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Freedom and Governance in U.S. Arbitration Law

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FREEDOM AND GOVERNANCE IN U.S. ARBITRATION LAW

THOMAS E. CARBONNEAU[†]

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I. INTRODUCTION

A. *The Promise of Arbitration*

Arbitration has long served as a contractual substitute for judicial litigation.¹ It provided a workable and effective form of adjudication in ancient societies and among religious groups, much as it does in contemporary times.² Its long-standing appeal resides in enabling parties to choose a private adjudicatory mechanism based upon expertise and expedition that delivers fair, affordable, and enforceable outcomes. Arbitral adjudication effectively intermediates between the need for functional trial procedures and the imperative of safeguarding legal rights.³ Rights

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¹ For a general account of the history of arbitration, *see, e.g.*, FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS, AND ACHIEVEMENTS* (1948); IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992); DEREK ROEBUCK, *EARLY ENGLISH ARBITRATION* (2008); Lord Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43 (1989); Katherine V.W. Stone, *Arbitration-National*, in *ENCYCLOPEDIA OF LAW AND SOCIETY* (D. Clark ed. forthcoming); Imre S. Szalai, *Modern Arbitration Values and the First World War*, 49 AM. J. LEGAL HISTORY 355 (2009).

² *See* sources cited *supra* note 1.

³ According to the late Chief Justice Warren E. Burger, “ADR devices are often superior to litigation ‘in terms of cost, time, and human wear and tear.’” *AMF Inc., v. Brunswick Corp.*, 621 F. Supp. 456, 462 (E.D.N.Y. 1985) (citing remarks of Warren E. Burger, Chief

cannot be vindicated if the applicable hearing mechanisms are inaccessible and inefficient. The protracted puffery of lawyers is not a feasible solution for most parties in conflict.

Although it casts them—to some degree—in a misleading and unflattering light, arbitral procedures gained sharper definition when they were adopted by trade groups just prior to and following the industrial revolution.⁴ The objective was to shield business operations from legal encroachments. Legal requirements could hinder significantly the efficacy of commercial relationships and the profitability of transactions.⁵ Adjudicators, experienced in the trade and prone to practical solutions, could perform their decisional tasks in informal trial settings. In a word, decision-makers of a kindred spirit avoided ritualistic fanfare and rendered rulings that properly reflected the interests of their colleagues. The flexible confines of arbitration permitted parties to be heard and a record of the matter constituted without subjecting the litigants and their disagreement to adversarial dismemberment. In these commercial sectors, rationality and pragmatism generally prevailed in the resolution of disputes.⁶

Justice of the United States, at the Twin Cities Advisory Council of the American Arbitration Association, St. Paul, Minn., August 21, 1985). Arbitration permits “merchants and companies to expend more resources on their commercial activities by supplying them with a frugal, fair, and final form of expert and effective adjudication.” Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1367 (2009) [hereinafter *Judicial Approbation*]. THOMAS CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 21 (3d ed. 2009) [hereinafter CARBONNEAU, *LAW AND PRACTICE*] (Proponents “seek to achieve two basic goals: First, the practical objective of lessening the human and economic costs associated with judicial litigation; second, the ideological and humanistic aim of ‘empowering’ disputants and to have them develop a psychologically ‘healthier’ approach to conflict management.”).

⁴ “The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 n.2 (1967) (Black, J., dissenting). See also 50 A.B.A. Rep. 357 (1925).

⁵ See, e.g., Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999), (citing SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 92-96 (3d ed. 2d prtg. 1966)); Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258 (1933); JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 53-55 (1918).

⁶ See Thomas E. Carbonneau, “*Arbitracide*”: *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT’L ARB. 233 (2007) [hereinafter *Arbitracide*] (“An adjudicatory process that is efficient, effective, and accessible can hardly be described as incapable of protecting rights. The expense and indecision associated with protracted adversarial proceedings before courts do not protect citizen rights, but rather promote the attorneys’ combat and embellish their fees. Lawyers, of course, tendentiously assert that participation in their battleground is synonymous with rights protection. The argument ignores the impact of litigation warfare on the litigants’ lives and interests.”); *Litigation Cost Survey of Major Companies: Presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States, 2010 Conference on Civil Litigation*, DUKE LAW SCHOOL 2 (May 10-11, 2010) (statement of U.S. Chamber Institute for Legal Reform), <http://lfcj.digidoq.com/BLAP/Lawyers%20for%20Civil%20Justice/FRCF%20DATA%20Litigation%20Cost%20Survey%20of%20Major%20Companies%202010.pdf> (Finding that “[l]itigation transaction costs [for large corporations for cases which go to trial] on average

In fact, efficient results—comprehensible to the parties and providing useful solutions—represented a more acceptable form of fairness than the legal system’s narrow, single-minded focus upon procedural rigor and its jesuitical construction of applicable law. Legal procedures are alien to ordinary human experience. Moreover, judicial litigation is permeated with distrust and cynicism. These attitudes blind advocates to sensible compromise, causing them to undervalue and reject human ingenuity, resourcefulness, and creativity in the circumstances of disagreement.⁷ Coerced settlements or protracted proceedings are the inevitable outcomes.⁸ Trade association arbitration was not merely “merchant justice,” but

and as a percent of revenue have risen substantially over the past nine years . . . [excluding judgments and settlements]. . . . The average outside litigation cost per respondent was nearly \$115 million in 2008, up 73 percent from \$66 million in 2000. This represents an average increase of 9 percent each year.”).

⁷ See David Gwynn Morgan, *Fairness ‘Too Much of a Good Thing’*, THE POST-IRELAND (Nov. 21 2010), available at <http://www.sbpost.ie/businessoflaw/fairness-too-much-of-a-good-thing-52870.html> (“[T]he law is dealing with institutions of government in a constitutional democracy and assumes one of the features distinguishing [judges] from private individuals is that they are non-partisan and open to persuasion, as long as all the relevant facts are put before them.”); Advantages and Disadvantages of the Adversarial System in Civil Proceedings, LRCWA 7, 41 n.21 (1998), <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-2civiladvers.pdf> (The obsessive focus on procedural correctness in litigation “inhibit[s] the courts’ capacity to link other organizations that might help the users of courts with other aspects of their problems. Courts are compared unfavorably with [arbitral] tribunals on this subject,” and need to be “more procedurally and substantially just, expeditious, proportionate, managed and maximizing of resources.”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 974-75 (2002) (“Many commentators see these concerns for judicial accountability as inescapably in conflict with the goals of judicial independence: The only way to make judges accountable for their decisions is to control them in ways that intrude on their independence. But this mischaracterizes the problem, and we think that framing the issue differently dissolves any apparent contradiction. Neither judicial independence nor judicial accountability are ends in and of themselves. Both are means toward the construction of a satisfactory process for adjudication. As we have seen, this means a process that is appropriately ‘legal’ in its nature: one in which decisions are made for appropriately legal sorts of reasons, without regard for considerations that law considers extraneous or immaterial. As we have also seen, however, it means a process that is subject to legitimate democratic control over differences in the range of outcomes procurable within the confines of legal analysis: a process in which judges cannot deviate too far from popular political understandings for reasons unconstrained but not excluded by law. Not surprisingly, these joint and several allegiances to law and democracy—with their joint and several objectives of procedural rectitude, legal impartiality, and democratic accountability—necessitate a complex institutional design. Searching for the right system, we mix and match in different ways and to different degrees various arrangements—some protecting the independence of judges, others making them accountable—in the effort to construct a properly balanced judiciary.”).

⁸ *Arbitracide*, *supra* note 6, at 269 n.160 (“Access and operational effectiveness are the attributes of the arbitral process that make it far superior to judicial litigation. It achieves functionality while also protecting rights and assuring that arbitral proceedings guarantee due process rights.”); THOMAS E. CARBONNEAU, CARBONNEAU ON ARBITRATION: COLLECTED ESSAYS 360, n.32 (2010) [hereinafter ON ARBITRATION] (Among specialized groups, arbitration stands for “adjudicatory efficiency, privacy, flexibility, and expertise”); (“[T]he human civilization associated with law and the legal process.”); (describing the Supreme

adjudication that satisfied the real needs of its users. It gave effect to a rule of law⁹ anchored in the commercial habits and personality of the community of merchants.¹⁰

Arbitration rekindled the value of finality in adjudication.¹¹ It gave *res judicata* its proper significance in the process of litigation. The conclusive resolution of disputes was indispensable to social civilization. A social dynamic in which disappointment was cultivated and failed circumstances were perpetually reconsidered would undermine the operation of society. In arbitration, the litigants' time, energy, and treasure—not to mention their rights—no longer needed to be sacrificed to a distant, insatiable, and abstract “ideal” of justice. Parties could engage in an effective and workable process of adjudication. They could explain their behavior, state their positions on the issues, be given a determination, and resume their business activities. In arbitration, advocacy was reunited with a measured sense of purpose and an awareness that adversarialism could have a destructive impact upon the parties, their interests, and society. The utility and resourcefulness of the arbitral remedy eventually led it to have a broader role in American society.¹²

Court's rulings on arbitration as “motivated exclusively by a desire to fulfill its responsibility to the rule of law—to the provision of effective legal and juridical services in American society.”); and (“the rule of law is also instrumental to an individual's rights and personal allegiance to society.”). *Id.* at 43-44.

⁹ See ON ARBITRATION, *supra* note 8, at 4 (“Practicability has emerged as the dominant force in the definition and implementation of law”); (“The general recourse to arbitration reflects a growing need for more rational dispute resolution”); (The use of arbitration . . . “evidences confidence in human rationality, the capacity to achieve compromise, and, more generally, a stance for more far-reaching dispute resolution goals. . . . Arbitration allows the parties to assume responsibility for and exercise basic governance over their adjudicatory destiny.”).

¹⁰ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(1)(e), 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention] (providing that “an award can be denied recognition or enforcement if it is not final or has been set aside by a court in another jurisdiction with contacts to the arbitration”). See also THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 794 (5th ed. 2009) [hereinafter CASEBOOK]. ON ARBITRATION, *supra* note 8, at 191 (“[T]he view that arbitration is an autonomous and fully-functional adjudicatory process and that the contract of arbitration is the law between the parties . . . allows for the possibility that the earlier arbitral award constitutes a final and binding determination of the question, precluding the court from ruling . . . on the basis of *res judicata*.”).

¹¹ ON ARBITRATION, *supra* note 8, at 156 (The doctrine of *functus officio* emphasizes the “importance of finality in arbitration and the need to contain the appeal of awards to fundamental procedural irregularities,” fostering efficiency, justice, and finality); CASEBOOK, *supra* note 10, at 701 (“The doctrine is motivated by the perception that arbitrators, lacking the institutional protection of judges, may be more susceptible to outside influences pressuring for a different outcome and also by the practical concern that the ad hoc nature of arbitral tribunals makes them less amenable to re-convening than a court.”).

¹² See *Judicial Approbation*, *supra* note 3, at 1343.

B. The Work of the Court

The U.S. Supreme Court has been the chief advocate for arbitration's integration into the adjudicatory mainstream.¹³ Judicial support has been vital to arbitration wherever it has taken hold.¹⁴ In the last forty years, the High Court has decided forty-five arbitration cases and continues to cast a watchful eye upon the evolution of

¹³ The U.S. Supreme Court sees the Federal Arbitration Act as a vehicle for achieving the congressional objective of fostering the enforcement of arbitration agreements. *See generally Prima Paint*, 388 U.S. 395; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Court federalized the law of arbitration through the federal preemption doctrine, immunizing arbitration from conflicting state law regulatory provisions. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Southland*, 465 U.S. 1; *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1 (The Court discovered a strong "federal policy favoring arbitration agreements" in the Act. *Id.* at 24.); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1986); *Southland*, 465 U.S. 1. The U.S. Supreme Court also emphasized the role of contractual freedom in arbitration, requiring courts to enforce privately negotiated agreements to arbitrate in accordance with parties' stipulations. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). The Court also substantially increased the decisional sovereignty of the arbitrator to decide the arbitration agreement's meaning, confining courts to the most basic threshold matters. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *PacifiCare Health Sys. v. Book*, 538 U.S. 401 (2003). The Court advanced a wide definition of interstate commerce, extending the scope of the FAA's application to almost all commercial transactions. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). It also increased the scope of arbitrability to encompass the vast majority of statutory claims. *See Mitsubishi Motors*, 473 U.S. 614; *Gilmer*, 500 U.S. 20; *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

¹⁴ *See generally Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Barrentine v. Arkansas-Best Freight Sys., Ins.*, 450 U.S. 728 (1981); *Wright v. Universal Mar. Ser. Corp.*, 525 U.S. 70 (1981); *Moses H. Cone Mem'l*, 460 U.S. 1, 24; *Southland Corp.*, 465 U.S. 1; *Dean Witter Reynolds*, 470 U.S. 79; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Mitsubishi Motors*, 473 U.S. 614; *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Perry v. Thomas*, 482 U.S. 483 (1987); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Gilmer*, 500 U.S. 20; *Mastrobuono*, 514 U.S. 52; *Allied-Bruce Terminix*, 513 U.S. 265; *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Casarotto*, 517 U.S. 681; *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000); *Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57 (2000); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Howsam*, 537 U.S. 79; *Bazzle*, 539 U.S. 444; *Citizens Bank*, 539 U.S. 52; *PacifiCare Health*, 538 U.S. 401; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 529 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *14 Penn Plaza*, 129 S. Ct. 1456; *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A.*, 130 S. Ct. 1758; *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011); *Granite Rock Co. v. Int'l Bro. of Teamsters*, 561 U.S., 130 J. Ct. 2847 (2011).

arbitration law among lower courts. As it built its decisional “edifice”¹⁵ on arbitration, the Court refashioned the content of the U.S. or Federal Arbitration Act (FAA),¹⁶ seeking to make arbitration impervious both to serious attacks and perfunctory, but time-consuming adversarial challenges.¹⁷ As a result, the statute is now animated by a strong or emphatic federal policy favoring arbitration.¹⁸ Moreover, the federal law overrides any state law of arbitration that conflicts with its basic precepts, giving the FAA (as construed by the Court and informed by the principles of CBA arbitration) absolute dominion over the national regulation of arbitration.¹⁹ Freedom of contract and party intent—otherwise stated, the agreement

¹⁵ CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 229 (quoting *Allied-Bruce Terminix*, 513 U.S. 265 (O’Connor, J., concurring) (“[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation . . .”).

