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Arbitration With Government

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I. INTRODUCTION

Arbitration is today employed for dispute resolution well beyond its origins in private contractual relations. It is now widely adopted by both state and federal governments for contracting with the private sector, government to government relationships, both at state and federal levels, state governments' engagement with federal agencies and their bureaucracies, and for the contractual and treaty relationships between the United States and other nations.[1]

This broadening engagement of government with arbitral process has generally occurred with, at best, only sporadic and contextual examination of whether there are unique considerations that distinguish arbitration from its private sector employment. This article will seek to draw, from the variety of contexts of arbitration with government, these special considerations for all lawyers engaged in arbitration with government.

There is a need to understand these unique concerns not only to maximize the societal benefits arbitration affords, but to understand when government's involvement imposes special limits on the utility and value of arbitration. This is necessary to ensure not only that arbitration can be successfully employed to serve public policy, but also to

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[1] Stephen Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMP. & LAB. L. 521, 522–74 (2000); Ksenia Polonskaya, *Diversity in the Investor-State Arbitration: Intersectionality Must Be A Part of the Coversation,* 19 MELBOURNE J. OF INT'L L. 259, 260–97 (2018); Stavros Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36 Fordham Int'l L.J. 745, 745–87 (2013).

prevent its weaponization for engagement to subvert the public interest government is supposed to secure. [2]

We see ambivalence about the value of arbitration with government, reflected in the hesitancy with which U.S. governmental agencies have moved in implementing arbitral process, even when mandated by legislation.[3] The reason, assuredly, is the perception that arbitration may sacrifice the advantages other dispute resolution affords for government—domesticly, legal process of trial and appellate courts, and internationally, diplomacy. There is the pervasive perception that arbitration imposes undue risk of diminishing or negating the public interest that government is supposed to secure.[4] How this occurs and how it may best be prevented is also the subject of this article.

Arbitration, agreed by way of a contract clause or *ad hoc* after a dispute has developed, is therefore, at bottom, a political as well as legal matter. For the government lawyer, as representative of the state, the choice to arbitrate is not simply a choice of legal process, but how best to meet governmental policy objectives. For the lawyer at issue with government, the choice to arbitrate may be the means to mitigate the otherwise overwhelming resources and power of government. The choice to arbitrate, and in what form, must therefore be evaluated for the government lawyer and

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[2] David Chriki, *Strapping Down Regulatory Space with Investment Arbitration: A New Breed of International SLAPPS*, 51 GEO. J. INT'L L. 415, 416–19, 428–29 (2020).

[3] Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1–16 (Westlaw through Pub. L. No. 116–58); Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–84 (1996); *see* Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709, 710–12 (2001); Charles Pou, Jr., *Federal Agency ADR: Turning Square Corners to Meet Real Challenges*, 49 S. TEX. L. REV. 1019, 1020–37 (2008).

[4] It is a common view that "the major arbitration issue of our time" is "the imposition on consumers and employees of arbitration agreements that effectively deprive them of the ability to vindicate their federal- or state-law rights." Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 736 (2012).

the lawyers representing private interest working in the trenches of dispute resolution with government, by weighing the strategic advantages and disadvantages of arbitration, against alternative strategies for dispute resolution, and to know what considerations should determine the right choices.

II. ADVANTAGES AND DISADVANTAGES OF ARBITRATION IN RELATION TO DISPUTE RESOLUTION WITH GOVERNMENT

A. THE CONVENTIONAL WISDOM

What, then, are the advantages and disadvantages? Why, especially, should government, dressed with deep pockets and the emblems of public interest, abandon the alternative prerogatives of sovereignty to be obtained through constitutionally established adjudicatory process?

There is, of course, the conventional wisdom about arbitration: that arbitration, irrespective of the parties, is cheaper, faster, less encumbered by evidentiary and procedural rules, and broad in its discovery. The choice of arbitration also can serve to design the process of dispute resolution to the distinctive nature of any dispute, as for example, imposing limits on the litigable issues, discovery and evidence, and even available remedies.

The choice to arbitrate is generally also seen as assuring a fundamentally greater dimension of finality than other means of dispute resolution.[5] This follows because the grounds for appeal of an arbitral award are so limited, offering considerable avoidance of much of the risk, time, and costs of appeal.[6] This latter advantage of arbitration may

[5] Peter Hirst, *Do Arbitration Users Really Value Finality?*, KLUWER ARBITRATION BLOG (June 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/06/04/arbitration-users-really-value-finality/.

[6] Section 10 of the FAA, for example, echoed in most arbitral rules, permits the court to vacate an arbitration award only: (a)(1) "where the award was procured by corruption, fraud, or undue means;" (a)(2) "where there was evident partiality or corruption in the arbitrators, or either of them;" and (a)(3) "where

be particularly advantageous for arbitration involving government and its agencies, when time is critical, as for example environmental and water rights disputes.

Another item of the conventional wisdom about arbitration, that the government attorney would be well advised to take into account, is that arbitration can provide greater opportunity to secure a decision-maker known to have knowledge, and also experience, in the field of law and controversy at issue. This is obviously true in contra-distinction to the politically appointed judge or however well-vetted jury. In contrast to the chance and often arbitrary nature of assignment to a litigation judge—who may or may not have the requisite expertise to adequately understand a dispute—arbitration affords all parties the opportunity to weigh in on the arbitrator's appointment, and accordingly the arbitrators qualifications.[7] Indeed, the value of this opportunity goes well beyond the technical or legal expertise of the decision-maker, to the even more fundamental and important questions of competence and minimization of bias.[8] The professional competence of the litigation judge assigned one's case is the risk any lawyer runs in going to court. It may be of critical value to avoid that risk—particularly for government lawyers often charged with politically significant cases.[9] The ability to vet and choose the decision-maker that arbitration affords, accordingly, is of special value.

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the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced." 9 U.S.C.A. § 10 (2002); *see also* CAL. CIV. PROC. CODE § 128.6 (repealed 2011).

[7] *Arbitrator, Judge, or Jury; Pick Your Poison*, SMITH AMUNDSEN (May 24, 2017), https://www.salawus.com/insights-alerts-ArbitratorJudgeorJury.html.

[8] Matt Hoffman, *The Advantages and Disadvantages of Arbitration vs. Court Litigation*, TUCKER ARENSBERG (Feb. 13, 2020), https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/.

[9] Joseph R. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678, 682 (1976).

B. THE NAIVETE OF THE CONVENTIONAL WISDOM

The conventional wisdom about arbitration, however, requires significant qualification—especially as to its most acclaimed attributes—when considered in the context of arbitration with government. Arbitration ***is*** usually faster and cheaper—but not necessarily so.[10] Arbitration in general results in substantial reduction in time and costs relative to the discovery and motion practice that burdens court litigation.[11] But particularly for arbitration with government—and in general—as the use of arbitration has expanded throughout the global economy, it has become increasingly more likely that complex substantial, economic, and political interests are at stake in arbitration.[12] This added complexity often belies the conventional wisdom of "faster and cheaper."

The cost and efficiency contrast with litigation is less pronounced the larger and more complex the case. As the stakes and complexity are greater, arbitration is more likely to be infused with the more formal procedures of litigation, such as discovery, motions practice, submission of briefs, and written awards.[13] This has importantly altered the character of arbitration in ways that contradict the conventional wisdom.[14]

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[10] Duane Horning, *Should You Agree to Arbitration?*, CALIFORNIA BUSINESS LAW GROUP (Jan. 30, 2017), http://www.cblg.biz/resources/arbitration/should-you-agree-to-arbitration-/.

[11] Horning, *supra* note 10.

[12] *See generally Guide to International Arbitration*, LATHAM & WATKINS (2019), https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017.

[13] Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does,* HARVARD BUS. REV., May–June 1994. Available at https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does.

[14] It is concerning that arbitration is commonly just as costly and time consuming as court litigation, and increasingly dominated by legal formalities*; see generally*, Alain Frécon, *Delaying Tactics in Arbitration*, 59 DISP. RESOL.

It is important to view with skepticism the most common proposition of the conventional wisdom about arbitration—that it is faster and more cost effective. That proposition may or may not be true, depending on the scope and import of the matter at hand.

There is indeed abundant demonstration, that for any particular matter, arbitration is often neither faster nor more cost effective than other modalities of dispute resolution.[15] This may be so for any number of reasons. One of the most significant reasons—at least in U.S. arbitration—is that one of the few bases on which an arbitrator's award can be reversed is when the arbitrator has refused to entertain relevant evidence.[16]

In general, arbitrators are accorded broad discretion as to evidentiary decisions in favor of expeditious hearing.[17] But courts do find due process violations where arbitrators exclude material evidence, and this may be a basis for a court to vacate an arbitral award.[18] So—professional ethics

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J. 40 (2005); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration*, 58 DISP. RESOL. J. 37 (2003); Perry A. Zirkel & Andriy Krahmal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 OHIO. ST. J. DISP. RESOL. 243 (2001).

[15] *See generally*, Frécon, *supra* note 14; Phillips, *supra* note 14; Zirkel & Krahmal, *supra* note 14.

[16] *See, e.g.*, Hall St. Assocs., L.L.C. v. Mattel, Inc., 552, 582 n.4, U.S. 576 (2008) (citing 9 U.S.C. § 10(a)(4).; Royal All. Assocs., Inc., v. Liebhaber, 2 Cal. App. 5th 1092, 1107–08 (Cal. Ct. App. 2016).

[17] *See e.g.*, Legion Ins. Co. v. Ins. Gen. Agency, Inc., 822 F.2d, 541, 543 (5th Cir. 1987); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268 (2d Cir. 1971); Stephen J. Ware*, Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ARB. & MEDIATION 56, 70 (2014); 9 U.S.C. § 10(a)(4); *see, e.g.*, American Arbitration Association, Commercial Arbitration Rules, Rule R-30(b); Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co., LLC, 260 Fed.Appx. 497, 502 (3rd Cir. 2008).

[18] *See, e.g.*, Confinco, Inc. v. Bakrie & Bros., 395 F.Supp. 613, 615–16 (S.D.N.Y. 1975); Harvey Aluminum v. United Steel Workers of America, 263 F.Supp. 488 (C.D. Cal. 1967)*; see also* Federal Arbitration Act, 9 U.S.C. § 10(a)(1)–(4) (2002) ("[i]n any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon

notwithstanding—the inclination of the arbitrator, in order to avoid reversal of his or her award, is to admit into the proceedings most if not all evidence offered—however tenuous its relationship to the issue—resulting in significant impacts on costs and speed.[19]

Furthermore, for the arbitrator, the exaggerated admission of evidence is compounded by the reality that the arbitrator is typically paid on an hourly or daily basis.[20] The arbitrator may be inclined to accept the opportunity that "relevance" presents in order to run up additional time. To the contrary, the salaried judge—whose salary is the same no matter how heavy or light the caseload—is inclined to do all he or she can to lighten the caseload.[21] Thus, when there is a dispute as to the scope of arbitral jurisdiction, relegating all possible issues to arbitration improves the income of the arbitrator and lightens the caseload for the judge—an

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sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy.").

[19] This can extend the time and cost considerably beyond a comparable litigation. Adjudication before a litigation judge is much more constricted by rules limiting the admission of evidence – for example, the rule precluding hearsay evidence where a witness would state what he claims to have heard from someone else. *Compare* Commercial Arbitration Rules and Mediation Procedures, Rule 34 (2013 Am. Arbitration Ass'n) (stating "[c]onformity to legal rules of evidence shall not be necessary . . . [t]he arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant"), *with* JAMS Comprehensive Arbitration Rules & Procedures, Rule 32 (2014 JAMS) (stating "[s]trict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence").

[20] *Costs of Arbitration*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs_of_Arbitration.pdf, at 2.

[21] *Judicial Compensation*, UNITED STATES COURTS, https://www.uscourts.gov/judges-judgeships/judicial-compensation.

attractive disposition for both. Moreover—as to the consequences of cost—it is important to keep in mind that each party is paying up to three arbitrators by the hour or by the day, along with substantial administrative fees when an arbitral institution is involved. In judicial litigation, of course, the state—i.e., the citizen-taxpayer—pays both for the justice system and the judge.

Another item of the conventional wisdom about arbitration being superior to judicial litigation that the government lawyer needs to consider more critically is that arbitration can better serve to preserve a working relationship between the claimant and respondent when resolving a particular dispute.[22] The effort to capitalize on this advantage is well illustrated in private and governmental context by the standard construction contract of the American Institute of Architects, wherein the architect is in effect designated as an arbitrator charged to resolve disputes between owner and contractor such that construction can proceed to completion—notwithstanding the disputes that almost invariably arise before arriving at completion.[23]

However, it is the common experience that once the contractor and owner hire lawyers, the relationship between contractor and owner is destroyed, rarely allowing its

[22] Stephen S. Strick, *Alternative Dipsute Resolution*, ARBITRATION & MEDIATION SERVICES (Last accessesd Mar. 2021), https://www.arbitratemediate.com/alternative-dispute-resolution.

