to pay for the totality or a large portion of the costs of arbitration when they impose arbitration on their employees or consumers. See *Cole v. Burn Int'l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1996); *Armendariz v. Found. Health Psychcare Serv., Inc.*, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000). The court opinions state that the payment of costs alleviates the unfairness of the unilateral imposition of the contract of arbitration. While it achieves that objective, it may also lead arbitrators, subconsciously or otherwise, to favor the party paying for their fees and other arbitral costs. Whether this factor weights the process is speculative and difficult to establish.

the payor party<sup>80</sup> is heightened—at least in theory, or “outward seeming”, as Justice Cardozo would say.<sup>81</sup>

The same problem can surface in judicial proceedings. It arises from the stronger party’s natural edge and it is difficult, if not impossible, to eliminate. Demanding that sole arbitrators be chosen at random by the weaker party or that arbitrators never reappear in proceedings involving a prior party might alleviate the inequality. Such procedures, however, tilt and thereby compromise the process and burden arbitrations with delay and enhanced costs, lessening their functionality. Party inequality remains and the process is little improved, if not worsened. Truly neutral arbitrators make full disclosure, are chosen from an outside administrator’s list or by a court, and seem to be the most effective solution to the problem.<sup>82</sup> Establishing actual neutrality and maintaining its appearance in all circumstances is indispensable to the continued vitality of adhesionary or disparate-party arbitration.<sup>83</sup>

#### POSSIBLE SOLUTIONS TO THE LACK OF CONTRACT FAIRNESS

Contractual fairness in arbitrations between unequal parties remains the principal and principled concern. There are three possible doctrinal solutions. The first is to espouse the U.S. Supreme Court’s approach. The Court alluded to the issue of adhesion briefly in only two of its forty-plus rulings on arbitration.<sup>84</sup> In each instance, the Court acknowledged the problem only to dismiss it just as quickly.<sup>85</sup> It gave the issue of cost distribution in adhesionary or disparate-party arbitration a greater, albeit equally unsympathetic, presence in its decisional law.<sup>86</sup> The Court’s treatment of

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<sup>80</sup> The ability of corporations to retain outside legal counsel or to employ in-house legal counsel demonstrates the advantage of both resource and sophistication. Companies, in fact, develop policies on litigation as part of their business plan and corporate practices. They have a fully thought-out and articulated policy when a problem arises, but the employees or consumers do not.

<sup>81</sup> See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342 (1928).

<sup>82</sup> See generally ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, Mar. 1, 2004, <http://www.adr.org/si.asp?id=4582>, [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf).

<sup>83</sup> See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

<sup>84</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/Am. Express Co., Inc.*, 490 U.S. 477 (1989).

<sup>85</sup> See *Gilmer*, 500 U.S. 20; *Rodriguez*, 490 U.S. 477. In each case, the discussion is ten to twenty lines.

<sup>86</sup> See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

challenges to the validity of arbitration agreements is curt and turns on technical considerations, like burden of proof.<sup>87</sup> The cryptic pronouncement on the distribution of costs generated activity among the lower federal courts to determine a workable analytical standard for defining the affordability of arbitration.<sup>88</sup> The quest for a uniform and harmonious standard remains unfulfilled, and the likelihood of reaching an eventual protocol remote. In effect, the Court practices an avoidance approach; it deflects and minimizes the difficult analytical issues that relate to the validity of arbitration agreements, thereby preserving the enforceability of the agreements despite allegations of unfairness and imbalance in their formation.

A second solution was suggested by the Seventh Circuit when it articulated a new definition of lawful contract formation. The definition also revised the concept of fairness in contract relationships. In addressing the validity and effect of an adhesion contract in a consumer transaction, the court held that unilaterally drafted and imposed “agreements” are valid contracts as long as they provide each party with real, substantial, and serious benefits.<sup>89</sup> In effect, negotiated mutuality is replaced by the exchange of objectively desirable advantages. Standardized contracts that facilitate the acquisition of goods and services by consumers at lower prices is of considerable significance to the purchaser.<sup>90</sup> Applying this reasoning to arbitral agreements, both parties are given access to a functional, fair, economical, and effective adjudicatory process that achieves the timely and binding resolution of disputes. Under the Seventh Circuit’s holding, the exchange obviates adhesion and renders the agreement enforceable.

