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Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership

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I. INTRODUCTION

Dispute resolution systems historically have included three primary forums: the judicial process, administrative procedures, and the arbitral system. This article focuses on the modern and rapidly expanding third system – that of arbitration. For many disputes, arbitration may be the exclusive way parties have chosen to seek final relief. For other disputes, arbitration may be a choice parties can select to resolve their differences.

Our society is witnessing, at the dawn of a new millennium, the evolution of an arbitration system that is the preferred way used to resolve various types of disputes and that is gradually replacing litigation as the primary dispute resolution process. This change signals a new and significant approach in how parties are and will be resolving disputes. For some, this useful and effective change is a welcome relief from the excessive costs, wasted time, and painful process fostered by lawsuits. For others, this suspicious and questionable change is an unwelcome diversion from our common law, jury based trial system. Friends and foes of arbitration have one thing in common: they understand and realize that arbitration has been readily accepted by clients and parties, has been approved by the highest federal and state courts, and continues to be authorized by federal and state statutes. Like it or not, arbitration is being used and will continue to be used.

The goal of everyone interested in maintaining a fair, accessible, and affordable civil justice system is to monitor, shape, and maintain arbitration as a fair, accessible, and affordable system. The purpose of this article is to provide information and ideas which will help make that goal a success. Our hope in authoring this article is that our explanations and suggestions will foster the continuation and further development of a fair civil justice system accessible and affordable to all.

The first part of this article (Sections II and III) explains the historical development of arbitration in this country prior to and under the Federal Arbitration Act (the FAA) and continuing through to the present day. This legal history is primarily a review of significant United States Supreme Court decisions that have interpreted and applied the FAA. This legal development has established the groundwork and created the framework for enforceable arbitration agreements and awards for virtually all types of disputes involving all types of parties, including common, domestic disputes between businesses and customers and complex, complicated multi-billion dollar international disputes.

The second part of this article (Section IV) begins with an exploration of the basic and essential factors that traditionally comprise the American way to resolve disputes fairly. These factors underlie the judicial, administrative, and arbitral systems and are indispensable features of any fair dispute resolution process. This part concludes with an innovative proposal promoting the development of a public and private partnership between arbitral associations and the judicial system to offer and support a fair, accessible, and affordable arbitral/judicial process.

It will be up to the reader to decide whether this partnership proposal is a good thing. It will be up to all of us to decide how this joint venture private/public system, or a variation of it, will be developed and used. It will be up to history to tell us whether we succeeded.

II. WHERE HAVE WE BEEN?

Arbitration did not always receive the favorable treatment in the United States it receives today. In fact, while early U.S. merchant communities favored the use of arbitration as a means to settle disputes, early courts were hostile to arbitration.[1] It did not take long, however, for courts to recognize the practicality and efficiency of arbitration. Once courts realized these attributes, the use of arbitration developed with lightning speed. A brief summary of this development follows.

A. History of Pre-1925 U.S. Arbitration

The use of arbitration began in the United States during the colonial period.[2] According to newspapers, legal records and business records, "arbitration was in constant and widespread use in New York" between 1664 and 1783.[3]

1. Merchants' and Industry's Use of Arbitration

Arbitration was used by colonial merchants to avoid the "expensive end-

1. Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 482-83 (1995); STEPHEN PATRICK DOYLE & ROGER SILVE HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION 28 (1991).

2. Benson, *supra* note 1, at 481; DOYLE & HAYDOCK, *supra* note 1, at 28; Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 443 (1984) (noting "[i]n colonial times arbitration played an important role in resolving disputes").

3. Benson, *supra* note 1, at 481.

less law" dispensed by government courts of that period.[4] Merchants recognized that arbitration was quicker, less formal, less expensive and more private than litigation.[5] Moreover, unlike public judges of that time, arbitrators were "chosen on the basis of their expertise in matters pertinent to specific disputes."[6] Practices developed among merchants to enforce arbitration awards; the failure to comply with an arbitrator's decision resulted in threats to a merchant's reciprocal arrangements or to his reputation.[7] Consequently, arbitrators' decisions were generally honored and the use of arbitration was effective.

Eventually, business and trade associations began to use arbitration on an institutional basis. The New York Chamber of Commerce, for example, approved of and provided for the use of arbitration from its inception in 1768.[8] It appointed its first arbitration committee on June 7, 1768.[9] The Chamber continued to appoint committees regularly until the war in 1775, and it resumed appointing arbitration committees as soon as the war was over.[10] The New York Stock Exchange also incorporated arbitration into its 1817 constitution.[11]

2. Common Law Developments

English courts were hostile to arbitration and that hostility carried over, initially, in the early courts of the United States. The precedent of hostility to arbitration dates back to 1609 when an English court declared, in *Vynior's Case*,[12] that contracts to submit to arbitration were revocable.[13] Even later, as the common law began to recognize parties' intent as a significant factor in contract enforcement, arbitration clauses continued to be treated as

4. *Id.* at 482.

5. *Id.*; DOYLE & HAYDOCK, *supra* note 1, at 28; *see also* Mann, *supra* note 2, at 463 (noting "people who chose arbitration rather than law seemed to believe that arbitration offered advantages that were unobtainable elsewhere").

6. Benson, *supra* note 1, at 482.

7. *Id.* at 484; *see also* Mann, *supra* note 2, at 465 (stating people believed "arbitration awards could . . . offer remedies that judgments at law could not").

8. Benson, *supra* note 1, at 482.

9. *Id.*

10. *Id.*

11. *Id.* at 485. The Exchange continues to use arbitration today.

12. 4 Eng. Rep. 302 (1609).

13. *Id.*

revocable.[14]

In the United States, early decisions followed English precedent. In 1803, for example, in *Hobart v. Drogan,*[15] the appellants argued the dispute was subject to arbitration. The United States Supreme Court responded that arbitration, "being to a mere amicable tribunal, . . . could not, in a case of this sort, be now insisted upon to bar the jurisdiction of the court. It is wholly unlike the case, where a positive law has fixed the mode of ascertaining the compensation."[16] Thus, "[a] dispute settled by an arbitrator could be appealed to an American court and essentially be treated as though it had never been investigated before."[17]

Nevertheless, as early as 1842, the United States Supreme Court began to reconsider its position towards arbitration. In *Hobson v. McArthur,*[18] the Court declared "in construing [an arbitration] agreement, we must look at what was the obvious intention of the parties."[19] Then, in 1854, the Court made a significant statement in favor of arbitration in *Burchell v. Marsh.*[20] The Court noted:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.[21]

The United States Supreme Court developed a positive position toward arbitration at a relatively early point on the historical spectrum.

3. Statutory Developments

By the late nineteenth century and early twentieth century, use of arbitration increased.[22] Litigation issues similar to contemporary problems were already beginning to plague American courts. Lawsuits were costly; courts

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14. *See, e.g.,* Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746) (holding contract to arbitrate was attempt by the parties to "oust this court" of its jurisdiction and it was therefore unenforceable).
15. 35 U.S. 108 (1836).
16. *Id.* at 119.
17. Benson, *supra* note 1, at 484.
18. 41 U.S. 182 (1842).
19. *Id.* at 192-93.
20. 58 U.S. 344 (1854).
21. *Id.* at 349-50.
22. DOYLE & HAYDOCK, *supra* note 1, at 28.

were congested; and trials were subject to long delays.[23] Business people favored the use of arbitration for resolution of commercial disputes.[24] Moreover, most lawyers found themselves excluded from the increasingly popular private dispute resolution methods developing among merchants.[25] As a result, some attorneys recognized that the establishment of arbitration statutes would be beneficial to promote the use of attorneys in the process.[26] And according to the American Arbitration Association, arbitration legislation had already become "a prime objective for the business community in meeting its dispute resolution needs."[27]

New York passed the first modern arbitration statute in 1920.[28] The New York statute was co-sponsored by the New York Chamber of Commerce and the New York State Bar Association.[29] "The statute was unique in providing for enforcement of agreements to arbitrate future disputes, as well as agreements to settle existing disputes."[30]

In 1922, business leaders established the Arbitration Society of America to educate the public about the benefits of arbitration and to lobby for more extensive arbitration legislation.[31] The Arbitration Foundation, a second arbi-

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23. Benson, *supra* note 1, at 489.

24. DOYLE & HAYDOCK, *supra* note 1, at 28.

25. Benson, *supra* note 1, at 491; *see also* DOYLE & HAYDOCK, *supra* note 1, at 28 (noting factors that contributed to the increased use of arbitration during the late nineteenth and early twentieth centuries).

26. Benson, *supra* note 1, at 491-92. According to Benson:

> [A] St. Louis attorney argued before the [1914] meeting of the Missouri Bar Association that some private disputes should be diverted to arbitration, where a lawyer chosen by the disputants would serve as the arbitrator. To make his proposal attractive to the membership, he also emphasized that it would increase respect for the judiciary because court delay should diminish, and given that only attorneys with "character and learning" would serve as arbitrators, "suspicion and reproach" of the bar would also recede. Therefore, by publicly supporting arbitration by lawyers as an alternative to the courts, the bar could claim that it was actively pursuing the "public interest."

Id. at 493-94.

27. American Arbitration Association, *History of Public Service - Part I, Background, at* http://www.adr.org/history/990907aa.html (last visited March 2, 2001) [hereinafter *History of Public Service*].

28. N.Y.C.P.L.R. §§ 7501-7514 (McKinney 2000) (originally enacted as Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803).

29. *History of Public Service, supra* note 27.

30. *Id.*

31. *Id.*

tration organization, was established in 1924.[32] The Arbitration Foundation, however, focused more on research and promoting the "commercial interests of its constituents."[33] Then, in 1925, thanks in large part to the lobbying efforts of the Arbitration Society of America,[34] Congress passed the Federal Arbitration Act ("FAA").[35]

With the implementation of federal arbitration legislation, the Society and the Foundation worked to integrate their differing approaches, recognizing that they were both seeking the same goals.[36] "In 1926, with the help of a mediator, a negotiated settlement was reached resulting in the merger of the two pioneering groups into a single entity: [The] Amercian Arbitration Association."[37] "Not surprisingly, the AAA openly encourage[d] lawyer participation at all steps of the arbitration procedure, from the drafting of arbitration clauses and contracts to the hearing itself."[38] Also not surprisingly, "lawyer representation before the AAA arbitration tribunals . . . rose from 36 percent in 1927 to . . . 91 percent in 1947."[39]

B. Federal Arbitration Act of 1925 ("FAA")

The general provisions of the FAA are set forth in Sections 1 through 16.[40] Section 2 of the FAA provides that written agreements to arbitrate matters involving commerce[41] or maritime transactions[42] "shall be valid, irrevoca-

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32. *Id.*

33. *Id.*

34. *Id.*

35. 9 U.S.C. §§ 1-16, 201-208, 301-307 (West 2001)(originally enacted as Act of Feb. 12, 1925, ch. 213, 43 Stat. 883. According to the AAA, Title 9, U.S. Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLS 669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15. American Arbitration Association, *The Federal Arbitration Act, at* http:// www.adr.org/statutes/federal_act.html (last visited Jan. 27, 2001). An extensive discussion of the legislative history of the American Arbitration Act is set forth in IAN R. MACNEIL, AMERICAN ARBITRATION LAW 83-122 (1992).

36. *History of Public Service, supra* note 27.

37. *Id.*

38. Benson, *supra* note 1, at 496 (quoting STEVEN LAZARUS ET AL., RESOLVING BUSINESS DIPSUTES: THE POTENTIAL FOR COMMERCIAL ARBITRATION 92 (1965); *see also* Mann, *supra* note 2, at 445 ("In time, the legal system appropriate arbitration to itself and turned it into a formal process that differed little from legal adjudication.").

39. Benson, *supra* note 1, at 496.

40. 9 U.S.C. §§ 1-16 (West 2001).

41. The FAA defines "commerce" as:

commerce among the several States or with foreign nations, or in any Territory of the

ble, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[43] Moreover, "[i]n enacting the FAA, Congress specifically stated its intent to place arbitration agreements on par with other contracts and to help parties avoid the expense and delay of litigation."[44]

Under Section 3 of the FAA, if a court finds the parties have a written agreement to arbitrate a dispute, the court may issue a stay on litigation of the dispute.[45] Section 4 goes even further in allowing a court to compel the parties to arbitrate a dispute upon the refusal of a party to an arbitration agreement to submit to arbitration.[46] The FAA also ensures that arbitration awards are enforceable and confirmable to a civil judgment and limits to specific circumstances when an award may be appealed, vacated or modified.[47]

While the provisions of the FAA have remained essentially unchanged since the FAA's enactment in 1925,[48] the application of the FAA has been dramatically expanded. From "arguably no more than a remedy applied to arbitration cases . . . the FAA [has become] definitively established as a substantive federal law, preemptive and binding on the states, and articulating a federal policy extending to issues well beyond its literal terms."[49]

In the years after passage of the Federal Arbitration Act, "arbitration was in vogue."[50] Nevertheless, "[f]or years courts and commentators agreed that the statute applied only in the federal courts and so governed only the

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United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*

9 U.S.C. at § 1 (emphasis added).

42. The FAA defines a "maritime transaction" as charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction. 9 U.S.C. § 1.