[23] Under the American Institute of Architects standard form contracts, the architect serves as the initial arbiter of disputes between contractors and owners. If the architect arbitrator's decision is unacceptable, the standard form contract then calls for formal mediation, followed by arbitration. This method of dispute resolution is intended to resolve disputes "without delay and expense of courtroom proceedings." *You and Your Architect*, AMERICAN INSTITUTE OF ARCHITECTS, 7 (2007), https://aiala.com/wp-content/uploads/You-and-Your-Architect.pdf*; see also* Richard H. Steen, *Construction Industry ADR: Setting the Standard*, 217-Oct. N.J. LAW. MAG. 23, 24 (2002); 2 ALVIN L. ARNOLD & MARSHALL TRACHT, CONSTRUCTION AND DEVELOPMENT FINANCING § 9:63 (Thompson West, 3d ed. 2009).

reconstruction.[24] The project, whatever it may be, simply stops while the lawyers argue and run up fees, irrespective of the availability of an architect to serve as arbitrator.[25]

In governmental arbitration, stopping may result in significant collateral damage and may not be otherwise feasible for practical or political reasons.[26] The need to get along with the various constituencies that government governs, and the private and governmental partners with which government engages under contract on a continuing basis, is one factor that makes arbitration more attractive for government than judicial litigation.[27] This can be true for disputes between government agencies that must continue in a cooperative relationship, for disputes between a government agency and a public/private partnership, or between government and an entity with which the government necessarily has a long-term evolving relationship.[28]

The conventional wisdom that arbitration can help sustain an important relationship can be correct, and especially advantageous for government and its agencies. Relatedly, for arbitration involving government, arbitration can assure greater confidentiality than litigation and thereby

[24] *See* Cara Shimkus Hall & Jeffrey S. Wolfe, *The How and Why of Alternative Dispute Resolution: What It Means to the Architect and the Owner*, 8 AIARCHITECT (2001), http://info.aia.org/aiarchitect/thisweek/tw0824/0824tw2rskmgmt.pdf ("Unlike mediation, where the goal is to reach a compromise resolution, arbitration is an *adversarial* process — one side opposing the other, with a neutral and disinterested third party. . . .").
[25] Hall & Wolfe, *supra* note 24.
[26] PAMELA ESTERMAN, MICHAEL KENNEALLY, JR. AND HOWARD PROTTER, THE BENEFITS OF ALTRNATIVE DISPUTE RESOLUTION FOR RESOLVING MUNICIPAL DISPUTES 1 (2011), https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Dispute%20Resolution%20PDFs/Municipalwhitepaper12-21-2010.pdf ("When a dispute involves a municipality, the costs of resolving it will typically be borne by the taxpayers either directly through taxation, or indirectly through increased insurance premiums.").
[27] *See* ESTERMAN, KENNEALLY, JR. & PROTTER, *supra* note 26.
[28] *See* ESTERMAN, KENNEALLY, JR. & PROTTER, *supra* note 26.

help preserve existing or long-term relationships for government procurement and socio-economic programs.[29] So facilitation of long-term relationships *is* one element of the conventional wisdom about arbitration to be acknowledged where such relationships should be facilitated.[30]

But as to confidentiality facilitating arbitration, the conventional wisdom is again short on deeper consideration when arbitration is with the government. There is, in general, a presumption of confidentiality in arbitration.[31] All major institutional arbitration rules guarantee the confidentiality of arbitral hearings,[32] and typically the award is kept private, although as with all matters in arbitration, the parties can agree otherwise.[33] In commercial litigation, the principle of confidentiality serves to secure such matters as trade secrets and reputation, and avoiding stock impacts, and thereby, the theory goes, encourages more candid expression by the parties and hence more expeditious results than courtroom litigation.[34] Moreover, there may be situations,

[29] *See* ESTERMAN, KENNEALLY, JR. & PROTTER, *supra* note 26.
[30] *See* ESTERMAN, KENNEALLY, JR. & PROTTER, *supra* note 26.
[31] Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L.REV. 969, 970 (2001).
[32] *See, e.g.,* U.S. Department of Justice, *Confidentiality in Federal Alternative Dispute Resolution Programs*, 65 Fed. Reg. 83085, 83085-95, https://www.federalregister.gov/documents/2000/12/29/00-33247/confidentiality-in-federal-alternative-dispute-resolution-programs (discussing limitations on confidentiality in U.S. Federal arbitration). Dispute resolution communications are also protected from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, or for use as evidence in a court, 5 U.S.C. §574. As to international arbitration, *see, e.g.,* G.A. Res. 65/22 (Dec. 6, 2011); 2010 UNCITRAL Arbitration Rules, art. 21(3), 28(3) (2010).
[33] Hall & Wolfe, *supra* note 24 ("[T]here are no formal rules of pro- cedure or evidence governing the actual arbitration, *apart from those adopted by the parties themselves*.").
[34] Brown, *supra* note 31, at 972 n. 8, 1008; U.S. Department of Justice, *Confidentiality in Federal Alternative Dispute Resolution Programs*, 65 Fed. Reg. 83085, 83085–95 (2000),

more likely in a mixed civil–criminal context, where the assurance of confidentiality to the parties or third parties, may also be productive in securing information that would otherwise be concealed from public view. The public interest and the interests of the parties and third parties may also be served by confidentiality where the relationship of the parties could be disrupted and potentially destroyed by publicity.[35] For labor disputes, for example, arbitration and the confidentiality it affords may be valued as serving preservation of a viable employer–employee relationship and providing a more congenial environment for employee reinstatement.[36]

But should a government lawyer always prefer the confidentiality that arbitration can more likely assure than courtroom litigation? This should always be a threshold question for the government lawyer, and the answer will vary by context.

It is always tempting, of course, to extend a blanket of confidentiality over one's affairs, whether arising in the office or the bedroom.[37] But for a government lawyer,

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https://www.federalregister.gov/documents/2000/12/29/00-33247/confidentiality-in-federal-alternative-dispute-resolution-programs.

[35] Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should be Required to Issue Written, Public Opinions,* 4 EMP. RTS. & EMP. POL'Y J. 295 (2000).

[36] Randall Thomas, Erin O'Hara & Kenneth Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959, 971 (2010).

[37] *See* Michael Barbaro, *The Daily: Silenced*, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/podcasts/the-daily. Michael Barbaro of The Daily reviews the elaborate system that has developed to silence women who level accusations against powerful men. One of those women is Stephanie Clifford (known as Stormy Daniels), a pornographic actress who claims to have had an affair with American President, Donald J. Trump. Trump's lawyer negotiated a contract with Stephanie Clifford to prevent exposing their relationship to public scrutiny and potential legal charges. Barbaro emphasizes that the freedom to privately resolve disputes and avoid judicial or public scrutiny of even the most egregious conduct has become engrained in dispute resolution at the highest level of U.S. political and social society. Barbaro opines that the ability to pay for zero transparency of such conduct is a system unlikely to disappear from U.S. culture in the long-term because of its widespread use; *see*

confidentiality may be vice or virtue.[38] And confidentiality, though touted in private context as expediting conflict resolution, is generally vice for the government lawyer working in the various arenas of public interest.[39] For the public interest, publicity and transparency are often essential virtues, not to be avoided, but to be cherished.[40]

When Congress approved the 1996 amendments to the Administrative Dispute Resolution Act, it sought to strike a balance between open government and the protection of confidentiality to facilitate and support alternative dispute resolution.[41] Consistent with this general thrust of the amendments, the presumption was in favor of confidentiality.[42] Congress, however, also listed a number of situations where disclosure would be permissible and a process for securing disclosure.[43] Given the case-specific nature of the tension between confidentiality and disclosure,

also Toby Luckhurst, *The Stormy Daniels-Donald Trump story explained,* BBC NEWS (Mar. 11, 2018), http://www.bbc.com/news/world-us-canada-43334326.

[38] *See* Kaczmarek, *supra* note 35.

[39] Kaczmarek, *supra* note 35.

[40] Brown, *supra* note 31 at 1013-14, 1017 (stating transparency is also of value to the arbitral process, as by improving the predictability of arbitral proceedings). Brown*, supra.* at 1019 (discussing the same in training arbitrators). Kaczmarek, *supra* note 35 (suggesting to create pressure to improve the quality of arbitral awards by exposing the award and its reasoning to critique). Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 31-32 (1986) (providing exposure to judge the qualification of arbitrators). For lessons as to the adverse social consequences of arbitral confidentiality in international arbitration involving governments, *see* Anthony Depalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), http//www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html.

[41] Charles Pou, Jr., *Gandhi Meets Eliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, 24 ADMIN. & REGUL. L. NEWS 5, 7 (1999).

[42] Pou, Jr., *supra* note 41, at 7.

[43] Pou, Jr., *supra* note 41, at 5.

the result was to leave resolution of that tension to the courts, essentially within broad parameters.[44]

Many states, including perhaps most prominently California, have attempted to remove the cloak of confidentiality (which arbitration normally affords) from arbitration involving governmental policy, for example, by banning forced arbitration at the workplace.[45] And for the attorney representing government in arbitration, the general presumption *should be* against confidentiality. Blanket confidentiality is normally not necessary nor appropriate to secure public interests.[46] If there is information requiring secrecy, there is the much preferred alternative of selective preclusion of such information from the arbitral award and its reasoning.[47] Making exceptions and denying transparency for such reasons as 'reputational concerns' can otherwise too easily become euphemisms for avoiding disclosure of corruption and other activity that may be harmful to the public.[48] Therefore, exceptions favoring confidentiality for governmental arbitration should be narrowly selected and narrowly construed to prevent an escape from public accountability. And in service of the public interest, we must place the burden of proving the merit of the exception in arbitration with government squarely on the proponent of 'confidentiality.'

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[44] Pou, Jr., *supra* note 41, at 7; *see also* Mark H. Grunewald, *Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act*, 9 ADMIN. L.J. AM. U. 985 (1996); Admin. Conference of the U.S., Recommendation No. 95–96, ADR Confidentiality and the Freedom of Information Act, 60 Fed. Reg. 43, 115 (1995).

[45] *See* Laurence Darmiento, *Judge Halts California Law Banning Forced Arbitration at the Workplace,* LOS ANGELES TIMES (Dec. 30, 2019, 5:28 PM), https://www.latimes.com/business/story/2019-12-30/california-forced-arbitration-law-blocked; Grunewald, *supra* note 44 at 987.

[46] Grunewald, *supra* note 44, at 987–9 (1996); *see generally,* Catherine A. Rogers, *Transparency in International Commercial Arbitration*, Vol. 54 No. 5 U. KANSAS L. REV. 1401 (2006).

[47] 5 U.S.C. § 574(d); *see also* Grunewald, *supra* note 44, at 989.

[48] Grunewald, *supra* note 44, at 987–89 (1996); *see generally*, Rogers, *supra* note 46.

Transparency as a transcendent principle is surely to be commended. The devil, though, typically tends to lurk in the details of implementation. And greater light is often necessary to negotiate the dark. For arbitration with government, light by example may be obtained from the broader implementation of arbitration—for example, modern international agreements employing arbitration for dispute resolution for international trade and investment agreements.[49] These agreements commonly and specifically provide guidelines for maximizing transparency in arbitration.[50] Moreover, transparency has become a

[49] *See* George A. Bermann, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933 (1996).

[50] An example of a recent development of standards to ensure public accountability and transparency in arbitration are the transparency requirements developed for the investment settlement section of the Trans-Pacific Partnership Agreement that were developed for the Trans-Pacific Partnership Agreement, stating as follows:

> Article 9.24: Transparency of Arbitral Proceedings
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> 1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
>
> a. The notice of intent;
> b. The notice of arbitration;
> c. Pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);
> d. Minutes or transcripts of hearings of the tribunal, if available; and
> e. Orders, awards and decisions of the tribunal

Trans-Pacific Partnership Agreement, Chapter 9: Investment (Jan. 26, 2016), https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership.

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") is another leading example of provision for transparency, particularly instructive in its detail. UNCITRAL, *Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency"*) (Dec. 10, 2014), https://uncitral.un.org/en/texts/arbitration/conventions/transparency. The

predominant mandate for the implementation of international agreements through national law.[51]

Convention incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html. These rules require the following publication of documents:

> Article 3. Publication of documents
>
> 1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.
> 2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.
> 3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and not to make available exhibits and any other documents provided to, or issued by the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified time.

[51] Thus, for example, the legislation for implementing the NAFTA agreement between the United States, Canada and Mexico specified the need to ensure 'the fullest measure of transparency in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, by – (i) ensuring that all requests for dispute settlement, submissions, findings, and decisions are promptly made public; (ii) ensuring that all hearings are open to the public; and (iii) establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and governmental organizations.' Trade Act of 2002, 19 U.S.C. § 3802(b)(3)(H) (2002). Bilateral Investment Treaties and Free Trade Agreements entered into by the United States post-NAFTA have accordingly required that the following documents be made available to the disputing Party(ies) and the public: the notice of intent to submit a clam to arbitration; the notice of arbitration; pleadings, memorials, and briefs submitted to the tribunal by any disputing party, non-disputing Party, or *amicus curiae*; minutes or transcripts of hearings of the tribunal, where available; and orders, awards and decisions of the tribunal; *see, e.g.*, U.S.-Chile Free Trade Agreement, Art. 10.20, ¶ 1, 3–5.