Finally, contract fairness concerns could be addressed through the adoption of the English rule for arbitration in consumer transactions.<sup>91</sup> In 1989, the Parliament of the United Kingdom of Great Britain and Northern Ireland enacted legislation that established that the submission agreement was the only arbitration agreement

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<sup>87</sup> *Id.*

<sup>88</sup> See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001); *Perez v. Globe Airport Sec. Serv., Inc.*, 253 F.3d 1280 (11th Cir. 2001); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003); *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212 (3d Cir. 2003).

<sup>89</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997).

<sup>90</sup> *Id.*

<sup>91</sup> See THOMAS E. CARBONNEAU, SUPPLEMENT FOR CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 15 (1998).

that could be incorporated into a consumer contract.<sup>92</sup> In effect, once a dispute arose, the consumer could choose to go to court or submit the dispute to arbitration. Like the eventual European Union (“EU”) rule<sup>93</sup> on this topic with which it was merged, the provision accounted for the parties’ inequality. The would-be contract unfairness in adhesionary or disparate-party arbitration in the United States could be remedied by the adoption of a similar provision. Giving consumers and employees the right to choose the form of adjudication might quell the criticism of consumer arbitration, but it also foils the Court’s ambition of expanding arbitration’s range of application in civil dispute resolution.<sup>94</sup>

In order to preserve the latter objective and entice the weaker party to choose arbitration, companies could, upon the emergence of a dispute, offer to pay the entire cost of arbitration as well as a percentage of the weaker party’s attorney’s fees if the weaker party selects arbitration. The company could further agree to discount any award it receives in its favor by a given percentage in exchange for the promise to arbitrate. In employment circumstances, at least, this offer could be tendered at the outset of the relationship, effectively requesting that the employee enter into an arbitral clause. These financial incentives could be communicated to the arbitrators at the outset of the proceedings and incorporated by them into the final award. The availability of litigation contributes to social civilization, but it is inextricably bound to the quest for individual financial gain and advantage. The proffer of arbitration can serve both of these goals.

The prospective accommodation could establish an acceptable balance between risk, reward and the traditional dictates of contract fairness on the one hand, and the Court’s policy to provide greater and more effective citizen access to civil adjudication on the other. It would be unfortunate to prevent already dispossessed citizens from availing themselves of the benefits of arbitration. Adhesionary or disparate-party arbitration could become a type of specialized arbitration, like NASD or maritime arbitration.<sup>95</sup> Spe-

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<sup>92</sup> *Id.*

<sup>93</sup> EUROPEAN COMMISSION, HEALTH & CONSUMER PROTECTION DIRECTORATE-GENERAL, CONSUMER PROTECTION IN THE EUROPEAN UNION: TEN BASIC PRINCIPLES 7, 12 (2005); PAOLISA NEBBIA & TONY ASKHAM, EU CONSUMER LAW (2004); STEPHEN WEATHERILL, EU CONSUMER LAW AND POLICY (2005); A CASEBOOK ON EUROPEAN CONSUMER LAW (Reiner Schulze & Hans Schulte-Nolke eds., 2002).

<sup>94</sup> See CARBONNEAU, LAW AND PRACTICE, *supra* note 32, at xv-xvi.

<sup>95</sup> See SEC LAW.COM, Arbitration Information Center, <http://www.seclaw.com/centers/arbcent.shtml> (last visited Apr. 8, 2009); THOMAS J. HINES & JOHN K. BRUBAKER, NASD ARBI-

cific provisions, like the English rule, could be developed to alleviate problems and assuage weaknesses, as well as to assist interested communities in gaining beneficial access to the process.<sup>96</sup>

### INTERNATIONAL ARBITRATION

The presentations on international commercial arbitration (“ICA”) were generally less controversial and more cogent than the discussions of domestic arbitration. Although investment arbitration<sup>97</sup> is—by definition and in practice—something of an exception, arbitration in the transborder context has thus far escaped being mauled by the claws of politicalization.<sup>98</sup> It is vital to global