43. 9 U.S.C. § 2.

44. Ed Anderson & Roger Haydock, *History of Arbitration as an Alternative to U.S. Litigation*, Aug. 12, 1996 WEST'S LEGAL NEWS 8257, *available at* 1996 WL 449743.

45. 9 U.S.C. § 3.

46. 9 U.S.C. § 4.

47. 9 U.S.C. §§ 9-13, 16.

48. DOYLE & HAYDOCK, *supra* note 1, at 29.

49. Hirshman, *supra* note 49, at 1352-53.

50. *Id.* at 1305.

few contract suits that happened to involve diversity or admiralty jurisdiction."[51] During these first twenty-five years of the FAA, arbitration was used to resolve a broad range of disputes privately by the parties. There was little intervention by the courts in arbitration cases. Beginning in the 1950s, a United States Supreme Court decision created an obstacle to the expansion of arbitration that would stand for many years.

C. *United States Supreme Court Development — 1950s through the 1990s*

1. Off The Rails — *Wilko v. Swan*[52]

Treatment of the Federal Arbitration Act by the U.S. Supreme Court got off on the wrong track with the 1953 decision *Wilko v. Swan*. In *Wilko*, the Court examined an agreement between a securities broker and a buyer whereby the parties had agreed to arbitrate controversies arising out of the transaction. The buyer later sued for misrepresentation. The broker brought a motion to stay the lawsuit, pending arbitration. The buyer sought to continue with his suit in federal court arguing that the arbitration clause in the parties' agreement was an unenforceable waiver of his right to bring suit in court under section 14 of the Securities Act.[53]

The Supreme Court bought the buyer's argument, holding the Securities Act conferred on the buyer a right to sue that could not be waived.[54] The Court found the arbitration clause was, therefore, an illegal waiver.[55] Despite the Court's holding, it was the Court's reasoning that caused the real damage to the Federal Arbitration Act. According to the Court:

> [E]ffectiveness in application [of Securities Act provisions advantageous to the buyer are] lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" cannot be examined. [Moreover], power to vacate

51. *Id.*

52. 346 U.S. 427 (1953).

53. At that time, section 14 read as follows: "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." *Wilko*, 346 U.S. at 430 n.6.

54. *Id.* at 435.

55. *Id.*

an award is limited.[56]

Thus, the Court believed arbitrators would not be sufficiently *competent* to determine whether the broker had violated the Securities Act by misrepresenting some aspect of the transaction. The Court's negative attitude towards the enforcement of legal rights in arbitration, as expressed in *Wilko*, took a long time to change, evolving gradually over a period of thirty years.

2. The "Steelworkers Trilogy"[57] of 1960

Seven years after *Wilko*, the Supreme Court issued a group of three opinions known as the "Steelworkers Trilogy." These three cases became the framework for the development of federal common law governing labor agreements.

a. *United Steelworkers v. American Manufacturing Co.*

The first case in the trilogy dealt with the question of when an issue must be submitted to arbitration. In *United Steel Workers v. American Manufacturing Co.*, the Court reviewed the role of the judiciary in the context of collective bargaining and the Labor Management Relations Act (LMRA). As a result, a court's sole function was "confined to ascertaining whether the party seeking arbitration [was] making a claim which on its face [was] governed by the contract."[58] Because the contract at issue provided for arbitration of all claims "arising between the parties as to the meaning, interpretation and application of the provisions of [the] agreement,[59] the Court rejected the company's argument that the employee's claims were frivolous and therefore not arbitrable. According to the Court:

> The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry, the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious . . . .
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.[60]

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56. *Id.* at 435-436 (footnotes omitted).
57. As referred to by Hirshman, *supra* note 49, at 1306 n.9.
58. United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 568 (1960).
59. *Id.* at 565 n.1.

While this opinion seems to depart substantially from *Wilko*, and indeed it is the beginning of the erosion of the holding in *Wilko*, the Court seemed to justify its departure from *Wilko* based in part on the language of the LMRA. At that time, the LMRA provided that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[61] Thus, the statute at issue in this case contained language lending itself to the enforceability of arbitration agreements whereas, at least in the Court's *Wilko* opinion, the Securities Act did not.

b. *United Steelworkers v. Warrior & Gulf Navigation Co.*

In this second case of the Steelworkers Trilogy, the Court once again enforced an arbitration clause in a collective bargaining agreement. This time, the Court specifically distinguished *Wilko* as "irrelevant" to the case at bar.[62] The Court noted the LMRA provided for enforcement of arbitration provisions in collective bargaining agreements:[63]

> In the commercial case, arbitration is the substitute for litigation. Here, [in the labor relations context], arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.[64]

The Court apparently believed arbitration was more appropriate in the labor relations context than in the commercial realm.

The clause at issue in the collective bargaining agreement purportedly exempted from arbitration "matters which are strictly a function of management."[65] The district and appellate courts held the activity at issue — the contracting out of work by the employer — qualified as a function of management. The employer's actions were therefore exempt from the mandatory arbitration provisions.[66]

The Supreme Court disagreed, holding activities qualifying as "strictly a function of a management," must be those activities specifically defined in

60. *Id.* at 567-68 (footnotes omitted).
61. *Id.* at 566.
62. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).
63. *Id.* at 577-78.
64. *Id.* at 578.
65. *Id.* at 576.
66. *Id.* at 577.

the collective bargaining agreement to grant management "complete control and unfettered discretion."[67] Because the collective bargaining agreement did not grant management complete control and discretion over the contracting out of work, the Court held the dispute was arbitrable.[68] In so holding, the Court noted judicial inquiry under the LMRA "must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."[69] A court should not review the merits of a dispute and "doubts should be resolved in favor of [arbitration]."[70]

c. *United Steelworkers v. Enterprise Wheel & Car Corp.*

The third case in the Steelworkers Trilogy dealt with enforcement of an arbitrator's award. The lower court had reversed the arbitrator's award, finding the award failed to meet requirements under the collective bargaining agreement, and further finding the collective bargaining agreement had expired and the award was therefore unenforceable. The Supreme Court rejected this reasoning because "the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[71] While recognizing that an arbitrator's authority "is confined to interpretation and application of the collective bargaining agreement," the Court nevertheless recognized that courts must defer to the decision of an arbitrator who does not exceed that authority.[72]

Establishing a rule that is still in force today, the Court held a labor/management agreement award is legitimate (*i.e.*, not subject to judicial review) as long as "it draws its essence from the collective bargaining agreement."[73] Thus, while the Court in this case found the arbitrator's opinion and award ambiguous "ambiguity in the opinion accompanying the award, which permits the inference that the arbitrator *may have* exceeded his authority, is not reason for refusing to enforce the award."[74] The Court concluded its

67. *Id.* at 584.
68. *Warrior*, 363 U.S. at 585.
69. *Id.* at 582.
70. *Id.* at 582-83.
71. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 595-96 (1960).
72. *Id.*
73. *Id.* at 597.
74. *Id.* at 598 (emphasis added).

opinion with this strong statement: "So far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[75]

With the conclusion of Steelworkers Trilogy, the enforceability of contracts to arbitrate and arbitration awards became firmly established in the area of labor relations.

3. Narrowing *Wilko* — 1974

a. *Scherk v. Alberto Culver Co.*

After the Steelworkers Trilogy, arbitration in labor relations gained a stronger foothold. However, arbitration of commercial disputes, in particular commercial disputes involving claims under the Securities Act, were still subject to the limitations of *Wilko*. The next major swipe at *Wilko* came with the *Scherk* decision in 1974.

In *Scherk*, a U.S. citizen purchased three enterprises from a German citizen.[76] The German citizen warrantied in the sales contract that the trademarks associated with the three enterprises were unencumbered.[77] When the U.S. citizen later discovered the trademarks were encumbered, he sued in U.S. federal court.[78] The German citizen, on the other hand, sought to compel arbitration based on the arbitration clause in the contract.[79] Had the plaintiff alleged only breach of contract claims, this case might have gone straight to arbitration. However, the plaintiff (probably with the intent to avoid arbitration) alleged claims under the Securities Act.[80] He claimed the false statements in the sales contract were fraudulent representations violating section 10(b) of the Securities Exchange Act. Thus, the district court and the court of appeals relied on *Wilko* to hold the arbitration clause unenforceable.[81] The Supreme Court reversed.

First, the Supreme Court noted that *Wilko* dealt with claims under section 12(2) of the Securities Act of 1933, while this suit alleged claims under the Securities Exchange Act of 1934.[82] The Court noted the remedies pro-

75. *Id.* at 599.
76. *Scherk*, 417 U.S. at 508 (1974).
77. *Id.*
78. *Id.* at 509.
79. *Id.*
80. *Id.* at 509-10.
81. *Id.*
82. *Scherk*, 417 U.S. at 510.

vided by the different statutory provisions were not the same.[83] Moreover, the choice of forum under the 1934 Act was not as broad as what was allowed under the Securities Act of 1933.[84] The Court, however, did not base its decision on this distinction and instead accepted the premise "that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934."[85]

Instead, the Court based its decision on the "significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here."[86] The Court emphasized that the agreement in question in this case was "a truly international agreement."[87] According to the Court:

> Such a contract involves considerations and policies significantly different from those found controlling *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock purchase agreement . . . . [No] credible claim could have been entertained that any international conflict of laws problems would arise. In this case, by contrast, in the absence of the arbitration provision, considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.[88]

The Court seemed to indicate that in international commercial cases it is permissible to "substitute" arbitration for litigation.[89]

The Court distinguished *Wilko*, notwithstanding the fact that "the laws of the state of Illinois were explicitly made applicable by the arbitration agreement."[90] Instead, the Court called the agreement to arbitrate a *forum selection* cause (*i.e.*, the parties chose arbitration before the International Chamber of Commerce instead of opting into the United States litigation system), whereas the *choice of law* provision designating Illinois law designated the *procedure* to be used in resolving the dispute.[91]

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83. *Id.* at 513-14.
84. *Id.* at 514.
85. *Id.* at 515.
86. *Id.*
87. *Id.*
88. *Scherk*, 417 U.S. at 515-16.
89. *Warrior*, 363 U.S. at 578 ("In the commercial case, arbitration is the substitute for litigation").
90. *Scherk*, 417 U.S. at 519 n.13.
91. *Id.* at 519.

b. *Prima Paint Corp. v. Flood & Conklin Manufacturing Company*

Prima Paint involved another commercial arbitration clause. Two corporations, citizens of different states, entered a consulting agreement that contained an arbitration clause. A year later, one of the parties brought suit in federal court alleging the other party had induced it to "accelerate the execution and closing date of the consulting agreement."[92] The defendant brought a motion to stay the action, pending arbitration. The plaintiff brought a motion to enjoin arbitration. The district court and the court of appeals held the arbitrator, not the court, should determine whether there had been fraud in the inducement of the contract. The Supreme Court affirmed.

The Court justified its decision based, first, on its belief that the consulting agreement "was inextricably tied to [the] interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business."[93] Thus, the Federal Arbitration Act applied.[94] Next the Court noted there was no allegation by the plaintiff that it had been fraudulently induced to enter into the arbitration clause.[95] Instead, the allegations surrounded the execution and closing of the contract as a whole.[96]

The Court held "the statutory language [of the Federal Arbitration Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally."[97] Only if the claim were fraud in the inducement of *the arbitration clause* may a federal court proceed to adjudicate it.[98] Thus, the Court held the avoidance of arbitration would not be justified based on an allegation of fraud in the inducement of a contract simply because it *contained* an arbitration clause.[99]

4. The "Second Trilogy"[100] — 1983-1985

After *Scherk* and *Prima Paint*, arbitration of commercial disputes gained a firmer foothold in practice and in the federal common law. Nevertheless,

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92. Prima Paint Corp. v. Flood & Conklin Mfg. Company, 388 U.S. 395, 398-99 n.2 (1967).

93. *Id.* at 401.

94. *Id.*

95. *Id.* at 406.

96. *Id.* at 398-99 n.2.

97. *Id.*

98. *Prima Paint*, 388 U.S. at 403-04.

99. *Id.* at 406.

100. Hirshman, *supra* note 49, at 1353 (discussing three significant arbitration decisions of the United States Supreme Court between 1983 and 1985 and referring to them as the "Second

Wilko was not overruled. The Court continued to chip away at *Wilko* throughout the 1980's with a Second Trilogy of significant arbitration holdings.

a. *Moses H. Cone v. Mercury Constr. Corp.*

The *Moses H. Cone* case in 1983 involved a dispute between a North Carolina Hospital and the Alabama contractor it hired to construct additions to the hospital building.[101] The contract between the hospital and the contractor appointed the architect to resolve disputes.[102] In the absence of a resolution by the architect within a specified period of time, the parties were required to submit disputes to binding arbitration under an arbitration clause in the contract.[103] At one point in the parties' relationship, the hospital refused to pay certain fees claimed by the contractor.[104]

Simultaneous with its refusal to pay the fees, the hospital brought a declaratory judgment action in state court alleging the contractor had no right to arbitration.[105] The hospital also sought a stay of arbitration.[106] The contractor immediately demanded arbitration and brought a suit in federal court seeking an order compelling arbitration.[107] But the federal district court granted the hospital's motion to stay the federal court action, pending resolution of the state court declaratory judgment action. The contractor appealed the federal court's order.[108] The Circuit Court of Appeals reversed and issued an order compelling arbitration. The Supreme Court agreed with the Circuit Court, finding that both the state court and the federal court were required to apply the federal substantive law of arbitration since the parties' agreement fell within the scope of the Arbitration Act.[109]

The Supreme Court also agreed that the state court suit and the federal court suit did not necessarily overlap simply because they both dealt with the

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Arbitration Trilogy").

101. Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp., 460 U.S. 1, 4 (1983).
102. *Id.*
103. *Id.* at 5.
104. *Id.* at 6.
105. *Id.* at 7.
106. *Id.*
107. *Moses H. Cone*, 460 U.S. at 7.
108. *Id.* at 8.
109. *Id.* at 24.

arbitrability of the dispute.[110] The state court suit involved the question of whether a *stay* should be issued under *section 3* of the Federal Arbitration Act. The federal court suit, on the other hand, involved the question of whether an order *to compel* arbitration should be issued under *section 4* of the Federal Arbitration Act. The Court noted:

> But in a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing -neither to litigate nor to arbitrate. If the state court stayed litigation pending arbitration but declined to compel the hospital to arbitrate, [the contractor] would have no sure way to proceed with its claims except to return to federal court to obtain [an order compelling arbitration] -a pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act.[111]

Thus, even had the state court made a determination that a stay was appropriate, in this case, a stay would not have been adequate to protect the right to arbitration.[112]

b. *Southland Corp. v. Keating*

In the second case in the Second Trilogy, the Supreme Court re-emphasized the fact that the Federal Arbitration Act is binding substantive federal law which preempts state law where there is a conflict. *Southland Corp. v. Keating*,[113] involved a consolidated action by 7-11 store franchisees in California against the owner and franchisor of the 7-11 stores. The franchisees alleged various contract claims and also violations of the disclosure requirements of the California Franchise Investment Law.[114] Southland, the franchisor, sought to compel arbitration under the arbitration clauses in the contracts with its franchisees.

The case worked its way up through the California state court system. Eventually, the California Supreme Court ruled the franchisees' claims under the California Franchise Investment Law were *not* subject to arbitration under the Federal Arbitration Act, but the contract claims were.[115] The Supreme Court reversed in part, holding that even the claims under the California Franchise Investment Law were subject to arbitration.

The significance of *Southland Corp.* is that it established the supremacy of federal law over arbitration contracts. According to the Court, there are

110. *See id.* at 21-24.
111. *Id.* at 27.
112. *Id.*
113. 465 U.S. 1 (1984).
114. *Id.* at 4.
115. *Id.* at 5.

"only two limitations on the enforceability of arbitration provisions governed by the [FAA]."[116] First, the arbitration provision "must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce.' "[117] Second, "such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' "[118] The Court pointed out the FAA contained no provision indicating the FAA's "broad principle of enforceabilty is subject to additional limitations under State law."[119]

This clear reading of the FAA together with the legislative history of the statute led the Court to declare California's law preempted by the FAA.[120]

c. *Dean Witter Reynolds, Inc. v. Byrd*

In the third case of the "Second Trilogy," the Supreme Court once again faced the *Wilko* issue of whether securities law claims would be governed by the Federal Arbitration Act.[121] The plaintiff, an investor, sued his broker in federal court, alleging violations of both *federal* securities laws and New York *state* securities laws.[122] Once again, the contract between the investor and the broker contained an arbitration clause purporting to make arbitrable any dispute related to the contract.[123]

One of the reasons the Supreme Court granted certiorari in *Byrd* was to resolve a conflict among the federal circuits about how to handle pendant state securities law claims. Prior to this case, federal courts had used *Wilko* to justify their refusal to compel arbitration of pendant state court securities-related claims. The federal courts reasoned that this "Intertwining Doctrine" was necessary to avoid overlapping proceedings and collateral estoppel issues

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116. *Id.* at 10-11.

117. *Id.* (quoting § 2 of the FAA).

118. *Id.*

119. *Southland Corp.*, 465 U.S. at 11.

120. *Id.* at 16. With respect to the legislative history, the Court noted:

> The problems Congress faced were therefore twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. To confine the scope of the [FAA] to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.

Id. at 14.

121. *See* Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985).

122. *Id.* at 214.

123. *Id.* at 215.

raised by arbitration awards.[124] In *Byrd*, the broker brought a motion to compel arbitration of the investor's state law claims, notwithstanding the Intertwining Doctrine. The district court and the court of appeals denied the broker's motion.[125] The Supreme Court reversed.[126]

In terminating the Intertwining Doctrine, the Supreme Court determined that, while it may be *more efficient* to treat state and federal securities claims similarly, Congress' primary goal with the Federal Arbitration Act was to ensure the *enforceability* of contracts to arbitrate.[127] Moreover, the Intertwining Doctrine provided a means whereby parties could avoid arbitration of securities claims by simply tying state law claims to federal claims.[128] Therefore, the Court reasoned the Intertwining Doctrine must be eliminated. After *Byrd*, securities claims arising under *state law* may not be sued out where they are arbitrable under an arbitration agreement. Notwithstanding the holding in *Byrd*, *Wilko*, although weakened, still governed the arbitrability of *federal* securities laws claims.

5. *Wilko* Finally Falls

While the Court did not overrule *Wilko* in *Byrd*, the writing was on the wall. The Court obviously no longer believed that arbitrators were incompetent to understand complicated legal claims like securities claims. Nevertheless, *Wilko* was standing in the way of the expansion of arbitration. It had to go.

a. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*

The issue in *Mitsubishi Motors* was whether claims arising under U.S. antitrust laws and "encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction" were arbitrable under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention").[129]

The dispute arose between a Japanese car manufacturer and one of its dealers in Puerto Rico. The sales agreement provided for the arbitration of

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124. *Id.* at 216-17. The "doctrine of intertwining" was the approach used by several circuits to deny arbitration of the arbitrable claims and try all the claims together in federal court. The doctrine was used "when arbitrable and nonarbitrable claims [arose] out of the same transaction, and [were] sufficiently intertwined factually and legally." *Id.*

125. *Id.* at 215-16.

126. *Id.* at 217.

127. *Byrd*, 470 U.S. at 219.

128. *Id.* at 219-20.

129. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616 (1985).

"all disputes, controversies or differences which may arise . . . out of or in relation to . . . the Agreement or for the breach thereof."[130] As a result, the Japanese manufacturer brought an action to compel arbitration. The dealer counterclaimed with claims under the U.S. antitrust laws. Prior to this case, courts had followed the Second Circuit's opinion[131] that, in accordance with *Wilko*, claims under U.S. antitrust laws were "of a character inappropriate for enforcement by arbitration."[132] Nevertheless, the district court ordered arbitration based on its belief that *Scherk* required arbitration because of the international character of the dispute.[133] The First Circuit Court of appeals reversed, in part, holding the antitrust claims were not subject to arbitration.[134]

The Supreme Court decided all of the claims — even the antitrust claims — were arbitrable. In so ruling, the Court emphasized there is nothing in the FAA implying a "presumption against arbitration of statutory claims."[135] Instead, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[135] When a court finds the parties intended to arbitrate a statutory claim, a court should examine the applicable statute to determine whether Congress intended to prohibit arbitration. The Court noted:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.[137]

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130. *Id.* at 617.

131. *See* American Safety Equip. Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2nd Cir. 1968).

132. *Mitsubishi Motors*, 473 U.S. at 621.

133. *Id.*

134. *Id.* at 623.

135. *Id.* at 625.

136. *Id.* at 626.

137. *Id.* at 628. Interestingly, the Court cited *Wilko* to support its conclusions, although the Court acknowledged the outdated hostility towards arbitration expressed in *Wilko*. *Id.* at 626-27 ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.").

The implication is that broad arbitration agreements will, after *Mitsubishi Motors*, be deemed to include statutory claims unless those agreements expressly exclude statutory claims from their scope, or unless Congress has expressly prohibited arbitration of those claims in the relevant statute or legislative history. Nevertheless, the Court in this case justified its decision to compel arbitration based on the holding in *Scherk*. That is, the international nature of the dispute compelled enforcement of the arbitration agreement as a forum selection clause.[138] Thus, once again, *Wilko* was not overruled.

b. *Shearson/American Express, Inc. v. McMahon*

The holding in *Wilko* took another hit with the release of the Supreme Court's opinion in *Shearson/American Express v. McMahon*.[139] Once again, securities brokers sought to compel arbitration of customers' claims made under the Securities Exchange Act (SEA).[140] The brokers also sought to arbitrate claims filed by the customers under the Racketeer Influenced and Corrupt Organizations Act (RICO).[141] In holding both the SEA and the RICO claims arbitrable, the Court reinforced the use of its two-step analysis to determine the arbitrability of disputes.[142]

The first analysis performed by the Court was to determine whether the scope of the arbitration agreement was meant to include the statutory claims at issue.[143] Since the agreements provided for the arbitration of "any controversy arising out of or relating to" the accounts, transactions or the agreement itself, the claims fell within the scope of the agreement.[144]

The second, more difficult question was whether Congress intended to exempt claims under the SEA or RICO from the FAA. The task of finding the claims exempted was made more difficult by the Court's holding in *Wilko* that the Securities Act prohibited arbitration because it voided agreements

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138. *Mitsubishi Motors*, 473 U.S. at 630:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id. at 629.

139. *McMahon*, 482 U.S. at 220 (1987).

140. *Id.* at 223.

141. *Id.*

142. *Id.*

143. *Id.* at 226 (stating the "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights").

144. *Id.* at 223.

waiving obligations under that statute. The SEA contained a similar prohibition on "waiver."[145]

The Court nevertheless held in *McMahon* that arbitration of claims under the SEA was permitted and not prohibited by Congress because the "waiver" only applied to *obligations* arising under the SEA, and not the *jurisdiction* of the federal courts.[146] As such, the parties were permitted to agree to adjudicate disputes over SEA obligations in an arbitration proceeding and were not required to use the federal courts to resolve those disputes.[147]

But how did the Court get around the holding in *Wilko* that the analogous waiver provision in the Securities Act *did* prohibit arbitration? First, the Court noted the holding in *Wilko*:

> can only be understood in the context of the Court's ensuing discussion explaining why arbitration was inadequate as a means of enforcing 'the provisions of the Securities Act, advantageous to the buyer.' The conclusion in *Wilko* was expressly based on the Court's belief that a judicial forum was needed to protect the substantive legal rights created by the Securities Act.[148]

At the time *Wilko* was decided, "the plaintiff's waiver of the 'right to select the judicial forum' was unenforceable only because arbitration was judged inadequate to enforce the statutory" obligations created under the Securities Act.[149]

Next, with *Wilko*'s "context" in mind, the Court launched into a discussion about how much the perception towards arbitration had changed since 1953. The Court acknowledged "it is difficult to reconcile *Wilko*'s mistrust of the arbitral process with the Court's subsequent decisions involving the Arbi-

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145. "Section 29(a) of the Exchange Act declares void 'any condition, stipulation, or provision binding any person to waive compliance with any provision of the Act.' " *McMahon*, 482 U.S. at 227 (citing 15 U.S.C. § 78cc(a)).

146. *Id.* at 228-29. Specifically, the Court stated:

> What the anti-waiver provision of § 29(a) forbids is enforcement of agreements to waive "compliance" with the provisions of the statute. But § 27 [the jurisdiction provision] itself does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under § 29(a).

Id.

147. *Id.*

148. *Id.* at 228 (citing *Wilko*, 346 U.S. at 435).

149. *Id.* at 228-29 (citing *Wilko*, 346 U.S. at 435).

tration Act."[150] First, courts generally recognized that arbitrators are competent to handle complex factual and legal issues without direction or instruction from the court.[151] Second, arbitration procedures had been "streamlined" to the extent that courts no longer fear that arbitration unfairly limits substantive rights of claimants.[152] Finally, judicial review of arbitration awards, while limited, were still sufficient to ensure that arbitrators comply with the law.[153] These were all reasons relied on in *Wilko* that the Court in *McMahon* believed were no longer relevant. In sum, "even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority."[154]

While *McMahon* did not expressly overrule *Wilko*, the stage was now set for *Wilko*'s demise.

c. *Rodriguez de Quijas v. Shearson/American Express, Inc.*

Just two years after *McMahon*, the question inevitably arose whether agreements to arbitrate claims under the Securities Act would now be permitted. That is, would *Wilko* hold up against a direct challenge? The case of *Rodriguez de Quijas* involved claims by customers against their brokers under both the Securities Act and the Securities Exchange Act.[155] The Supreme Court granted certiorari after the Fifth Circuit decided all claims were arbitrable because decisions subsequent had reduced the *Wilko* holding to "obsolescence."[156]

The Court agreed with the Fifth Circuit that *Wilko* was, indeed, obsolete. Finally, after almost forty years, the Court overruled *Wilko* and set the stage for the expanded use of arbitration.[157] In overruling *Wilko*, the Court acknowl-

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150. *McMahon*, 482 U.S. at 231-32.

