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Judicial Policing of Consumer Arbitration

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As legend has it, Mae West¹ once cooed instructively to a troop of mid-century American GIs that, “Too much of a good thing . . . is wonderful.”² Ms. West was probably not talking about arbitration.

There is a good deal of arbitration going on now, or at least a large number of contracts in which the arbitration of potential disputes is a requirement. One rapidly growing application of arbitration is in standard forms issued by businesses and subscribed to by consumers. Too much of this good thing may not be so wonderful.

“Adhesive” consumer arbitration agreements pose questions that go beyond the problems of adhesion contracting generally. They may well reside beyond the reach of the conventional tools the law wields against the products of unequal contracting knowledge or unequal bargaining power. Crafting new tools to deal with this growing reality may be among the more significant challenges the law will face in the near-term future of ADR.

This essay describes why standard-form consumer arbitration requirements may be particularly troublesome. Despite its superficial neutrality, arbitration between individual consumers and business entities may be systematically more favorable to the business entities. The rules of arbitration law, however, inhibit effective judicial policing of the consequences of those inequalities. The federal sources of arbitration law further diminish the ability of state-based contract law to police the more subtle abuses. The result is a particularly difficult jurisprudential problem with a specially weakened legal solution. This essay offers, in very general terms, a framework for thinking about this problem, focusing on the role of judicial oversight in a world of privatized dispute resolution.

Two preliminary points deserve mention: Why this matters, and why it may be useful to discuss the problem in this way.

Mostly A Matter of Principle

1. Ms. West was a playwright and actress who, in her own words, “[climbed] the ladder of success wrong by wrong.” M. Jefferson, *Revisions*, New York Times, Feb. 7, 2000 at B2.

2. This and the quotations that introduce the following sections of this essay are from Joseph Weintraub, *The Wit and Wisdom of Mae West* (1967).

"If you put your foot in it, be sure it's your best foot."

The judiciary in the United States has long been the police force of the nation's economic traffic. Though more vigilant in some eras than in others, courts have always been places where fouls can be called, and where the rules of the traffic can be expressed. For the most part, participants in economic traffic may go anywhere they wish, and courts will respect whatever bargains they strike. Judicial policing is normally limited to helping things move smoothly and to refereeing the aftermath of the collisions when they occur. The law of contracts is applied principally to serve these goals.

Some bargains, however, are simply not allowed. Examples include agreements that violate the rights or the safety of an outsider to the bargain, contracts requiring acts that would contravene positive law, and private agreements whose enforcement would embarrass the judicial function itself. In addition to these easily identifiable occasions for judicial proscription there is another, broader class of transactions in which the myth of contractual assent is both false and has been unfairly exploited. These deals are called unconscionable, and under that broad label courts are allowed to find that a combination of unfair substance and unfair process has gone outside the bounds of allowable exchange.

It is important to recognize the juridical philosophy that underlies unconscionability in particular. The idea of contractual agreement in most consumer traffic is mostly a myth, albeit an essential one. It is a myth because the unequal distribution of opportunities and the unequal imposition of needs results in little but Hobson's choices in much of the economic activity in which individuals engage. The legal terms in consumer contracts are almost never agreed-to, in the sense of having been tailored to meet a consumer's preferences. That is as it has to be. Incurring the manifold costs of individualized bargains would in most instances be economically intolerable.

Yet the myth is essential even though it is false. The political floor joists of the entire economic system are built on the premise that exchange results from voluntary choice. The premise must be observed, for to deny it would leave a vacuum that only public economic management could fill, and to most Americans that would be politically intolerable.

Judicial policing of the substance of bargains can therefore occur only along the periphery, where substantive unfairness results from a too-obvious exploitation of the realities of contractual "assent." Unconscionability and its related doctrines are flexible tools useful for policing such embarrassments of the contractual myth. Wielding that kind of scrutiny over private deals is a vital and traditional part of the judicial role. Contractually mandated consumer

arbitration makes that traditional judicial job harder if not impossible for the courts to do.