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TRATION SOLUTION: FIVE BLACK BELT PRINCIPLES TO PROTECT AND GROW YOUR FINANCIAL SERVICES PRACTICE (2007); *see also* W. REESE BADER, SECURITIES ARBITRATION: PRACTICE AND FORMS (looseleaf, updated periodically); Society of Maritime Arbitrators, *About the SMA*, <http://www.smany.org/sma/about.html> (Table of Contents) (last visited Apr. 8, 2009); Maritime Arbitration Association of the United States, *Mission & Values*, <http://www.maaus.com/who-we-are/mission-%26-values> (last visited Apr. 8, 2009); *see generally* GEORGIOS I. ZEKOS, INTERNATIONAL COMMERCIAL AND MARINE ARBITRATION (2008).

<sup>96</sup> The Society of Maritime Arbitrators (“SMA”) Rules, for example, have rules on consolidation and the publication of awards that are customized to this form of arbitration and its users. In Section 1, the Rules provide that, “Unless stipulated in advance to the contrary, the parties, by consenting to these Rules, agree that the Award issued may be published by the Society of Maritime Arbitrators, Inc. and/or its correspondents.” The provision reflects and reinforces the long-standing SMA practice of publishing rendered awards in a special collection for purposes of general reference and use in subsequent arbitrations.

Section 2 of the Rules provides that, “The parties agree to consolidate proceedings relating to contract disputes with other parties which involve common questions of fact or law and/or arise in substantial part from the same maritime transactions or series of related transactions, provided all contracts incorporate SMA Rules.” The content of the provision reflects to the interconnected character of standard maritime transactions. The latter usually involve a ship owner, the rentor of the vessel, a supplier, a purchaser, and various insurers. Consolidation of related arbitrations for a single incident fits hand-in-glove the basic transactional circumstances.

In adhesionary or disparate-party arbitration, there could be special rules regarding the appointment of arbitrators, the composition of the arbitral tribunal, the assessment of damages, the payment of fees, and the review of awards. Such rules should transcend the rudimentary character of the various due process protocols in the field. They should yield a fully adapted regulation of the unique characteristics of the process. *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION, ch. 3 (3d ed. forthcoming). (This book is published by Juris Publishing, Inc. and will appear in the Fall).

<sup>97</sup> *See* T.J. GRIERSON WEILER, INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (2008); KAJ HOBER, INVESTMENT ARBITRATION IN EASTERN EUROPE: IN SEARCH OF A DEFINITION OF EXPROPRIATION (2007); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007).

<sup>98</sup> There appears to be a general consensus among States that ICA needs to operate on a self-regulatory basis in order to insure the efficiency and effectiveness of the process. The con-

commerce and an effective means of resolving breaches in transnational commercial agreements.<sup>99</sup> Regardless of its utility and functionality, ICA is not a panacea or without its imperfections. Disagreements exist about the role of the arbitrators, legal counsel, and the courts; the collection of information; the use of experts; and the presentation and examination of witnesses.<sup>100</sup> Stipulations in the contract of arbitration, the choice of an arbitral service-provider, or the selection of a particular law of arbitration can resolve many, if not all, of these issues.<sup>101</sup>

Several recent developments reflect ICA's current standing among world legal systems. First, the success of arbitration is directly linked to its resilience and capability for pragmatic adaptation. For instance, the ICC rules require that the parties enter into an agreement at the outset of the process that contains the terms of reference.<sup>102</sup> The latter are basically equivalent to a submission agreement. They represent a statement of the matters to be submitted to the arbitrators for resolution, thereby establishing the arbitrators' jurisdiction.<sup>103</sup> Their articulation requires the parties to agree about their disagreement. Litigating parties often cannot agree on these rudimentary issues, causing the arbitration to be delayed and creating greater expense and depletion of resources. In order to minimize this problem, ICC arbitrators began to establish the terms of reference themselves.<sup>104</sup> When parties indicated a typical inability to come to terms about the elements or characterization of their disagreement, ICC arbitrators would generally inform the parties that the terms of reference would be defined during the proceedings. In other words, the trial process would yield the necessary understanding of the specific matters in dispute.