¹⁶ See Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1925) [hereinafter FAA]. Title 9, §§ 1-14, first enacted on February 12, 1925 (43 Stat. 883), *codified* July 30, 1947 (61 Stat. 669), *amended* September 3, 1954 (68 Stat. 1233). Chapter Two was added on July 31, 1970 (84 Stat. 692). Two sections were added to Chapter One by Congress in October 1988, and renumbered on December 1, 1990 (Pub. L. Nos. 669 and 702); Chapter Three was added on August 15, 1990 (Pub. L. No. 101-369); and Section 10 was amended on November 15, 1990. See generally CASEBOOK, *supra* note 10, at 57-94.

¹⁷ *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24; *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors*, 473 U.S. at 625.

¹⁸ The U.S. Supreme Court has interpreted the FAA to contain a strong federal policy favoring arbitration. See generally CASEBOOK, *supra* note 10 at 57-92. See also *Prima Paint*, 388 U.S. at 411 (The FAA is “a congressional directive” to federal courts on how they should rule on matters of arbitration regardless of the holding in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). Federal courts ruling on the basis of diversity of citizenship must apply the provisions of the FAA on matters of arbitration. *Southland Corp.*, 465 U.S. at 34-35; *Allied-Bruce Terminix*, 513 U.S. 265. The Supreme Court applies a wide view of interstate commerce. *Citizens Bank*, 539 U.S. at 56. In applying the federal policy favoring arbitration, federal courts generally uphold unilateral adhesive arbitration contracts. *Shearson/Am. Express*, 482 U.S. 220. But see *Waffle House*, 534 U.S. at 314 (an agreement to arbitrate in the employment context does not bar a plaintiff from obtaining relief through the EEOC. The majority noted, however, that permitting such accesses “will have a negligible effect on the federal policy favoring arbitration.”). The statute does not incorporate the *kompetenz-kompetenz* doctrine, but the U.S. Supreme Court in *First Options of Chicago* provided for the doctrine by contract; parties could agree to submit jurisdictional challenges—by contract—to the arbitrators. *First Options of Chicago*, 514 U.S. at 946. More recently, the Court emphasized the arbitrators’ power to decide threshold matters of procedural arbitrability. See *Howsam*, 537 U.S. 79; *PacifiCare Health*, 538 U.S. at 406-07; *Bazzle*, 539 U.S. 444. See also *Arthur Andersen*, 129 S. Ct. 529 (holding that “a litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement”). The Court provided for wide venue in the enforcement of arbitral awards. *Cortez Byrd Chips*, 529 U.S. 193.

¹⁹ *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24 (“Federal law in the terms of the Arbitration Act governs . . . in either state or federal court.”); *Southland Corp.*, 465 U.S. at 16 (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”); *Dean Witter Reynolds*, 470 U.S. at 221 (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is

as written—prevail unless they are themselves antagonistic to the recourse to arbitration.²⁰ Arbitrations and arbitrators have considerable autonomy. With contract permission or the choice of certain institutional rules,²¹ arbitrators can resolve challenges to their jurisdiction.²² Additionally, when the contract fails to provide for arbitrator authority to rule on jurisdiction, arbitrators can—as a matter of law—interpret the arbitral clause in the same sovereign manner they construe the underlying contract. Recent litigation, however, may have placed restrictions on the arbitrators’ threshold powers. It appears that, despite the invention of a second arbitrability doctrine, courts will review the contract sufficiency of a jurisdictional delegation if the question is properly stated to the supervising court.²³

According to the Court, because arbitration is but a means of conducting a trial—exclusively a matter of procedure—its application has no impact upon substantive

“piecemeal” litigation, at least absent a countervailing policy manifested in another federal statute. . . . By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.”); *Volt Info. Scis.*, 489 U.S. at 472 (“While the FAA therefore pre-empts application of state laws which render arbitration agreements unenforceable, [i]t does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their [arbitration] agreement to abide by state rules.”); *Allied-Bruce Terminix*, 513 U.S. at 269 (“[T]he Act has the basic purpose of overcoming judicial hostility to arbitration agreements and applies in both federal diversity cases and state courts, where it pre-empts state statutes invalidating such agreements.”); *Casarotto*, 517 U.S. at 686 (quoting *Allied-Bruce Terminix*, 513 U.S. at 281: “What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’s intent.”); *Buckeye Check Cashing*, 546 U.S. at 449 (“[R]egardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”); *Preston*, 552 U.S. at 350 (“[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”).

²⁰ *Volt Info. Scis.*, 489 U.S. at 479 (“Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. . . . By permitting the courts to “rigorously enforce” such agreements according to their terms[,] . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.”); *Mastrobuono*, 514 U.S. at 57 (“[T]he FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties.”).

²¹ See *First Options of Chicago*, 514 U.S. 938; *ADR Clauses, Rules, and Procedures*, JAMS, <http://www.jamsadr.com/rules-clauses/> (last visited July 10, 2010); *AAA’s Rules and Procedures*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/arb_med (last visited July 10, 2010) (providing rules for commercial, consumer, employment, labor, and government arbitrations).

²² See *Howsam*, 537 U.S. 79; *Bazze*, 539 U.S. 444. But see *Stolt-Nielsen S.A.*, 130 S. Ct. 1758.

²³ See *Casarotto*, 517 U.S. at 686; *Buckeye Check Cashing*, 546 U.S. at 449 (“[R]egardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”). *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987); *Rodriguez de Quijas*, 490 U.S. at 486.

rights.²⁴ Also, arbitrations proffer the same procedural protections and remedies as a court of law.²⁵ Such statements, at best, are suspect and perhaps fanciful. They are nonetheless an integral part of the Court's decisional doctrine on arbitration. Both contract and statutory disputes can be submitted to arbitration.²⁶ In fact, a broad submission includes both types of disputes as a matter of law.²⁷ Additionally, civil rights claims—despite their significance to American political and constitutional history—can be submitted to arbitration without qualification or preconditions. Unless arbitrators fail to disclose possible conflicts of interest,²⁸ the nullification of

²⁴ *Shearson/Am. Express*, 482 U.S. at 232 (1987) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628 (Ordinarily, “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”)); *Rodriguez de Quijas*, 490 U.S. at 486 (“[R]esort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners.”).

²⁵ *See Mitsubishi Motors*, 473 U.S. 614. *See also Shearson/Am. Express*, 482 U.S. 220; *Rodriguez de Quijas*, 490 U.S. 477; *Gilmer*, 500 U.S. 20.

²⁶ *See MedCam Inc. v. MCNC*, 414 F.3d 972 (8th Cir. 2005); *Orange Cty. Choppers, Inc. v. Goen Techn. Corp.*, 374 F. Supp. 2d 372 (S.D.N.Y. 2005); *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624 (6th Cir. 2004).

²⁷ *14 Penn Plaza*, 129 S. Ct. at 1474 (holding that a “collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate [civil rights] claims is enforceable as a matter of federal law . . .”).

²⁸ *See Revised Uniform Arbitration Act* § 12(a) [hereinafter RUAA] (“Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including: (1) a financial or personal interest in the outcome of the arbitration proceeding; and (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators [sic].”). RUAA section 12(f) provides: “If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).” RUAA § 12(f).

See FAA, supra note 16, § 10. Section 10 provides that the United States District Court, in and for the district wherein the award was made, may make an order vacating the award upon the application of any party to the arbitration “where the award was procured by corruption, fraud or undue means [or] where there was evident partiality or corruption in the arbitrators.” *Id.* While recognizing that arbitrators are not expected to sever their ties with the business community, the Court concluded that it must be scrupulous in safeguarding the impartiality of arbitrators, because they have “completely free reign to decide the law as well as the facts and are not subject to appellate review.” *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968). To achieve this goal, the Court imposed “the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.” *See id.* Although the Court noted that there was no evidence of actual bias in the case before it, the arbitrator's failure to disclose his business relationship with the prime contractor “constituted evident partiality justifying vacation of the award.” *See id.* Congress intended the “evident partiality” clause of § 10(a)(2) to ensure a fair and impartial arbitral process. *See id.* Section 2 provides that “an arbitrator may be challenged

arbitral awards is, at best, a remote possibility.²⁹ In the Court's view, private arbitrations are *sui generis*, or "one-off" events, with little, if any, consequence beyond the arbitrating parties and their transaction.³⁰ This assertion, once again, induces skepticism and, in fact, disbelief; its "truth," however, resides in its facilitation of a supportive and deferential judicial doctrine on arbitration. Articulating the latter has been an imperative for the High Court. Accordingly, judicial correction or emendation—as commanded by the governing statute—is limited to egregious, aberrant denials of procedural justice.³¹ The bargain for arbitration must be given effect even when adhesion makes the agreement legally questionable.³² Although the FAA contains a restriction on the arbitrability of

only if circumstances exist that give rise to justifiable doubt as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties." UNCITRAL Model Law on International Commercial Arbitration, art. 12, 2, U.N. GAOR, 40th Sess., Supp. No. 17, Annex 1, at 81-93, U.N. Doc. A/40/17 (1985), *reprinted in* 24 I.L.M. 1302. The General Standards Regarding Impartiality, Independence and Disclosure provide that "[e]very arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceedings until the final award has been rendered or the proceeding has otherwise finally terminated." *Part I Rule (1), IBA Conflicts of Interest in International Arbitration*, IBANET.ORG (May 22, 2004), http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx. The AAA-ABA *Code of Ethics for Arbitrators* establishes a presumption that all arbitrators, including party-designated arbitrators, are neutral. *The Code of Ethics for Arbitrators in Commercial Disputes*, AMERICAN BAR ASS'N (2004), http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf; *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, CALIFORNIA COURTS (adopted by the Judicial Council of California April 19, 2002), http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf; DEERING'S CALIFORNIA RULES OF COURT, Appendix, Division VI (Lexis-Nexus 2003); Harry L. Arkin, *Neutrality of Dispute Resolution in International Commercial Dispute Resolution*, 15(11) WORLD ARB. & MED. REP. 270 (2004); Markham Ball, *Probity Deconstructed – How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?*, 15(9) WORLD ARB. & MED. REP. 333 (2004).

²⁹ See generally Matthew David Disco, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113 (1993); Laurence Shore, *Disclosure and Impartiality: An Arbitrator's Responsibility vis-a-vis Legal Standards*, 57 DISP. RESOL. J. 32 (2002); James Wangelin, *Buttressing the Pillars of Arbitration*, 19(1) INT'L ARB. REP. 27 (2004); Otto de Witt Wijnen, Nathalie Voser, & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT'L 433 (2004). See also CASEBOOK, *supra* note 10, at 540.

³⁰ See *Shearson/Am. Express*, 482 U.S. 220.

³¹ ON ARBITRATION *supra* note 8, at 142 (The strong presumption in FAA § 10 favoring judicial enforcement of arbitration awards limits judicial oversight. Awards that are subject to vacatur must arise from an "arbitration [that was] corrupted or denatured as an adjudicatory proceeding [and] it amounts to a denial of justice to one of the parties." Such "debilitating elements" include: bias in the arbitrators, unrevealed relationships among parties to the arbitration, bribery, and arbitrator interest in the outcome. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) ("parties agree to arbitrate and trade 'the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'").