In consumer contracts the decision to arbitrate is almost never the subject of an explicit bargain. Whether an arbitration provision will be included in the deal is virtually always the option of the business entity which, it may be presumed, has analyzed the situation and determined that the attributes of arbitration will operate on the whole in its favor. Most important, however, is the fact that an arbitration provision differs fundamentally from every other term in an agreement. Arbitration is not just another element of the exchange. It creates the mechanism by which the other terms of the exchange are to be policed. Rather than having a neutral police force impose the rules of the road on everyone, a private venue chosen by an economically superior party imposes a police force chosen precisely because it is known to do its job in ways more favorable than conventional litigation does for those traffickers who chose it.

In a society full of unavoidable economic inequalities, an “agreed-to” form of private adjudication may tend to be a product (if not a provider) of those same inequalities. This is, in the argot, a double whammy. Market inequalities that lead to the privatizing of adjudication are thus fundamentally different from market inequalities that lead to other kinds of unbalanced deals. This is the threat posed by the growth of contractual arbitration in consumer transactions. This is why it matters.

The approach in this essay is mostly one of legal theory. Ideally the analysis of a problem like this begins with an empirical assessment: How widespread is contractually mandated arbitration in consumer markets? How pervasive (or inescapable) is it in the markets for necessary goods and essential services such as health care, banking, and employment? Have the results of arbitration’s use in fact been adverse to consumers, as that might be measured by comparing arbitration outcomes with the outcomes that would have obtained had there been no mandatory arbitration? Unfortunately, these kinds of data are generally not available, except as collections of anecdotes. That gap in our knowledge creates a risk if not just a weakness. The weakness is that what may be just a philosophical preference cannot be tested by hard evidence. The risk is that by not knowing how deeply the problem cuts, it may be but an empty task to explore its solutions.

A theoretical discussion is nevertheless worthwhile, for two reasons. For one, there is persistent anecdotal information suggesting that the phenomenon of mandatory arbitration in consumer markets is widespread. It has been im-

possible to assess its consequences because the outcomes of arbitrations are generally inaccessible. For that reason alone the results of arbitrated disputes³ cannot be compared with the outcomes of non-arbitrated disputes on a rigorously controlled basis.⁴ However, a theoretical description of arbitration's asymmetries, combined with a reasonable if anecdotal assessment of its pervasiveness, suggests that the adverse effects of those asymmetries are, while not quantifiable, real enough to be cause for concern. Moreover, it is not necessary to establish that every consumer is adversely affected in every transaction. Even if only a minority of consumers are affected in a minority of their transactions, the scale of the problem may still be sufficient to call for a remedy that would police, but not proscribe, arbitration provisions in those contracts. We do not forgo preventing robberies, for example, just because in the absence of policing only a minority of the population would ever be robbed.

The second reason for a theoretical approach lies in the nature of the problem itself. Some values are important to preserve even when it is not possible to demonstrate their empirical significance. Much of the law of judicial due process rests on sheer principle, not on any demonstration that any particular encroachment leads to measurable adverse outcomes. Likewise for equal protection, the jury system, judicially-crafted protections under the Fourth and Fifth Amendments, and other aspects of our law that describe how a judiciary should behave in American society. Perhaps these values are only preferences; but if so, they are preferences that are widely held and historically durable. They are the same kind of values as those implicated in the mandatory arbitration problem, a problem that addresses the very scope of the judicial function. The rules of trafficking should not in any degree be those of just one class of traffickers, even if no biased outcome could ever be proven. This is very much a matter of principle, the meaning of which is not entirely empirical.

The Asymmetries of Arbitration

3. The word "disputes" is important. It is one thing to compare an arbitration award with a judicial order in similar cases. But it is not a very frequent thing. The portion of all disputes that are ever adjudicated, in either regime, is trivially small. What matters more is how the framework, within which other strategies of resolution take place, affects those other strategies. The proper comparison would therefore be that between a group of transactions governed by arbitration and a group of similar transactions not so governed. This comparison is vastly more ambitious than is the less useful study of arbitration awards and judicial orders.