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sensus is concentrated and especially strong among North American and European States, but applies elsewhere in the world as well but to varying degrees. See Carbonneau, *Ballad*, *supra* note 24.

<sup>99</sup> See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 32, at 429–33.

<sup>100</sup> On the competition between the civil law and common law in arbitral procedures and proceedings, see *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* (Stehan Frommel ed., 1999); Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, 60 *ARB.* 78 (1994); Lawrence W. Newman & David Zaslowsky, *Cultural Predictability In International Arbitration*, in *CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION* 489 (Thomas E. Carbonneau ed., 2005).

<sup>101</sup> See Newman & Zaslowsky, *id.*

<sup>102</sup> See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 32, at 23.

<sup>103</sup> *Id.*

<sup>104</sup> Telephone Interview with Eric Schwartz, Esq., Parnter, Freshfields Bruckhaus Deringer, Paris, ICC arbitrator, in Paris France (June 17, 2005).

At the end of the hearings, the arbitrator would submit the terms of reference to the parties for their evaluation and comments—much in the same way that jury instructions are established in an adversarial civil trial. The final decision on the content of the terms of reference is made by the arbitrator.<sup>105</sup>

The foregoing practice reflects pragmatic adaptability. It fulfills the objective of devising an effective means of avoiding delay by quelling the front-end disagreements in arbitration. It has a substantial doctrinal drawback as well. It allows arbitrators to establish (or, at least, to participate in establishing) the range of their own jurisdiction, and thereby eliminates, for all intents and purposes, the possibility of vacatur for rulings on matters not submitted (excess of arbitral authority).<sup>106</sup> While seeking to encourage the effective operation of the arbitral process, ICC arbitrators increased substantially their own autonomy and jurisdictional power. They substituted themselves for the parties, or made themselves into an ersatz party, on a matter of strategic significance in the arbitral process. The practice eliminated the possibility of party deadlock and delay, but also entrusted the arbitrators with decisive authority on jurisdiction—even beyond the reach of the *kompetenz-kompetenz*<sup>107</sup> doctrine.

Second, in a corollary example of pragmatic adaptability, ICC arbitrators have begun to hear expert witnesses jointly.<sup>108</sup> The experts appear before the tribunal, making their presentations and answering the tribunal's questions. Arbitrators report that these joint appearances reduce confusion and contradictions and enable the tribunal to understand more clearly the points being made by the experts.<sup>109</sup> While the use of adversarial experts represents a concession to common-law procedure,<sup>110</sup> joint appearances allow the arbitral tribunal to make the best use of the parties' proffer of

<sup>105</sup> *Id.*

<sup>106</sup> FAA § 10(a)(4); New York Arbitration Convention, Art. V(1)(c).

<sup>107</sup> *Kompetenz-kompetenz*, also known as *competence sur la competence* or jurisdiction to rule on jurisdiction, gives arbitrators jurisdictional powers that are equal to those of courts. Arbitral tribunals can rule on questions or challenges that pertain to their right to rule (did the parties enter into an arbitration agreement?, is it a valid and enforceable contract?, and does it cover the dispute in question?). Under *kompetenz-kompetenz*, the arbitrators rule first on these matters. Their determinations are subject to *de novo* review by the courts at a much later stage of the process.

<sup>108</sup> See ERIK SCHAFFER, HERMAN VERBIST & CHRISTOPHE IMHOOS, ICC ARBITRATION IN PRACTICE (2005); THOMAS H. WEBSTER & MICHAEL W. BUHLER, HANDBOOK OF ICC ARBITRATION: COMMENTARY, PRECEDENTS, MATERIALS (2d ed. 2008).

<sup>109</sup> See *supra* note 108 and accompanying text.

<sup>110</sup> See *supra* note 100 and accompanying text.

expert knowledge. It attests to the hold of practicality and common sense on the process. The latter exhibits a continuing ability to adjust creatively to eliminate flaws and perfect its value as an adjudicatory process.