151. *Id.* at 229.

152. *Id.*

153. *Id.*

154. *Id.* at 233.

155. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 478-79 (1989).

156. *Id.* at 479 (citing Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1299 (5th Cir. 1988)).

157. While the Supreme Court agreed *Wilko* should be overruled, it cautioned the courts of appeals to leave it to the Court to make that pronouncement. *Id.* at 484. "We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* After this brief lecture, the Court, in the next sentence states: "We now conclude that *Wilko* was incorrectly de-

edged it was "not obviously correct" in its interpretation that the Securities Act prohibited waiver of a judicial forum.[158] Relying on the reasoning in *McMahon*, the Court noted that *Wilko*'s reasoning may have been justified at one time, given the context in 1953. However, "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[159]

In addition, "it also would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side."[160] To leave both decisions intact would create confusion and inconsistency in precedent. After all, the "waiver" provision construed in the SEA in *McMahon* is "in every respect the same as that in" the Securities Act.[161] Thus, the inconsistency between *McMahon* and *Wilko* "is at odds with the principle that the 1933 and 1934 Acts should be construed harmoniously."[162]

6. The Third Trilogy — The 1990s

Wilko was the mountain preventing expansion of the arbitration expressway. Overruling *Wilko* left the road wide open for the further development of arbitration to resolve disputes. As a result, a trilogy of cases in the 1990's (the Third Trilogy) continued to recognize and enforce a strong "federal policy favoring arbitration."[163]

a. *Gilmer v. Interstate/Johnson Lane Corp.*

Beginning with *Gilmer v. Interstate/Johnson Lane Corp.*,[164] the Court began to clarify some of the unanswered questions left by its previously inconsistent arbitration policy. The arbitration clause in *Gilmer* was contained in a securities brokers application for registration with the New York Stock Ex-

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cided . . . ." *Id.*

158. *Id.* at 480.
159. *Rodriquez de Quijas*, 490 U.S. at 481.
160. *Id.* at 484.
161. *Id.* at 482.
162. *Id.* at 484.
163. *McMahon*, 482 U.S. at 226 (1987).
164. 500 U.S. 20 (1991).

change.[165] When, at the age of 62, the broker was fired, he filed claim with the EEOC, and then filed suit claiming violations of the Age Discrimination in Employment Act (ADEA).[166] The employer argued the ADEA claim was subject to arbitration, and the Supreme Court agreed.

While it was clear that the scope of the arbitration clause was broad enough to encompass the ADEA claim, and there was nothing in the text or legislative history to indicate Congress had intended to exempt ADEA claims from arbitration, the broker argued there was an inherent conflict between arbitration the purpose of the ADEA which prohibited making those claims subject to compulsory arbitration.[167] The Court, however, disagreed with this argument.

First, EEOC's administration of the ADEA would not be hindered, in the Court's opinion, by the enforcement of agreements to arbitrate ADEA claims.[168] The employee was not prevented from filing a charge with the EEOC and the EEOC could still investigate on its own, even in the absence of a claim by the employee.[169] Moreover, "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes."[170]

Second, the ADEA does not guarantee a judicial forum[171] and the procedures available in an arbitration forum are sufficient to provide relief. For example, the extent of discovery allowed in an arbitration setting provides an adequate means for the plaintiff to develop his case.[172] There is no evidence that an ADEA claim is so much more complicated than other types of claims that arbitration would be inadequate.[173] In addition, the Court noted that arbitrators have the power to grant equitable relief and are required to issue written opinions. Thus, the types of relief and review contemplated in the ADEA

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165. *Id.* at 23. The application contained a clause whereby the broker "'agreed to arbitrate any dispute, claim or controversy' arising between him and [his employer] 'that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register.' " *Id.* A NYSE rule required arbitration of employment disputes. *Id.*

166. *Id.*

167. *Id.* at 26-27. Gilmer conceded that nothing in the text of the ADEA or its legislative history explicitly precluded arbitration. *Id.*

168. *Id.* at 28.

169. *Id.* at 28-29.

170. *Gilmer*, 500 U.S. at 28.

171. *Id.* "So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 614).

172. *Id.* at 31.

173. *Id.*

are still available in an arbitration forum.[174] Finally, the Court rejected that notion that arbitrators would be biased and noted that the NYSE's arbitration rules provided protections in the unusual circumstance where a plaintiff believed bias to be an issue.[175]

The *Gilmer* Court reviewed the major complaints and concerns that had been voiced by those opposed to arbitration, and that had been raised in the lower courts. Of all the U.S. Supreme Court arbitration cases, *Gilmer* is perhaps the seminal case heralding a new era for arbitration. The Court's decision in *Gilmer* closed almost all of the loopholes that had been used to avoid enforcement of arbitration agreements and made clear that arbitration agreements between businesses and individuals are readily enforceable. The Court's next opinion closed another loophole with its broad construction of the language of the FAA and further expanded the horizons for arbitration agreements.

b. *Allied-Bruce Terminix Cos., Inc. v. Dobson*

Since the Court's decision in *Southland Corp. v. Keating*,[176] state arbitration laws in conflict with the FAA were meant to be preempted by the federal law. Yet, in the eleven years since that decision, several state courts navigated around *Southland Corp.*[177] by construing the language of the FAA narrowly, avoiding conflict and thereby avoiding preemption of the state law.[178] Under that narrow construction of the FAA, the parties to the contract must have contemplated a connection between their contract and interstate commerce.[179] But under a broader reading of the FAA, a contract is arbitrable if it involves interstate commerce in fact. The parties' "contemplations," under the broader construction, are irrelevant.[180]

In light of the FAA's stated purpose to end the hostility towards arbitration agreements and to put them on the same footing with other contracts, the

174. *Id.* at 31-32.

175. *Id.* at 30.

176. 465 U.S. 1 (1984).

177. The Dobsons, with the support of 20 attorneys general requested in this case that the Court overrule *Southland Corp.* The Court refused. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 272.

178. *Id.* at 269.

179. *Id.* at 278.

180. *Id.*

Court held the broader construction of the statute was the correct construction.[181] Before making its determination, the Court closely examined the language of the FAA which governs "a contract evidencing a transaction involving commerce."[182] First, the Court construed the words "involving commerce" to mean "affecting commerce."[183] This was evidence, in the Court's eyes, that Congress intended to exercise expansive powers over arbitration contracts.[184] Next, the Court construed the language "evidencing a transaction" such that a contract involving interstate commerce *in fact* was sufficient to "evidence a transaction" governed by the FAA.[185]

With evidence of congressional intent to extend federal power over contracts affecting interstate commerce, the Court had no trouble finding the FAA governed this contract between a nationwide termite company and Alabama homeowners.[186] Moreover, because the FAA conflicted with the Alabama statute that would have invalidated the arbitration clause, the Alabama law was preempted by the FAA.[187] The U.S. Supreme had now resolved any further doubts about the ultimate reach of the FAA in governing arbitration agreements and signaled a further advancement in the use of arbitration agreements between businesses and consumers.

c. *Doctor's Associates, Inc. v. Casarotto*

Any doubt that remained about the Court's resolve to support the holding in *Southland Corp.* was extinguished with the 1996 decision in *Doctor's Associates v. Casarotto.*[188] The Court remanded *Casarotto* for reconsideration after issuing its opinion in *Dobson.*[189] Nevertheless, the Montana Supreme Court affirmed its previous decision that a Montana statute, which required a specific type of notice on arbitration contracts, was not preempted by the FAA.[190]

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181. *Id.* at 271-73.

182. *Id.* at 273.

183. *Dobson*, 513 U.S. at 273.

184. *Id.* at 273-75.

185. *Id.* at 277-78. "[W]e conclude that the first interpretation ("commerce in fact") is more faithful to the statute than the second ("contemplation of the parties")." *Id.*

186. *Id.* at 281-82. In fact, the parties did not contest the fact that the transaction, "in fact, involved interstate commerce." *Id.* at 282.

187. *Id.* at 269-70.

188. 517 U.S. 681 (1996).

189. 515 U.S. 1129 (1995).

190. *Casarotto*, 517 U.S. at 684. The statute stated, "[n]otice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration." *Id.*

Once again, the Court disagreed with the state court. The argument in this case was not over the tenuousness of the interstate commerce connection (as in *Dobson*), but rather the fact that Montana's statute singled out arbitration contracts from other contracts.[191] Under the FAA, arbitration contracts must be placed on the same footing with all other contracts.[192] Thus, Montana's statute conflicted with the FAA and was preempted.[193] Another loophole was successfully closed.

III. WHERE ARE WE NOW?

The opinions over the last decade, as indicated by the Third Trilogy, have only strengthened the enforceability of arbitration contracts under the FAA. These cases have made clear that arbitration is an acceptable, and perhaps preferable, way for parties to choose and use to have their disputes resolved. The Supreme Court upheld arbitration agreements between businesses and customers, employers and employees, and corporations and individuals. The war over the availability and use of arbitration was over, and arbitration prevailed with the real winners being the parties who select arbitration instead of litigation to resolve their disputes.

Arbitration contracts of all types of agreements and involving all types of parties are being readily enforced with the reliability of other contracts. As a result, arbitration clauses in all types of contracts are becoming more and more common, but, not without challenges. The attacks have changed in their focus. The attacks can no longer claim arbitration is disfavored or a bad idea, or un-American. Federal and state courts have followed the precedent and lead of the U.S. Supreme Court and recognized that arbitration can be used by parties to replace lawsuits. The attacks now focus on the procedural details of the available arbitration process to ensure its fairness to all parties. Two cases in the last few years present examples of the ways businesses are using

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191. *Id.* at 687 (holding the special notice requirement is generally not applicable to contracts).

192. *Id.* "By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' " *Id.*

193. *Id.* "Montana's [statute] directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.*

arbitration contracts today, and the Supreme Court's view on whether those uses are legitimate.

A. *The New Millennium — Arbitration Continues to Expand*

1. *Green Tree Financial Corp. v. Randolph*

The case of *Green Tree Financial Corp. v. Randolph*[194] involved consumer claims under the Truth in Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA"). Previous cases had also dealt with individuals who were not sophisticated users of litigation or arbitration. The consumer party in this case agreed to an adhesion contract drafted by a large financial company. The arbitration agreement challenged by the consumer was contained in her mobile home financing agreement.[195] The consumer alleged that agreement was, in itself, a violation of her rights under the ECOA because she could not afford to pursue arbitration and therefore was prohibited from pursuing her statutory rights under the TILA.[196] Randolph claimed TILA violations relating to excessive finance charges.[197]

The first issue the Court had to face was whether the district court's order compelling arbitration was a final order and therefore immediately appealable.[198] Section 16 of the FAA contained two provisions that may have governed this issue. On the one hand, no appeal could be taken from an interlocutory order compelling arbitration.[199] On the other hand, an appeal *could* be taken from "a final decision with respect to an arbitration that is subject to [the FAA]."[200] The Court reasoned that the decision "end[ed] the litigation on the merits and [left] nothing more the court to do but execute the

194. 531 U.S. 79 (2000).

195. *Id.* at 83. The agreement provided "that all disputes arising from, or relating to, the contracts, whether arising under case law or statutory law, would be resolved by binding arbitration." *Id.*

196. *Id.*

197. *Id.* Randolph "brought the action on behalf of a similarly situated class." *Id.* The trial court denied Randolph's motion to certify a class. *Id.* Randolph argued to the Supreme Court that the arbitration agreement was unenforceable on the grounds that it precluded her from bringing her TILA claims as a class action. *Id.* at 86, n.7. The Court, however, refused to consider that argument because it had not been argued before the court of appeals. *Id.*

198. *Randolph,* 531 U.S. at 81-82. The district court had compelled arbitration and dismissed Randolph's claims, with prejudice. *Id.* at 82. The Eleventh Circuit held it had jurisdiction to review the order because that order was a "final decision" appealable under section 16 of the FAA. *Id.*

199. *Id.* at 83 (citing 9 U.S.C. § 16(b)(3)).

200. *Id.*

judgment."[201] Thus, the Court agreed with the Eleventh Circuit that the order compelling arbitration and dismissing all claims with prejudice was a "final decision" and was therefore immediately appealable.[202]

The second issue considered by the Court was whether the lack of reference to arbitration costs in the arbitration agreement precluded enforcement of the agreement.[203] Randolph argued the "risk" of prohibitive arbitration costs would force her to "forgo" her claims against Green Tree and therefore preclude her from "vindicating her federal statutory rights in the arbitral forum."[204] The Court agreed this was a danger.[205] However, Randolph failed to produce sufficient evidence of the costs she would actually incur in arbitrating her claims.[206] In fact, there was no evidence that she would have incurred any costs at all.[207] Based on this fact, the Court refused to invalidate the arbitration agreement. "The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."[208]

Whether or not an arbitration process is so prohibitively expensive, as a legal and practical matter, may only be readily proven after an arbitration, and not before. The arbitration agreement itself may require the business to pay all or most of the arbitration fees. Or the rules of the arbitration administrator may require the business to pay most of the costs, or allow an indigent consumer a waiver of fees. Justice Ginsburg, even in dissent, noted that models of fair fee allocation exist.