³² See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999).

employment disputes,³³ the near totality of workplace controversies can be heard and decided by arbitrators.³⁴

The Court's decisional law on arbitration is steadfast (at least, in terms of assembling a majority of Justices for each case),³⁵ despite the variable political strains in the Court's composition, the ubiquitous turnover of its membership, and the succession of Chief Justices.³⁶ Over the years, the haphazard thinking and periodic brevity³⁷ of some rulings demonstrated that the Justices were not necessarily interested in the doctrinal content of arbitration law, but rather perceived arbitration primarily as a means of achieving an important practical objective.³⁸ Despite vigorous discussions in a few cases, the Court has not seen arbitration as a law that warrants rigorous analysis.³⁹ It is an adjudicatory procedure that allows the legal process to manage its resources and dockets when the other branches of government

³³ See *FAA*, *supra* note 16, § 4 (the so-called employment contract exclusion); *Circuit City Stores*, 532 U.S. at 112 (the employment contract exclusion is limited to transportation workers "actually engaged in the movement of goods in interstate commerce.").

³⁴ See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 450-51 (1957) ("... § 301(a) is more than jurisdictional . . . it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.").

³⁵ The three most recent decisions were essentially decided by a 5-to-4 margin and divided the Court on grounds of political ideology. See *Stolt-Nielsen S.A.*, 130 S. Ct. 1758 (5-to-3 with one justice abstaining from the decision); *Rent-A-Center*, 130 S. Ct. 2772; *AT&T Mobility*, 563 U.S. ___, 131 S. Ct. 1740.

³⁶ The last three Supreme Court Chief Justices favored arbitration. See generally *AT&T Mobility* (Roberts, J., joining); *Bazze*, 531 U.S. 79 (Rehnquist, J., dissenting). See also Broadcast: Chief Justice Burger urges use of arbitration to settle legal disputes (NBC News 1982), http://www.nbcuniversalarchives.com/nbcuni/clip5112516837_s12.do.

³⁷ The decisional law on arbitration is not a domain for sophisticated judicial analysis. In fact, many decisions appear to contain seat-of-pants inventions that "fix" the problem that arose in the case. The rulings are not persuasive statements of doctrine. Arbitration, for the Court, is a device for implementing policy. It is a lawyer's area (because it is a trial mechanism), but it fails to capture the Court's intellectual interest. See, e.g., *First Options of Chicago*, 514 U.S. 938 (the jurisdictional delegation strengthens arbitral autonomy, but it also conflicts with FAA § 3); *Rodriguez de Quijas*, 490 U.S. 477 (arbitration is a "mere form of trial" having no impact on substantive statutory rights—a contention that hardly makes sense given the procedural traditions of the American legal system); *Shearson/Am. Exp.*, 482 U.S. 220 (The Court forgets its express qualification of the holding in *Mitsubishi Motors*, 473 U.S. 416, confining it to transborder arbitration and proclaims *ex cathedra* the universal arbitrability of statutory rights).

³⁸ The purpose of judicial supervision in the arbitral context seems to be to preserve the "litigation efficiencies" of arbitration so that litigating parties can derive the benefits of accessible adjudication. See, e.g., *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991). See also *Remmey v. Painewebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995). See, e.g., *Mitsubishi Motors*, 473 U.S. 614; *Scherk*, 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); *Allied-Bruce Terminix*, 513 U.S. 265.

³⁹ For a detailed discussion of the Supreme Court's arbitration opinions, see generally CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 359-428.

have no inclination or ability to fund new courts.⁴⁰ Arbitration is a workable remedy that resolves disagreements effectively with little, if any, public oversight. It addresses all aspects of a dispute: its emergence, definition, and resolution. Its applicable range is complete.

By supporting arbitration unequivocally and shaping its regulation accordingly, the Court has provided American citizens with access to a functional process of adjudication. Were it not for arbitration, the benefits of U.S. citizenship would be poorer. In effect, arbitration is the wellspring of political and jural legitimacy in American law and politics. Its mandate is to uphold the right to redress grievances by attenuating the intricate, nearly nonsensical complications of due process and the “kick boxing” mannerisms of procedural jousting. In many respects, the failings of judicial justice have been the stepping stones of arbitration’s success.⁴¹

C. Adaptability and Growth

Two final observations underscore arbitration’s basic character. First, arbitration is a resilient and adaptative process that seeks to maintain its functionality and appeal. Indeed, as for successful species, adaptability is arbitration’s quintessential trait. Relatedly, arbitration is compelled by a commercial heritage of pragmatism.⁴² For example, as transborder arbitral litigation became increasingly adversarial and complex, arbitral practice generated a form of arbitration with simplified procedures and proceedings, namely, fast-track arbitration.⁴³ Rather than cede business either to courts or mediators, arbitration devised a means of responding effectively to market demands. Expedition and economy—arbitration’s celebrated traditional virtues—were available through the exercise of party choice.

⁴⁰ See *id.* at 21-56.

⁴¹ Thomas Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 266 (2008) (“Individual parties gained access to a viable form of adjudication that provided workable remedies and basic fairness. Arbitral adjudication also had an extensive track record of adaptability to new circumstances . . . [a]daptability, expertise, and eventual finality are the principal characteristics of arbitration.”); Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB. 213, 258 (2005) (“The functionality and adaptability of arbitration became attractive in all areas of civil litigation.”); *Arbitracide*, *supra* note 6, at 259 (“[T]he development of arbitration has demonstrated its creative ability to adjust and adapt to its changing mandate.”).

⁴² Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 231 (1990), reprinted in ON ARBITRATION, *supra* note 8, at 351, 5 OHIO ST. J. DISP. RESOL. 231 (1990) (“Arbitration has long provided a pragmatic alternative to court proceedings—to the formality, delays, financial onus, and generally destructive effects of full-blown litigation.”).

⁴³ Fast-track arbitration, or “time limited” arbitration, are contractual provisions enhancing the effectiveness and speed of arbitration by incorporating a deadline which the arbitrator must follow in rendering the award. In fast-track cases, arbitrators are given substantial authority. See CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 60; Hans Smit, *Fast-Track Arbitration*, 2 AM. REV. INT’L ARB. 138 (1991); Nicolas de Witt, *Comment: Online International Arbitration: Nine Issues Crucial to Its Success*, 12 AM. REV. INT’L ARB. 441, 464 (2001); Mirèze Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?*, ARBITRAL WOMEN 253, <http://www.arbitralwomen.org/files/publication/0105202718125.PDF>. See generally CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF, & GABRIELE SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 86 (Kluwer Law International 2006).

Unlike court litigation, arbitration has never been a zero-sum game. In maritime arbitration, a long-standing form of commercial arbitration, for example, joinder and the participation of non-signatory parties became a fixture of the process because of the inter-related character of maritime transactions.⁴⁴ The transport of goods by sea generally involved large sums of money and required the distribution of risks.⁴⁵ The transactional pattern typically involved a shipowner, the renter of the vessel, the buyer and seller of cargo, and a number of insurers in the background. The interests of the parties were secured by primary and secondary underwriters. An arbitration between any two parties affected the interests of the other participants to the

⁴⁴ See *Maritime Arbitration Rules, Doc. No. 1*, SOCIETY OF MARITIME ARBITRATORS, § 2, <http://www.smany.org/sma/about6-1.html> (last visited Oct. 2, 2011) (Consolidation) (“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.”); *Id.* § 17 (Attendance at Hearings) (“Persons having a direct interest in the arbitration are entitled to attend hearings.”).

⁴⁵ “The origins of maritime arbitration can be traced as far back as the voyages of ships owned by ancient Phoenicians carrying the cargoes of Greek traders. Ever since, arbitration has played a significant role in waterborne commerce. Although American Courts regularly enforced arbitration awards from the early days of the Republic, it was not until 1925 that the U.S. Federal Arbitration Act [9 U.S.C. §§ 1-14] (the “Act”) was enacted, establishing guidelines and a summary means for enforcing arbitration agreements as well as awards. New York has regularly been chosen as an arbitral site in charter parties and other contracts of affreightment starting with the New York Produce Exchange Time Charter in 1913. Although the New York Produce Exchange, founded in 1861, no longer exists, its form of charter party remains in wide general use throughout the world. The charter calls for arbitration of disputes in New York by three commercial men (which is understood to mean “three commercial persons” regardless of gender). Many disputes are also arbitrated in New York under various tanker and other charter parties.” *Maritime Arbitration in New York*, SOCIETY OF MARITIME ARBITRATORS, INC., <http://www.smany.org/sma/about2.html> (last visited Oct. 2, 2011).

Maritime Transactions are defined by the FAA, 9 U.S.C. § 1, as “charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions or other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction.” FAA, *supra* note 16, § 1. Today, typical maritime disputes are based on specific factual controversies requiring expert knowledge of maritime practices and technicalities of vessels, navigation operation, and personnel requirements, such as: Standard contractual matters of sale, purchase, and repair of vessels; Seaworthiness; Negligence and officers’ conduct; Storage of cargo; Loading and unloading cargo; and damages. See CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 99-102. Generally, such disputes require technical expertise rather than legal knowledge.

The Society of Maritime Arbitrators provides maritime parties with the following arbitration clause: “Should any dispute arise out of this Charter, the Matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. This Charter shall be governed by the Federal Maritime Law of the United States. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc. The arbitrators shall be members of the Society of Maritime Arbitrators, Inc.” *SMA Model Arbitration Clause*, SOCIETY OF MARITIME ARBITRATORS, INC., http://www.smany.org/sma/smamodelarbitration_clause.htm (last visited Oct. 2, 2011). See also SOCIETY OF MARITIME ARBITRATORS, INC., MARITIME ARBITRATION IN NEW YORK 1-3 (3d ed. 1994).

transaction, making consolidation a necessity. The use of three-member panels in commercial arbitrations also attested to the molding of arbitral procedures to emerging procedural exigencies and user needs. These tribunals provided each party with a relatively “sympathetic” arbitrator who could emphasize the designating party’s position during the arbitrators’ confidential deliberations. Each party’s position would then be considered at this crucial stage of the process. Although loyalty to the appointing party rarely dictated an arbitrator’s actual vote, the presence of a neutral arbitrator eliminated any prospect of deadlock.

Additionally, when the merits review of awards became standard practice in English arbitration law, arbitrators began issuing “cryptic” awards that were purged of any reasoning on the law and merely summarized the facts and the parties’ arguments and announced the outcome of the litigation.⁴⁶ Today, the use of “emergency arbitrators” prior to the organization of the official arbitral tribunal preserves evidence and assets, thereby assuring the effectiveness of eventual proceedings.⁴⁷ Moreover, experts are often heard collegially by arbitral tribunals⁴⁸ to avoid the superficial “tit-for-tat” of expert opinions and provide the tribunal with information of practical value.

Second, arbitration continues not only to be adaptive, but, relatedly, to expand its jurisdictional range. The development of employment and consumer arbitration is one illustration. The use of arbitration in these transactional settings liberated the mechanism from the confines of specialty and integrated it into the more visible sectors of economic activity in society. Despite the distrust of political partisans, arbitration has become a remedy for everyday disputes that involve ordinary people. The use of arbitration reflected the *quid pro quos* in the parties’ relationship. Expedited but fair justice suited the parties’ desire for efficiency and effective outcomes. People wanted to have their say before a decision-maker who listened to them; then they wanted a responsive and considered result that allowed them to

⁴⁶ See ON ARBITRATION, *supra* note 8, at 82-83; Thomas Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT’L L. 581-86 (1996).

⁴⁷ On “emergency arbitrators,” see generally Guillaume Lemenez & Paul Quigley, *The ICDR’s Emergency Arbitrator Procedure in Action*, 63 DISP. RESOL. J. 4 (Nov. 2008/Jan. 2009); Bjorn Tude, *Arbitration-Sweden SCC’s New Rules on Emergency Arbitrators*, INTERNATIONALLAWOFFICE.COM (FEB. 11, 2011), www.internationallawoffice.com/newsletters/detail.aspx?g=e9; Therese Villard & Polina Permyakova, *Revised SCC Arbitration Rules Have Entered Into Force*, PRACTICAL LAW COMPANY, (Feb. 4, 2010), www.arbitration.practicallaw.com/0-501-3993; Jonathan Leach & Julian Berenholtz, *The Expedited and Emergency Arbitrator Procedures under the SIAC Rules—Six Months on, How Have They Fared?*, HOGAN LOVELLS (FEB. 2011), http://www.hoganlovells.com/files/Publication/68f010f5-af65-41ac-b36a-eecc77c4b805/Presentation/PublicationAttachment/7b3ea0d5-04cd-4308-8e15-fa15ae622148/Article_on_revisions_to_SIAC_Rules.pdf; Freshfields Bruckhaus Deninger, *Briefing Singapore International Arbitration Centre Issues Revised Arbitration Rules*, FRESH FIELDS (July 2010), <http://www.freshfields.com/publications/pdfs/2010/july 10/28537.pdf>.