Finally, two national court developments should be described—one which demonstrates the vitality of the relationship between national judiciaries and ICA, and the other which testifies to a misguided judicial practice in regard to ICA. As to the vital relationship, French courts assumed years ago a position of leadership in regard to arbitration and have persisted without fail in their commitment to the process.<sup>111</sup> These courts adapted an obsolete domestic law to the exigencies of transborder arbitration and laid the doctrinal foundation for the statutory overhaul of the French law of arbitration.<sup>112</sup> Their achievements in this field have been remarkable. French court rulings on arbitration are intelligent and agile; the courts fashioned rules that reconciled the dictates of legal dogma with the objective of improving society and advancing the practical interests of French civilization. French judicial rulings on arbitration, especially those of the Court of Cassation and the Court of Appeal in Paris,<sup>113</sup> have always been shaped and directed by decisional clarity, making them exemplary expressions of the rule of law. These decisions intermediated effectively between history, societal rules and interests, and practical exigencies. Rather than erecting barriers to sensible and necessary policy, the French decisional law on arbitration generated rules that expressed, addressed, and satisfied the needs of society, thereby guiding the French legal system to a position of preeminence in the field.

The decision in the recent *NIOC v. Israel* case<sup>114</sup> indicates that the French courts continue to assume a vigorous position in the development of international legal rules on arbitration. The facts of the case are well-known and need not be recited exhaustively.<sup>115</sup> Shortly stated, the National Iranian Oil Company (“NIOC”) filed an action before the French courts requesting that they appoint an arbitrator on behalf of Israel which had defaulted on its obligation. The dispute related to a long-standing pipeline project. The only connection between the French legal order and the transaction was

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<sup>111</sup> See Thomas Carbonneau, *The Elaboration of A French Court Doctrine*, *supra* note 2.

<sup>112</sup> See *id.*

<sup>113</sup> *Id.*

<sup>114</sup> Cour d’appel [CA] [regional court of appeal] Paris, March 29, 2001, 2002, REV. ARB. 427; Cass. crim., Feb. 1, 2005, Ire Civ. Ch., Juris-Data No. 2005-026746, JCP No. 11, Mar. 17, 2005.

<sup>115</sup> *Id.*

a reference in the contract to the possible intervention of the ICC, headquartered in Paris, in the event of a procedural deadlock between the parties. Apparently, the Israeli refusal to appoint its arbitrator deprived the NIOC of its ability to adjudicate the dispute and to obtain a resolution of the matter.<sup>116</sup> In an opinion eventually upheld by the Court of Cassation, the French court asserted jurisdiction over the appointment petition on the basis of the contractual reference to the ICC. It thereafter ruled that French law required national courts to rule on a matter involving an arbitration taking place abroad and not involving any national interest or party in order to avoid a denial of justice in ICA.

While the political undercurrents of the matter are undoubtedly explosive, the legal implications of the ruling are far-reaching. By so holding, the French courts assumed a form of extraterritorial jurisdiction in regard to matters of transborder arbitration. As long as the issue involved either the availability of arbitration or the basic functionality of the proceedings and there was some connection (no matter how tenuous) to the French legal order, the French courts could intervene to rectify the problem with the implementation of arbitration. A party's inability to arbitrate amounted to an unwarranted refusal to give effect to the form of justice agreed upon in the contract. The substance of the ruling reflects the internationalist doctrines that apply in jurisdictions that are hospitable to global commerce and ICA.<sup>117</sup> In fact, American and English courts have the statutorily-conferred authority to assume a similar jurisdictional posture in matters of transborder arbitration, although there are no cases in which that authority has been invoked.<sup>118</sup> The French decision is noteworthy because it articulates the principle of extraterritorial judicial responsibility for ICA with doctrinal force and eloquence, and continues to express the unfailing allegiance of the French judiciary to contract freedom in global commerce and dispute resolution.