Accordingly, bilateral Investment Treaties and Free Trade Agreements entered into by the United States have provided helpful reference points for developing and implementing critically important transparency.[52]

III. DRAFTING THE AGREEMENT TO ARBITRATE

As the above qualifications of the conventional wisdom about arbitration indicate, the challenge for the government attorney is to assure that the choice to arbitrate will secure the advantages of arbitration, but not to the detriment of distinctly governmental objectives of public interest.[53] The practical steps in meeting this challenge begin with drafting the arbitration agreement and establishing its scope.[54]

The drafting may be designed to cover an entire contractual relationship, or particular disputes.[55] It may be

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Canada has approved a similar and guidelines in Canada's model Foreign Investment Protection Agreement issued in 2003; *see* Canada's Model Foreign Investment Protection Agreement at Art. 38–39, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download.

[52] Post-Nafta International Investment Agreements have included, for example, that "(T)he tribunal shall conduct hearings open to the public" U.S.-Chile Free Trade Agreement, Art. 10.20, ¶ 2, that the tribunal shall "have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party." U.S.–Chile Free Trade Agreement, Art. 10.19, ¶ 3 (June 6, 2003); U.S.–Colombia Free Trade Agreement, Art. 10.20, ¶ 3 (May 15, 2012); U.S.–Peru Trade Promotion Agreement, Art. 10.20, ¶ 3 (Apr. 12, 2006). Submissions in NAFTA and CAFTA–DR (The Dominican Republic–Central America FTA) as well as awards, can be found on the websites of the respective countries. Hearings that can provide further enlightenment have been made public, either by closed-circuit TV or webcast.

[53] *See generally*, Rogers, *supra* note 46; Trade Act of 2002, 19 U.S.C. § 3802(b)(3)(H) (2002); Trans-Pacific Partnership Agreement, Chapter 9: Investment (Jan. 26, 2016), https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership; *see also* Grunewald, *supra* note 44.

[54] Blackaby, "Redfern and Hunter on International Arbitration," 6th ed., Oxford Univ. Press, 1–5, 35–39 (2015).

[55] Blackaby, *supra* note 54, at 35–38.

prospective, drafting the clause before a dispute has arisen, or for *ad hoc* arbitration after a dispute has arisen.[56]

Draftsmanship is of the greatest importance, because what is most distinctive about arbitration as a modality of dispute resolution, is its most fundamental premise—*party autonomy*.[57] That is, in contrast to judicial litigation, the parties choosing arbitration can control the entire dispute resolution process, by way of how the agreement to arbitrate is drafted.[58] The parties can designate the scope of the tribunal's jurisdiction. They can designate the available remedies, including a cap or high-low range on the amount that can be awarded by the arbitrator.[59] The entire substance and process is subject to the parties' consent in establishing arbitration as the means for resolving their dispute.[60] They can determine the substantive and procedural law that governs both the arbitration process and

[56] Blackaby, *supra* note 54.
[57] Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, 52 DISP. RESOL. J. 24, 25 (1997); ALAN REDFERN, LAW AND PRACTICE OF COMMERCIAL ARBITRATION 135, 315 (Sweet & Maxwell, 4th ed. 2004); Gordon Blanke, *International Arbitration in EC Merger Control: A "Supranational" Lesson to be Learnt*, EUR. COMPETITION L. REV., 324, 335–36 (2006); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law,* 17 EUR. J. INT'L. L. 121, 140 (2006); INSTITUT DE DROIT INTERNATIONAL, THE AUTONOMY OF THE PARTIES IN INTERNATIONAL CONTRACTS BETWEEN PRIVATE PERSONS OR ENTITIES (Basel Session 1991), https://www.idi-iil.org/app/uploads/2017/06/1991_bal_02_en.pdf (characterizing party autonomy of arbitration as one of 'the fundamental principles of private international law').
[58] Bockstiegel, *supra* note 57, at 25; REDFERN, *supra* note 57, at 315; Blanke, *supra* note 57, at 335–36; Van Harten & Loughlin, *supra* note 57, at 140; INSTITUT DE DROIT INTERNATIONAL, *supra* note 57.
[59] *See* FindLaw Attorney *Writers, Another Look at Remedies in Arbitration*, FindLaw (Last Updated Apr. 29, 2016), https://corporate.findlaw.com/litigation-disputes/another-look-at-remedies-in-arbitration.html.
[60] Bockstiegel, *supra* note 57, at 25; REDFERN, *supra* note 57, at 315; Blanke, *supra* note 57, at 335–36; Van Harten & Loughlin, *supra* note 57, at 140; INSTITUT DE DROIT INTERNATIONAL, *supra* note 57.

the merits of the dispute.[61] This can include the utmost significant detail, such as, burden and standard of proof, the extent of disclosure, the nature and presentation of evidence, time limits, and decisions on weight and admissibility of evidence.[62] The parties can choose that the substantive law governing the merits of the dispute will be differently sourced than the procedural law, or different from the procedural law and substantive law that will govern the arbitral process.[63]

There are many choices to be made by the government lawyer in drafting the arbitration clause. Should the arbitration be left *ad hoc*, to be agreed, if at all, once a dispute arises, or agreed as part of the greater deal? Should arbitration be mandated to occur under the aegis of an arbitral institution and/or its rules? That is, to what extent is it desirable to utilize an existing arbitral institution, which may be expensive, or maintain more robust and complete control over the procedural and substantive issues—though going it *ad hoc* is going it alone and may require reinventing the wheel and thereby heighten the risk of leaving out something important? What should be the scope of the arbitration as to jurisdiction, including substantive issues? What should be the remedial authority of the arbitrator? Should a time frame and/or time limits be specified? Should the parties empower the arbitrator to interpret or clarify its

[61] Bockstiegel, *supra* note 57, at 25; REDFERN, *supra* note 57, at 315; Blanke, *supra* note 57, at 335–36; Van Harten & Loughlin, *supra* note 57, at 140; INSTITUT DE DROIT INTERNATIONAL, *supra* note 57.
[62] Bockstiegel, *supra* note 57, at 25; REDFERN, *supra* note 57, at 315; Blanke, *supra* note 57, at 335–36; Van Harten & Loughlin, *supra* note 57, at 140; INSTITUT DE DROIT INTERNATIONAL, *supra* note 57.
[63] Bockstiegel, *supra* note 57, at 25; REDFERN, *supra* note 57, at 315; Blanke, *supra* note 57, at 335–36; Van Harten & Loughlin, *supra* note 57, at 140; INSTITUT DE DROIT INTERNATIONAL, *supra* note 57.

award?[64] Should the arbitrator be authorized to resolve future related disputes between the parties?[65]

Any one of these parameters may prove critical to sustaining an arbitral award. If the tribunal exceeds the granted authority, by going beyond the designated jurisdiction and issues, any eventual award may be set aside or refused recognition and enforcement, as by way of article V(1)(a), (c) and (d) of the New York Convention governing enforcement of foreign arbitral awards, and every well-established arbitral system, domestic or international.[66] This naturally follows from the principle of party autonomy, whereby it is the limits established by the parties that control. Each limit proposed in drafting the arbitration clause warrants close analysis as to its potential consequences. Potential abuse of process may be subtle and packaged as innocent. This means, for arbitration involving government, that any parameter concerning scope of arbitration must be examined closely in reference to public policy and the pertinent governmental objectives.

What is revealed in the case law, when there is neglect as to the drafting of the arbitration clause, is highly cautionary and instructive. It is remarkable how commonly lawyers fail to consider potential consequences of provision for arbitration that must be recognized from the very outset of a contractual relationship. Even in the performance of prestigious law firms and their highly compensated

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[64] *See* J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 100 (Cambridge Univ. Press ed., 6th ed. 2017).

[65] In *Rainbow Warrior*, the arbitration ruling focused on creating a framework to regulate the parties' future relationship and behavior. *Rainbow Warrior* was a dispute between France and New Zealand that arose when an undercover French military operation sank a Dutch ship berthed in the Auckland Harbor. Rainbow Warrior Affair (N.Z. v. Fr.), 20 R.I.A.A. 215, 254 (Fr.–N.Z. Arb. Trib. 1990). For further discussion, *see* MERRILLS, *supra* note 64, at 96–97, 107.

[66] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

attorneys, there is well-documented lack of awareness of the significance of the content of the arbitration clause or arbitration agreement—until it is too late.[67]

Consider one example of this sort of lawyer negligence, where the lawyers left out just about everything, but were nevertheless compelled to arbitrate. This was a significant governmental arbitration that took place in San Francisco, California, in the early 1980's, concerning the very substantial matter of debt obligations of the then newly installed Sandinista government of Nicaragua.[68] That government sought to compel arbitration of its expropriation of a fruit company, one of the U.S. enterprises that had previously dominated the Nicaraguan economy.[69] Meeting in San Francisco, the lawyers on both sides of the dispute thought they had achieved a settlement.[70] But the deal was never finalized, and contracts never executed.[71] However, the lawyers had vaguely agreed to arbitrate disputes.[72]

The agreement to arbitrate was wholly deficient, with virtually nothing specified.[73] The lawyers couldn't even remember the name of the London arbitration agency some of them thought they might use, so they didn't designate an arbitral forum by name.[74] Nevertheless, the U.S. Ninth Circuit Court of Appeals, sitting in San Francisco, determined that arbitration was required, on the basis of the strong United States federal policy in favor of arbitration, and the related so-called "separability doctrine."[75] That doctrine provides that though a contract may be held to be invalid or never even consummated, if

[67] New York Convention, *supra* note 66.
[68] Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991).
[69] *Nicaragua*, 937 F.2d 469.
[70] *Nicaragua*, 937 F.2d 469.
[71] *Nicaragua*, 937 F.2d 469.
[72] *Nicaragua*, 937 F.2d 469.
[73] *Nicaragua*, 937 F.2d 469.
[74] *Nicaragua*, 937 F.2d 469.
[75] *Nicaragua*, 937 F.2d 469.

arbitration was agreed, arbitration will be treated as severable and enforceable.[76]

That same "separability doctrine" is accepted in most national jurisdictions.[77] Moreover under the widely established principle of *Kompetenz–Kompetenz,* a doctrine which many jurisdictions link as implied by the separability doctrine, it is for the arbitral tribunal itself to determine any question concerning validity of the arbitration clause or arbitration agreement.[78]

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[76] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 74–95 (Wolters Kluwer ed., 2d ed. 2001).

[77] *See, e.g.,* Cour de Cassation [Cass.] [supreme court for judicial matters] May 7, 1973, Recueil Dalloz 1963, 545; Cour d'appel [CA] [regional court of appeal] Feb. 24, 1994, 1997 XXII Y.B. Comm. Arb. 682l ("In international commercial arbitration, the principle of the autonomy of the arbitration agreement is a principle of general application, being an international substantive rule consecrating the legality of the arbitration agreement, beyond all reference to a system of conflict of laws."); Corte di Appello [court of appeal] Bologna, 21 December 1991, n. 1786 (It.) ("the arbitral clause is autonomous with respect to the contract – so that the nullity of the latter does not automatically affect the former"); Cass. 2 July 1981, n. 4279 (It.) (arbitration clause is "not affected by any nullity and, therefore bars the admissibility before the court, of an action aimed at having a contract declared null and void because its subject matter is unlawful"); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1970, 53 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 315 (Ger.); Preliminary Award of 14 January 1982, 1986 XI Y.B. Comm. Arb 97, 102 ("The Autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations, in the writings of the most qualified publicists on international arbitration, in arbitration regulations adopted by international organizations and in treaties").

[78] *Final Award in ICC Case No. 5294 of 22 February 1988*, 1989 XIV Y.B. Comm. Arb. 137; *Final Award in Case No. 3896 of 1982*, 1985 X Y.B. Comm.Arb. 47; *Final Award in Case No. 5485 of 18 August 1987*, XIV Y.B. Comm. Arb. 156, 159 (1989) ("in international commercial arbitration the arbitrators have the authority to determine their own jurisdiction"); TOPCO/Calasiatic v. Libya, Nov. 27, 1975 Preliminary Award, *reprinted in* J. Gillis Wetter, *The International Arbitral Process: Public and Private,* 74 AM. J. INT'L. L. 441 (1979). *See generally* BORN, *supra* note 76; *see also*, J. Gillis Wetter, *The Importance of Having A Connection*, 3 ARB. INT'L. 329 (1987); Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring That International Commercial Arbitration is Effective*, SIXTY YEARS OF ICC ARBITRATION – A LOOK AT THE FUTURE 255, 263 (1984); STEPHEN

In light of the general inclination of the courts to defer to arbitration, it can be expected, particularly after an arbitration has come to judgment, that the competent court would be highly disinclined to nullify an arbitration provision, except in the most egregious case of the arbitral tribunal exceeding its evident jurisdiction, or having succumbed to one of the otherwise stated limited grounds for overturning an award, such as extortion or corruption.[79] Moreover once an arbitration has reached judgment and award, courts naturally are reluctant to nullify the arbitration provision.[80] In other words, once you agree to arbitration, you are in all likelihood, stuck with it for the duration.