⁴⁸ See generally CAMPBELL MCLACHIAN, LAURENCE SHORE, MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2008); ANDREW NEWCOMBE & LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* (2009); TODD WEILER, *INTERNATIONAL INVESTMENT LAW AND ARBITRATION* (2005).

resume their daily activities. In truth, arbitration accomplishes these ends far better than judicial litigation.⁴⁹

On the international side, investment arbitration is a forceful example of arbitration's virtuosity.⁵⁰ Investment arbitration and the related use of the WTO dispute settlement system⁵¹ indicate that arbitral adjudication has made an inroad into curtailing the absolutism of sovereignty in transborder commercial activity. The Schmittoff days,⁵² in which the State lacked the motivation even to notice arbitration, have long been eclipsed. States are indeed interested in global investment practices and participate actively in World Bank,⁵³ NAFTA,⁵⁴ and BITs-driven arbitration.⁵⁵ In the final analysis, States are open to accepting the authority of arbitrators and arbitration in exchange for a stake in the lucrative business of global commerce.⁵⁶

Arbitration's role in resolving investment disputes accentuates its adaptability and resilience.⁵⁷ Early in the NAFTA arbitration process, the problem arose of the

⁴⁹ See generally CARBONNEAU, LAW AND PRACTICE, *supra* note 3.

⁵⁰ See generally CLIVE M. SCHMITTHOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE (2d ed. 1981); CLIVE M. SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE (1980).

⁵¹ See generally WORLD TRADE ORGANIZATION, LEGAL AFFAIRS DIVISION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2004); PETER-TOBIAS STOLL & FRANK SCHORKOFF, WORLD TRADE ORGANIZATION (2006); ANDREW D. MITCHELL, WORLD TRADE LAW ASSOC. CONF., CHALLENGES AND PROSPECTS FOR WTO (2005); RUFUS H. YERXA & S. BRUCE WILSON, KEY ISSUES IN WTO DISPUTE SETTLEMENT (2005).

⁵² See, e.g., LUCY REED, JAN PAULSSON, & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION (2d ed. 2010); CHRISTOPH SCHREUER, LORETTA MALINTOPPI, & AUGUST REINISCH, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009).

⁵³ See generally IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION (2010); David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 U. TORONTO L.J. 909 (2010); Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration*, 73 L. & CONTEMP. PROB. 335 (2010); Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J. INT'L DISP. SETTLE. 341 (2010).

⁵⁴ See, e.g., CHARLES H. BROWER II, JACK J. COE, JR., & WILLIAM S. DODGE, NAFTA CHAPTER ELEVEN REPORTS (2006); KINNEAR, BJORKLAND, & HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER II (2006); TODD WEILER, NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (2004).

⁵⁵ See, e.g., UN CONF. ON TRADE & COMMERCE, BITS IN THE MID-1990S (1998); UN CONF. ON TRADE & COMMERCE, BITS 1995-2006 (2007); UN CONF. ON TRADE & COMMERCE, INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES (2005).

⁵⁶ See generally CHRISTOPHER DUGAN, NOAH D. RUBINS, DON WALLACE, & BORZU SABAH, INVESTOR-STATE ARBITRATION (2008).

⁵⁷ On the requirements for arbitrators and tribunals and their qualifications in the investment context, see, e.g., *The Code of Ethics for Arbitrators in Commercial Disputes*, AMERICAN BAR ASS'N (2004); *IBA Guidelines on Conflicts of Interest in International Arbitration*, IBANET.ORG, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics (last visited Oct. 2, 2011); Code of Conduct for Dispute Settlement Procedures under Chapters 19 & 20 of the North American Free Trade Agreement, WORLD

impact of the arbitrators' prior experience on tribunal determinations.⁵⁸ Some arbitrators were commercial people, while others had a greater affinity for diplomatic considerations. Arbitral administrators eventually developed rules by which to achieve greater balance in the selected panels, so that the State was not at the mercy of the disposition of commercial litigators.⁵⁹ Moreover, ICSID arbitrators recognized the value of *amicus curiae* briefs in arbitrations involving natural resources in Latin American countries.⁶⁰ Both developments reflected arbitration's ability to adjust its practices and procedures to new political elements. Allowing commercial arbitrators to ignore the State's public dimension or prohibit public interest groups from participating in proceedings would have depreciated arbitration's appeal and suitability as a mechanism of dispute resolution.⁶¹

TRADE LAW, www.worldtradelaw.net/nafta/19-20code.pdf (last visited Oct. 4, 2011); *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO.ORG (Dec. 11, 1996), http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm. See generally Charles B. Rosenberg, *Challenging Arbitrators in Investment Treaty Arbitrations*, 27 J. INT'L ARB. 505 (2010); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010).

⁵⁸ See generally WEILER, *supra* note 48. The controversy was ignited by an editorial in the NY Times in 2004, entitled "The Secret Trade Courts." The accusations were that commercial litigators assembled as arbitral tribunals and resolved matters in such a fashion so as to promote corporate interests—not the would-be public interests supported by the State. The proceedings were private and confidential—closed to public attendance. The awards were also inaccessible. Once the proceedings were opened to the public, the journalists lost any interest in observing the process when they became aware of the complexity of the matters under adjudication. *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A1.

⁵⁹ See generally DUGAN, *supra* note 56. See also *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Mar. 31, 2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1581_En&caselId=C67.

⁶⁰ See generally Andre de Lotbinière McDougall & Ank Santens, *ICSID Tribunals Apply New Rules on Amicus Curiae*, 22 MEALEY'S INT'L ARB. REP. 69 (Feb. 2007); Gary Born, Steven P. Finizio, David W. Ogden, et al., *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules* (2006), available at www.wilmerhale.com/publications/whPubsDetail.aspx?publication; *ICSID Tribunal Affirms its Power to Admit Amicus Curiae Participation*, available at www.ciel.org/Tae/ICSID_AmicusCuriae_1Jun05.html; *ICSID Tribunal accepts civil society organizations as amici curiae*, available at www.ciel.org/Tae/ICSID_AmicusCuriae_24Feb07.html.

⁶¹ See, e.g., Luke Eric Peterson, *Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*, LAW.COM, (June 25, 2009), www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202431736731&slreturn=/&hbxlogin=/ ("Argentine financial crisis claims have been a major driver of investment treaty arbitration in recent years. During the 1990s, companies like BP plc, Suez, TOTAL SA and Enron Corp. flocked to Argentina as the government embarked on a major privatization spree. Then, in 2002, the Argentine government took a series of emergency measures to avert an economic free fall, including unyoking the peso from the U.S. dollar. When Buenos Aires refused to let foreign-owned utilities hike the price of basic services like water, gas and electricity to compensate for the peso's sharp drop, many foreign owners cried foul. Starting in 2002, investors began to file a slew of arbitration claims, alleging breach of investment protection treaties. In recent years, Argentina has accounted for a quarter of ICSID's case load. Several large law firms . . . have handled more than a half-dozen Argentine claims apiece—often billing \$5 - \$10 million a

It is undeniable that the operation of investment arbitration remains dependent upon State fealty—or, at least, acquiescence—to treaty obligations and, further, the national government's willingness to enforce awards through local courts.⁶² In the end, the State must willingly surrender its authority to the transborder process.⁶³ Even China's integration into the global economy, however, required the Communist

case, according to cost filings—and seeking hundreds of millions of dollars on behalf of clients. Collectively, our 2009 Arbitration Scorecard counted more than 40 cases against Argentina, while arbitrations involving Argentina have produced some of the largest arbitral awards in recent years, including the \$133.2 million CMS award and a \$185 million award in favor of U.K. energy company BG Group plc.

“To date, more than a half-dozen arbitration rulings have been handed down by tribunals in Argentine crisis cases. Arbitrators have tended to agree that the emergency measures taken by Argentina were in breach of treaty obligations, because they overturned prior contractual and legal commitments made to investors. But to the dismay of many observers, arbitrators have diverged sharply on the central question as to whether Argentina's emergency measures—and the resulting treaty breaches—can be excused by the economic calamity which befell the country.

“In the first ICSID ruling on this issue, in the CMS case, arbitrators flatly rejected Argentina's arguments that it acted out of “necessity” in response to the crisis. The following year, a separate ICSID tribunal took a contrary view: Argentina's emergency measures may have harmed the U.S. gas company LG&E Energy Corp., but they were excused on the grounds of necessity, at least during the peak months of the financial crisis. In a black eye for ICSID, separate arbitration panels hearing broadly similar claims under the same U.S.-Argentina bilateral investment treaty had reached sharply divergent conclusions.

“Arbitration specialists try to put a positive spin on these developments, stressing that some inconsistency is “unavoidable” given that there is no formal doctrine of precedent in arbitration. However . . . lack of predictability in the ICSID system is making it increasingly difficult to advise clients on their international treaty rights.

“Meanwhile, lawyers for the Argentine government complain that “contradictory” rulings give conflicting signals to governments trying to regulate their economics while complying with international law. Argentina's attorney general Osvaldo Guglielmino says that the ICSID system of one-off arbitration is “ill-conceived” when it comes to handling a tidal wave of similar claims arising out of systemic crises.”).

⁶² See generally *id.* See also Guido Barbarosch & Pablo F. Richards, *The Arbitration Review of the Americas 2011 Section 3: Country Chapters*, GLOBALARBITRATIONREVIEW.COM, www.globalarbitrationreview.com/reviews/32/sections/115chapterscountry (last visited Oct. 5, 2011); Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709 (2010); Hulya Dagdeviren, *Political Economy of Contractual Disputes in Private Water and Sanitation: Lessons from Argentina*, 82 ANNALS PUB. & COOPERATIVE ECON. 25 (2011); Ignacio A. Vincentelli, *The Uncertain future of ICSID in Latin America*, 16 L. & BUS. REV. AM. 409 (2010).

⁶³ Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 398 (2009) (Believing the term “mandatory arbitration” is a misnomer. When disagreements involve parties of disparate levels of sophistication and arise from adhesive contracts, 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.”).

Party to acknowledge that international business could not take place without a functional rule of law supplied by an independent, recognized, and effective system of adjudication. Despite difficulties and imperfections, CIETAC Arbitration makes business relationships and transactions with China viable.⁶⁴

Its ability to adapt and expand its range of application speak well of arbitration's commercial legacy and its adjudicatory future. Judicial litigation is analogous to a black hole that devours social resources, while arbitral adjudication performs the function of a white hole that returns energy and matter to society so it can continue to exist and develop. The contemporary ascendancy of the arbitral remedy demonstrates that adjudicatory systems can operate effectively without (or despite) the exercise of State regulatory power. Even in its extreme form, court deference to arbitration has not impoverished the legal system. The law of arbitration is increasingly sophisticated; it has generated an abundance of legal rules and standards. A corpus of provisions has emerged that provide for the process' universal operation and enable it and the societies in which it functions to flourish. Astute social systems understand the need for intelligent regulation. Externally-devised constraints, imposed for reasons other than systemic integrity and cohesion, are not only artificial and inapposite, but they also undermine the targeted process' viability. Unless instances of radical and irremediable injustice emerge, an ethic of self-policing, the expansion of arbitrator power, and State quiescence remain the proper *modus vivendi* for the legal regulation of arbitration.

II. EMERGING ISSUES

A. Adhesive Arbitration and Unconscionability

As the reach of arbitration expands to more sectors and activities, the reformation of adjudication that it portends has encountered stronger headwinds and greater opposition. Three critical issues have arisen. The first of these captured the interest of the legislative branch of the federal government and some state legislatures. It relates to the potential fundamental unfairness and alleged abuse associated with the use of arbitration in imbalanced transactions in which the economically stronger party obligates the weaker one to engage in arbitration—a practice that amounts to coerced participation in the arbitral process.⁶⁵ Commercial enterprises and

⁶⁴ On CIETAC Arbitration, see generally YU Jianlong, *CIETAC Arbitration in a Nutshell*, in *BUSINESS DISPUTES IN CHINA* CH. 8 (2d ed. 2009); JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* (2008); JOHN MO, *ARBITRATION LAW IN CHINA* (2001); I. NEIL KAPLAN, PETER MALANCZUK, DANIEL R. FUNG, *et al.*, *ARBITRATION IN CHINA* (2001). See also M. MOSER, *PRACTICAL COMMENTARY ON THE CIETAC RULES OF ARBITRATION* (2011).