4. While it has been possible to do that with court-annexed arbitration programs, those results cannot be extrapolated to the private market, where such forms of investigation are simply unavailable.

When I'm good I'm very, very good. But when I'm bad I'm better.

Anatol France is reported to have observed that “the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges”⁵ Consumer arbitration is something like that. Arbitration per se seems even-handed enough, until we notice how its apparently fair and intrinsic features have systematically different effects on systematically different people. For example, in arbitration discovery is sharply limited—an advantage to those who have information the other party needs, and a disadvantage to those who need information the other party has. That imbalance might be unobjectionable if neither party knew in advance which of those positions they would later be in. But they do know. In employment disputes, health care disputes, securities claims, and in most kinds of product- or service-related disputes, consumers tend strongly to be the ones who need the information the business has, and much less so the other way around. The seemingly symmetrical rule may have a systematically unsymmetrical result.

Another common feature of arbitration is the absence of appeal, and of any other realistic ways to correct errors of fact or law. Again, both sides to any arbitration are subject to the same risk of a decision by an arbitrator that is not just wrong, but unjust and harmful, and inescapable. The difference is that a party who is involved over time in many arbitrations on similar matters may be as likely to be the beneficiary of those errors as to be their victim. In a large pool of cases the average of the outcomes may be quite acceptable, even if one is seriously and wrongly adverse. For a party who participates once in a lifetime, however, in a matter of great significance (e.g. health care coverage, or employment, or a major money-loss claim), one error is a very different sort of thing. Again, the advantage seems to go to the businesses, and against the consumers.

Other features are more subtle and their effects less certain to occur, but to the extent they have any adverse effects at all, the asymmetries seem to go the same way. Businesses and consumers have unequal access to information about the propensities of particular arbitrators, even when the parties have equal rights to strike and select. There is the much suspected but not yet proven “repeat player” problem, in which for-profit arbitrators may see a

5. J. Bartlett, *Familiar Quotations* 550 (16th ed. 1992)

business entity before them today as a source of repeat business tomorrow, but see the consumer as a one-timer. Arbitration proceeds without a jury, removing a factor believed to be sympathetic to individuals. Arbitrations are private, which may affect in very different ways the “threat” value of a formal claim. Even arbitration’s lowered cost is not a consumer-friendly feature in most cases. It is true that a lower cost to process a claim can reduce the threshold for low-value cases, but when the consumer is a claimant their attorney is often paid a contingent fee, resulting in no difference in legal costs between arbitration and litigation. The advantage of informality and lowered cost goes mostly to parties who pay their lawyers by the hour. In most cases that party is the business.

None of this is to say that arbitration is inherently evil. In particular instances arbitration may have advantages for individual consumers that outweigh these asymmetries, or even that outweigh, in any one case, the advantages the business might gain from using the procedure. There is nothing to carp about, then, if the choice to arbitrate is made freely and with sufficient information about these and other kinds of effects. Unfortunately, that is not what usually happens. The choice to arbitrate is made unilaterally by the drafter of the standard form, whom we can assume did not select arbitration for its fairness, but for its advantage. Businesses are more likely than consumers to be able to set the legal terms of the deal. They are also at least as able to ascertain how the chosen dispute-resolution system will work for them. The result may be a superficially fair but systematically lopsided system designated as the sole venue for disputes arising from any other part of the deal. In this way the inequalities of the marketplace can extend their effects to the very system by which the behavior of the marketplace will be policed. This is a problem unlike the more familiar effects of those inequalities.

The Rules of Arbitration

“It isn’t what I do but how I do it . . .”