Negligence in drafting the clause, as in the example just related, is all too common.[81] When lawyers are negotiating an agreement, they focus on the deal, not the dispute resolution that might be engaged if the deal falls apart, notwithstanding that good lawyering requires evaluation of risk.[82] Normally, so long as they are not thinking about arbitration, there really isn't all that much to think about because the existing litigation system is a given. Lawyers, including government lawyers, naturally are inclined to assume the more familiar details and dynamics of the dispute resolution process of court litigation. Because the parties and their lawyers intent on making the deal, not much may be thought or said about dispute resolution unless someone puts arbitration on the table.[83] Even with that,

SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 1-60 (Cambridge Univ. Press ed., 3d ed, 1987).
[79] Federal Arbitration Act, 9 U.S.C §10 (2002).
[80] Federal Arbitration Act, 9 U.S.C §10 (2002).
[81] John M. Townsend, *Drafting Arbitration Clauses Avoiding the 7 Deadly Sins*, 58–APR DISP. RESOL. J. 28 (February–April 2003).
[82] *Negotiate to win*, AMERICAN BAR ASS'N: FIRST FOCUS (October 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/october-2019/pros-offer-constructive-tips-for-negotiating-/.
[83] *Negotiate to win*, *supra* note 82.

arbitration is often treated as a minor matter, an option, or often at best an afterthought.[84]

Because the critical principle of arbitration is "party autonomy," arbitration opens design of the dispute resolution process to the parties creating their own legal system.[85] If the lawyer engaged in arbitration with the government doesn't do the preparatory work required to secure his client's interests in designing the arbitration, the lawyer will have missed a boat that has already sailed. If the boat later sinks with the client's cargo, the lawyer is poorly positioned to deny responsibility. The truth of the matter is that when things go wrong, the arbitration clause, however ill-formed, may likely become the most important clause in the contract. So it is imperative that the lawyers, especially government lawyers being charged with the public interest, do the necessary preparation when thinking of engaging arbitration; giving the most fulsome consideration to drafting the arbitral regime by way of the arbitration clause in all its critical aspects.

For the government, some aspects may be so critical as to instruct against arbitration. By agreeing to arbitration, the government lawyer risks waiving powers, defenses, or rights that are unique to the government.[86] These powers, defenses, or rights must therefore be brought into focus before agreeing to arbitration.

Most of all, it is essential for government lawyers to appreciate that the contractual adoption of an arbitration clause entirely preempts the issue of immunity. In U.S. domestic law and in general in international arbitrations, an

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[84] Larry P. Shiffer, *Remedies for Arbitration Clause Impossibilities*, CASETEXT (April 16, 2015), https://casetext.com/analysis/remedies-for-arbitration-clause-impossiblities.
[85] Bockstiegel, *supra* note 57, at 25.
[86] Ryan Henry, *Texas Supreme Court holds immunity waived for arbitration clauses, but only a court can decide the immunity question*, LAW OFFICES OF RYAN HENRY, PLLC (May 8, 2020) https://rshlawfirm.com/texas-supreme-court-holds-immunity-waived-for-arbitration-clauses-but-only-a-court-can-decide-the-immunity-question/.

agreement to arbitrate is read broadly by courts as a waiver of any possible claim of immunity.[87] The pendulum has swung so far in this direction that in 1988 the United States Congress passed a statute that specifically provides that if a government or government agency has agreed to arbitration, the agreement to arbitrate completely eliminates sovereign immunity from the dispute, whether as a defense or otherwise.[88] The instruction, therefore, for a lawyer representing a government or government agency is: never agree to arbitration without fully assessing your potential claims for immunity or other special rights of government that may be thereby waived.

IV. PUBLIC POLICY

A. PARTY AUTONOMY

Arbitration presents dire risks for governmental interests. It is "party autonomy," the foundational principle of arbitration, that carries this risk.

A government lawyer especially should be aware of the serious consequence of party autonomy in affecting the mindset of the arbitrator. Arbitration is likely to be much *less* sensitive to the concerns of the government than litigation before a judge.[89] This is because the social legitimacy of arbitration is based exclusively on the parties' consent, not national sovereignty.[90] For an arbitrator, the standard for decision-making is the contract.[91] Judicial litigation, to the contrary, while considering the contract, makes primary the interests of the state and subordinate

[87] *See* BORN, *supra* note 76.
[88] For discussion of sovereign immunity in the realm of international arbitration, s*ee generally* Tai-Heng Cheng & Ivo Entchev, *State Incapacity and Sovereign Immunity in International Arbitration*, 26 SINGAPORE ACAD. L. J. 942 (2014).
[89] *See generally* Gary L. Benton, *Arbitrators Are Not Judges*, SILICON VALLEY ARBITRATION & MEDIATION CENTER (Jan. 4, 2018), https://svamc.org/arbitrators-are-not-judges/.
[90] Natalie Chaeva, *Consent to Arbitration*, JUS MUNDI (July 13, 2020) https://jusmundi.com/en/document/wiki/en-consent-to-arbitration.
[91] Hoffman, *supra* note 8.

values of the legal system and rule of law, particularly when the government is one of the parties.[92] The arbitrator's preoccupation is: what did the parties intend their contract to mean? The litigation judge, on the other hand, is not just interpreting the contract, but is doing so guided by concerns of public policy reflected in statutory or regulatory law and the relevant corpus of adjudication, whether binding by *stare decisis* or as respected authority.[93] The judge, as a government official, has the responsibility to secure the mandates of the law and the integrity of the official legal system.[94] Yes, the judge looks to the intent of the parties, but gives priority to the mandates of the law with awareness that whatever he or she decides, that decision will fold into precedent for the future of society.[95] The arbitrator is not bound by prior decisions, and normally is not concerned with instructing non-parties or even present parties for the future.[96] The arbitrator's focus is what is required for resolution of the instant case consistent with the express contractual intent of the parties.[97] It is also true, however, that where multiple interests are involved, including those of non-parties, the arbitrator is better positioned to elicit those interests and craft orders that take into account the full collection of interests involved relative to the litigation judge confined by the need to rule on motions or judgment by the

[92] Hoffman, *supra* note 8.
[93] Hoffman, *supra* note 8.
[94] *Code of Conduct for United States Judges*, UNITED STATES COURTS (March 12, 2019) https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.
[95] *The Importance of Precedent*, JAILHOUSE LAWYER'S HANDBOOK, http://jailhouselaw.org/the-importance-of-precedent/ (last visited March 3, 2021).
[96] Paula Costa e Silva et al., *Arbitral Precedent: Still Exploring the Path*, KLUWER ARB. BLOG (Oct. 28, 2018) http://arbitrationblog.kluwerarbitration.com/2018/10/28/arbitral-precedent-still-exploring-the-path/.
[97] Hoffman, *supra* note 8.

more purely adversarial structure of litigation.[98] In this regard, arbitration can allow for greater input by the parties as to the workability of decision-maker results, particularly the more technical questions of implementation that may be involved.[99]

The litigation judge is also aware that any decision he or she renders is subject to reversal if found at odds with the letter or policies of the law. In judicial litigation, the judge writes for other judges. The judge is concerned with his or her institutional duty to the legal system, and perhaps above all, the very personal and professional concern not to be reversed.[100] In that regard, judicial litigation has a more conservative inclination in its results. The formality and procedural requirements of judicial litigation in comparison to arbitration also make it more likely that the litigation judge will be restrained by established norms than will the arbitrator, quite apart from the degree to which stare decisis may be controlling.[101]

The arbitrator, in contrast to the litigation judge, proceeds unencumbered by precedent, instructed by it, but not concerned about making it or following it, and relatively free to act contrary to established standards. The arbitrator is accordingly freer to take on a quasi-legislative role and shape the dispute to the interests of the parties at hand. The arbitrator, though distinguished from mediator by the power to dispose, can act as problem-solver vis-a-vis the parties.

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[98] *See generally* Eugene J. Heady, *What Will the Arbitrator's Final Award Look Like?*, SMITH CURRIE (May 9, 2014), https://www.smithcurrie.com/publications/common-sense-contract-law/what-will-the-arbitrators-final-award-look-like/.

[99] *See generally,* Heady, *supra* note 98.

[100] Andrew Cohen, *Influencing and Challenging Judges and Their Decisions in Child Welfare Cases*, AMERICAN BAR ASSOCIATION (Sept. 11, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/influencing-and-challenging-judges-and-their-decisions-in-child-/.

[101] Annie Beersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field,* 12 DISP. RESOL. L.J. 189, 190 (2012).

The proactive litigation judge, especially in the common law system, is inclined to act, when the situation warrants, as policymaker within the law and for the most part, bound by established legality. The arbitrator's freedom to depart from established standards, and proceed untroubled by future policy, results because the arbitrator can act without fear of review of the merits, given the very narrow and limited grounds for reversal of an arbitral award, whether under U.S. arbitration law or international arbitration standards.[102]

This also results in the relative freedom of the arbitrator to ignore imperatives of public policy. Arbitral rules include a public policy limitation on enforcement as declared, for example, in the New York Convention regarding enforcement of international arbitral awards and stated in virtually all arbitration regimes.[103] But are such "public policy" limitations effective? The actual record of arbitrations, both national and international, belies the effectiveness of public policy as a policing concept. Public

[102] *See* Federal Arbitration Act, 9 U.S.C §10 (2002) (Exemplifying the narrow grounds for review of an international arbitral award are the grounds stated in the New York Convention on Recognition and enforcement of Foreign Arbitral Awards now adopted by most other nations significantly engaged in international trade and investment, and which Brazil joined in 200); New York Convention, *supra* note 66 (Five defenses are found in Article V(1) and two in Article V(2). The five Article V(1) defenses are (1) incapacity and invalidity, (2) lack of notice or fairness, (3) arbitrator acted in excess of authority, (4) the tribunal or the procedure was not in accord with the parties' agreement, and (5) the award was not yet binding or had been set aside. The two Article V(2) defenses are (1) lack of arbitrability and (2) violation of public policy. The party resisting enforcement under any of the defenses has the burden of proof, though the two defenses in Article V(2) can also be raised by the court *sua sponte*. Most notable in relation to appeal is that none of the defenses are based on the merits, and there is universal acknowledgment in national and international litigation that the defenses are to be narrowly construed.); *see* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF COMMERCIAL ARBITRATION 231–44 (Cambridge Univ. Press ed., 3d ed. 2017), for relevant summary of results, particularly under the New York Convention defenses.

[103] New York Convention, *supra* note 66.

policy is rarely invoked with success to prevent the rendering or enforcement of an arbitral award.[104]

The consequence, therefore, of the party-autonomy principle of arbitration, as it plays out in arbitration and judicial review of arbitral awards, is that even the most significant public policy, even if embodied in the most significant substantive laws, can be sacrificed to arbitration. And to the present day, not only U.S. state and federal cases, but international adjudication of arbitral awards, instruct that public policy as a limitation on arbitration, is not much of a limitation at all.[105] One reason for this is simply that burdened courts come to love arbitration as means to lighten their caseload. Accordingly, they tend to read the arbitrator's jurisdiction as broadly as possible, whatever might be implied from statutory or decisional law.

Under the pro-arbitration policy of the FAA, arbitration will prevail also as to the procedural aspects of vindication of a federal or state right. Thus, though enforcing a waiver of class arbitration leaves no economic incentive for claimants to pursue their rights through

[104] *See, e.g.*, U.N. Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, art. 34(3)(b)(ii), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf; China's Civil Procedure Rules (allowing refusal of enforcement of foreign award that runs counter to social and public interests of the country). There are exceptional cases where public policy has been determinative; *see* Özmak Makina Ve Elektrik Anayi AS v. Voest Apline Industrieanlagenbau GmBH and anor, Bundesgericht [BGer] [Federal Supreme Court] Sept. 18, 2001, 4P_143/2001, 20 ASA Bulletin 311 (Switz.); Francelino da Silva Matuzalem v. Federation Internationale de Football Association (FIFA), [BGer] Mar. 27, 2012, 4A_558/2001 (Switz.) (holding that restriction of a person's economic freedom violated public policy, because FIF banned the payer from all football-related activity until full amount of obligation to the organization was repaid).

[105] For a list of court decisions from countries reversing previous law to permit arbitration of contracts even where implicating antitrust issues, *see* REDFERN, *supra* note 57, at 165–68.

arbitration, the arbitration clause will be enforced as written.[106]

Another reason the courts are inclined to read the jurisdiction of the arbitrator as broadly as possible is—as previously noted with respect to the admission of evidence—that there is no deduction from the judge's salary for the lesser work resulting from deferring to arbitration. Because the litigation judge is paid by the state at a fixed salary no matter the lesser or greater his or her caseload, and the arbitrator bills by the hour or by the day, litigation judge and arbitrator working from the perspective of their own professional and economic interests are alike content with the broadest reading of arbitral jurisdiction, notwithstanding the enhanced risk that public policy will be ignored.