As to the misguided judicial practice, a number of international lawyers have indicated that the Swedish courts abandoned their traditionally deferential approach to the supervision of international arbitral awards.<sup>119</sup> These courts are now engaging in a

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<sup>116</sup> *Id.*

<sup>117</sup> See Carbonneau, *Ballad*, *supra* note 24.

<sup>118</sup> To the author's knowledge. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 32, at 650.

<sup>119</sup> Interview with Jan Paulsson, Esq., Partner, Freshfields Brackhaus Deringer, Co-head of his law firm's international arbitration and public international law groups, Montréal, Québec, Canada (May 28, 2008). See generally LARS HEUMAN, *ARBITRATION LAW OF SWEDEN: PRACTICE*

more extensive examination of the arbitral proceedings and the arbitral tribunal's determination. While awards are not necessarily nullified more frequently, the Swedish judicial approach, at the very least, creates substantial insecurity regarding enforceability, the key consideration in any transnational adjudicatory context.<sup>120</sup> A practice of detailed scrutiny and review of arbitral awards never indicates a legal system that is hospitable to arbitration. The avoidance of judicial reconsideration is not meant to foster commercial lawlessness or arbitrator unaccountability, but rather it is a means of securing the parties' bargain for an arbitral determination of their disputes. The infringement of local courts upon the sovereignty of the arbitral process and the arbitrator compromises the jurisdiction's ability to act as a venue for transborder arbitral adjudication.<sup>121</sup> It is both an unfortunate and a costly policy that serves only to fracture the world community with conflicting perceptions of the national interest and trans-border legality.

### CONCLUSIONS

The Senate sponsor of the Arbitration Fairness Act submitted a statement to the journal editors, explaining the motivation underlying the proposed legislation on arbitration to the conference participants and attendees.<sup>122</sup> The statement essentially reiterates the findings included in the bill. It is filled with the same ideological mischaracterizations of arbitration and fails even to allude to how the legislation is endorsed by and advances the interests of the American Trial Lawyers Associative ("ATLA"). In many respects, it is a defense of the indefensible. The bias against "big business" is paraded more overtly in the Senator's statement than in the findings.<sup>123</sup> Over the years, the Democratic Party has targeted corporate entities and used the rhetoric of "robinhoodism" to fan the flames of class warfare. Senator Russ Feingold never refers to the failure of courts and judicial litigation to protect the legal rights of American citizens whose claims are not economically attractive to

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TICE AND PROCEDURE (2003); FINN MADSEN, *COMMERCIAL ARBITRATION IN SWEDEN* (3d ed. 2007).

<sup>120</sup> See Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183 (2004).

<sup>121</sup> *Id.*

<sup>122</sup> See U.S. Sen. Russ Feingold, *Protecting the Right to a Day in Court* (conference materials, Cardozo Journal of Conflict Resolution Symposium, *Whither Arbitration?* (Nov. 2009)) (on file with author).

<sup>123</sup> *Id.*

lawyers or who lack the standing to be noticed, let alone heard, by society. The right to a civil jury trial is a hollow (not hallowed) guarantee for whole segments of American society. By supervising the attribution of arbitral costs and the availability of remedies, the case law has eliminated much of the potential for inequity in the reference to arbitration.<sup>124</sup> Opponents of arbitration should know that deliberately ignoring objective facts does not lessen their relevance or persuasive value.

Arbitration does not contribute to, or act as a vehicle for, injustice; rather, it fills wide gaps and makes adjudication accessible to individuals by promoting economy and effectiveness through the provision of expertise, basic fairness, and binding determinations. Statutory rights and the freedom from discrimination are more certain of application in an adjudicatory process that can actually function. There is no evidence that the arbitral process is “unaccountable” or that U.S. citizens must be protected from its “exploitation.” The evidence to the contrary is overwhelming. The hypocritical political discourse is unfortunate because the deception it contains can be very destructive. If arbitration, in any of its applications, withers, it will besmirch the process and negatively effect American democracy and citizens. The duplicity of the left-wing critique of arbitration should not be allowed to prevail. The interests of American citizens should be given expression through the triumph of arbitration and the workable form of adjudication it embodies.

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<sup>124</sup> See *supra* notes 17–18 and accompanying text.