The United States Supreme Court has surrounded arbitration with the legal equivalent of a Papal Bull. Section 2 of the Federal Arbitration Act sets the foundation:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or

in equity for the revocation of any contract.⁶

The “saving clause” is particularly important. No court may decline to enforce an agreement to arbitrate, unless the grounds for refusing enforcement are grounds applicable to all contracts generally. A court—or a state through its legislature—may not apply rules or policies that are restrictive of arbitration agreements in particular. While an agreement to arbitrate might be set aside on familiar grounds of fraud or duress or the like, state policies that subject arbitration agreements uniquely to higher or different standards are not allowed.⁷

The protections go even deeper. For instance, if there is a claim of fraud in the inducement of the contract, under most ordinary circumstances (and under all circumstances in which the arbitration clause was drafted expansively enough), the claim of fraud is not heard in court, but in the arbitration itself, by the arbitrator appointed pursuant to the same contract whose fraudulent inducement the consumer is complaining about.⁸

Most important, perhaps, is that the United States Supreme Court has more than once heard—and rejected—arguments that arbitration is intrinsically or effectively unfair or inferior to conventional litigation. Arbitration, the Court has held, is not inferior to litigation; it is just different. Even in disputes between employees and employers, or for claims in such sensitive areas as statutorily-prohibited discrimination, the Supreme Court has decreed there is nothing inherently wrong with arbitration.⁹

The Rules of Common Law Contracts

“It ain’t no sin if you crack a few laws now and then, just so long as you don’t break any.”

6. 9 U.S.C. § 2 (West 1999) (emphasis added).

7. See *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995) (denying the validity of Alabama’s state law limiting consumer arbitration).

8. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967). Under the “separability” doctrine if the claim of fraud goes to the inducement of the arbitration agreement alone, it can be heard by the court. But if the alleged fraud, or any other invalidating cause, affects the entire contract, then under the terms of the typical arbitration clause the claim of fraud is itself arbitrable, meaning that the courts will not hear the claim.

9. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

Particular abuses can always be spotted. Courts have refused to enforce arbitration agreements that require consumers to travel to another state to attend a hearing, agreements that impose up-front fees that are disproportionate to the amount at issue,¹⁰ agreements that are imposed on consumers under conditions of obvious personal distress¹¹ or in which the requirement of arbitration is hidden, and agreements that provide for selection of the arbitrators by one side only.¹² These kinds of patent abuses can be readily addressed by the existing rules of duress and fraud and unconscionability. These, however, are not the problem. The more subtle asymmetries are the unbalanced effects that inhere in arbitration not when it is shaped abusively, but when it is shaped in its most traditional and facially neutral way. This is the more difficult problem, which may reside beyond the reach of the existing legal tools.

Unconscionability is a flexible tool, but it is not infinitely elastic. The conventional understanding of the doctrine is that it is multi-dimensional. To find that a contract is unconscionable, and to decline to enforce it, in most states the court must be able to find two defects. These two dimensions of the rule are often referred to as “procedural” and “substantive” unconscionability. Procedural unconscionability refers to defects in the bargaining process, such as “take-it-or-leave-it” deals executed when there is no other meaningful choice. Substantive unconscionability refers to excessive imbalance or harshness in the exchange itself, such as “add-on” repossession clauses, waivers of defenses, or confessions of judgment (now proscribed by statute.)

In any but the most extreme cases, neither substantive nor procedural defects alone will be sufficient to deny enforceability to the contract. This is not an unreasonable conclusion. There are good reasons for standardized agreements, and good reason not to disallow agreements just because they are standardized. They result in essential economies, without which the costs of doing business would be severe. If “take-it-or-leave-it” were by itself sufficient grounds to deny enforcement, virtually every consumer contract would be unenforceable. Likewise, an unbalanced exchange alone cannot be enough, for

10. See *e.g. Patterson v. ITT Corp.*, 14 Cal. App. 4th 1669 (1993).

11. See *e.g. Broemmer v. Abortion Services of Phoenix*, 840 P.2d 1013 (Ariz. 1992).

12. See *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999), holding the agreement to arbitrate unenforceable because “Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.” The arbitration provision in the employment agreement created a system in which the business established rules of procedure patently onerous to the claimant, and a panel selection process that restricted two of the three arbitrators to a panel of names selected in advance by the business. See also *Duffield v. Robertson-Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1997); and *Randolph v. Greentree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999).