All of the Justices in the *Greentree* Court held that arbitration is a legitimate, acceptable method for businesses and consumers to resolve their differences. The importance of the *Greentree* decision extends far beyond what the Court directly held. Critics of arbitration attacked it as being unfair to parties to adhesion contracts, to consumers who have to do business with corpora-

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201. *Id.*

202. *Randolph*, 531 U.S at 83.

203. *Id.* at 84.

204. *Id.*

205. *Id.*

206. The Court re-emphasized the burden is on the party resisting arbitration to prove why arbitration is not appropriate. *Id.* Randolph produced no information to provide a "sufficient basis for concluding that [she] would in fact have incurred substantial costs in the event her claim went to arbitration." *Id.* at 85 n.6.

207. *Id.*

208. *Randolph*, 531 U.S. at 85.

tions, and to individuals who have a right to a civil jury trial lawsuit, and these challenges were advanced in the *Greentree* case. The Supreme Court's decision in *Greentree* rejects these attacks and challenges and recognizes that arbitration is readily enforceable if it is fair, affordable, and accessible.

2. *Circuit City Stores, Inc. v. Adams*

After *Randolph*, the Court granted certiorari on *Circuit City Stores, Inc. v. Adams*[209] to determine the scope of the FAA as it applies to contracts for employment. Specifically, section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or other class of workers engaged in foreign or interstate commerce."[210] Nine of the federal circuit courts of appeal construed this clause to exempt only employment contracts of transportation workers; the Ninth Circuit alone held the provision exempted all contracts of employment from arbitration under the Federal Arbitration Act.[211] The Supreme Court agreed with all the other circuits and disagreed with the Ninth, and narrowly construed the exemption in section 1 such that only transportation workers' contracts are exempt.[212]

The Court gave two primary reasons for its decision. First, the Court addressed Adams' argument that, under section 2 of the FAA, an employment contract was not a "contract evidencing a *transaction* involving interstate commerce."[213] According to Adams, the word "transaction" extended the FAA only to commercial contracts and therefore, the FAA did not apply to employment contracts.[214] The Court easily rejected this argument, noting "if all contracts are beyond the scope of the [FAA] under the section 2 coverage provision, the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce' would be pointless."[215]

Next, Adams compared the language "engaged in commerce" to the language "involving commerce" to argue that Congress intended to exempt all employment contracts "affecting commerce."[216] The Court also rejected this

209. 121 S. Ct. 1302 (2001).
210. 9 U.S.C. § 1.
211. *Adams*, 121 S. Ct. at 1306.
212. *Id.*
213. *Id.* at 1308.
214. *Id.*
215. *Id.*
216. *Id.* at 1308. Remember that, in *Dobson*, the Court construed "involving commerce" to mean "affecting commerce" and that meant Congress intended to exercise its commerce powers to their fullest extent. *See Dobson*, 513 U.S. at 273-75. Adams' argument, therefore, was that Congress intended to exempt all employment contracts "affecting commerce" -i.e., all employ-

argument, using the maxim *ejusdem generis*,[217] to restrict the meaning of the employment contract exemption. According to the Court:

> Unlike the "involving commerce" language in § 2, the words "any other class of workers engaged in . . . commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it . . . .[218]

According to the Court, Congress intended the exemption to include employment contracts of seamen, railroad workers and other transportation workers who, like seamen and railroad workers, are also "engaged in" commerce.

The Court went on to state that, even without *ejusdem generis*, "engaged in" commerce does not, on its face, mean the same thing as "affecting commerce" or "involved in commerce." Instead, "the specific phrase 'engaged in commerce' [is] understood to have a more limited reach."[219] Therefore, even were the phrase not a residual phrase, qualified by the specific references to seamen and railroad workers, on its face, the phrase does not show congressional intent to exercise the full reach of its power to exempt employment contracts from the FAA.[220]

In *Adams*, the Court once again construed the FAA such that more contracts, rather than fewer, fall within its scope. Instead of exempting all employment contracts from the reach of the FAA, the Court's construction of that Act exempts only the employment contracts of transportation workers.

3. *Equal Opportunity Commission v. Waffle House*

The Supreme Court in *Equal Opportunity Commission v. Waffle House*[221] examined whether the Equal Opportunity Commission could seek remedies against an employer where the employee signed an arbitration agreement with the employer. The Court decided that "yes" the EEOC could seek injunctive,

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ment contracts.

217. *Ejusdem Generis* is "the statutory cannon that 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.' " *Adams*, 121 S. Ct. at 1308-09.

218. *Id.* at 1308.

219. *Id.* at 1309.

220. *Id.*

221. 9 U.S.C. § 2.

monetary, and other relief against the employer even though the employee had agreed to arbitrate.[222]

The employer argued that the EEOC should not be able seek relief through litigation if the employer and employee had an enforceable agreement to arbitrate disputes between them. The EEOC, on the other hand, argued it had the statutory right to seek relief in court despite the existence of a private arbitration agreement. Circuit decisions were split on this issue.[223] The Fourth Circuit reached a compromise position and decided the EEOC had the power to seek injunctive relief in the public interest, but could not seek victim-specific relief for an employee.[224]

The Supreme Court found the EEOC had clear statutory authority to seek redress for patterns and practices of employment discrimination and held it could therefore bring cases in the public interest.[225] The Court based its decision on two primary factors. First, the EEOC brings suit in its own name and has complete mastery of the case; the employee has no independent cause of action and no control over the case.[226] Second, the EEOC was not a party to the arbitration agreement.[227] For these reasons, the Court determined that the Federal Arbitration Act did not preclude the EEOC from litigating these issues; the Court held the EEOC could seek all types of relief in public interest cases.[228]

Waffle House is harmonious with previous employment arbitration cases. Following its precedent in *Gilmer* and *Circuit City*,[229] the Supreme Court in Waffle House upheld the enforceability of the arbitration agreement between the employee and the employer. These decisions allow an employee to seek private remedies in arbitration if an enforceable arbitration agreement exists, and still allow the EEOC to choose to litigate, or presumably to join, an arbitration proceeding if the parties agree.

Waffle House did not decide related questions such as whether the EEOC could proceed with litigation if the employee had arbitrated previously or had settled an arbitration case.[230] The Court clearly stated it was only deciding a

222. 122 S. Ct. 754 (2002).
223. *Id.* at 765.
224. *Id.* at 759.
225. *Id.* at 762.
226. *Id.* at 765.
227. *Waffle House*, 122 S. Ct. at 763.
228. *Id.* at 764.
229. *Id.* at 765.
230. In February 2002, shortly after Waffle House was decided, the Ninth Circuit invalidated the arbitration agreement in *Circuit City* on grounds that it was unconscionable. Circuit City v. Adams, 279 F.3d 889, 896 (9th Cir. 2002).

very narrow issue, which may account for the 6 to 3 majority decision.[231]

Waffle House supports the continued use and expansion of arbitration by employers. For example, critics of arbitration point out that the use of arbitration clauses may eliminate the opportunity to seek class-wide relief via a class action. Now it is clear the EEOC can seek class relief in those situations where the public interest will be served. Individual employees can readily and effectively seek remedies for their individual claims in arbitration, and classes of employees can obtain relief through a lawsuit brought by the EEOC. This bifurcated approach makes for good social and public policies.

B. Arbitration is Here to Stay For Good

It took seventy-five years from the passage of the FAA for the United States to come to this point where arbitration is clearly favored and contracts to arbitrate are reliable and enforceable.[232] Judicial opinions over that time reflect the clear support of Congress, through the Federal Arbitration Act, and the United States Supreme Court, through all the Justices, of the expanded use and continued growth of arbitration as an accessible, affordable, and fair way to resolve disputes and provide civil justice relief for everyone in our society. Congress has not amended the FAA in any way which might limit or discourage the use of arbitration. The enactment of many federal laws providing parties with statutory causes of action and various forms of relief are allowed to be brought in arbitration.[233] In other ways Congress has encouraged the use of ADR methods, including arbitration and mediation, instead of litigation to resolve cases.[234]

The sixteen Supreme Court decisions explained in this section represent all the important arbitration cases since 1960. And all of these cases have resulted in opinions which promote, support, or expand the use of arbitration. Of the twenty-four different Justices who have been members of the Court over this period of time, all of them — all twenty-four — were members of

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231. *Waffle House*, 122 S. Ct. at 766. An employee cannot obtain double recovery, so it would seem that an employee could seek monetary relief in arbitration. However, the Court did not decide whether the EEOC could seek injunctive relief in court. *Id.*

232. *Id.*

233. Johnson v. W. Suburban Bank, 225 F.3d 266 (3d Cir. 2000); Stout v. Byrider, No. 99-3854, 2000 WL 1269402 at *7 (6th Cir., Sept. 8, 2000); Bette J. Roth, et al., *The Alternative Dispute Resolution Guide*, §§ 15.1 -15.13 (West Group 1999).

234. Federal Civil Justice Reform Act.

the majority upholding arbitration in at least one case during their tenure, and most of them were members of the majority a number of times.[235] In general, they all agreed that arbitration was a reasonable, enforceable method for many parties to resolve their disputes; in particular, some of them disagreed with the procedures under review in the particular cases.

Further, three of the more important decisions were decided by clear majorities: *Prima Paint* was a 1967, 6 to 3 decision; *Southland* was a 1984, 6 to 2 decision, with one justice concurring and dissenting in part; *Gilmer* was a 1991, 7 to 2 decision.[236] Even in the most recent consumer and employees cases, all the Justices currently on the Court supported the use of arbitration that was fair, affordable, and accessible.[237]

We conclude this part of the article with the clear and unmistakable message from the legislative and judicial branches that arbitration is, and will be, a significant part of our civil justice system and is a highly favored way to resolve disputes. We now begin an analysis of what the past means and our proposals for what should happen in the future.

IV. WHAT IS A FAIR, AFFORDABLE, AND ACCESSIBLE DISPUTE RESOLUTION SYSTEM?

Disputes are inevitable, or almost inevitable. Business relationships or consumer transactions between any two parties have the potential for controversies and disagreements. So many things can go wrong that some inevitably will, creating a controversy and the need for a fair, affordable, and accessible civil dispute resolution system.

This is the history of relationships and transactions between businesses, consumers and corporations, employers and employees, buyers and sellers, and virtually all other relationships. Our societal and law abiding reaction to these potential disputes has been and is to develop a resolution system which resolves these problems.[238] Our legal system defines many of the rights and duties parties have and governs the means used to resolve disputes.

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235. Chief Justices Warren, Burger, Rehnquist and Justices Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart, White, Goldberg, Fortas, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

236. *Id.* at nn.92, 176, and 188.

237. *See supra* notes 194 and 209.

238. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with Administration of Justice*, 29 ARIZ. A.B.A. ANN. REP. 395 (1906); Christine Lepera Jeannie Costello, *New Areas in ADR, in Alternative Dispute Resolution: What the Business Lawyer Needs to Know 1999*, PLI LITIG. & ADMIN. PRAC. 595 (1999).

In any effective dispute resolution system, a neutral decision maker must apply the law to the facts and decide a case on its merits, or, at least, that is the discernible goal that is to be achieved, unless something goes wrong. Participants in such a dispute resolution forums will have faith in, believe in the system, and accept the results if the process is fair. What are the essential elements of a fair dispute resolution system?

Centuries have elapsed since we began to craft a useful and acceptable system. Our predecessors discovered or created basic elements essential to a fair system. Decades of trial and error and years of failure and success have refined and developed these characteristics. Whether these elements were discovered or created by us, we have as a community of law abiding members come to believe that these elements of fairness are essential to the just resolution of our disputes.[239] We think of them as "due process," otherwise known as a party's bill of procedural rights.[240]

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239. *See* Martha A. Field, *Sources of Law: The Scope of Federal Compensation Law*, 99 HARV. L. REV. 881 (1986); David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT'L L. REV. 2, 14 (2001) (stating "due process safeguards must be incorporated into any viable ADR system such that a fair and equitable forum is provided for both the employer and employee"); *Resolving Employment Disputes: A Practical Guide*, *in* Alternative Dispute Resolution: What the Business Lawyer Needs to Know 1999, PLI LITIG. & ADMIN. PRAC. 141 (1999)(stating "due process safeguards are critical to any employment dispute resolution program because they ensure a fair and equitable forum for both employees and employers").