⁶⁵ See generally Jean R. Sternlight, *Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) [hereinafter Sternlight, *Panacea*]; Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, (2001) [hereinafter Sternlight, *Mandatory*]; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017, 1042 (1996); Heidi M. Hellekson, *Taking the "Alternative" out of the Dispute Resolution of Title VII Claims: the*

employers often impose arbitration upon consumers and employees on an all-or-nothing basis. The subordinate party's ability to buy and sell goods and services and to be employed depend upon its willingness to acquiesce to coerced arbitration.⁶⁶ Economic isolation is rarely, if ever, desirable or sought-after. The motivation for arbitration is, therefore, paternalistic or worse in these circumstances. It is, by any measure, an "involuntary" choice—a type of "super" term and condition.

The economically superior party, however, not only makes the arbitration of disputes the passport to economic activity in society, but also dictates the manner of recourse to arbitration. The superior party's extensive control over the "bargain" for arbitration increases the prospect of overreaching and abuse. Critics emphasize that adhesive arbitration agreements violate basic fairness and the traditional canons of contract formation.⁶⁷ In addition, stronger parties can use the reference to arbitration

Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts, 70 N. DAK. L. REV. 435 (1994).

⁶⁶ See Schwartz, *supra* note 65, at 39 (Arguing that "the current regime of compelled arbitration rests on three faulty analytical positions: the failure to distinguish submission agreements from pre-dispute agreements (the false analogy with settlements); the presumption that compelled arbitration is substantively outcome-neutral (the false analogy with forum selection); and the insistence on reviewing consent-based challenges to compelled arbitration on a case-by-case basis, rather than generically."). Additionally, "displacing adjudication through pre-dispute arbitration clauses systematically reduces the legal liability of corporate defendants. This is particularly troubling where regulatory statutes are involved. The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves." *Id.* at 37. EEOC Policy Statement on Mandatory Arbitration, Daily Lab. Rep. (BNA) No. 133, at E4 (July 11, 1997) (The EEOC complains that mandatory arbitration "affords no opportunity to build a jurisprudence through precedent" and the availability of judicial review is necessary to protect plaintiffs' rights; that costs may be prohibitive for employees as compared to employers; statutory rights may be limited, thus reducing the amount of damages; the public plays no role in selecting the arbitrators, while the private nature of arbitration limits the amount of public accountability; and perceived procedural and structural biases against plaintiffs in arbitration as opposed to litigation, especially in employment discrimination cases; Stone, *supra* note 65, at 1042 (Certain arbitration policies: (1) prevent government agencies like OSHA from enforcing their laws; (2) reduce the statute of limitations; (3) alter the burden of proof; and (4) allow for untrained arbitrators.). *But see* Sternlight, *Panacea* *supra* note 65, at 674-675 ("Four major policy arguments can be articulated in defense of a preference for binding arbitration. First, some might propound a genuine or free will freedom of contract argument, asserting that where all parties have knowingly agreed to arbitrate the court should enforce that agreement. Second, some contend that even if all parties have not knowingly agreed to binding arbitration, they will nonetheless all benefit from the process because arbitration will save all parties time and money. Third, some argue that even though sellers might want to use the arbitration process to gain an advantage over consumers, the operation of the market will prevent them from doing so, and that arbitration will again benefit all. Fourth, some might contend that even if a few parties are harmed by binding arbitration, the gains for society as a whole outweigh any such individual losses.").

⁶⁷ See, e.g., Sternlight, *Mandatory*, *supra* note 65, at 669-70 (arguing that *Gilmer*'s validation of binding and mandatory arbitration in the areas of employment and labor disputes, denies employees' Seventh Amendment right to a jury trial. The violation applied to consumers and any other unsophisticated party involved in adhesiary contracting.). "The Seventh Amendment jury trial right supercedes any policy emanating from a federal statute." *Id.* at 717. Hellekson, *supra* note 65, at 457 ("To be a true 'alternative' for both employees

to exclude legal remedies and thereby reduce their exposure to liability.⁶⁸ Further, they can declare themselves exempt in some, many, or all circumstances from the obligation to arbitrate.⁶⁹ Arbitration, then, becomes a means by which the advantaged party abridges the weaker party's rights and enhances its own position.⁷⁰ As long as arbitration continues to benefit from judicial protection, the imposing parties can escape accountability and restrictions on their conduct.

Depriving weaker parties of their rights through contract engendered demands for corrective legislation. Proposed laws categorically banned the use of arbitral clauses in adhesive transactions.⁷¹ The blanket condemnation amounted to a lethal approach; it could stigmatize and create bias against arbitration. No matter how illogical or inaccurate, such positions—once established—are difficult to contain or alter. Their imprint can be long-lasting, perhaps indelible. Declaring arbitration agreements absolutely unlawful, even in a single set of circumstances initially, is drastic.⁷² It invites a return to the days of the legal system's hostility to arbitration and casts doubt upon, and an illicit aura around, all arbitral contracts, imperils arbitration's broad social use, and could deprive American citizens of arbitration's substantial procedural benefits. Seeking to criminalize adhesive arbitration⁷³ reflected the proverbial circumstances of "throwing the baby out with the bath water." Regulation should heed the wisdom of moderation. Full-out banishment should be replaced by the goal of adding a new section to the FAA designed to

and employers, arbitration must be voluntarily entered into after the dispute has materialized. This voluntary, dispute-oriented arbitration was what Congress endorsed when enacting the Civil Rights Act of 1991, which encouraged courts to authorize parties to engage in ADR techniques "where appropriate."'). But see *Arbitracide*, *supra* note 6, at 252 n.118 ("Mere access to the remedy makes it a substantial improvement over the judicial process.").

⁶⁸ These provisions are known as "carve outs." They allow the drafting party to limit its exposure to arbitration by exempting some disputes from the agreement's range or coverage. Such hold-back provisions render the clause suspect and must be justified by "business necessity." Donald Lee Rome & David M. S. Shaiken, *Arbitration Carve-Out Clauses in Commercial and Consumer Secured Loan Transactions*, 61 DISP. RESOL. J. 42 (Aug.-Oct. 2006). Court enforcement of non-compete clauses is a standard example of such provisions. See generally *Aames Funding Corp. Sharpe*, No. Civ.A.04-4337, 2004 WL 2418284 (E.D. Pa. Oct. 28, 2004).

⁶⁹ There are examples of abuse in this area, but it should be emphasized that the promise of judicial justice often remains an abstraction. Arbitration provides a functional remedy. See *Arbitracide*, *supra* note 6, at 247-49.

⁷⁰ See Fairness in Arbitration Act discussed in *Arbitracide*, *supra* note 6, at 252 ("The potential superiority of arbitration becomes manifest when the obligor pays the costs of arbitration, is equally subject to the duty to submit disputes to arbitration, and includes all the forms of relief available in court, including class action litigation, attorney's fees, and punitive damages."'). See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Mercuro v. Sup. Ct.*, 116 Cal. Rptr. 2d 671 (Cal. App. 2002); *Flores v. Transamerica Home First Inc.*, 113 Cal. Rptr. 2d 376 (Ct. App. 2001).

⁷¹ See generally *Arbitracide*, *supra* note 6.

⁷² See *id.* at 275.

⁷³ *Id.* at 262-63.

regulate—sensibly and reasonably—adhesive arbitration.⁷⁴ Once righted, even a wobbly form of arbitration outdistances court litigation on the terrain of adjudicatory worth and effectiveness.

Despite their thorough knowledge of the decisional law, the critics of adhesive arbitration have neglected to take into account the content of actual rulings.⁷⁵ Courts have eradicated much (possibly all) of the unfairness of adhesive arbitration by requiring mutuality in the obligation to arbitrate, the allocation of arbitral costs primarily to the stronger, imposing party, and mandating that arbitration proffer relief closely equivalent to that supplied through judicial procedures. In this vein, arbitral institutions have adjusted their arbitration rules to make aggregative proceedings available.⁷⁶ Advocacy on the basis of ideological fervor is akin to acting on anger or rage. It is gratifying momentarily, but, in the end, it is an irrational foundation for conduct that leads to outcomes that are costly to repair. Intemperate behavior rarely benefits the greater good. Anger and ideology generally misconceive reality and distort the significance of the implicated interests and the positions associated with them. Irrational thinking and behavior should be avoided in all circumstances.

B. Litigation About Arbitration

The other emergent issues in arbitration law do not implicate the convictions of political ideology. They raise more genuine issues of legal analysis. In point of fact, the second of the three issues was identified by the U.S. Supreme Court itself. In a number of landmark opinions,⁷⁷ the Court maintained that the profusion of judicial litigation about arbitration was antithetical to the purpose and effectiveness of arbitral adjudication.⁷⁸ The *raison d'être* of arbitration is precisely to avoid judicial recourse.⁷⁹ Accordingly, court actions that challenge the reference to, or results of, arbitration are counterproductive. This consequence explains, at least in part, the unequivocal character of the Court's rulings on arbitration. Creating exceptions to the practice of favoring arbitration not only generates more litigation, but also leads to the possibility that these exceptions will engulf the original rule and eventually absorb it.

Even *pro forma* opposition to arbitration can be harmful. Empty challenges, too, could help convert the FAA into a latter-day Administrative Procedure Act (APA).⁸⁰

⁷⁴ *Id.* at 275.

⁷⁵ See works cited *supra* note 65 (beginning with Sternlight, *Mandatory*).

⁷⁶ See *Commercial Arbitration Rules and Mediation Procedures*, <http://adr.org/sp.asp?id=22440> (last visited Sept. 18, 2011) (AAA class procedures).

⁷⁷ *First Options of Chicago*, 514 U.S. 938; *Bazzele*, 539 U.S. 444.

⁷⁸ *Id.*

⁷⁹ See CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 387-88. See also CASEBOOK, *supra* note 10, at 263 n.6.

⁸⁰ Administrative Procedure Act, 5 U.S.C. § 500. See SENATOR PAT MCCARRAN, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG., 1944-46, 298 (Pat McCarran ed., 1997) (According to Sen. McCarran, the APA was “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated” by federal government agencies.).

The APA was one of the first experiments in U.S. law with ADR; in the wake of WWII, it was intended to simplify litigation brought against proliferating government agencies through the use of judges specialized in administrative law, flexible trial models, and a body of accommodative legal principles.⁸¹ Administrative law litigation, however, became a highly complex, expensive, and protracted form of court litigation.⁸² The Court, therefore, is right to warn of the danger of pushing arbitration toward the re-invention of the wheel mold that inevitably returns to the *status quo ante*.⁸³ American society needs to have a genuine opportunity to avoid the crushing burden of judicial litigation and its crippling impact on socio-economic processes.⁸⁴

C. Power Roles

The final issue, also linked to standard legal analysis, relates to the distribution of power within the arbitral process. To some degree, the principal parties in an arbitration—the arbitrating parties through their agreement, the designated arbitrators, and the institutional administrators—vie for controlling authority in the conduct of hearings and reaching a determination.⁸⁵ The State—through the vehicle of legislation, the courts, or both—is also a major participant in the power configuration within the arbitral process. Acting in the name of the public interest, the State—by exercising its regulatory capacity—can facilitate arbitral operations by giving them autonomy or discourage them by imposing restrictions upon the accessibility and finality of arbitration.⁸⁶ The objective of government oversight should be to prevent fraud and overreaching, rather than fostering ill-conceived social policies that hamper initiative and creativity.⁸⁷ The targeted entity or activity

⁸¹ See D. HALL, *ADMINISTRATIVE LAW BUREAUCRACY IN A DEMOCRACY* (4th ed. 2009); George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). See U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act (1947).

⁸² This concern points to the need to make “decisions with teeth” if any real change is to be effectuated. The process of judicial litigation provides an adjudicatory framework that is too cumbersome and expensive to maintain in the sector of civil litigation. If arbitration becomes excessively judicialized, it will cease to be an alternative. Adjudication is necessary to social civilization, but it cannot exceed social resources.

⁸³ Responsive alternatives are a new element in the social contract. Adjudication must be fair and effective. Arbitration is a proper solution even in adhesive circumstances.

⁸⁴ See generally, Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002).

⁸⁵ The entire modern law of arbitration aims precisely to foster legislation that favors arbitration and its autonomous operation, beginning with the enactment of the FAA in 1925 and proceeding through the New York Convention, the UNCITRAL Model law, and various national laws on arbitration (in France, the United Kingdom, The Netherlands, and other jurisdictions). The tenor of the law determines the fate of arbitration and the availability of functional civil justice in society. See generally CARBONNEAU, *LAW AND PRACTICE*, *supra* note 3.