Contracts law has since its beginning adopted the view that the equivalency of the parties' exchange will not be second-guessed by the courts.

When both elements are found together, however, the contract may be put aside. The legal difficulty now is obvious: under the normal take-it-or-leave-it conditions of consumer bargaining, the Supreme Court's determination that arbitration is not inherently inferior effectively precludes a finding of unconscionability in all cases in which the arbitration called for is not patently unfair or explicitly skewed in some pro-business way. Good old fashioned fraudulent bargaining can be found and interdicted, but policing exploitations of the intrinsic imbalances is put beyond the law's reach. Getting around this constraint has taken some real judicial ingenuity,¹³ if not disingenuousness.

Options for Enhanced Judicial Scrutiny

"Between two evils, I always pick the one I never tried before."

Contractual arbitration has become a house pet of the federal judiciary, a useful tool for the business sector, a privatization of what have traditionally been public functions, and an unprovable and unquantifiable decrement in the legal rights of consumers. What's a responsible judiciary to do?

There is as yet no clear solution. While the purpose of this essay has been to describe a challenge that ADR must face as it continues its evolution in the new millennium, it is appropriate at least to sketch a few additional ideas, if only to try on some of the avenues that might be helpful. The task, again, is to equip the judiciary with effective tools for policing the more subtle exploitations available to the users of arbitration in consumer contracts. This is not to replace the present rules of fraud, duress and unconscionability so far as they are already able to address the patently abusive. Rather, the objective is to extend the judiciary's reach, so that problems created not by the

13. This is precisely what happened in *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903 (Cal. 1997), in which the California courts were furious about how the defendant had unfairly manipulated the mandatory arbitration, but were able to set the contract aside only by fastening onto the fortuity of an overt fraudulent misrepresentation made at the time of contracting. The facts that allowed the agreement to be set aside were unique and unlikely ever to recur.

abusive but by the intrinsic might come under closer scrutiny. The following are a few suggestions:

Establish State-law Rules Allowing Judges to Apply Stricter Scrutiny to Consumer Arbitration. This would be the most direct approach, but for all practical purposes it remains unavailable. The Federal Arbitration Act is federal law. It pre-empts all state laws that are inconsistent with it. Relying on Section 2 of the FAA, the United States Supreme Court has held more than once that efforts by the states, legislative or judicial, to limit the enforceability of arbitration agreements in any way, is just such an inconsistency. The Court struck down Alabama's attempt to enact a judicial policy against pre-dispute arbitration in consumer cases.¹⁴ It invalidated Montana's statute that would have required bold-face disclosure of the arbitration provisions in consumer contracts.¹⁵ Given that most of the serious things consumers do are matters of interstate commerce, these statutes and others similarly designed are doomed. Arbitration is thus for most practical purposes beyond the ability of any state to regulate, apart from the general, pre-existing and insufficiently robust rules of ordinary contracts law.

Construe Contracts to Avoid Unfair Results. This avenue is disingenuous and equally likely to fail in the long run. The best recent example is the opinion of the California Court of Appeals in *Badie v. Bank of America*,¹⁶ perhaps the most perfect example of the dangers that marketplace inequalities can pose. In *Badie*, the Bank of America unilaterally imposed an arbitration requirement on several millions of individual customers through a "bill stuffer" notice of amendment to the consumers' credit and deposit account agreements.¹⁷ The court set the arbitration requirements aside, finding that the changes implemented by the "bill stuffers" did not fall within the scope of the "we-can-amend-this-later" clause in the original agreements.