240. Edward C. Anderson, *The Forum Consumer Due Process Standard*, PLI CORP. L. & PRAC. 341 (1999). The National Arbitration Forum has adopted a Consumer Due Process Standard for dispute resolution. The standards are as follows:

> PRINCIPLE 1. FUNDAMENTALLY FAIR PROCESS — All parties to a dispute resolution process are entitled to fundamental fairness.
>
> PRINCIPLE 2. ACCESS TO INFORMATION — In agreeing to a dispute resolution process, the parties should have reasonable access to information about the process.
>
> PRINCIPLE 3. COMPETENT AND IMPARTIAL NEUTRALS — In any dispute resolution process, the Neutrals should be both competent and neutral.
>
> PRINCIPLE 4. INDEPENDENT ADMINISTRATION — The administration of a dispute resolution process should be independent of all parties.
>
> PRINCIPLE 5. CONTRACTS FOR DISPUTE RESOLUTION — An agreement to a dispute resolution process should conform to the principles of contract which apply to other agreements.
>
> PRINCIPLE 6. REASONABLE COST — The cost of any dispute resolution process should be commensurate with the claim.
>
> PRINCIPLE 7. REASONABLE TIME LIMITS — The dispute resolution process should yield reasonably prompt results.
>
> PRINCIPLE 8. RIGHT TO REPRESENTION — All parties should have the right to be represented in any dispute resolution process.

A. *What are the "Due Process" Elements?*

1. Reasonable Accessibility

Whatever system exists, the disputing parties need to have access to it.[241] Two primary aspects of accessibility are reasonably understandable procedures and realistic access.[242]

First, the dispute system needs to make sense to and be relatively understood by the parties. Two components of this element are understandable rules and usable procedures. If parties cannot figure out what to do, they are denied real access. If parties cannot effectively participate in the system, they are denied real results. Rules need to be composed which reflect the average level of understanding of the larger community. Procedures need to be developed that permit participation by those likely to be the participants.

Second, the parties must be able to access the system. They must be able to file documents, receive and distribute information, and attend or participate in a hearing. These activities may be accomplished through traditional delivery methods such as written papers and postal mail, or through modern methods such as electronic submissions and e-mail. Parties who want and want to

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PRINCIPLE 9. SETTLEMENT & MEDIATION — Resolution of disputes by the parties is generally the preferable dispute resolution process.

PRINCIPLE 10. HEARINGS — Dispute resolution hearings should be convenient, efficient, fair, and private.

PRINCIPLE 11. ACCESS TO INFORMATION — The parties to a dispute resolution process should have access to the information necessary to make a reasonable presentation to the Neutral.

PRINCIPLE 12. AWARDS AND REMEDIES — The remedies resulting from a dispute resolution process should conform to the law.

The complete Standard, with Comments, is available from the Forum at www.arb-forum.org or P.O. Box 50191, Minneapolis, MN 55405 Elements of basic fairness in arbitration administration include: (1) the selection of a neutral arbitrator who knows the law; (2) simple, adequate discovery; (3) cost-sharing; (4) an opportunity for representation; (5) availability of all legal remedies; (6) a written, reasoned award and opinion; and (7) judicial review of the award. Theodore St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 6 (1998).

241. *See How the Public Views The State Courts: A 1999 National Survey.* National Conference on Public Trust and Confidence in the Justice System (May 14, 1999) *at* <http://www.ncsc.dni.us/PTC/results.htm>; Supreme Court of Texas, Office of Court Administration and State Board of Texas, *Public Trust and Confidence in the courts and the Legal Profession in Texas Summary Report* 6 (1999); *Public Loses as Lawyers Block Access to Cheaper Legal Help*, USA TODAY, Feb. 19, 1999, at 14A (according to the American Bar Association, 100 million Americans are unable to access the courts because of high legal costs).

242. James W. Meeker & John Dombrick, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2281(1993); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994).

attend a hearing ought to be able to do so practically and conveniently. Parties should have a choice regarding the type of hearing they prefer as well a convenient location if they choose a traditional, in-person hearing. The type and location of a hearing are important enough to warrant their own element in paragraph nine that follows.

2. Reasonable Affordability

A system has to be affordable, and the degree of affordability needs to be proportional to the issues.[243] If people cannot afford to enter and use the system, it is of no use to them.[244] If only rich folks can have their disputes resolved, others will not tolerate the process nor respect the results. If indigent parties are precluded from pursuing a reasonable claim, the integrity of the system suffers. Affordability does not mean free, because a free system would wreak economic havoc by allowing people to make irrational economic decisions in seeking to resolve their disputes and in allowing them to impose involuntary process costs on their adversaries.

There must be a reasonable cost, a cost proportional to what is at stake.[245] This means that small disputes need to cost little and large disputes can cost more. The real costs will reflect the financial status of the general society, based on the average income, assets, and wealth of the available participants relative to the value of the issues. When more is at stake, more needs to be risked, so that the parties make rational, economic decisions when they decide to pursue, or not pursue, a claim or defense.

3. Choice of Representation

Parties ought to have a choice regarding who helps, assists, or represents

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243. Michael D. Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 37, 45 (1986); Jay Folberg, Joshua Rosenberg, Robert Barrett, *Use of ADR in California Courts: Findings & Proposals*, U.S.F. L. REV. 343 (1992).

244. *See* Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and For the Future*, 27 WM. MITCHELL L. REV. 745, 751 (2000); National Conference on Public Trust and Confidence in the Justice System, *How the Public Views the State Courts: A 1999 National Survey*, by the National Center for State Courts, funded by the Hearst Corporation *at* <http://www.ncsc.dni.us/PTC/results/report.htm>

245. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, Arbitration Now 25 (ABA 1999); Roper Starch Worldwide, Legal Dispute Study, September 1999, on behalf of the Institute for Advanced Dispute Resolution.

them in the system.[246] Parties should reasonably be able to represent themselves, depending upon the nature of the dispute; and parties should be able to decide to have someone help them, when necessary or when preferred. Traditionally, lawyers have played the role of professional advocate on behalf of clients, while others have also assisted parties.[247] No one profession or occupation ought to have a monopoly on representation.[248] Those who make themselves available to represent others need to have the knowledge and skills to be able to be an effective representer.

The abilities of a representer may vary with the simplicity or complexity of the dispute resolution system. Some cases will require a highly trained and skilled professional to represent parties. Other cases may permit the parties to effectively represent themselves. Rules should allow parties the choice of representing themselves or having someone help them, including a lawyer.[249] Informed parties should have the option to select help based on the abilities of the available representers, the type of case they have, the forum and tribunal procdures, and their right to knowingly choose whom they want to help them.

4. Exchange of Differences

When the dispute ripens, one or both parties may want or need a resolution. One party may want it more than other, or the other party may prefer to avoid a resolution. The system requires a complaining party to clearly notify the other party about the dispute. In other words, the complaining party is required to explain the dispute by disclosing who the other party or parties are, what is being complained about, and what relief is sought. Correspondingly, the defending party needs to disclose to the complaining party its defense and why it is not responsible, and whether it seeks something from the com-

246. Robert E. Meade, *Commercial Dispute Resolution Procedures*, PLI CORP. L. & PRAC. 65 (1999); Nicole Buonocore, *Resurrecting A Dead Horse—Arbitrator Certification as a Means to Achieve Diversity*, U. DET. MERCY L. REV. 483 (1999).

247. Stafford Henderson Byers, *Delivering Indigents' Right to Counsel While Respecting Lawyers' Right to Their Profession: A System "Between a Rock and a Hard Place"*, ST. JOHN'S J. OF L. COMM., 491 (1999); Howard A. Matalon, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, B.U. L. REV. 545 (1991).

248. *See* Michael Pryles, *Assessing Dispute Resolution Procedures*, AM. REV. OF INT'L ARB. 75 (1996); Jill Schachner Chanen, *Pumping up Small Claims: Reformers Seek $20K Court Limits -with No Lawyers*, A.B.A. J., Dec. 1998, 18.

249. Marcus J. Lock, *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, U. COLO. L. REV. 459 (2001); Gillian K. Hadfield, *The Price of Law: How the Market For Lawyers Distorts the Justice System*, MICH. L. REV., 953 (2000).

plaining party. These exchanges are known as claims, responses, and counterclaims. It is not possible for a party to defend a case unless they know what it is they are defending against. It is not realistic for a party to pursue a claim unless they know if the other side is right or wrong.

These exchanges are typically served on one another by a method of notice that assures that each party receives the documents. The type of required service depends upon the nature of the dispute. A case should not proceed unless it is clear that both parties know what is happening when.

5. Opportunity to Disclose and Discover Factual Information before a Hearing

There are several levels and types of factual information a party may want to or need to know before he hearing. The previous element subsection discussed the element of knowing each other's claim or defense, which is contained and exchanged in claim and response documents. Other bits of information in possession of the other side are: (a) helpful factual information (b) negative factual information, and (c) information the contents of which is unknown to the requesting party.

As to helpful information, it can be quite useful for a party to disgorge helpful information from the other party. Getting this information before a hearing helps prepare for the hearing, may encourage settlement, and avoids time being wasted at the hearing.[250] And so, this type of essential information ought to be sought and available. One party ought to be able to ask to other party for it and receive it, all before the hearing.[251]

As to negative information, it also can be very useful for a party to learn about negative information. Getting this information before the hearing helps plan a rebuttal, avoids a surprise, and can provide the decision maker with a reasonable explanation, diluting the negative nature of the information.

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250. Steven A. Weiss, *ADR: A Litigator's Prospective*, BUS. L. TODAY 33 (1999). Advantages to ADR include developing a specific plan regarding discovery and procedures. The parties can agree to specific discovery and timelines, exchanges of witness lists and exhibits, and other aspects of arbitration. While courts will sometimes allow the parties to comment on procedural issues, parties usually do not reach such agreements in traditional litigation, and some judges will not allow intrusion into what the judge feels is the court's prerogative. *Id.*

251. *See* ROGER S. HAYDOCK, DAVID F. HERR, & JEFFREY W. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION, ch. 1 (1999); James R. Holbrook and Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, J. CONTEMP. L. 18 (1995).

Whether this information ought to be disclosed is usually not critical. A party is very likely to know about it, and even if they do not, they can usually reasonably respond to it during the hearing. However, a party can ask for it before a hearing and may be able to receive it.

As to the unknown, this x-file information is usually not obtainable. If it is neither helpful nor harmful factual information, then it may be of little consequence. If the information relates to legal matters, or privileged matters, or strategies and tactics, then it ought not to be disclosed.

6. Neutral, Impartial, and Knowledgeable Decision Maker

It is an elementary element of fairness that the person who is to decide the merits of a case should not have any conflicts of interest nor actual biases and prejudices against a party.[252] Otherwise, the decision may be unduly influenced by factors other than the facts and law. A system that dos not require the decision maker to be fair and impartial cannot produce respectable and enforceable decisions.[253]

A dispute resolution system typically has two divisions of work: one is clerical, and the other is decisional. Administrative clerks routinely have contacts with parties, demand and accepts fee payments from them, listen to their administrative complaints, allow ex parte questions, answer their procedural questions, and may develop an appropriate working relationship with them, especially if they have a lot of disputes. Decision makers — including judges and arbitrators — develop a different and more distant relationship with the parties, and necessarily so. Parties need only to be able to contact decision makers when the decision maker needs to obtain information from them, and then not on an ex parte basis. Parties to a dispute are not customers or clients of any administrator or decision maker; rather they are users of a dispute resolution system and must be treated the same under the rules.

This element requiring neutral, impartial decision makers can be enforced by allowing a party to challenge a decision maker for cause, that is by offering facts which show that the decision has some actual bias or prejudice and is not impartial.[254] A neutral who is disqualified can be replaced by someone who is qualified. Mere allegations or general assertions of partiality

252. David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT'L L. REV. 2, 15 (2001); Adam Furlan Gislason, *Demystifying ADR Nuetral Regulation in Minnesota*, 83 MINN. L. REV. 1839 (1999).

253. *See* Robert Donald Fischer & Roger S. Haydock, 21 WM. MITCHELL L. REV. 941, 964 (1996); Holbrook & Gray, *supra* note 251, at 9-10.

254. *See* 9 U.S.C. § 5 (1994)(defining the procedure of the court upon failure of the arbitrator selection process). *See also* Weiss, *supra* note 250, at 32.

or bias is ordinarily not enough to disqualify a decision maker;[255] otherwise a party who wants to avoid the hearing or who is otherwise recalcitrant could unduly delay the process and unfairly increase costs for all.[256] The integrity of the decision needs to be balanced with the realities of having neutral, independent decision makers appointed. Parties are not practically able to select their decision maker; rather, they are entitled to a neutral, independent decision maker.

The third component of this element relates to the knowledge of the neutral. Parties want and need a wise decision maker, wise about the applicable law, knowledgeable about the procedures, and experienced in making difficult decisions.[257] These qualities make it unnecessary for a party to have to educate a decision maker, except about the facts. A decision maker needs to base a decision on the merits of the case. It is the responsibility of the parties to introduce relevant and reliable facts. It is the responsibilities of the neutral to listen to the facts, screen them for relevancy and reliability, determine credibility, conduct he hearing, understand the procedures and the rules, know and apply the law, and reach a decision. This person needs to be quite knowledgeable, and often is a lawyer trained and experienced in these responsibilities.