The ostensible control by imposition of "public policy" is even less consequential at the enforcement stage of arbitration than when asserted as basis for "non-arbitrability." Though most arbitration formulations provide for public policy or "good morals" as basis for non-enforcement or annulment of an arbitral award, these doctrines are rarely employed, and rarely successful.[107] In the critical and seminal case of *Mitsubishi v. Soler*,[108] where

[106] The Supreme Court addressed such argument directly in the *Italian Colors* case, a case involving tension between the FAA and federal antitrust law, declaring that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." American Express Co. v. Italian Colors Rest., 570 U.S. 228, n.5 (2013).

[107] *See, e.g.*, Laurie A. Tribble, *Vacating Arbitrators' Awards Under the Public Policy Exception: Are Courts Second-Guessing Arbitrators' Decisions*, 38 VILL. L.R. 1051, 1055 (1993).

[108] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985) [hereinafter *Mitsubishi*]. Mitsubishi was a joint venture by Chrysler International, S.A. ("CISA"), a Swiss corporation, and Mitsubishi Heavy Industries, Inc., a Japanese corporation. Soler Chrysler-Plymouth, Inc. ("Soler"), the plaintiff, was a Puerto Rico corporation that sold automobiles, with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico. Soler and CISA entered into a distributor agreement which provided for the sale of Mitsubishi automobiles, by Soler, within Puerto Rico. Mitsubishi, CISA, and Soler entered into a sales agreement which provided for the sale of Mitsubishi products to Soler (for Soler to sell under the distributor agreement

the issue was arbitration of a dispute under the U.S. antitrust laws, the Supreme Court said the public policy mandate of the antitrust laws could be guaranteed because at the time the prevailing party would seek enforcement of the award, the reviewing court could check whether the U.S. antitrust laws had been taken into account by the arbitrator, and if not taken into account, could deny enforcement.[109] But because an arbitral award is most often in the form of an amount of currency to be paid or a denial of any compensation, this

terms). The sales agreement included an arbitration clause that provided for all disputes under the agreement to be resolved by arbitration in Japan. The sales agreement stated, "All disputes, controversies or differences which may arise . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Mitsubishi* at 617.

Due to difficulties in the new car market, Soler sought to delay shipment of Mitsubishi products and to sell the Mitsubishi automobiles outside of Puerto Rico to meet its expected sales goals. Mitsubishi and CISA disallowed shipment of the products by Soler outside of Puerto Rico and ultimately withheld shipments before bringing legal action. Mitsubishi brought an action in the United States District Court for the District of Puerto Rico to compel arbitration of several disputes under the agreement. Soler counterclaimed and asserted causes of action under the Sherman Act, the United States federal antitrust law. Soler alleged Mitsubishi and CISA violated the Sherman Act because they conspired to restrain free trade by dividing markets. Soler alleged Mitsubishi and CISA refused to sell ancillary products that would enable Soler to sell the automobiles outside of Puerto Rico and that Mitsubishi and CISA attempted to replace Soler with a wholly owned subsidiary as the exclusive Mitsubishi retailer in Puerto Rico. Though Soler conceded that disputes of contract interpretation are generally arbitrable, Soler contended that the arbitration clause must specifically contemplate the arbitration of disputes arising out of statutes that were designed to protect the party resisting arbitration. *Mitsubishi* at 620.

[109] The Supreme Court purported to afford protection for public policy in stating, "[h]aving permitted the arbitration to go forward, [U.S.] courts will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Article V(2)(b). While the efficacy of the arbitral process requires that substantive review at the award enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." *Mitsubishi* at 638.

claim of control is pure fiction. How would a reviewing court determine whether a number or zero, the typical antitrust results, represents the arbitration having taken into account the antitrust laws?[110]

In the past, many U.S. courts were inclined to reverse an arbitral award when there was so-called "manifest disregard of the law," as might be the case for substantive law as important as the antitrust laws.[111] "Manifest disregard of the law" could, in theory, leave an opening for the realization of public policy.[112] However, "manifest disregard of the law" is no longer generally recognized as a valid objection to recognition and enforcement of an arbitral award.[113] Indeed, there are typically no formal limits to prevent an arbitrator from making an error in choosing or interpreting the governing substantive law except as explicitly stipulated by the parties, and no limit in interpreting the law or applying the law to the facts.[114] The arbitrator can even apply general principles of law that go beyond the law which a judge may apply.[115]

For example, particularly in a commercial arbitration involving international parties, an arbitrator may recognize and apply general principles of international commercial law, so-called "lex mercatoria," the "new law

[110] And of course, the arbitrator, now aware that the U.S. Supreme Court's *Mitsubishi* decision could be a basis of reversal of his or her award if the antitrust laws are ignored, to protect the award can simply state in the award that the arbitration did take into account the antitrust laws. *Mitsubishi* at 638.
[111] Michael H. LeRoy, *Are Arbitrators Above the Law? The 'Manifest Disregard of the Law' Standard*, 52, B.C. L. REV., 137, 137, (2011).
[112] *See* Michael H. LeRoy, *supra* note 111, at 137.
[113] Thus, in a case governing arbitration under federal law in the United States, the Supreme Court resolved a division between federal circuit courts when it held that judicial review of an arbitral award under the Federal Arbitration Act is limited to the narrow grounds listed in the statute; *see* Hall St. Assocs. v. Mattel Inc., 552 U.S. 576, 585 (2008).
[114] *See* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,* 23 MICH. J. INT'L L., 341, 414–15 (2002) (stating "(e)ven clear mistakes of law in arbitral awards are virtually immune from appellate review.").
[115] *See* Rogers, *supra* note 114, at 415.

merchant," or "transnational law."[116] This may be to the advantage of the government attorney when there is risk that the matter at hand may be subject to the jurisdiction of a foreign state and its adverse principles, even to the point where the government attorney may wish to negotiate a stipulation that such general principles rather than national laws will be applied.

But it is also necessary for the government attorney to keep in mind that any reference to such "general principles," given their generality, is inherently an invitation to the expansion of the arbitral tribunal's flexibility and discretion in the exercise its power.[117] This presents another potential to undermine the public interests with which the government is charged, and therefore cautions adoption of general principles as absolving the agreement of risk. Moreover, notwithstanding this risk of reference to ill-defined general principles, judicial approval can generally be expected to follow given the contemporary presumptive validity of arbitration for its value in achieving expeditious finality.[118]

There is a complex of reasons why judges are inclined to leave it all to arbitration, despite what may be their better instincts for protecting the public interest. This inclination effectively opens the way for arbitrators to maximize their exercise of power. Most importantly, the grounds for review and reversal of an arbitral award are so limited, and the inclination of judiciaries to avoid any review on the merits so strong, that the ultimate result of party autonomy and independence of the arbitrator is that the

[116] For example, "[t]he Brazilian arbitration law allows the use of national rules, non-national rules, general principles of law, uses and customs, and international rules of commerce for resolving the dispute." Savio R. Sordi, Tatiana de Almeida F.R. Cardoso Squeff, *The Introduction of Arbitration Within the Brazilian Legal Context*, 4 PANOR. BRAZ. LAW 306, 320, (2016).
[117] Philip McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. L. REV. 453, 471 (1999).
[118] *See* Hall St. Assocs., 552 U.S. at 587.

arbitrator is seated at the head of the table as the proverbial "500-pound gorilla."[119] The arbitrator is a 500-pound gorilla because the arbitrator need not worry about reversal on the basis of public policy, or any argument grounded in the merits, so as long as there is no demonstrable bias, offense to due process, or lack of jurisdiction—all rarely successful grounds for reversal or nullification of an arbitral award.[120]

The instruction, therefore, for a lawyer representing government or its agencies is that by choosing arbitration over judicial litigation, that lawyer runs a significant risk that public policy or "good morals" will fall outside the purview of the arbitrator, who is focused primarily and most often exclusively on what the parties intended by their contract. There is thus good reason to be cautious about adopting arbitration. If the dispute importantly concerns public policy of the state rather than simply contractual rights, the government lawyer must beware of the arbitrator. The arbitrator is less likely than the judge to pay heed to the remedial and deterrence functions of the law, and less likely to seek to deter conduct that is inimical to the public good.[121]

Presumably, negotiating the requirement for a so-called "reasoned award" can serve to assure adherence to the law and its public policy mandate.[122] A potential antidote to the uncontrolled discretion of the arbitrator is to require the

[119] *See* Hall St. Assocs., 552 U.S. at 587.
[120] Federal Arbitration Act, 9 U.S.C §10 (2002); CAL. CIV. PROC. CODE § 128.6 (West, current through Ch. 372 of 2020 Reg. Sess.).
[121] For example, in a labor dispute the arbitrator is less likely than the judge to rule in a manner to put employees or employers outside the arbitration on notice of correct behavior. The arbitrator is also less likely to act to prevent future public law violations; *see* Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L.R. 1 (2015).
[122] *See Types of Final Arbitration Awards: Why the Choice Matters*, STRADLEY RONON (Feb. 2020), https://www.stradley.com/-/media/files/publications/2020/02/adr-advisor--february-2020.pdf.

arbitrator to include the arbitrator's elucidation of its reasoning with the award.[123]

No doubt the requirement for statement of reasons does provide inhibition for the arbitrator.[124] Knowing one's reasoning will be scrutinized surely encourages rational and objective analysis, if for no other reason than the arbitrator's personal concern to maintain a reputation of integrity and competence.[125] No doubt the requirement of statement of reasons is also a significant consideration in ensuring objectivity.[126] Even apart from the reputational concern for integrity and competence of the arbitrator, this dynamic is enhanced by the promise of more business for the arbitrator perceived by prospective parties on both sides of a case as fair, objective, and competent. In that the appointment of an arbitrator depends on the consent of both sides, this is one respect in which arbitration can be markedly superior to adjudicative process, considering that judges in the formal legal system who gain office by election or appointment are less dependent on reputation for competence.

However, even the stipulation for a "reasoned award" does not serve as an ultimate or absolute constraint on the power of the arbitrator to ignore public policy.[127] That is because most, if not all, arbitral systems posit the discretion of the arbitrator to act *ex aequo et bono*, i.e., to exercise equitable discretion.[128] This is not only for arbitral systems involving government with the private sector or operating under domestic law but also in international arbitration that includes governments and their agencies.[129] Particularly in international arbitrations involving

[123] *See Types of Final Arbitration Awards, supra* note 122.
[124] *See Types of Final Arbitration Awards, supra* note 122.
[125] *See infra* Section E.
[126] *See Types of Final Arbitration Awards, supra* note 122.
[127] *See* Jaque I. Garvey, *Arbitration Involving Governmental Entities*, REVISTA ELETRÔNICA DA PROCURADORIA GERAL DO ESTADO DO RIO DE JANEIRO, 14 (2018).
[128] Garvey, *supra* note 127.
[129] MERRILLS, *supra* note 64, at 158, 160–61.

governments, *ex aequo et bono* is there, being valued as assuring the flexibility of decision to frame a result as "fair" for both parties.[130] The arbitrator is not required to designate winners and losers, as court litigation is ostensibly, if not practically, designed to achieve. Such discretion of the arbitrator is also valued as providing the flexibility to adjust to changed circumstance and make provision to avoid future conflict.[131]

If not rigidly referenced to certain legal standards by consent of the parties, there is ultimately no guarantee to insulate arbitration from the exercise of equitable discretion to ignore public policy, whatever the rationalization offered in the award.[132] Ultimately, the limits on review are again what is critical.[133] Arbitrators universally render their awards with full awareness that their awards cannot be reviewed and reversed on the merits.[134] It is the very nature of arbitration to provide this assurance; the assurance of no review on the merits being what distinguishes arbitration as providing greater and more expeditious finality than judicial litigation, or negotiation, or mediation.[135]

The tension between the arbitrator's equitable powers and the requirement of a reasoned award as a saving grace for arbitration cannot be eliminated.[136] *Ex aequo et bono* is there, alive and well, and as a more threatening and pervasive uncertainty than in litigation.[137] The arbitrator's subjective sense of equity can determine the admission of evidence, the cross-examination of witnesses, the examination of documents, and most importantly, the

[130] Garvey, *supra* note 127.
[131] *See, e.g., Rainbow Warrior Affair*, 20 R.I.A.A. at 254.
[132] *See Judicial Exercise of Equitable Discretion in Enforcement of Arbitration Contracts*, 21 U. CHI. L. REV. 719 (1954).
[133] *See* Garvey, *supra* note 127.
[134] *See* Garvey, *supra* note 127.
[135] Garvey, *supra* note 127.
[136] McConnaughay, *supra* note 117, at 460 (relating the goals for proper award and values).
[137] McConnaughay, *supra* note 117, at 470.

result.[138] In arbitration, *ex aequo et bono* is not within the discretion of a judge subject to judicial review, but simply and finally, 'equity' is within the absolute discretion of a 500-pound gorilla.[139]

B. POLITICAL DEFLECTION

In general, the more significant the public policy interest involved in a dispute, the less likely a government lawyer will be or should be inclined to agree to arbitration—or, indeed, to any third-party neutral dispute resolution process.[140] One technique to still enjoy the benefits of arbitration in matters of governmental significance, if it can be accomplished, is to break up the dispute into its components, resolving the lesser with arbitration and the greater with negotiation or another mode of dispute resolution.[141] But the smartest strategy, in the right case of high profile governmental interest, may be quite the contrary—to adopt arbitration for resolution of the entire dispute.[142] This is a strategy that could be best described as "political deflection." The right dispute for this strategy is when, as the colloquialism expresses it, "the dispute is too hot for diplomacy to handle."[143]