While the opinion of the California Court of Appeals rings with justice in the particular case, the process the court employed raises questions of its own. The court "construed" the modification terms of the contract in a way that made them inapplicable to the new arbitration requirement, thereby preventing its enforceability. The construing, as I have suggested elsewhere,¹⁸

14. See *Allied-Bruce Terminix Co.*, 513 U.S. 265 (1995).

15. See *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996), holding that Montana's statute regulating consumer arbitration is invalid because inconsistent with federal law.

16. 67 Cal. App. 4th 779 (1998).

17. *Id.* at 785.

18. See E. Dauer, *Arbitration Wins; Arbitration Loses*, 10 World Arb. & Med. Rep. No. 1 (1999)

was a most obvious misconstruing, even if done in the cause of an obviously just result.

Karl Llewellyn taught us many years ago that judicial efforts to “construe” are covert and therefore unreliable tools, and especially so when they are in fact deliberate attempts at misconstruction, even if in pursuit of a good result. Covert tools, Llewellyn said, are never reliable tools.¹⁹ The court’s opinion in *Badie* did not solve the underlying problem. The Bank can simply redraft its deposit and credit agreements for all of its new customers, thereby phasing the arbitration program in any way. Except for the parties involved in that one case, nothing much has changed.

Fight a Guerilla War. I am not much more enamored of this avenue than I am of the strategy of construing. The Ninth Circuit Court of Appeals, for example, has steadfastly searched for – and found²⁰ – ways to avoid the Supreme Court’s preference for arbitration, doing everything just short of blatant disobedience. In employment contracts, for example, some courts have created stringent rules about “the reality of assent,” bolstering them with the public policies embedded in the federal employment laws in an effort to allow some relief from mandatory arbitration in those settings. The ingenuity is admirable, but the method is something of a brute force device, jettisoning the good along with the bad. A court that is focusing on the reality of contractual assent cannot at the same time focus sensitively on the substantive contours of what has allegedly been assented to. This tack would not distinguish between a case in which arbitration’s asymmetries were a problem and a case in which they were not, nor between those kinds of cases for which traditional arbitration generally carries imbalances and those in which it does not. This route may be a good deal of fun, but it is too blunt a tool. It addresses a different kind of problem.

19. K. Llewellyn, Book Review, 52 Harv. L. Rev. 700, 703 (1939), reviewing O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937): “The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.”

20. Among the better known of such opinions in the Ninth Circuit is *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), cert. den. 516 U.S. 812 (1995), holding that because the employment form subscribed by the employee did not describe the kinds of disputes that would be subject to arbitration, there was no enforceable agreement to arbitrate. The opinion is difficult if not impossible to reconcile with the Supreme Court’s opinion in *Gilmer v. Interstate Johnson/ Lane Corp.*, 500 U.S. 20 (1991).

Follow the Market. To some extent, the private sector is doing what the courts have not done so well—articulating the minimum decencies required for arbitration between individuals and commercial entities. For one example, the National Employment Law Association—a group of attorneys who act mainly as plaintiffs’ counsel in employment law matters—exercised its own market power to force arbitration service providers into refusing to participate in mandatory pre-dispute arbitration agreements. By threatening to not appoint arbitrators (when its members had the ability to choose arbitrators) from those services that were willing to be written into such employment contracts, NELA hoped to generate pressure on employers to eschew the pre-dispute agreements. The effort was somewhat successful. Some providers agreed not to allow themselves to be written in, and at least one other responded by proposing its own set of “due process” standards to govern those cases in which it was written in. This too is a blunt approach. It solves the problem of intrinsic asymmetries by precluding pre-dispute agreements to arbitrate altogether. Nevertheless, it did create an opening in what may eventually turn out to be a more sophisticated negotiation.