7. Opportunity to Prepare for Hearing

This element includes sufficient time to prepare for the hearing and

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255. The following courts have rejected the notion that parties can avoid arbitration by making allegations of bias prior to the arbitration taking place: *Gilmer*, 500 U.S. at 30-32 (1991); *Alter v. Englander*, 901 F. Supp. 151, 154 (S.D.N.Y. 1995); *Pompano-Windy City Partners, Ltd. v. Bear, Stearns & Co., Inc.*, 698 F. Supp. 504 (S.D.N.Y. 1988); *Valdiviezo v. Phelps Dodge*, 995 F. Supp. 1060 (D. Ariz. 1997); *Copen Associates, Inc. v. Dan River, Inc.*, 385 N.Y.S.2d 557 (N.Y. App. Div. 1976).

256. *Gilmer*, 500 U.S. at 30. The Gilmer Court stated an alleged 'bias' of the arbitration administrator will not prevent an arbitration provided an effective selection process is in place. *Id.* The court went on to hold that anti-bias provisions negated an allegation that the arbitration administrator would provide biased arbitrators: (1) The parties were informed of the employment histories of the arbitrators and could make further inquiry into their backgrounds; (2) Each party was allowed one peremptory challenge and unlimited challenges for cause; (3) The arbitrators were required to disclose any conflict that would not allow them to render an objective and impartial determination; and (4) The Federal Arbitration Act protected against bias by allowing parties to overturn arbitration decisions for evident partiality or corruption. *Id.*

257. *See* JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 1, (1997); David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT'L L. REV. 2, 14 (2001).

enough advance notice of the time of the hearing.[258] These timing components allow a party to be prepared for the hearing. Insufficient notice and time denies parties this opportunity. Similarly, a hearing scheduled too far in the future diminishes the memories of the parties and witnesses. A timely, prompt hearing, with adequate notice, satisfies this element. Parties may prefer to delay a hearing while they conduct essential discovery or make an effort to settle a case, on their own or through a mediator.

8. Opportunity to Obtain Procedural Remedies

The parties to the dispute may need the assistance of the decision maker before the final hearing. Disputes about the rules, procedures, or process may arise, and the help of a neutral expert is necessary.[259] This element is satisfied if the parties have a reasonable opportunity to request relief or seek an order from the decision maker regarding these matters. Sufficient reasons need to exist in support of the relief or order, to avoid a party from unfairly using these procedures to the disadvantage of the other side. Remedies a party may need include amendments to claims and responses; the consolidation or severance of parties, issues, or cases; discovery disputes; the need for a continuance; motions to dismiss for various reasons; and other remedies.

9. Reasonably Convenient Hearing Type and Location

A responsive dispute resolution system can have a variety of types of hearings available for the parties. Today there at least four types of potential hearings, or combination of hearings: (a) document, (b) telephone, (c) on-line, and (d) participatory.[260] Parties participate in a document hearing by submitting everything they want or need to the decision maker in writing for review and consideration. Telephone hearings involve the parties presenting evidence

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258. Haydock, *supra* note 250; Michael Pryles, *Assessing Dispute Resolution Procedures*, AM. REV. INT'L ARB. 274 (1996).

259. *See* David F. Herr & Roger S. Haydock, Discovery Practice Introduction, Ch. 3 (2000); Linda S. Mulleniz, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1408-1414 (1994); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525, 531-32 (1998); HERR, MOTION PRACTICE, Intro., Ch. 1-2 (2000); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632-34 (1994).

260. *See* David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT'L L. REV. 2, 19-20 (2001) (stating the telephone, cyberspace and video conferencing provide efficient mediums to conduct mediation); National Arbitration Forum Code of Procedure, Rules 25 and 26, *at* <www.arb-forum.com>.

and arguments in a telephone conference call with the decision maker. Parties participate in an on-line hearing through e-mail and private chat room communications with each other and the decision maker. A participatory hearing has the parties appearing in person before the arbitrator, similar to a court trial. The system can allow the parties to choose from among these types of hearings.[261]

The location of the participatory hearing needs to be reasonably convenient for the parties. In a business dispute, the businesses have the resources to appear at a location that has a reasonable connection to the dispute. In a consumer dispute, the consumer can appear in the community where they live or work. The exact location depends upon the circumstances of the case and the reasonableness of the location in light of the circumstances of the parties involved.

A corollary issue involves the recording of the hearing. A hearing need not be recorded if the role of the decision maker is to hear and decide the facts and apply the law to decide the merits of the case. The parties should have the option of having a hearing recorded if they prefer.

The hearing should be scheduled for a date and time certain, when all the parties, representatives, witnesses, and other participants are available and when the decision has set aside the time. The hearing can then start on schedule, without wasting time and resources, and can end on schedule, without unnecessary delays.

10. Appear and Present Evidence

This element can be satisfied in all of the various types of hearings, and it must be so. Each party must have an equal opportunity to present its case.[262] The key element is choice: one party may choose a participatory hearing and the other party may choose to appear by telephone. Both sides had the opportunity to appear in person, but one party prefers to appear by phone.

The opportunity to fully present a case involves a party being able to subpoena witnesses to the hearing, if needed, and requiring the disclosure and

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261. Judicial Arbitration Mediation Services, Rule 17, *at* <www.jamsadr.com>; Christine Lepera Jeannie Costello, *New Areas in ADR, in* Alternative Dispute Resolution: What the Business Lawyer Needs to Know 1999, PLI Litig. & Admin. Practice 602 (1999).

262. Roger S. Haydock & John O. Sonsteng, Trial: Advocacy Before Judges, Jurors, and Arbitrators, Ch. 2 (1999).

introduction of documents and exhibits. The opportunity to introduce evidence involves a party being able to examine supportive, unfavorable, and neutral witnesses under oath through direct and cross-examinations.

These elements reflect the adversarial nature of the hearing process and the burden on the parties to present the merits of their case. The decision maker is not, in this system, an active or activist participant in the introduction or development of the facts. That is the task of the parties, or their representatives.

11. Present Law, Explanations, and Argument

Parties should also have the option of presenting information about the law, an explanation of the circumstances of the case, and any relevant argument they believe informative to the decision maker. The parties may choose not to introduce legal explanations by way of argument or memorandum, but they should have the chance to do so. In a global sense, the parties ought to have a full and equal opportunity to say what they want to the decision maker, tempered by the factors of relevance, reasonableness, and time.[263]

12. Receive an Understandable Award

After the hearing is all over, the decision maker should decide the case and issue a prompt, understandable award. It can be short as long as it states who won and lost and what was won or lost. It can include findings of facts, conclusions of law, or a detailed explanation, if the parties request those details. The decision maker ought to be bound by the substantive law, and prevented from exercising unbounded discretion.[264] Requiring the decision maker to follow the law results in more predictable and reasonable decisions. And, a fair dispute resolution system wants and needs predictable and foreseeable results.

13. Opportunity to Appeal Award if Wrong or Wrongly Decided

The requirement that the decision maker follow the law readily permits an appeal or challenge from the decision to a judge or panel of judges who can review the legal issues de novo and determine if the decision was right or wrong about the applicable law.[265] The factual findings of the decision maker

263. *Id.* at chapter 3; HAYDOCK, *supra* note 251, Book 4.

264. *See Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

265. 9 U.S.C. § 15; *Uniform Arbitration Act*, § 11 (2000).

should be upheld unless the determination violates the law because the decision maker was present to hear the witnesses, determine credibility, accept the evidence, and interpret the facts, and the appellate panel was not. The appeal of the legal issues acts as a check on wayward decision makers who may intentionally or negligently fail to follow the law. This review also makes for a more predictable and reasonable basis for future decisions in similar cases. The relief an appeal may provide includes affirming, vacating or modifying the result and remanding the case to the decision maker.

14. Enforcing the Decision

It is critical that the winning party to a decision that has not been challenged or that is upheld on appeal be able to enforce it.[266] A decision that mandates that the losing party pay the winning party money needs to be enforced if the losing party refuses or fails to pay. The winner needs to be able to go the jurisdiction where the losing party has resources and enforce the decision as a civil judgment. Decisions that are not enforceable after having been wrought through an entire dispute resolution system renders that system unworkable and useless.

15. Reasonably Prompt and Responsive Process

This entire process must be reasonably fast. Common disputes ought to be resolved within a matter of months.[267] A prompt, responsive system keeps costs down, processes cases while the facts are still fresh in the memories of the participants, and results in a process parties prefer. A process that takes too long deprives many parties of any useful result. In some cases, decisions may need to be made within weeks to provide the parties with the relief they need. A procedure needs to be able to provide timely — and perhaps prompt and immediate final — decisions to meet the individual or business interests of the parties.

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266. Enforcement of any arbitration award requires confirmation of the award by a court. *See* 9 U.S.C. § 9 (1994); Daniel D. Demer & Roger S. Haydock, *Confirming an Arbitration-Award*, 23 WM. MITCHELL L. REV. 879, 881-883 (1997).

267. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, ARB. NOW 23 (ABA 1999).

16. Goal: Fair Process and Result, Win or Lose

The goal of a fair, due process based dispute resolution system is this: after it is all over, the losing party says, however grudgingly: "It hurts to lose, but it was a fair hearing, and I'd do it again in the future." A winning party is likely to be pleased with both the process and the results, or at least accept them more willingly, or at least complain less. The ultimate objective is to get the losing party to accept defeat and praise, or at least, recognize the process and result as fair.[268] The elements of the system described in this section help achieve that noble purpose.

B. How to Implement a Dispute Resolution System

Is there an existing system that has these essential due process elements? Is there a procedure that provides for full and fair hearings and just results? Is there a forum that provides parties with access to justice? Did you think we would have written this much this far if we did not have an answer for you? And we anticipate that you already know or surmise the answer: it is an arbitration system with judicial review.

An arbitral forum has all the basic due process fairness elements to provide parties with the hearing of their dreams, well, almost. The judicial forum has the additional power and authority to review arbitral awards, so dreams and not nightmares come true, and can enforce arbitration awards so winning parties can pay for their dreams. The reason we thought you might have already divined this system is that is reflects what currently is available throughout the world, and maybe in other galaxies. This system has developed, on its own, sort of, to provide parties and the public with what is needed to maintain and foster a civil and civilized society.

It appears, in theory, that there are three primary civil dispute resolution systems available: purely public, more public than private, and more private than public.[269] They are generically labeled: judicial, administrative, and arbitral. Public laws (a mix of constitutional, statutory, and natural laws) have created the civil judicial system which is largely operated by public figures. Public laws have also created administrative law proceedings which have relied on or reflected private law proceedings. Both public and private laws

268. ROGER S. HAYDOCK et al., LAWYERING: PRACTICE AND PLANNING 109-23 (1996).

269. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, UCLA L. REV. 949 (2000); Alfred C. Aman, Jr., *The Globalizing State: A Future-Orientated Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 783 (1998): *First Global Research Facility Dedicated to ADR Launched*, 54 DISP. RESOL. J. 4 (1999).

have fashioned the arbitral system, with its mix of private decision makers regulated by public laws.

Actually, in reality, all three systems share a blend of public and private proceedings, rules, and law. A comparison of judicial and arbitral systems supports this notion. The judicial system is commonly thought to be a public system, with public rules, public decision makers, and public results. Yet, about 95% of the time, or more, critical stages of judicial cases are not publicly conducted nor resolved.[270] Private law regulates the vast majority of civil judicial disputes.

Parties do not have to use the judicial system to gain results. They can and do most frequently resolve disputes by settling the case before any lawsuit is filed. Further, litigants who have invoked the system almost always choose to not have their dispute resolved by a public judge or jury. The reality is that litigants usually settle their case secretly with the help of their private lawyers who primarily represent them. The lawyers broker dispute resolution deals outside the judicial forum, and occasionally inside with the help of a judge or public mediator who encourages or fosters the settlement. The parties agree to confidential terms the details of which the public never sees. The settlement terms and amounts are secret and protected by a confidentiality agreement, the public breach of which can void the settlement.

Judges commonly approve these settlements by signing a dismissal order prepared by the lawyers, and may only get occasionally directly involved in cases involving minors, injunctive relief, and lots of parties. The settlement talks occur in private offices or through confidential correspondence. The results of the settlement are never made public nor reviewed by a judge. A growing number of these settlements are brokered by private mediators, re-

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270. Anne-Therese Bechamps, *Sealed Out-Of-Court Settlements: When Does the Public Have a Right to Know?* NOTRE DAME L. REV. 117 (1990); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 77 (1997) (stating that 90 to 95% of filed cases settle); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) (noting that one study suggests that of all cases filed, only 2.9% go to trial); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Marc Galanter & Mia Cahill, *"Most Cases Settle:" Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. L. STUDIES 135 (1993)(stating that 95% of filed cases settle); Donald G. Gifford & David J. Nye, *Litigation Trends in Florida: Saga of a Growth State*, 39 U. FLA. L. REV. 829 (1987)(noting a below two percent trial rate in Florida in 1979-1985).

tained by the parties when the lawyers are unable to begin or close the deal.[271] This is the reality of the current lawsuit system, used by all parties and countenanced by the public court system.

The reasons why rational parties choose this method of dispute resolution rather than going to trial and having a judge or jury decide the case have been explained in detail elsewhere.[272] Many parties may prefer some control over their destiny rather than the unpredictability, expense, and time of a jury trial verdict; other parties may settle judicial cases because they cannot afford the excessive costs and wasted time resulting from litigation; others much prefer to avoid the painful litigation and trial process; and still others are influenced by these and other factors.[273] For whatever reasons, the idea that the public judicial system resolves disputes for parties is wrong and the conclusion that public judges and jurors regularly help all or most litigating parties is inaccurate.[274] Parties with purely or largely private disputes rely on and help themselves, with the assistance of lawyers.