Consider two examples from international arbitration: First, the arbitration between Israel and Egypt concerning jurisdiction over the Taba area on the coast of the

[138] McConnaughay, *supra* note 117, at 470.
[139] McConnaughay, *supra* note 117, at 460, 70.
[140] McConnaughay, *supra* note 117, at 486.
[141] For example, in the Torres Strait dispute, a maritime delimitation between Australia and Papua New Guinea, the arbitral tribunal approached the dispute resolution process by splitting the issues and separating out items for negotiation. For further discussion, *see* MERRILLS, *supra* note 64, at 160–61.
[142] MERRILLS, *supra* note 64.
[143] MERRILLS, *supra* note 64, at 160–61; Richard Bernstein, *World Court Settles Dispute on U.S.-Canada Boundary*, N.Y. TIMES (Oct. 13, 1984), https://www.nytimes.com/1984/10/13/world/world-court-settles-dispute-on-us-canada-boundary.html,

Sinai Peninsula,[144] and second, the "Georges Bank" dispute over fishing rights on the adjoining coasts of Canada and the United States.[145] Both were situations where the dispute was so hotly loaded with the economic and political interests of domestic constituencies that diplomacy was not likely to succeed. For the case of Taba, given the history of the conflict, the symbolic significance of any conflict of jurisdiction between Israel and Egypt was potentially too great for diplomatic resolution.[146] For the Georges Bank Arbitration, which concerned on the one side the Canadian fishermens' interests, and the other the United States fishermens' interests, a concession by either side would have been viewed as a betrayal of its fishermen.[147] In both Taba and the Georges Bank, even if any diplomatic compromise could be achieved, it inevitably would have left the respective domestic constituencies blaming their government for failure to adequately vindicate their rights.[148] But by moving the matter to the neutral third party process that arbitration affords, the governments of Israel, Egypt, Canada, and the United States, in response to any result less than 100%, could all proclaim to their domestic constituents, "we did the best we could. It was the arbitrator who failed to fully vindicate your rights."[149]

It is thus that arbitration can be utilized as an escape from political accountability—but surely not to be condemned when the objective for all is successful dispute resolution. For the government lawyer, the resolution of the dispute to serve the relationships involved, whether between

[144] MERRILLS, *supra* note 64, at 100 (discussing the issues the international tribunal was asked to decide and the lack of guidance of the tribunal).
[145] Bernstein, *supra* note 143 (noting the dispute was decided by a five-judge panel drawn entirely from Western democracies that based its decision largely on technical and geographic grounds and rejected the U.S. and Canadian historical ties arguments).
[146] MERRILLS, *supra* note 64, at 100.
[147] Bernstein, *supra* note 143.
[148] Bernstein, *supra* note 143; MERRILLS, *supra* note 64, at 100.
[149] McConnaughay, *supra* note 117, at n.74.

nations or other governmental entities, or the government and a private party, on any of a variety of possible terms, may be more important than the terms of the award.[150] If the political deflection that arbitration provides for the primary benefit of all parties is what it takes, so be it.

V. ARBITRATION AND CONFLICTING PUBLIC POLICY

A. FEDERAL PUBLIC POLICY

U.S. federal law does include ostensible constraints on the use of arbitration where important federal public policy is at issue.[151] The FAA provides that Arbitration will not be used whenever:

> (1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
> (2) The matter involves or may bear upon significant questions of Governmental policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
> (3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not

[150] Spitko, *supra* note 121, at 40.
[151] The U.S. Federal Administrative Dispute Resolution Act of 1996 similarly provides that arbitration should not be used when: (1) precedent is required; (2) there are "significant questions of Government policy"; (3) "maintaining established policies is of special importance" (4) "the matter significantly affects persons or organizations who are not parties to the proceeding" (5) "a full public record of the proceeding is important" and (6) "the agency must maintain continuing jurisdiction over the matter[.]" 5 U.S.C. § 572 (1990).

> likely reach consistent results among individual decisions; . . . [152]

Reflected in these standards is not only public policy concern, but also concern about arbitration's flouting of *stare decisis*.[153] One arbitral result may be predictive or instructive as to another, but any given arbitration cannot, by force of decision, create a body of public contract law that other arbitration panels will necessarily follow, or even purport to follow, or see as even bound to distinguish.[154] Accordingly, if it is in the client's interest to rely on precedent, that is reason to prefer litigation to arbitration.[155] This also means that in pre-arbitration, if arbitration is to be the mode of dispute resolution, the parties are less able to evaluate their chances of success than in judicial litigation.[156] The prospects of settlement are consequently less as the parties are less able to evaluate, pre-arbitration, their chances for success and achieve a predictable basis for compromise.[157]

The U.S. Congress, of course, has the power to exempt claims arising under any statute from the FAA's pro-arbitration policy.[158] But Congress has rarely shown any such inclination, and the United States Supreme Court has been adverse to finding any such mandate.[159]

This was dramatically demonstrated at the federal level with respect to the United States antitrust laws—laws that the U.S. Supreme Court has referred to as the nation's "Charter of Economic Liberty."[160] Given the importance and grounding of the antitrust laws as fundamental economic

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[152] 5 U.S.C. § 572 (1990).
[153] *See* 5 U.S.C. § 572 (1990).
[154] *See* 5 U.S.C. § 572 (1990).
[155] *See* 5 U.S.C. § 572 (1990).
[156] *See* 5 U.S.C. § 572 (1990).
[157] *See* 5 U.S.C. § 572 (1990).
[158] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, n. 5 (2013).
[159] Spitko, *supra* note 121, at 3, n. 1.
[160] New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 436 U.S. 954 (1978); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

doctrine for the United States prior to the U.S. Supreme Court addressing the matter of arbitration of the antitrust laws, most commentators thought implementation of the antitrust laws to be off-limits for domestic arbitration.[161] This is especially true for international arbitration, which would risk removing public policy control completely from the jurisdiction of the United States.[162] But after international arbitration was deemed to be legitimately advantageous in a broad range of U.S. federal statutory areas, including the securities laws[163] and labor laws,[164] there came the big test the arbitration community was waiting for—arbitration of antitrust—where U.S. policy was uniquely firm and extreme compared with most other nations.

The case that ultimately tested arbitration against the concern that it could undermine antitrust policy was the case filed against the Mitsubishi Automobile Corporation, a Japanese corporation with its principal place of business in Tokyo, Japan, concerning its franchise operation in Puerto Rico.[165] The plaintiff distributor sought protection under the U.S. antitrust laws.[166]

The prevalent view before the *Mitsubishi* decision was rendered—on whether the antitrust laws could be trusted to

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[161] *See* Thomas Bush, Arbitration in Antitrust Cases, FREEBORN AND PETERS LLP, https://www.freeborn.com/sites/default/files/arbitration_in_antitrust_cases_-_freeborn.pdf

[162] McConnaughay, *supra* note 117, at 485.

[163] Diana B. Henriques, *When Naivete Meets Wall Street*, N.Y. TIMES (Dec. 3, 1989), https://www.nytimes.com/1989/12/03/business/when-naivete-meets-wall-street.html (explaining the use of arbitration in securities disputes and the relative leverage held by investors and brokers as a result).

[164] Jessica Silver-Greenberg, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (discussing the use of arbitration clauses in employment contracts and the long-run impact on employees).

[165] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).

[166] *Mitsubishi*, 473 U.S. 614.

arbitration—was that because the antitrust laws are designed to promote and protect competition, and the United Sates has a fundamental interest in enforcing its antitrust laws to maintain a competitive position in the world market, arbitration would not be allowed.[167] Moreover, the thinking was that because arbitration is based on the autonomy of private parties to design and control both process and substance, it is vulnerable to the inordinate leverage the antitrust laws are purposed to prohibit, and therefore arbitration would not serve adequately to provide deterrence of potential antitrust violations.

The United States Supreme Court, addressing these concerns, nevertheless declared the provision for foreign arbitration in Japan valid and enforceable, much to the surprise of the international arbitration community.[168] It disposed of two principal contentions that the antitrust dispute was nonarbitrable.[169] First, the court considered whether the scope of the U.S. federal Arbitration Act imposes a presumption of nonarbitrability of claims arising under statutes that are not specifically mentioned in the parties' agreement.[170] Second, the U.S. Supreme Court considered whether the public interest in enforcing U.S. antitrust laws was so paramount as to render antitrust disputes nonarbitrable.[171]

Interpreting the scope of the FAA broadly, the Court held that the Act does not imply a general presumption against arbitration of statutory claims; quite the opposite. It declared that the Court has a duty to "rigorously enforce agreements to arbitrate" because Congress's primary intent in enacting the FAA was to enforce private parties'

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[167] Richard Levin, *On Arbitration of Competition/Antitrust Disputes: A Tribute to Mitsubishi*, 73 DISP. RESOL. J. 4, 39 (2019), https://richardlevinarbitration.com/wp-content/uploads/2019/06/On-Arbitration-of-Competition-Antitrust-Disputes-June-19.pdf.
[168] *Mitsubishi*, 473 U.S. 614.
[169] *Mitsubishi*, 473 U.S. at 628, 640.
[170] *Mitsubishi*, 473 U.S. 614.
[171] *Mitsubishi*, 473 U.S. at 629.

agreements to arbitrate, and that doubts concerning whether issues are arbitrable are to be resolved in favor of arbitration.[172] The Court allowed only that a clear congressional statement of intent could be the basis to determine that issues under federal law are non-arbitrable, given the FAA and its categorical pro-arbitration mandate. It concluded the United States Congress had not evidenced any such intent, anywhere, to limit the broad scope of arbitration in relation to the application of the U.S. anti-trust laws.[173]

In this respect the decision was somewhat myopic, given the longevity of the antitrust laws, and their origination long before arbitration was legislated as national policy in the FAA.[174] But the analysis and the result in *Mitsubishi* does demonstrate how far the Court was willing to go to support arbitration despite the countervailing public interests embodied in statutory embodiment of federal public policy in the antitrust laws or any other federal statute.[175]

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[172] *Mitsubishi*, 473 U.S. at 626.
[173] *Mitsubishi*, 473 U.S. at 627–28.
[174] Federal Arbitration Act, 9 U.S.C §10 (2002).
[175] In considering whether the significant public interest in enforcing U.S. antitrust laws renders such disputes categorically unsuitable for arbitration, the Court further concluded that international trade interests took precedence over the public policy interests in enforcing U.S. antitrust law. Thus, it concluded, there was no need to consider the categorical arbitrability of antitrust, declaring, "[C]oncerns 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." *Mitsubishi*, 473 U.S. at 629. The Court cited two earlier cases that involved the securities regulation statutes, also constituting a body of law embodying significant public policy interest. (The Court compared Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) and Wilko v. Swan, 346 U.S. 427 (1953).) The earlier case, Wilko had concerned securities regulation in a domestic context, and the Supreme Court held the alleged securities law violations non-arbitrable. The latter case Scherk, involving an international securities regulation dispute, was held to be arbitrable. The Court reasoned similarly for its determination in Mitsubishi that predictability of dispute resolution from contractual forum selection clauses is imperative for international business dealings. In so doing it reflected the similar view based in economics of international trade that the U.S. antitrust laws are "designed to promote the national interest in a competitive economy."

B. STATE PUBLIC POLICY AND THE FEDERAL/STATE CONFLICT

After passage of the FAA in 1996**,** there developed a substantial jurisprudence of conflict between state and federal law.[176] On the one hand, there was state legislation and adjudication overriding arbitration clauses deemed inimical to state public policy.[177] On the other was the pro-arbitration policy of the FAA as applied by the Supreme Court of the United States to override state public policy.[178]

Unlike the analysis of conflict between the policy of the FAA and other federal statutes where the issue is their relative scope, when the issue amounts to conflict between state public policy and the FAA, the issue was, and is, federal preemption—whether state policy is trumped by the pro-arbitration mandate of the FAA.[179] This conflict with state law has become particularly acute as the expansion of arbitration has expanded the efforts of companies to employ arbitration clauses in their contracts to target costly or embarrassing challenges to their power.[180]

Mitsubishi, 473 U.S. at 635. It acknowledged that private causes of action, particularly through the treble damages remedy, play an important role in enforcing antitrust, but reasoned that the choice to arbitrate disputes does not forgo substantive rights afforded by statutes, but only trades the procedural opportunities for review of a court opinion for the expediency of arbitration, and that so long as private parties effectuated their intent to be that the arbitral body would decide claims arising under the U.S. antitrust laws, the tribunal should be bound to decide the claims in accordance with those laws. Therefore, the Court reasoned, arbitration serves both remedial and deterrent functions. It concluded that a minimally intrusive review of the arbitration decision should be sufficient to ascertain the tribunal acknowledged and decided on the antitrust claims. *Id.* at 638.

[176] Robert Hollis et al., *Is State Law Looking for Trouble: The Federal Arbitration Act Flexes Its Preemptive Muscle*, 2003:2 J. DISP. RESOL. 1 (2003), https://core.ac.uk/download/pdf/217049943.pdf.