⁸⁶ See FAA, *supra* note 16, § 2 (arbitration agreements are “valid, enforceable, and irrevocable”).

⁸⁷ See generally *Urban Informal Sector Investment Climate Analysis in Kenya*, Note Number 35, THE WORLD BANK GROUP (Aug. 2006), <http://siteresources.world>

must have sufficient latitude to flourish and thrive. The provision of basic safeguards and the containment of “animal spirits” are important goals,⁸⁸ but freedom and self-definition are vital to the development of people and social institutions alike.

Most arbitral statutes give the agreement to arbitrate conclusive effect. If the contracting parties have provided for a particular requirement or procedure, their intent, as long as it is at least remotely lawful, prevails. The settled view recognizes that the contracting parties have the legal right to choose to arbitrate and, further, provide for the specific character of their arbitration.⁸⁹ Freedom of contract and party autonomy are generally dispositive. In some regulatory frameworks on arbitration, the failure to implement the agreement as written can result in the nullification or non-enforcement of an award.⁹⁰ When the contract is silent on a given issue, arbitrators possess the authority to fill the gap.⁹¹ The parties agreed to arbitrate and they are entitled to the benefit of their bargain—namely, arbitrator resolution of contested or unprovided-for matters.⁹²

bank.org/INTAFRsumaFTPS/Resources/aftpsnote35E0610-17.pdf (“... the application of measured regulation that benefits the public good.”).

⁸⁸ See JOHN M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 161-162 (1936); GEORGE A. AKERLOT & ROBERT J. SCHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* (2009).

⁸⁹ See, e.g., *Volt Info. Scis.*, 489 U.S. at 479 (“Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.”).

⁹⁰ See the grounds of the non-enforcement of awards under the New York Convention, *supra* note 10, art. V(1)(d) (“That the composition of the arbitral authority or the arbitration procedure was not in accordance with the agreement of the parties. . .”).

⁹¹ The rules of the International Chamber of Commerce (ICC), in the final analysis, grant tribunals the authority to choose the rules governing the proceedings. *Rules of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE (May 1, 2010), http://www.iccwbo.org/uploaded/Files/Court/Arbitration/other/rules_arb_english.pdf. Article 15(1) states that “The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.” *Id.* art. 15(1). The language of the arbitration is governed by Article 16, which states that “In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.” *Id.* art. 16. The applicable rules of law are governed according to Article 17(1), which states that “The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.” *Id.* art. 17(1).

⁹² See generally *Chicago Dist. Council of Carpenters Pension Fund v. K&i Construction, Inc.*, 270 F.3d 1060, 1067 (7th Cir. 2001) (“courts . . . would sometimes be required to deny employers the benefit to arbitrate by requiring arbitration but permitting unions to continue striking.”).

Institutional administrators generally respect the procedural and decisional powers of the arbitrators.⁹³ They see their function as, and are compensated, to organize the arbitration and address non-adjudicatory administrative problems.⁹⁴ The arbitral tribunal conducts the hearings and decides the merits.⁹⁵ Arbitral institutions have the discretion to refuse to administer arbitrations governed by flawed contract provisions (*e.g.*, that require the administrator to apply the arbitration rules of another arbitral institution);⁹⁶ they can demand that all arbitrators or arbitrations fulfill certain requirements (*e.g.*, for arbitrators, relating to impartiality, nationality, experience, and professional qualifications; for arbitrations, relating to time limits, basic hearing protocols, rules for discovery or the use of experts, and the like).⁹⁷ It is unusual for the administrator to refuse to seat a designated arbitrator or to challenge arbitrators. A highly controlling approach could undermine the institution's competitive standing in the service sector. Generally, institutional administration takes place pursuant to broad-gauged rules, a deferential attitude toward the parties and the arbitrators, and a view that the purpose of administration is to make arbitrations workable and effective.⁹⁸ Although conflicts can arise, there is a type of collaborative consensus that characterizes the relationship between the arbitrating parties, the arbitrators, and the arbitral administrator throughout an arbitration.

Power relationships and investitures, however, shift throughout the arbitral process. The crown of supreme sovereignty is worn by different participants at different stages of the adjudication. The exercise of authority is, in effect, a double-edged sword. Although it empowers, it also contains the seeds of its own extinction. The freedom to choose is curtailed and eventually eliminated by its very exercise. The nearly unfettered privilege of contract choice, for example, is ensnared once it is invoked, enforced, and made binding. At the very outset of the transaction—before any disagreement emerges—the parties decide all matters,⁹⁹ subject to the restraints of public policy and their ability to agree (whether to arbitrate, how to select the arbitrators, the choice of *ad hoc* or institutional arbitration, the designation of an arbitral institution [if relevant] and of governing laws, and, possibly, the details of the arbitral procedure). When a dispute divides the parties and the arbitration agreement is invoked, the arbitrators designated, and the tribunal constituted, the

⁹³ See CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 390-1. See also institutional rules at *Rules of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE (May 1, 2010), http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf; *ICSID Convention, Regulations and Rules*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, WORLD BANK, <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>; *Arbitration Rules (2000 Edition)*, CHARTERED INSTITUTE OF ARBITRATORS, <http://www.ciarb.org/information-and-resources/2010/06/14/CIARB%20Arbitration%20Rules.pdf>; *Maritime Arbitration Rules*, SOCIETY OF MARITIME ARBITRATORS, <http://www.smany.org/sma/about6-1.html>.

⁹⁴ See generally CARBONNEAU, LAW AND PRACTICE, *supra* note 3.

⁹⁵ *Id.* at 77.

⁹⁶ *Id.* at 77-86.

⁹⁷ *Id.* at 48-50.

⁹⁸ *Id.* at 48.

⁹⁹ *Id.* at 49.

right to decide flows from the parties to the arbitrators,¹⁰⁰ just as the earlier designation of an arbitral administrator exemplified, and concomitantly signaled, the abridgement of the parties' absolute authority. The constitution of an arbitral tribunal invests the arbitrators with the capacity to begin the trial of the matter and progress to the resolution of the dispute.¹⁰¹ At this stage, the arbitrators' authority can only be restrained by the arbitrating parties' right and ability to settle,¹⁰² unless the arbitral contract contains uncommon stipulations.

Once the proceedings commence, the parties' power is further constricted and the arbitrators' authority grows and becomes nearly absolute. At this point, the arbitrators exercise sovereign authority over the arbitration. The arbitral tribunal decides both procedural and substantive matters,¹⁰³ ranging from the choice and implementation of trial mechanisms to the interpretation of the main contract (and, perhaps, the arbitral clause),¹⁰⁴ ending with the construction and application of the law or other governing substantive predicates.¹⁰⁵ In this setting, the arbitral administrator's function is ministerial.¹⁰⁶ The contract generally invests the arbitrators with comprehensive adjudicatory powers. The arbitration agreement is the law of the arbitration, as long as it satisfies the basic conditions of contract validity and the State acquiesces to arbitration and the exercise of contract power by the parties.¹⁰⁷ As noted earlier,¹⁰⁸ the State policy on arbitration will be expressed through legislation and in accompanying court opinions.

The State policy on arbitration has an impact upon the exercise of party choice and the conduct of arbitrations. Most contemporary arbitration statutes (like the FAA) command that courts facilitate and assist arbitral proceedings.¹⁰⁹ Once an award is rendered and coercive enforcement becomes necessary, the State emerges as the final arbiter in the process.¹¹⁰ At this juncture, disgruntled or aggrieved parties can avail themselves of the governing legislation and demand that awards and the process that generated them comply with all the elements of the governing legal rules. Aggressive judicial policing of arbitrator determinations and arbitral proceedings indicates that State regulations disfavor arbitration and discourage recourse to the remedy. But for a few jurisdictions, courts generally engage in a hospitable and narrow evaluation of arbitrations and their determinations.¹¹¹

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 50.

¹⁰² *Id.* at 48-50 n.21.

¹⁰³ *Id.* at 51-52.

¹⁰⁴ *Id.* at 50.

¹⁰⁵ *Id.* at 60-61.

¹⁰⁶ *Id.* at 51-54.

¹⁰⁷ See *supra* text accompanying notes 84-5.

¹⁰⁸ See CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 16-19.

¹⁰⁹ See FAA, *supra* note 16, § 10; *Hall Street*, 128 S. Ct. 1396.

¹¹⁰ See CARBONNEAU, LAW AND PRACTICE, *supra* note 3, at 392-98.

¹¹¹ *Id.*

Moreover, parties are expected to raise objections in a timely manner; the failure to act promptly will constitute a waiver of their complaints. Even evident substantive or factual misunderstandings by arbitrators are deemed innocuous and inactionable.¹¹² Moreover, arbitrators have substantial discretion in the conduct of arbitral proceedings.¹¹³ In order to undermine the validity of an award, procedural errors must constitute fundamental prejudice to a party's basic rights.¹¹⁴ The most likely actionable flaw is an arbitrator's failure to disclose a known or 'knowable' conflict of interest.¹¹⁵ As long as State policy favors arbitration, courts engage in circumscribed, subdued, and unassertive assessments of the operation of the arbitral process.

III. STATIST AND MEDITATIVE ARBITRATION

Power relationships—who holds decisional authority, how much of it, and when—have generated a “new” debate in U.S. arbitration law. The asserted positions highlight the clash between party autonomy and State regulation and revisit the legitimacy of arbitration founded upon contract—so-called consensual arbitration. The critical questions center upon the extent, if any, of the State's preemptive role in regulating arbitration and, relatedly, whether freedom of contract always reigns supreme in the reference to and operation of arbitral adjudication.¹¹⁶ The written exchanges have propounded a stark choice between a statist and market-driven concept of arbitration—an issue that has actually long preoccupied the thinking about arbitration.

The Russian model of arbitration best exemplifies the statist perspective on arbitration.¹¹⁷ According to Russian concepts, arbitrators, their adjudicatory powers,

¹¹² See, e.g., *Wallace v. Bultar*, 378 F.3d 182 (2d. Cir. 2004); *Agrawal v. Agrawal*, 775 F. Supp. 588 (E.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d. Cir. 1992).

¹¹³ See, e.g., *Berlacher v. Painewebber Inc.*, 759 F. Supp. 21 (1991); *Robbins v. Day*, 954 F. 2d 679 (11th Cir.), *cert. denied*, 506 U.S. 870 (1992); *Hayne, Miller & Farni, Inc. v. Flume*, 888 F. Supp. 949 (E.D. Wis. 1995).

¹¹⁴ See FAA, *supra* note 16, § 10(a)(3) (“Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”).

¹¹⁵ See, e.g., *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217 (E.D. Pa. 2003); *Morelite Constr. Corp. v. NYC Dist. Counc. Carpen. Ben. Fds.*, 748 F.2d 79 (2d. Cir. 1984); *Ovitz v. Schulman*, 133 Cal. App. 4th 830 (Ct. App. 2005).

¹¹⁶ See Christopher Drahozal, *Privating Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031 (2009); Christopher Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227 (2009).

¹¹⁷ On Russian Federation arbitration, see William Butler, *State Interests and Arbitration: The Russian Model*, 113 PENN ST. L. REV. 1189 (2009) (Prof. Butler's article was part of a symposium, entitled, “Building the Civilization of Arbitration,” sponsored by the Penn State Law Review. The articles were subsequently published as a book by Wildy, Simmonds & Hill Publishers (London) in 2010. The volume bears the title of the symposium, BUILDING THE CIVILIZATION OF ARBITRATION, edited by myself and Angelica Sinopole, a lawyer at Sullivan and Cromwell (NYC), who served as an Editor-in-Chief of the Penn State law review

and the very principle of contract freedom are secondary to the State regulation of arbitration.¹¹⁸ A number of U.S. academic commentators align themselves with the statist view of arbitration. Their position centers upon the neologistic phrase—“private ordering” process—to describe arbitration and its operation.¹¹⁹ The phrase, in effect, has founded an academic trend that argues that arbitrators cannot, by their conduct of proceedings or decisions, thwart or defy a State’s public interest policies and practices.¹²⁰ They must comply with the jurisdictional seat’s mandatory legal provisions. But for its contemporary political substratum, the position barely differs from F.A. Mann’s stance in the debate with Berthold Goldman about the existence and legitimacy of “anational” arbitration.¹²¹ Otherwise stated, the State may have ceded a large portion of the ministerial function of civil adjudication to arbitration, but private adjudication remains a mechanism within a uniquely political activity at the core of the State’s public responsibilities.¹²² Delegation by the State does not imply the surrender of State authority to private interests and parties.