There are cases where and when the public judicial system actively works. Judicial cases involving public, constitutional, or societal issues can be and usually are resolved by a judge or jury. Administrative cases involving similar issues that transcend individual parties and affect many segments of community are ideal ways to have these socially significant cases resolved. Further, the government can and often is the prosecuting party seeking to establish or vindicate the rights of its federal, state, or local residents. Governmental administrative agencies can initiate these cases and represent the interests of many. Attorneys general can similarly bring judicial and administrative proceedings seeking relief for classes of people. This process works very well in America and is emulated in many other developed countries.

Other problems may interfere with the public justice system being able

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271. Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 4-5 (1992); John Dwight Ingram, *Why Aren't More Cases Settled?*, 45 S.D. L. REV. 94, 95-96 (2000).

272. Richard M. Calkins, *Mediation: The Gentler Way*, S.D. L. REV. 277 (1996); E. Patrick McDermott, *Survey of 92 Key Companies Using ADR to Settle Employment Disputes*, DISP. RES. J. 8 (1995); Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, OH. ST. J. DISP. RESOL. 865 (1998).

273. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, OH. ST. J. DISP. RESOL. 831 (1998); Samuel R. Gross & Kent D. Syverue, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, UCLA L. REV. (1996).

274. B. Ostrom & N. Kauder, *Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project*, National Center for State Courts 14 (1995) (comprehensive studies indicate a jury resolves less than 1.2% of filed civil lawsuits).

to do what some proponents prefer.[275] Public judges have the responsibility to resolve criminal, juvenile, and family law cases which reflect serious public issues. The limited resources available for the judiciary require judges to focus on their more significant duties. Even if they wanted to, they cannot resolve those cases largely involving private contract, tort, and property disputes with parties seeking money as compensation. So, either the judicial system is not really designed to deal with these issues on a regular and continuing basis or cannot do so. There are other and better ways to resolve these disputes.

C. A Private and Public Dispute Resolution Partnership

Parties ought to have two primary choices: how their dispute is resolved and who resolves their dispute. An effective system develops a fee schedule and rules to provide informed parties with a realistic opportunity to make a choice. A system that costs a lot of money to participate in, takes way too long to reach a final decision, requires help from a monopolistic profession, and may include unpredictable and inadequately knowledgeable decision makers, has to be avoided. It can only serve the rich and those that can wait a long time for results which they can afford to appeal and wait even longer.

The how and the who of dispute resolution should be decided by disputing parties. Some parties will want to settle their cases on their own, and they will need access to a system so they can threaten to use it if the other party does not want to voluntarily settle. Other parties will prefer to retain a lawyer to settle before or after pursuing a claim. Still other parties will want to have their dispute resolved by a neutral, wise decision maker and do not want to settle the case. They do not want to compromise but prefer to have an impartial, knowledgeable decision maker decide their case, win or lose. A fair, accessible, and responsive system needs to provide parties with real, available choices they can afford to pay for and participate in.

A way to make this systematically happen is to further develop the partnership between public and private dispute resolution systems.[276] This partner-

275. Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 109-10 (1994).

276. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, UCLA L. REV. 949 (2000); Edward J. Costello, Jr., *ADR: Virtue or Vice?*, DISP. RES. J. 62 (1999).

ship can and should have the following features, which reflect the essential due process elements explained previously:

1. Enforceability

The results of a dispute resolution system need to be enforceable so the winning party can really prevail and the losing party must accept consequences. Presently, a private arbitration award is enforceable by being converted into a civil judgment with the winning party confirming the arbitration results into a judicial judgment in any court with jurisdiction, and this judgment is the same as and enforceable as a civil judgment directly emanating from an original judicial action.[277] The Federal Arbitration Act, the current Uniform Arbitration Act, and state arbitration acts all provide this procedure.[278] This process can continue.

2. Accountability

An effective system holds the arbitrator accountable for the award. The best way to accomplish this goal is to require that the arbitrator apply and follow the applicable substantive law in deciding the arbitration case.[279] This requires the arbitrator, or a member of the arbitration panel, to be lawyer, that is, someone trained to be able to discern, understand, and apply the applicable law. This also requires that the award be reviewable or appealable to make sure that arbitrator has followed the law, and this requires that a judge be available to review de novo the legal decision reached by the arbitrator.[280] This can be accomplished when the winning party seeks to confirm the arbitration award into a judicial judgment. The judge could determine that the award appears to be supported by the law.[281] If there is uncertainty, the losing

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277. Daniel D. Derner & Roger S. Haydock, *Confirming an Arbitraion Award*, 23 WM. MITCHELL L. REV. 879, 881-83 (1997).

278. Enforcement of any arbitration award requires confirmation of the award by a court. See 9 U.S.C. § 9 (1994); Uniform Arbitration Act § 11.

279. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, TULANE L. REV., 39 (1999); National Arbitration Forum, *A Comparison of Arbitration Rules and Practices* (presented at the 2000 mid-year meeting of the ABA Business Law Section, Jan. 2000), *available at* <http://www.arb-forum.com> (the Forum's arbitrators are required to apply applicable substantive law).

280. *See Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Stifel, Nicolaus & Co., Inc. v. Francis*, 872 S.W.2d 484 (Mo. Ct. App. 1994); *Faherty v. Faherty*, 477 A. 2d 1257 (N.J. 1984).

281. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468-69 (D.C. Cir. 1997) (regarding cases of contracts to arbitrate statutory claims, the court stated it had "assumed that arbitra-

party can seek to vacate or modify the award arguing the arbitrator failed to follow the law.[282] The reviewing judge then determines whether the arbitrator was right or wrong, under the law. In cases where one of the parties believes the judge may be incorrect, an appeal is available to an appellate court so that a panel of three judges can determine the proper, applicable legal decision.

This process replaces the "manifest disregard of justice" standards courts have used to review arbitrator awards.[283] If the arbitration agreement or arbitration code of procedure requires the arbitrator to follow the law, arbitrators must comply with is requirement or otherwise exceed their power and authority.[284] A standard of review for arbitration awards is whether the arbitrators has exceeded their power or authority. If they have, the reviewing judge can correct this error and decide the case on the applicable law. Courts no longer have to defer to the legal judgment of the arbitrator.

These procedures supply an appellate review to arbitration awards. Some parties may choose not to have courts review the legal propriety of the arbitrator's decision by selecting arbitration rules that do not require an arbitrator

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tion awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law"); *Metropolitan Waste Control Comm'n. v. City of Minnetonka*, 242 N.W.2d 830 (Minn. 1976).

282. The grounds upon which the court can vacate an award are: (1) Where the award was procured by corruption, fraud, or undue means; (2) Where there was evident partiality or corruption in the arbitrators, or either of them; (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cuase shown or in refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced; or (4) Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a) (1994). The Uniform Arbitration Act provides for similar restrictions on vacating awards. Uniform Arbitration Act § 11.

283. The following courts ultimately created the "manifest disregard of the law" standard: *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990); *Marshall v. Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991) and *Montes v. Shearson, Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997). The FAA also provides remedies for claims of arbitral unfairness. *See* 9 U.S.C. §§ 10, 11 (1994).

284. *See* U.S.C. § 10(a)(4) (empowering the court to act "[w]here the arbitrators exceeded their powers.") However, the powers of the arbitrators are defined by the arbitration agreement. *See Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989). Furthermore, if arbitrators have broad powers, the court's review is limited. *See, e.g., United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

to follow the law. Parties who want the security that comes with another level of enforceability can agree to an appellate system.

3. Accessibility

The public/private partnership needs to be accessible to parties. And it is and can be readily available. The applicable procedural laws permit parties and their chosen representatives access to the public courts to review and approve arbitration awards issued by private arbitrators. This legal framework forms the basis for the public/private partnership.[285]

4. Affordability

This public/private system retains the advantages of a low cost arbitration system and a low cost appeal system. The parties can use the arbitration process to obtain an award and have available the public judicial system for those cases in which one of the parties believes the expert arbitrator has significantly failed to follow the law. These dual forums become much more affordable because of the lower costs associated with arbitration hearing procedures and the lower costs of fewer and selected judicial appeals.[286]

5. Predictability

A rational, fair dispute resolution system involves predictable results, and a private/public arbitration/judicial system provides that necessary level of predictability. The law affords parties, arbitrators, and judges with the basis for determining what the legal results ought to be. Precedent — what the law has been and is — coupled with the availability of judges to apply and interpret the applicable law — reviewability — make predictability predictable.

D. Meeting Private and Public Needs and Interests

Does this public/private system meet the public interest needs of our societal community? Does this arbitration/judicial system meet the private needs of the parties involved in the dispute? We think so. This integrated public and

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285. Re, *supra* note 275, 15 109-10.

286. *See* LEWIS MALTBY, PRIVATE JUSTICE: EMPLOYMENT ARBITRATION AND CIVIL RIGHTS, IN ARBITRATION NOW 23 (ABA Section of Dispute Resolution eds. 1999); Roper Starch Worldwide, Inc., *Legal Dispute Study* (Sept. 1999), *available at* <http://www.arb-forum.com>in the Forum library.

private system substantially promotes good things and significantly eliminates bad things:

A Rational, reasonable process . . . that eliminates excessive costs. People with disputes can choose to have them decided instead of compromised. Disputants can rationally decide on economic reasons to bring a claim or assert a defense and know they can have an expert arbitration and a reviewing judge decide who is right or wrong. Parties no longer have to face or incur excessive costs to have their day in private/public court.

An accessible, responsive system . . . that avoids excessive delays. Parties can become involved in an available, understandable system. They have prompt access to dispute resolution results. They do not have to wait years and endure seemingly endless delays for justice.

An available, populist process . . . that reduces excessive cases. Individuals can bring and defend their own claims, can assert their rights, can seek the relief for themselves. Large, cumbersome cases which substantially benefit lawyers are no longer needed. Consumers, employees, and individuals can obtain what they deserve, without having it substantially reduced by lawyer fees, administrative costs, and distributions to many who do not care. Effective class actions which seek effective results for all can continue to be brought in judicial forums by governmental, administrative, and regulatory agencies with the assistance of private lawyers. Groups of parties can be also be brought in arbitral forums by agreement of the parties. An evolutionary public/private system can return to Americans a civil justice process for all, and not just the monied or those who can afford or have access to lawyers.

Wise decision makers . . . who avoid unpredictable, improper decisions. Parties to a dispute need to have faith and trust in their decision makers. Parties expect — and demand — that decisions be based on the merits of a case, and not on emotions, irrational ideas, or biases. Arbitrators and judges and jurors can provide this procedures. Under existing law, jurors can determine whether enforceable arbitration/judicial agreements exists.[287] Arbitrators can decide who is wins and who loses a case. Judges can decide whether the jurors and arbitrators are legally correct. Not perfect, but a fair, affordable, and accessible system for all.

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287. 9 U.S.C. § 4.

E. The Future Arbitration/Judicial Review Partnership

Can this integrated private/public civil justice system continue to fulfill its promises? It can and will. In this system, private neutral experts and arbitrators join forces with judicial judges to provide a fair, affordable, and accessible system. Arbitrators serve as de facto private magistrates to the public judges who review their work.

A purely pubic system cannot meet the demands imposed by civil monetary disputes between private parties. The trial of criminal cases by public judges does and ought to take preference. The costs to the public to develop and maintain a dispute system to resolve civil monetary disputes is well beyond the means of taxpayers. The private businesses that have or are involved in these civil disputes can pay for access to a system for individuals they are doing business with, including consumers, employees, and customers. The federal, state, and local governments have much more critical needs to provide and pay for with limited governmental resources. Education, housing, and medical care are among the more essential goods and services the government needs to male available to all Americans.

Those of us involved as professionals in dispute resolution forums need to listen to and respond to the needs and interests of the public that does not use such a system. Dispute resolution practitioners and commentators can easily come to the belief that a civil monetary dispute system is the most important thing that a government needs to provide. For most Americans, it is not. It is important and essential and vital to a prosperous and democratic America and it must be monitored by public judges, as it has been and is. But it need not be and is not exclusively a purely governmental function. The answer lies with a private/public partnership.

ADR experts need to listen to judges, court administrators, and those who review our judicial system. Public judges, no matter how hard they work, always have had and will have caseloads that prevent them from spending the time and attention necessary to try the hundreds of thousands of civil disputes that occur. Private arbitrators can relieve public judges of this excessive work and allow the public judges the time and energy to review, when necessary, arbitration procedures and awards.

ADR professionals also need to listen as well to parties who have or may have disputes. They deserve and desire a fair, affordable, accessible, and responsive dispute resolution process. We should not provide them with expensive, lengthy, and complex processes and results. We have an opportunity to continue to develop a nationwide private/public dispute resolution model that meets the goals and objectives developed by the law and explained in this article. We can all accomplish all this by working together and develop-

ing an accessible and effective private/public civil justice system now and for the future.