[177] Hollis, *supra* note 176.

[178] Hollis, *supra* note 176.

[179] Hollis, *supra* note 176.

[180] Abigail Abrams, *81 of the Largest U.S. Companies Won't Let You Take Them to Court*, TIME, (Feb. 27, 2019 9:00AM) https://time.com/5538028/consumer-arbitration-agreements/.

The conflict extends to all sectors of the economy, most especially to areas such as consumer rights, rights of labor, and environmental concerns, often highlighting gross disparities of economic power between commercial entities and their workers or clients.[181] Arbitration has become a flashpoint of high-profile social conflict.[182] Examples include the use of arbitration clauses to stifle consumer litigation rights, including waivers of the right to join in a class action or the use of arbitration clauses and related assurances of confidentiality such as non-disclosure agreements to insulate employers against claims of sexual harassment in the workplace.[183]

The clash between the FAA and state public policy is probably most evident in the repeated clash between the U.S. Supreme Court interpreting the FAA as broadly preemptive, and the California legislature and California courts trying to articulate exceptions in the interest of California's public policies.[184] Indeed, the principal FAA

[181] Abrams, *supra* note 180.
[182] Abrams, *supra* note 180.
[183] Abrams, *supra* note 180.
[184] *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (holding that class action waivers should not be enforced under a multi-factor test and effectively ignoring the Supreme Court's holding in *Concepcion* that the FAA preempted California's *Discover Bank* rule and required absolutely that contractual waiver of class actions could not be regulated by California); Gentry v. Superior Court, 165 P.3d 556, 599 (Cal. 2007) (holding that "class arbitration waivers should not be enforced if, the trial court determines, based on certain factors . . . that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration."). These rulings were despite the U.S. Supreme Court's determination in *Concepcion* that the FAA prohibits states from conditioning the enforceability of arbitration agreements on the availability of classwide arbitration procedures. AT&T Mobility L.L.C. v. Concepcion, 131 S.Ct. 1740, 1744 (2011); *see also* Thomas J. Stipanowich, *The Third Arbitration Trilogy, Stolt-Nielsen, Rent-A-Center, Concepcion, and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323 (2011); Broughton v. Cigna Healthplans of Cal., 988 P.2d 67 (Cal. 1999) (holding claims for public injunctive relief under the California Consumer Legal Remedies Act not subject to arbitration); Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157 (Cal. 2003) (extending Broughton to include claims to enjoin unfair competition under

preemption cases have concerned challenges under the FAA to California statutory or case law.[185] Unlike cases of apparent conflict between the FAA and other federal statutes, where a federal statute might be deemed sufficiently clear and conclusive as prohibiting arbitration,[186] where the conflict is between the FAA's pro-arbitration policy and state law, the United States Supreme Court has uniformly ruled in favor of FAA preemption of state public policy, under the FAA[187] and the Supremacy Clause of the United States Constitution.[188] The U.S. Supreme Court's 2011

California's Unfair Competition Law and claims to enjoin false advertising under California Business and Professions Code Section 17500); Stephen A. Broome, *An Unconsciounable Application of the Unconsciounability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006).

[185] *See Discover Bank*, 113 P.2d at 1110; *Gentry*, 165 P.3d at 599; *Concepcion*, 131 S.Ct. at 1744; *Broughton*, 988 P.2d at 67; *Cruz*, 66 P.3d at 1157.

[186] Spitko, *supra* note 121 at, at 8–9; Mitsubishi, 473 U.S. at 637–638.

[187] The key provision of the FAA on which preemption is based is Section 2, declaring as its foundational principle that, "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C §2 (1947).

[188] *See* AT&T Mobility L.L.C. v. Concepcion, 131 S.Ct. 1740, 1753 (2011) (holding that the FAA preempts California's judicially-created "Discover Bank" rule classifying as unconscionable most consumer contract collective-arbitration waivers); Preston v. Ferrer, 552 U.S. 346, 359 (2008) (holding that the FAA preempts the section of the California Talent Agencies Act vesting in the California Labor Commissioner exclusive original jurisdiction over claims arising under the act); Volt Info. Scis., Inc. v. Leland Stanford Univ., 489 U.S. 468, 470, 479 (1989) (holding that the FAA does not preempt a provision of the California Arbitration Act allowing a court to stay arbitration pending resolution of related litigation if the parties have agreed that the provision shall govern their arbitration); Perry v. Thomas, 482 U.S. 483, 491–92 (1987) (holding that the FAA preempts the section of the California Labor Code providing that an action to collect wages may proceed notwithstanding an agreement to arbitrate); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (holding that the FAA preempts the section of the California Franchise Investment Law requiring judicial consideration of claims brought under the California statute).

decision in *AT&T Mobility LLC v. Concepcion* and the Court's 2013 decision in *American Express Co. v. Italian Colors Restaurant* are characteristic as consistently in favor of arbitration.[189] These cases make clear that neither state substantive policies nor procedural requirements of state law are allowed to impair "the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[190] The California Supreme Court, for example, attempted to carve out an exception from preemption where enforcement of a private right is designed as a substitute for action brought by the government, as under California's "Labor Code Private Attorneys General Act of 2004."[191] The suit was in the nature of a private attorney general action in that it was by an employee, but also on behalf other current or former employees.[192] The United States Supreme Court categorically rejected such exception.[193]

Notwithstanding the chain of rulings by the U.S. Supreme Court supporting federal preemption, the effort to break the chain in favor of state public policy has continued unabated, most notably by the legislature of California and California courts.[194] In 2020, a U.S. district judge enjoined California officials from enforcing a new law that was to bar employers from requiring workers, as condition of their employment, to waive "any right, forum or procedure" for

[189] American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013); *Concepcion*, 131 S.Ct. 1740 (2011).
[190] *Concepcion*, 131 S.Ct. at 1748.
[191] CAL. LAB. CODE §§2698–2699.5 (West 2004).
[192] Iskanian v. CLS Transp. Los Angeles, L.L.C., 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S.Ct. 1155 (2015); Arias v. Superior Court, 209 P.3d 923, 932 (Cal. 2009); Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), *cert. denied*, 566 U.S. 937 (2012). For critique of the California Supreme Court's holding in Iskanian and other cases standing for the exception, *see* Spitko, *supra* note 121, at 35–43.
[193] *Iskanian*, 327 P. 3d; *Ralphs Grocery Co.*, 128 Cal. Rptr. 3d.
[194] Chamber of Commerce of U.S. v. Becerra, 438 F. Supp. 3d 1078, 1108 (E.D. Cal. 2020).

resolving employment disputes.[195] The law would have imposed civil and misdemeanor criminal penalties on employers who required workers to agree to procedural limitations on their ability to enforce employment rights.[196] The California legislation explicitly provided that it was not intended to invalidate arbitration agreements that are otherwise enforceable under the FAA.[197] Nevertheless, a federal court found that California Assembly Bill 51 is preempted by the Federal Arbitration Act (FAA) because it "singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear the defining features of arbitration."[198] Assembly Bill 51 was deemed to be invalid for placing arbitration agreements on "unequal footing" as compared to other contracts.[199]

The pertinent academic literature includes various proposals for the realization of state public policy to avoid the broadly preemptive interpretation of the FAA that is now enshrined in a variety of opinions by the U.S. Supreme Court.[200] Since preemption is now the rule if at issue is a state public policy inconsistent with broad interpretation of the pro-arbitration policy of the FAA, the proposals generally depend upon the finding of congressional intent to preclude arbitration for certain types of disputes; effectively

[195] *Becerra*, 438 F. Supp. 3d at 1108.
[196] *Becerra*, 438 F. Supp. 3d at 1108.
[197] *See* Spitko, *supra* note 121.
[198] Spitko, *supra* note 121.
[199] *Becerra*, 438 F. Supp. 3d at 1108; *see* Anthony J. Oncidi et al., *Federal Court Strikes Down California's "Request Arbitration, Go to Jail" Law*, THE NATIONAL LAW REVIEW (Feb. 12, 2020), https://www.natlawreview.com/article/federal-court-strikes-down-california-s-request-arbitration-go-to-jail-law.
[200] *See, e.g.*, AT&T Mobility L.L.C. v. Concepcion, 131 S.Ct. 1740, 1753 (2011); Preston v. Ferrer, 552 U.S. 346, 359 (2008): Volt Info. Scis., Inc. v. Leland Stanford Univ., 489 U.S. 468, 470, 479 (1989); Perry v. Thomas, 482 U.S. 483, 491–92 (1987); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Spitko, *supra* note 121.

amending the FAA by constricting its application.[201] We have one example of this approach being realized, as the federal McCarran-Ferguson Act, which provides that state law preempts federal law with respect to the business of insurance.[202] Another is the 2010 Dodd Frank Act in which Congress authorized the Securities and Exchange Commission and Consumer Financial Protection Bureau to regulate the use of arbitration in broker–dealer and consumer financial contracts.[203]

However, despite the many attempts to reverse federal preemption in areas of preeminent state public policy concern, such as labor and consumer rights, the record is one of failure of the necessary Congressional consensus.[204] There is no reason to expect this political reality to change in the forseeable future given the powerful economic interests that have managed to use arbitration clauses and federal preemption under the FAA to negate procedural rights, such as the class action, or substantive rights

[201] *See generally supra* note 200.
[202] An example is the McCarran-Ferguson Act, which provides that state law preempts federal law with respect to insurance, stating "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (1947).
[203] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, § 921 (2010) (authorizing Securities Exchange Commission to regulate broker-dealers' use of arbitration in customer agreements); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, § 922 (2010) (prohibiting arbitration of certain whistleblower claims); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, § 1028 (2010) (authorizing Consumer Financial Protection Bureaus to regulate consumer financial companies' use of arbitration); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, § 1057(d) (2010) (prohibiting arbitration of certain whistleblower claims created by Dodd-Frank); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, § 1414 (2010) (prohibiting use of arbitration clauses in residential mortgage contracts).
[204] *See* references to a multitude of unsuccessful bills to have Congress invalidate predispute arbitration agreements, collected in Spitko, *supra* note 121, at 50–51, nn. 223–24.

grounded in state policies of labor, consumer, or environmental regulation.[205]

In the ongoing campaign to limit the impact of the U.S. Supreme Court's broadly pre-emptive reading of the FAA, there has been the proposal of some sort of federal *deus ex machina* to decide when state public policy should not be preempted by the FAA.[206] For example, one proposed solution is creation of a federal overseer with expertise in labor law with the power to strike a balance between state employment regulation and enforcement of arbitration agreements under the FAA.[207] The model drawn on to support this proposal is securities arbitration under the aegis of "FINRA," which today administers most arbitrations of securities disputes.[208]

Surely though, any suggestion of a federal bureaucratic means to reconcile conflict between the FAA and state public policy is fundamentally misconceived. There is a constitutionally profound difference between a federal agency that employs arbitration to resolve conflicts under a given state or federal law, as does FINRA, and an agency, as proposed, that would have the power to resolve a conflict between state public policy and the FAA. The former is conflict resolution under a particular law.[209] The proposed bureaucratic solution would be the transfer to a federal bureaucracy of the power to resolve a conflict between federal and state law, a power constitutionally relegated in its ultimate resolution under the United States Constitution, never to any bureaucracy, but to the federal

[205] *See generally* Spitko, *supra* note 121, at 50–51, nn. 223–24.
[206] *See generally* Note, *State Courts and the Federalization of Arbitration Law*, 134, HARV. L. REV. 1184, (2021).
[207] *See* Spitko, *supra* note 121, at 54.
[208] Spitko, *supra* note 121, at 54–55; *see also* Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 62, 64 (2008).
[209] *See generally About FINRA*, FINRA.ORG, https://www.finra.org/about.

courts, and ultimately the U.S. Supreme Court.[210] The U.S. Supreme Court, having already determined that the FAA and its pro-arbitration policy prevails in all cases where the efficiency value of arbitration may be put at risk by state law, any proposal for a federal bureaucracy to resolve conflict between state policy and the FAA, in any case, is a non-starter.[211]

Congress surely has the power to amend the FAA.[212] Congress no doubt could resolve the conflict in any area of state concern by providing that state policies, whether on employment, consumer rights, or environmental concerns, or in any area within its power to legislate, should prevail. But without Congress itself expressly providing for particular state policy to trump the pro-arbitration policy of the FAA, Congress does not have the power to compromise the exclusive authority of the federal courts to resolve public policy conflict when the question is one of federal preemption.[213]

i. ARBITRATION WITH GOVERNMENT AND COLLABORATIVE CONFLICT RESOLUTION

It is possible to minimize public policy concern yet utilize arbitral process by designing arbitration as conjunctive with collaborative process. We see this alternative particularly in the arena of governmental interagency arbitration, though it can be utilized in any arena

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[210] *See*, *e.g.*, JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (July 23, 2019), https://fas.org/sgp/crs/misc/R45825.pdf.

[211] *See* Lea Haber Kuck et al., *The Supreme Court and Evolving Arbitration Jurisprudence*, SKADDEN, (September 26, 2019), https://www.skadden.com/insights/publications/2019/09/quarterly-insights/the-supreme-court-and-evolving-.