Other examples of private responses are the Consumer Due Process Protocol adopted by the American Arbitration Association, and its derivative Health Care Disputes Protocol.²¹ The Protocols call for a “fundamentally fair” process, some of which gets to the kinds of asymmetries at issue. They would require, among other things, an equal say for the consumer in the selection of arbitrators, and an adequate opportunity to gather the information necessary for a fair presentation of the case. These are somewhat more sophisticated responses that could go far toward dealing with the problem. But in order for these responses to be effective, someone has to use them. Arbitration is still a creature of contract. The AAA is still a private organization. The Protocols are just advisory and easily ignored, by the judiciary or by any entity that dislikes them. There is nothing anywhere in the law today that can require a commercial party drafting a contract to abide by these market-spawned rules of the fairer road. How far they will penetrate the market, so that the problem of no-law is solved in fact, remains to be seen. At the moment they remain promising novelties.

We can dream nonetheless. Suppose, for example, the AAA’s Consumer Protocol does become a de facto standard for pre-dispute agreements. At that point, could its reach be amplified as a matter of law? Under both common law and statute, the customs of a market are regarded as being included in a

21. See Consumer Due Process Protocol in “Statement of Principles of the National Consumer Disputes Advisory Committee” (1999).

contract formed in that market, to the extent that the agreement's explicit terms do not preclude them.²² If everyone (or a court's view of enough of everyone) understands that "arbitration" means fair access to information in advance of a hearing, then in any later contract in which the word "arbitration" is used, that is what the word arbitration would mean.

This is not "construing" exactly, but rather a more reliable process. If I may illustrate the point with one personal war story: I recently arbitrated a matter in which one of the parties was finding one reason after the next (in good faith, I assumed) to delay the dates for the hearing until very far down the road. After allowing this for a bit and then being faced with yet further objections to the proffered hearing dates, I decided to simply establish a calendar and require that the process be completed within a certain number of weeks, regardless of the other pressures on counsel's time. The authority I invoked, apart from the AAA's rules on the matter, was that the parties by agreeing to arbitrate had agreed to a method of dispute resolution that was widely known to have certain attributes. One of those was expeditiousness in reaching an end. The parties therefore, I reasoned, had implicitly agreed to what both of them should have understood their contract to mean, and so we were going to have it done within the reasonable time that the term "arbitration" contemplates. So far, the ruling has not been challenged. Courts could do likewise; the authority to do so is clear.²³ The private sector itself can create customs of "minimal decency," but to make them judicially relevant requires that they be widely adopted. Maybe that will happen; maybe not.

Take the FAA Seriously. The occasions on which a court may refuse to confirm an arbitration award are narrowly circumscribed, being limited in most instances to the grounds for vacatur in Section 10 of the FAA and the grounds for modification in Section 11.²⁴ Most courts, however, define their authority more broadly to include "certain judge-made exceptions." An award may be vacated when the arbitrator has "manifestly disregarded the law,"²⁵ even though that language does not appear in the statute. In fact, if we were to take the language of the statute strictly, there is probably no au-

22. See UCC §1-205.

23. See, e.g., Restatement (Second) of Contracts § 20 (1982).

24. See 9 U.S.C. §§ 10 and 11 (West 1999). Section 11 on modification of awards addresses such things as numerical errors rather than procedural defects.

25. See *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2nd Cir. 1997).

thority at all for that widely-accepted rule. What the Act does say is that an award may be vacated when an arbitrator “has exceeded his powers.”²⁶ Courts have simply concluded that to manifestly disregard the law is to exceed one’s powers. The “manifest disregard” rule therefore shelters under, even if it cannot be fitted into, the text of the statute. Likewise with the duty to disclose prior business relationships – an obligation dimly visible in the language that refers only to “evident” corruption or bias in the arbitrators.²⁷

The language of Section 10 could be read broadly to create a requirement of fundamental fairness. It proscribes an arbitrator’s refusal to postpone a hearing despite sufficient cause shown, it mandates arbitrator impartiality, and it refuses to countenance “any other misbehavior by which the rights of any party have been prejudiced.”²⁸ Each of these phrases has acquired additional meaning through the accumulation of judicial decisions; and while none of those meanings explicitly encourage the closer scrutiny of intrinsic asymmetries today, it is not beyond the power or the traditions of statutory interpretation²⁹ for courts to use the underlying principles of a statutory text to fashion new understandings to meet new challenges. By sheltering rather than grafting it might be possible for a court to grant itself the authority to investigate the fundamental fairness of an individual case.