The private ordering camp endorses the enhanced judicial policing of arbitral awards and agreements—their nullification when they allegedly intrude upon the preemptory functions or jurisdiction of the State. While authority in arbitration may be “shared,” the advocates posit, the State has ultimate authority—a veto power. The parties in arbitration cannot be absolved of their responsibility to obey fundamental legal norms, assuming that these norms can be identified and established on the basis of solid legal principles. Because they adjudicate controversies, arbitrators are the implicit agents of the State. The State is not, and cannot be, indifferent to the resolution of disputes and the application of law, no matter where or how they take place.

during the symposium.) See also DAVID GOLDBERG, GORDON BLANKE, & JULIA ZAGONEK, *ARBITRATION LAW AND PRACTICE IN CENTRAL AND EASTERN EUROPE, Russian Federation* (2006).

¹¹⁸ See generally Butler, *supra* note 117.

¹¹⁹ An online dictionary provides two definitions of “neologism”: 1. “a new word, usage, or expression,” and 2. “a meaningless word coined by a psychotic.” Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/neologism>. The notion of “private-ordering” straddles the fence between the two definitions. It testifies to the limitations of academic coinage. It is neither particularly useful nor enlightening. It seems simply to describe a well-established concept with a new term. The expression has elements of originality, but the idea it encapsulates is entirely recycled. See Steven L. Schwarcz, *Private Ordering*, 97 NW. L. REV. 319, 320-21 (2002); Oliver E. Williamson, *The Law of Contract: Private Ordering*, 91 AM. ECON. REV. 438 (2002); Michael Birnhack, *Principle of Private Ordering*, HAFIA CENTER OF LAW AND TECHNOLOGY, www.isoc.org.il/hasdara/private_ordering.doc (“*Private Ordering* is the process of setting up of social norms by parties involved in the regulated activity . . . and not by the state.”).

¹²⁰ See sources cited *supra* note 116.

¹²¹ On F.A. Mann and Berthold Goldman, see THOMAS E. CARBONNEAU, ed., *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* (rev. ed. 1998).

¹²² The Court’s opinions permitted arbitration to function with greater autonomy while minimizing the role of judicial supervision and reducing the volume of litigation pertaining to arbitration. See *First Options of Chicago*, 514 U.S. at 943 (“A court must defer to an arbitrator’s arbitrability decision when the parties submitted that matter to arbitration.”); *Bazzele*, 539 U.S. at 453.

This concept of arbitration stands in contradistinction to the U.S. Supreme Court's decisional doctrine. Its proponents fail to heed the Court's warning about the consequences of excessive judicial litigation about arbitration.¹²³ They trust the State, despite its changing power structure and inability to resist short-term political advantage, to establish legal rules that promote the general good. This concept of arbitration ignores the testimony from the history of arbitration itself—in particular, from maritime and CBA arbitration—that extols the virtues of self-regulation.¹²⁴ The very development of American arbitration law makes evident that State regulation of arbitration need not be expanded beyond deferential judicial supervision.

The market and party-driven view of arbitration is a more robust and convincing concept of the distribution of authority within the arbitral process. It is not based upon imported values or convictions, alien to both arbitration and adjudication. It emerged from actual experience with the process. In this configuration, the parties exercise a stronger influence on the arbitration by choosing a trial format in their agreement¹²⁵ and by participating in an assessment of the award before it is finalized by the arbitrator.¹²⁶ While the party choice of an arbitral trial at the head of the

¹²³ See CARBONNEAU, LAW AND PRACTICE, *supra* note 3.

¹²⁴ See Lawrence Newman, *Agreements to Arbitrate and the Predictability of Procedures*, 113 PENN ST. L. REV. 1323 (2009).

¹²⁵ See Hans Smit, *Contractual Modifications of the Arbitral Process*, 113 PENN ST. L. REV. 995 (2009).

¹²⁶ See Jeanmarie Papelian, *Collaborative Divorce: Toward a Conflict-Free Divorce*, 7 ABA FAM. LAW LIT. 1, 9 (2008) (Collaborative law consists of a “paradigm shift” under which parties engage in cooperative strategies to resolve disputes. It applies primarily in the family law area, situations in which the parties are likely to need an on-going relationship. The approach eliminates the threat of adversarial litigation and encourages parties to focus on logical problem-solving and their respective self-interest. The process is based on four principles: “(1) proactive participation; (2) interest-based understanding; (3) cooperative resolution; and (4) team effort.”). See also John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007); Michael Moffitt, *Symposium: Against Settlement: Twenty-Five Years Later: Three Things to be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1226 n. 86 (2009) (“This system incentivizes parties and attorneys to work together. While judges must follow specific rules and guidelines, parties using the collaborative process can create customized solutions and control the pace of the process.”); Rebecca A. Koford, *Conflicted Collaborating: The Ethics of Limited Representation in Collaborative Law*, 21 GEO. J. LEGAL ETHICS 827 (2008); John Lande, *Possibilities for Collaborative Law: Ethics ad Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L. J. 1315 (2003).

There is some evidence that a consultative procedure has been practiced in the judicial setting. In *Mohamed v. Sec’y of State for Foreign & Commonwealth Affairs*, the court acknowledged that it had circulated “draft judgments” “to counsel, solicitors and the parties on a confidential basis in accordance with well understood practices.” *Mohamed v. Sec’y of State for Foreign & Commonwealth Affairs*, [2010] EWHC (Civ) 158, [¶ 4], Q.B. (Eng.), available at www.bailii.org/ew/cases/EWCA/Civ/2010/158.html. These practices allowed “the opportunity for correction” even by the judge because none of the terms of a draft judgment were binding. *Id.*

The court further explained:

process probably reflects a judicious use of contract freedom, the submission of a draft award to the parties is problematic. Both changes may be market-savvy, but collaboration between the arbitrator and the parties as to the final award muddles the role of the arbitrator and redefines the adjudicatory character of arbitration. The final determination is envisaged as a type of collaborative exercise, but the extent of collaboration, a vital concern to the legitimacy of the procedure, is unclear.

There are serious misgivings associated with decisional collaboration. First, it ironically highlights the benefits of the statist heavy-handed regulation of arbitration. Statism's emphasis on the public interest restricts contract freedom and arbitrator discretion and lessens the prospect of collaboration and, concomitantly, the danger of collusion and self-interested conduct. Second, when a sharing of decisional authority takes place between the arbitrator and the parties, it is difficult to determine which actor, if any, is the true adjudicator and whether *genuine* adjudication has taken place. The process appears to have elements of both arbitration and mediation or negotiation.¹²⁷ Third, it is difficult to justify collaborative arbitration as a form of closing arguments. It represents a collegial decision between the arbitrator and the parties. It creates a possibly ambiguous relationship, especially in terms of the arbitrator's reappointment in subsequent litigation. Finally, it may be a form of arbitration that is useful only in limited circumstances, *e.g.*, involving an arbitration with a single arbitrator or parties who are seeking to repair a transaction and continue their commercial partnership. It is always hazardous to blur essential boundaries between different processes and merge them eclectically. Anarchy is not creativity if the exercise of license does not generate clarity or lucidity.

Be that as it may, greater party presence and power in the decisional phases of arbitration may announce (I strongly suspect) the future progression of the arbitral process. It repairs the rift of authority between the arbitrator and the parties. Nothing in the current law prevents contracting parties from choosing a collaborative form of arbitration, in which the designated arbitrator performs the role of an "evaluative mediator" who guides the parties to an agreement on what the arbitrator (or they) believe(s) to be their best solution. To some degree, the arbitrator sets the table, but the parties, if they agree, can decide where to sit. The arbitrator is seeking party acquiescence or accommodation before the hammer of decision falls. Such "meditative arbitrations" can emphasize settlement and are but a dim reflection of a standard adjudication. Unless the proper personalities and dispositions are in place, the incorporation of a consultative stage to the arbitral process is likely to be confusing and perhaps ritualistic. While party agreement should prevail, when it is absent, someone must make the final decision. Collaboration between the arbitrator

The primary purpose of this practice is to enable any typographical or similar errors in the judgments to be notified to the court. The circulation of the draft judgment in this way is not intended to provide an opportunity to any party (and in particular the unsuccessful party) to reopen or reargue the case, or to repeat submissions made at the hearing, or to deploy fresh ones. However on rare occasions, and in exceptional circumstances, the court may properly be invited to reconsider part of the terms of its draft.

Id. [¶ 5].

¹²⁷ See MEGAN E. TELFORD, *MED-ARB: A VIABLE DISPUTE RESOLUTION ALTERNATIVE* (2000); Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT'L ARB. 411 (2011).

and the parties could only be effective when the arbitration has fully informed the parties, who—guided by the arbitrator’s resolution—can reach the settlement that eluded them at the outset. In the end, it is a procedure that may underestimate the depth of human disagreement.

In order to preserve the adjudicatory integrity of arbitration, consultations between the arbitrator and the arbitrating parties could be limited to achieving specific objectives that are intended to perfect the award and immunize it to, or perhaps remove it from, judicial challenge. Review by the parties should purge the determination of factual imprecisions, flagrantly erroneous reasoning, or incomprehensible conclusions. Consultations at the final stage of the process would be, in essence, an extensive editing exercise. The building of consensus between the parties as to the award should be a consequence, not the objective, of the procedure. The losing party may find it difficult to confine its evaluation to the written quality of the award. In the present state of the law, any challenges on the merits, amounting to an internal appeal to the deciding arbitrator, should only allow the arbitrator to respond to party objections in a fashion that does not truly alter the initial determination. Consultations would be a means of rectifying evident errors or misunderstandings and to state fundamental opposition to the arbitrator’s conclusions. It is one thing to ask the arbitrator to respond to objections; it is quite another matter to have the arbitrator take them into account in revisiting the determination. The other party would, at the very least, participate in the proceeding. It would have the consequence of making the arbitral process more judicial and adversarial at the critical stage of decision. Crossing the line into consultations and collaborative endings could be a perilous development that alters the adjudicatory gravamen of the arbitral remedy.

IV. THE SPECTRE OF MORE AGGRESSIVE JUDICIAL SUPERVISION

Recent U.S. Supreme Court rulings indicate a possible reversal of the Court’s favorable attitude toward arbitration in the form of a more pervasive and persistent form of judicial supervision. *Stolt-Nielsen S.A. v. Animal Feeds, Inc.*¹²⁸ and *Rent-A-Center v. Jackson*¹²⁹ were disturbing rulings that portended a substantial reorientation of the doctrinal direction on arbitration law. It seemed that arbitration’s status as the Court’s golden child was being reconsidered. The cases were decided by a conservative majority; it was, therefore, entirely plausible that the Court wanted to reassert the traditional role of the judiciary in the resolution of civil litigation.

Stolt-Nielsen was by far the more radical case.¹³⁰ It involved the maritime transportation of goods.¹³¹ The cargo owner believed that the transporter had engaged in a price-fixing conspiracy with other shippers that affected suppliers of the commodity.¹³² The allegation was made during an arbitration between the transporter and the cargo owner.¹³³ The possibility of conducting class action

¹²⁸ *Stolt-Nielsen S.A.*, 130 S. Ct. 1758.

¹²⁹ *Rent-A-Center*, 130 S. Ct. 2772.

¹³⁰ *Stolt-Nielsen S.A.*, 130 S. Ct. 1758.

¹³¹ *See id.* at 1764-65.

¹³² *Id.* at 1765.

¹³³ *Id.*

proceedings was raised and specifically submitted in a written submission to the sitting arbitrators.¹³⁴ The arbitral clause made no mention of the availability of class proceedings.¹³⁵ The arbitrators accepted the submission, held hearings, and listened to experts.¹³⁶ They rendered an award stating the parties' original agreement did not prohibit class proceedings.¹³⁷

The Court vehemently disagreed with the arbitrators' conclusion, permitting the parties, in effect, to engage in class proceedings under the rubric of their arbitral clause.¹³⁸ It founded its objection on two factors: (1) the silence of the agreement; and (2) the enormous procedural difference between bilateral arbitration and class litigation.¹³⁹ The majority stated and reiterated that the silence of the arbitral clause was deafening.¹⁴⁰ The arbitrators could not simply invent content and ascribe it to the contract.¹⁴¹ Silence was silence; it did not point in any direction.¹⁴² Arbitrators could not rewrite the parties' contract.¹⁴³ The parties had not agreed to class proceedings.¹⁴⁴ The Court emphasized that at least one maritime expert maintained that class litigation was wholly incongruous in maritime transactions, if only because its transborder character would generate paralyzing conflicts of law and, perhaps, jurisdiction.¹⁴⁵

The majority then contended that its reversal of the arbitrators' determination was further justified by the enormous procedural differences between ordinary arbitration and class litigation.¹⁴⁶ Class litigation is antagonistic to arbitration and its adjudication goals.¹⁴⁷ It conflicts with and undermines arbitration's informality, confidentiality, expedition, and use of expertise. Interpreting the arbitral clause, in effect, to tolerate class procedures adds a material element to the parties' agreement that completely alters it, creating a contract not agreed-to by the contracting parties.¹⁴⁸ In effect, the majority opinion misrepresented the narrow character of arbitrators' award and engaged in the judicial second-guessing of expert arbitrators in a highly commercial and traditional form of arbitration.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1766.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See generally id.*

¹³⁹ *Id.* at 1765.