This too may be an attractive avenue, though it also has a high hurdle to overcome. If such an interpretation of the statute did result in some greater latitude for courts to police the process, that policing will initially have to be on a case-by-case basis. That would run counter to the judicial reluctance to append an adjudication to every arbitration, a reluctance that is not just deeply ingrained but also well-conceived. Perhaps after a while a collection of such cases might develop predictable general standards about what a minimally fair process looks like, allowing for a less disruptive tool as happened with the workable standard of “manifest disregard.” Again, there is nothing in the statutory text that allows that form of policing either, but it happens in court every day.

Conclusion

“He who hesitates is last”

26. 9 U.S.C. § 10 (West 1999).

27. *See Commonwealth Coatings Corp., v. Continental Cas. Co.*, 393 U.S. 145, 147-49 (1968).

28. *See* 9 U.S.C. § 10(b)(2)(D) (West 1999).

29. *See* Guido Calabresi, *A Common Law for the Age of Statutes* (1985).

Arbitration in consumer contracts can be described as the privatization of what has traditionally been public justice. It is a new problem. We are, however, constrained at the moment to dealing with it using old tools. For their own reasons the federal courts have erected protective fences around arbitration, predicating a "hands-off" attitude on a statute, now 75 years old, that was never intended to govern consumer disputes in the first place.³⁰

If I may be allowed a prediction, I suspect the FAA will not be amended in response to the problems described in this essay. Its reach, however, may be. What we may see in this field is the law remaining the same, but the things to which it applies being changed. That has happened elsewhere.³¹ In Contracts law, for example, there has been some maturation over time, but much more striking has been the exclusion of whole areas of business from the reign of the common law, and their inclusion under the protection of special statutes.³² Likewise, though it is difficult to imagine the FAA itself being amended, it is not difficult to imagine federal statutes that deal with other things removing those other things from the FAA's reach. A health care statute enacted at the federal level, for example, might say that, "Notwithstanding anything in 9 USC sections 1-16, contracts governed by this chapter must . . . etc.," where the "etc." erects some specialized protections for private dispute resolution occurring in that statute's specialized realm.

I would welcome the political debates and the thoughtful discussions that might attend such a proposed enactment. The resulting legislation, if there were any, might very well be a better balance between the advantages of arbitration and the present potential for unfairness in the process. This would be a route worth exploring.

This route would not be easy, nor quick in coming. To reduce the scope of the FAA requires enacting another federal statute. Federal statutes are not easy to come by. In addition to the rigors of surviving the political process, such an approach would address the underlying problem only on a piecemeal basis, perhaps employment one year, securities and investments the next, banking a few years after that and so on. Meanwhile, the areas not carved out continue to grow as the market may shape them. Legislatures are not known

30. See Ian R. McNeil, *American Arbitration Law: Reformation-Naturalization-Internationalization* (1992).

31. The classic description is in Grant Gilmore, "The Death of Contract" (1974).

32. See e.g. Real Estate Settlement Procedures Act of 1974, Pub.L. 93-533 §2, 88 Stat. 1724 (1974). See also Consumer Protection Act, Pub.L. 90-321 §102, 82 Stat. 146 (1968).

for coming easily to the kind of comprehensive approach that may be required. Courts, on the other hand, have since the founding of the republic been the police of the marketplace. Assuring its own authority has been among the judiciary's historical responsibilities. Courts have also been the institutions most able to act when legislatures have not. Thus, though the argument here is weaker, and we are well advised to be cautious in advancing it, courts may also have the traditional authority to respond to new challenges by forging new tools out of old materials. Consumer arbitration is, if it is nothing else, just such a new challenge. It is a challenge to which courts should and can respond. It is important that they do so, for consumer markets will not and legislatures cannot. Unless the responsibility is shouldered well, the future of arbitration may be less just than its past.