¹⁴⁰ *Id.* at 1765-66.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1766.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1769 n.6.

¹⁴⁶ *Id.* at 1775-76.

¹⁴⁷ *Id.* at 1776.

¹⁴⁸ *Id.*

The Court's ruling in *Stolt-Nielsen* was its first direct statement about class litigation in arbitration. It was an advance over the plurality decision in *Bazzele*,¹⁴⁹ in which the Court essentially ignored the class litigation issue. There, to address the question of the silence of the arbitral contract, it attributed greater interpretative authority to the arbitrator to construe the arbitral clause.¹⁵⁰ In *Bazzele*, the Court greatly enhanced the arbitrator's decisional authority at the head of the process, allowing the arbitrator, in effect, to resolve the issues of contract inarbitrability without a party-conferred delegation of jurisdictional authority.¹⁵¹ When the majority concluded that the *Stolt-Nielsen* arbitrators engaged in an "excess of authority," it contradicted the core plurality ruling in *Bazzele* and violated the prime admonition of contemporary arbitration law by engaging in a merits review of the award. In effect, the Court aggrandized judicial supervision, voided the holding in *Bazzele*, and displayed an unsympathetic attitude toward arbitration and its systemic needs. *Stolt-Nielsen*, along with *Volt Information Sciences, Inc.*,¹⁵² are the only two modern arbitration cases in which other policies trumped the usually hospitable judicial support for arbitration. In *Volt*, it seems to have been motivated by the need to dispense lessons in contract drafting and, in *Stolt-Nielsen*, the Court's unfavorable assessment of class action and its impact upon economic and commercial activity.

Rent-A-Center v. Jackson (RAC) follows *Stolt-Nielsen*.¹⁵³ Although the majority reasoning there is much less dismissive of arbitration and its interests, the Court again endorses a policy of greater judicial supervision of the arbitral process.¹⁵⁴ The circumstances are a variation on the fraud-in-the-inducement problem in *Prima Paint*.¹⁵⁵ In *RAC*, the issue pertained specifically to a delegation of jurisdictional authority under the contract pursuant to *First Options of Chicago, Inc. v. Kaplan*.¹⁵⁶ Jackson alleged that the arbitral clause unilaterally imposed by the employer was unconscionable because, *inter alia*, of the fee-splitting arrangement and the limitations on discovery.¹⁵⁷ These deficiencies, it was asserted, voided the entire clause because abuse and unfairness permeated the agreement.¹⁵⁸

As in *Prima Paint*, the plaintiff failed to direct its objection to the jurisdictional delegation in particular.¹⁵⁹ The delegation, therefore, remained in effect and gave the arbitrator the power to decide the unconscionability claims raised by the employee.¹⁶⁰ The immediate application of the reasoning in *RAC* clearly supported

¹⁴⁹ *Bazzele*, 539 U.S. 444 (2003).

¹⁵⁰ *Id.* at 456-57.

¹⁵¹ *Id.* at 457-58.

¹⁵² *Volt Info. Scis.*, 489 U.S. 468.

¹⁵³ *Rent-A-Center*, 130 S. Ct. 2772; *Stolt-Nielsen S.A.*, 130 S. Ct. 1758.

¹⁵⁴ See generally *Rent-A-Center*, 130 S. Ct. 2772.

¹⁵⁵ *Prima Paint*, 388 U.S. 395.

¹⁵⁶ *First Options of Chicago*, 514 U.S. 938.

¹⁵⁷ *Rent-A-Center*, 130 S. Ct. at 2789.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2780.

¹⁶⁰ *Id.* at 2780-81.

arbitration and arbitrability, but—once it was decided—all future plaintiffs would avoid the error of Jackson’s strategy and challenge directly the validity of the jurisdictional delegation. Under the holding in *RAC*, the court would then need to intervene and rule on the contractual propriety of the delegation provision. There was no indication that review would be the hospitable supervision that ordinarily applies to enforcement matters in arbitration. A possibly strong judicial presence at the head of the arbitral process was virtually guaranteed, attributing greater power to the courts over arbitration. Such a precedent hardly adds to the autonomy, independence, and functionality of arbitration.

AT&T Mobility v. Concepcion, a subsequent case, reaffirmed the Court’s traditional and long-standing support of arbitration.¹⁶¹ It held that a line of California state court rulings that often led to holding arbitration clauses with class action waivers unconscionable conflicted with the fundamental objectives of FAA § 2 and was preempted by federal law.¹⁶² The decision essentially validated class waivers as a lawful part of the bargain for arbitration. It also gave implied legitimacy to adhesive consumer contracts. In so ruling, the Court repeated the *Stolt-Nielsen* distinction between bilateral arbitration and class proceedings, confirming the Court’s distaste for aggregation litigation. Nonetheless, the prospect of *de novo* review of arbitral awards and the availability of judicial supervision even when the parties have entered into a jurisdictional delegation provision challenge more substantially than ever the independent and unobstructed operation of the arbitral process.

V. CONCLUSIONS

Although the course of the American judicial doctrine on arbitration may have been unsettled by recent decisions,¹⁶³ judicial rulings are likely to remain favorable to arbitration. The fragility of settled principles, however, could be lessened by the incorporation of greater analytical rigor in the Court’s reasoning. The Court’s decisional law is built on common law modalities. It now seems to contain two separability doctrines and provide for contractual and decisional versions of *kompetenz-kompetenz*. The haphazard quality of the analysis has reinforced the criticism of arbitration in adhesive circumstances. The Court should explain why an imposed legal obligation to arbitrate is nonetheless legally valid, much like it explained—over time and a number of cases—why federal law preempts state laws that conflict with its interpretation of the FAA. Cogent analysis always pays substantial long-term dividends.

Obviously, the Court marches to the beat of its own drum. Its responsibilities are substantial. Its rulings have a mighty impact upon society. Nonetheless, opportunistic reasoning makes arbitration vulnerable to legislative attacks and the assaults of advocacy. Circumstantial doctrinal inventions lack coherence and can become inconsistent; cryptic, implausible explanations create derision and confusion. In a word, despite its many accomplishments, the judicial doctrine on

¹⁶¹ *AT&T Mobility*, 131 S. Ct. 1740.

¹⁶² *Id.* at 1749-50.

¹⁶³ See *Stolt-Nielsen S.A.*, 559 U.S. ___, 130 S. Ct. 1758; *Rent-A-Center*, 561 U.S. ___, 130 S. Ct. 2772.

arbitration is wanting in substantive rigor, weakening the force of the vision that animates it.

Throughout the decisional law on arbitration, the strained and makeshift character of majority opinions is almost always accompanied by high quality dissenting opinions. This feature of the law may indicate the difficulty of achieving a majority consensus within the Court and, concomitantly, the imperative need to forge a consensus on arbitration because of its importance to civil litigation. As Justice Ginsberg has pointed out, arriving at a five-member majority can have a decisive impact upon the content of an opinion, making it into a more eclectic and scattered statement of law. Articulating an individual position in opposition is easier to express in a cohesive declaration. The difference between Justice Souter's majority opinion in *Hall Street Associates* and dissent in *14 Penn Plaza v. Pyett* is a telling illustration.¹⁶⁴

The irony that results from the interplay of historical factors and institutional exigencies is that one of the most hospitable jurisdictions to arbitration does not have a cogent statement of law on arbitration. The FAA is antiquated and was molded as special interest legislation. It is not a law of arbitration in any real sense of that term, and political partisanship makes a new, more elaborate version virtually impossible. The RUAA, literally, is a disaster. The Reporter's Notes are, by far, a better statutory statement than the provisions themselves. The uniform law is poorly written and organized. Moreover, it has now been superseded by subsequent developments.

Finally, the development of collaborative arbitration coalesces with the desultory analytical quality of arbitration opinions to create a true danger to the continued viability of the mechanism. While arbitrations must remain independent of the courts, arbitrators do not necessarily need to be autonomous in relation to the arbitrating parties. The clandestine power struggle between these principal actors arises in part because parties pay the arbitrators and the latter exercise authority pursuant to a contract, not a public jurisdictional mandate. Arbitral practice may no longer be able to justify the court-like subordination of the parties to the arbitrator. Arbitration may be transformed into a form of "participatory adjudication" in which results are reached only after extensive consultations between the arbitrating parties and the arbitrator. The institution of such a system would be a radical departure from settled practices and currently controlling views. It may so alter arbitration that the latter becomes ineffective in the resolution of disputes. Despite the lucidity of the Court's vision on arbitration, there is an equally clear need for limpid definition of essential notions. The Court should provide the necessary guidance to protect the integrity of arbitral adjudication and prevent it from becoming a tool by which arbitrators placate parties and sustain their own business interests.

Public judicial adjudication is characterized by two attributes. First, the application of public jurisdiction complicates the dispute resolution process with unyielding rights protections and procedural requirements. Solutions are bloated and reached inefficiently; proceedings are protracted and prone to both legitimate and illegitimate delay; the process devours time and money. Received political values dominate the mechanism, which is more formal, complex, and difficult to implement. The procedural ritual often far exceeds, and even distorts, the parties' disputes. Second, unless there is outright corruption, judges—certainly federal

¹⁶⁴ See generally *Hall Street*, 128 S. Ct. 1396; *14 Penn Plaza*, 129 S. Ct. 1456.

judges who are appointed for life—come as close as possible to a state of absolute disinterestedness. They have no personal stake in the outcome of the proceeding; if they do, they are obligated to recuse themselves. They are the impersonal agents of the State, would-be public servants, whose oath requires fidelity to the U.S. Constitution and the integrity of law. Other than the subliminal influence of personal opinions, judges must behave in a neutral manner: They apply legal precedents, guarantee that due process governs, and survey the parties' combat for procedural rectitude. The impartial character of the process is further guaranteed by the availability of appeal to yet other judges.

When an arbitrator begins collaborating with the arbitrating parties to reach a final resolution, the adjudicatory character and integrity of the arbitral process are diminished. Commercial parties, at least those who disfavor arbitration, have long complained about the "dictatorship of the arbitrator." In fact, some commercial parties have further maintained that they should return to the process of judicial litigation because it better enables them to negotiate and exercise control over their own destiny. Enhancing party prerogatives to all stages of the arbitration may make the process less subject to criticism by its users, but—to some degree—collaboration transforms arbitral adjudication into structured negotiations or a form of arb/med/arb, in which the arbitrator finalizes the dispute (adjudication) only after the parties have reviewed and approved the arbitrator's conclusions (settlement). The award constitutes a form of homologation or a ruling based upon agreed terms.

This adjustment of arbitration is initially controversial, but it may ultimately be inconsequential. It gives greater, more forceful expression to the principle of party autonomy. It may be essential to the continued viability of commercial arbitration. It reflects the type of osmosis that, historically, prevailed in the creation and development of traditional forms of arbitration. It alters fundamentally, however, the protocol of arbitration, transforms the *raison d'être* of the process by giving it a hybrid character, and creates a form of complicity that would be intolerable in the public process of adjudication. Although it may be a brief for democratic governance or the rule of the marketplace, it foils the aloofness of the arbitrator and the neutrality of the process. Survival through adaptability may be arbitration's most vital attribute, but it is beginning to exact a substantial price. Are the proponents of the various transformations and modifications being entrapped by their own ideas? Are we losing sight of the overriding public policy exigency of adjudication by focusing so ardently upon the need for the arbitral remedy's pragmatic adaptability? These concerns restate the original dilemma of establishing a proper boundary between autonomous self-regulation and the essential interests of society in maintaining both its jurisdictional authority over adjudication and its level of civilization.

Government regulation may be distasteful and destructive, but it is well-known and its consequences predictable. It is rarely a felicitous event and even less frequently produces real benefits for society or the sectors it afflicts. In comparison, ingenious commercial creativity, although based upon an intimate sense of the specialty area, is more disturbing than the prospect of bureaucratic regulation. It gives rise to *sui generis* insights that portend real change, the results of which will only be known once they have been tested by time and the marketplace. Some moments of inspiration can be of enormous value, while others are merely flares that never reach the level of useful or significant change. The propriety of the contemplated change and the future of arbitration remain murky and elusive. A bad

choice as to what is acceptable practice could result in substantial damage to the arbitral process as well as the protection of rights.