[212] U.S. Const. art. I, § 1, cl. 1.

[213] *See generally* James C. Sturdevant, *Federal Preemption Cases: Reflections On The U.S. Supreme Court's Busy Docket*, PLAINTIFFMAGAZINE, (Feb. 2008), https://www.plaintiffmagazine.com/recent-issues/item/federal-preemption-cases-reflections-on-the-u-s-supreme-court-s-busy-docket.

of arbitration with government.[214] If there is reason to adopt a more collaborative process in conjunction with arbitration to realize public policy despite the preemptive impact of the FAA, how might that be done?

Arbitration employed for dispute resolution between governments or governmental entities provides the best demonstration of possible collaborative process, because it typically involves contending public policies or governmental interests contending for recognition, as well as ongoing intergovernmental relationships which the contending parties wish to nonetheless preserve.[215] For governmental interagency arbitration, or arbitration between governments, the fusion with more collaborative processes akin to mediation and negotiation can be especially opportunistic.

In commercial arbitration, usually mediation and negotiation, as available modes of dispute resolution, are kept separate and distinct from arbitration—and for good reasons.[216] The most significant reason is that negotiation for dispute resolution is facilitated when the parties do not risk that positions stated and information disclosed in mediation or negotiation as collaborative process will undermine their positions in arbitration as an adversarial process.[217] Accordingly, most court systems and provisions for mediation or negotiation provide for non-binding mediation and/or negotiation to precede arbitration, and include, as appropriate, assurances against disclosure.[218]

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[214] *See generally* Sarah B. Belter, *The Use of Arbitration By Federal Agencies To Solve Environmental Disputes: All Wrapped Up In Red Tape*, 56, U. MIAMI L. REV., 1033, (2002).
[215] *See generally* Daniel T. Deacon*, Agencies and Arbitration*, 117, COLUM. L. REV., 992, (2017).
[216] *See generally Mediation of Legal Disputes-The Basic Law*, STIMMEL, STIMMEL & ROESER, https://www.stimmel-law.com/en/articles/mediation-legal-disputes-basic-law.
[217] STIMMEL, STIMMEL & ROESER, *supra* note 216.
[218] STIMMEL, STIMMEL & ROESER, *supra* note 216.

To the contrary, there is an outstanding model for the fusion of arbitration and collaborative process when governmental interest is involved.[219] This is the formulation that became the "Side Agreements on Labor and the Environment" for the NAFTA trade agreement of the United States, Canada and Mexico.[220] The appeal of that formulation was well demonstrated by the fact that it became key to securing the NAFTA Treaty approval by the three governments, despite resistance from their respective domestic labor and environmental constituencies.[221]

The essentials of that design can be stated briefly, though their elaboration warrants study for any replication of what was achieved.[222] The scheme is to begin dispute resolution with negotiations at the highest governmental level available, then to proceed to arbitration if those negotiations do not resolve the dispute.[223] However, the design is exceptional in that the arbitrators' work is not to directly provide an award, but instead, to propose a mutually satisfactory action plan.[224] If the complained against party rejects that plan, that party then has the burden of proposing its own solution which the arbitrators can accept or reject.[225] If the arbitrators reject the complained-against party's proposed solution, the complained-against party's failure to comply with the arbitrator-mandated plan through the end of the process can result in sanction, first by fine, and if that doesn't secure the arbitrator plan, ultimately a loss of trade

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[219] *See generally NAFTA and the Side Agreements: Risks in Turning NAFTA Into a Labor/Environmental Pact*, THE HERITAGE FOUNDATION, (May 13, 1993), https://www.heritage.org/trade/report/nafta-and-the-side-agreements-risks-turning-nafta-laborenvironmental-pact.
[220] THE HERITAGE FOUNDATION, *supra* note 219.
[221] THE HERITAGE FOUNDATION, *supra* note 219.
[222] Jack I. Garvey, *Trade Law and Quality of Life–Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L. L. 439 (1995).
[223] *See* Garvey, *supra* note 222.
[224] *See* Garvey, *supra* note 222.
[225] *See* Garvey, *supra* note 222.

benefits.[226] This design incorporates a number of opportunities to negotiate along the course of this process (which as originally formulated) is supposed to take a maximum total of 1,225 days.[227]

The model's uniqueness and advantage is to achieve a fusion of political and legal process, maximizing the expression and accommodation of the public policy interests of the parties, while providing continuing opportunity for consensual resolution.[228] Arbitration is employed more to drive the process of resolution than to provide an award—more to educate the parties concerning constructive resolution and enforce that outcome only if they cannot reach resolution.[229] The objective is to avoid the need to employ the ultimate sanction of loss of trade benefits, a result that would be counterproductive to the parties' shared purpose to further free trade.[230] This is a design that acknowledges the political reality that it is the parties who best understand the respective interests they represent.[231] But it employs arbitration and potential sanction to compel the parties to find a practical solution.[232] It is a design that maximizes the capacity of arbitration, in contrast to litigation, to achieve a solution instead of a winner.[233] Presumably, that is the most desirable endgame for intergovernmental arbitration, for interagency governmental disputes at the state or federal level, between state and federal governmental agencies, or as it could be employed for disputes between government and private parties.

[226] *See* Garvey, *supra* note 222.
[227] Garvey, *supra* note 222, at 444.
[228] *See* Garvey, *supra* note 222.
[229] Garvey, *supra* note 222, at 439.
[230] *See* Garvey, *supra* note 222.
[231] *See* Garvey, *supra* note 222.
[232] *See* Garvey, *supra* note 222.
[233] *See* Garvey, *supra* note 222.

ii. THE POWER OF THE ARBITRATOR TO SECURE PUBLIC POLICY

Might it be sufficient, where the clash is more strictly and blatantly between the absolutist pro-arbitration policy of the FAA as interpreted and state policy disallowing collaborative resolution, to rely on the arbitrator's neutrality and expertise to advance the governmental public policy objectives involved in a dispute? In other words, might the arbitrator's power afford the saving grace for the realization of state public policy (though preemption in favor of the FAA is the prevailing rule where there is a clash)?

Commands to assure the arbitrator's neutrality are replete in arbitral rules.[234] And as the conventional wisdom goes, one of the principal advantages of arbitration is to secure the neutral and objective expertise of a decision maker familiar with the policies pertinent to the nature of the dispute.[235] Moreover, most arbitral rules recognize, unless otherwise stated in the arbitration agreement, that the arbitrator is empowered to provide equity between the parties.[236]

This is no reassurance, of course, with respect to restoration of critical procedural matters, such as class actions or punitive damages, which the U.S. Supreme Court found to be specifically at odds with the FAA's pro-arbitration policy.[237] But recognizing that arbitration includes significant discretion for the arbitrator, well beyond that of the litigation judge, to inject public policy into the arbitrator's deliberations—does arbitration assure

[234] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1990).
[235] *See* Spitko, *supra* note 121, at 54.
[236] Broome, *supra* note 184.
[237] *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005); Gentry v. Superior Court, 165 P.3d 556, 569 (Cal. 2007); AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 336 (2011); Stipanowich, *supra* note 184; Broughton v. Cigna Healthplans of Cal., 988 P.2d 67 (Cal. 1999); Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157 (Cal. 2003); Broome, *supra* note 184; Spitko, *supra* note 121.

neutrality? Moreover, if the arbitrator has the power to provide equity, isn't "fairness" including all relevant public policy, the worthy objective? Shouldn't the attorney arbitrating with government want fairness even if emanating from the arbitrator's amorphous equitable power?

However, it is necessary to consider relatedly the common criticism of the arbitral process—that it is "too neutral."[238] The charge is commonly made, especially among the practicing bar, that arbitrators tend to render "compromise awards," perhaps as a result of the contextual nature of the arbitral process—the decision maker and the parties' attorneys in much closer and less formal interaction than in judicial litigation—often of previous professional acquaintance.[239] More frequently than in judicial litigation, the lawyers and the "neutral" deciding their case share specific expertise, values, and relationships.[240] Arbitrators are chosen for their particular expertise, and they and the lawyers who appear before them typically belong to the same professional communities—certainly more than when the lawyers appear before a judge of general jurisdiction drawn from the formal legal system.[241] The arbitrators may indeed have an investment in not seriously displeasing particular colleagues.[242] Incentive to render a compromise award and thereby not disenchant the lawyers involved may also be in the arbitrator's interest to maintain future business in arbitral systems, such as those in the United States, that provide that the parties choose the arbitrators, if only from established lists, such as those employed by the American Arbitration Association.[243] For these reasons, there is the

[238] McConnaughay, *supra* note 117, at 465.
[239] *See* Garvey, *supra* note 222.
[240] Jennifer C. Bailey, *The Search to Clarify an Elusive Standard: What Relationships Between Arbitratir and Party Demonstrate Evident Partiality?*, 2000 J. DISP. RESOL. 153, 153 (2000).
[241] Bailey, *supra* note 240.
[242] Bailey, *supra* note 240.
[243] Bailey, *supra* note 240.

view that arbitrators are less inclined to issue an award that manifests a clear winner or loser. [244]

The common speculation that arbitration leads to compromise awards, in contradistinction to the winner and loser dynamic that drives court litigation, is belied to some degree by the common ambivalence and ambiguity as to who lost and who won often found as well in the result obtained from the litigation judge.[245] Moreover, the speculation that arbitrators are less inclined to follow the law, and therefore more inclined to render compromise awards, can at least be said to be unsubstantiated given the empirical studies specifically designed to expose the phenomenon of arbitral compromise verdicts.[246] Generally, these studies concluded that arbitrators do not commonly engage in "splitting the baby," and that arbitral awards do result in clear winners and losers no less than in the formal litigation system.[247]

But the widespread though unsubstantiated belief that an arbitrator is more likely than a litigation judge to split the baby merits special caution for the government lawyer. The risk of a compromise result from a decision maker not constrained by rights of appeal should be of special concern when the government lawyer is dealing with a matter of significant social policy and impact that warrants a clear result for deterrence or other purposes relating to other cases.[248] The caution is to avoid arbitration for such matters, or, if there is good reason nevertheless to secure the advantages of arbitration, to carefully examine the reputation

[244] *See* Garvey, *supra* note 222.
[245] *See* Garvey, *supra* note 222.
[246] Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, OXFORD HANDBOOK ON INTL. ARBITRATION 1, 25 (Dec. 21, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888552.
[247] *See* Stephanie Keer & Richard Naimark, *Arbitrators Do Not "Split the Baby": Empirical Evidence from International Business Arbitration: Collected Empirical Research* (2001), *reprinted in Towards A Science Of International Arbitration: Collected Empirical Research* 311 (Drahozal & Naimark eds., 2005).
[248] *See* Garvey, *supra* note 222.

of a particular arbitrator for objective disposition before agreeing to his or her appointment.[249]

With respect to "fairness" in arbitration, we should also recognize that party autonomy means that if there is inordinate leverage between the parties that results in the choice of arbitration, it can naturally lead to unfairness as to any procedural or substantive aspect of arbitration.[250] For example, the health care contracts of the Kaiser System in California formerly provided that only Kaiser doctors could act as arbitrators.[251] Besides the obvious problem of inherent bias, an apparent result was that delays in the system engineered by the doctors, in their self-defense, famously allowed an inordinate number of patients to die before there could be arbitration of their claims.[252]

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[249] Dominique Hascher, J., *Independence and Impartiality of Arbitrators*: *3 Issues*, 27 AM. U. INT'L L. REV. 789, 792–798 (2012) https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1784&context=auilr&httpsredir=1&referer=; *see also* Joan Stearns Johnsen, *Why Your Arbitrator Is Biased*, AMERICAN BAR ASSOCIATION (Mar. 18, 2015), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2015/why-your-arbitrator-is-biased/.

[250] Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 240 (1988); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, Proceedings of the 20th Annual Meeting of the National Academy of Arbitrators 1, 3–4 (1967); Silver-Greenberg*, supra* note 164; Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951 (Cal. 1997).

[251] Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951 (Cal. 1997).

[252] *Engalla*, 15 Cal. 4th at 951. Thus, in Engalla the California Supreme Court considered whether such circumstances of disproportionate leverage renders an arbitration agreement unenforceable. *Engalla*, 15 Cal. 4th at 951. Patient Engalla claimed Kaiser committed medical malpractice because its employees were negligent in detecting and diagnosing Engalla's lung cancer over the course of several years. *Engalla*, 15 Cal. 4th at 951. In accordance with the terms of Engalla's service agreement with Kaiser, the malpractice dispute was sent to arbitration. *Engalla*, 15 Cal. 4th at 951. Engalla made every effort to comply with the Kaiser-designed arbitration system and seek a speedy hearing because he was terminally ill from the undiagnosed lung cancer. *Engalla*, 15 Cal. 4th at 951. After Engalla died, with the medical malpractice dispute, not having been heard by the tribunal, the Engalla family brought an action in the California state court system. *Engalla*, 15 Cal. 4th at 951. The Engallas alleged

Similarly, in reference to bias and leverage, U.S. investment houses have provided that arbitrators in securities cases are required to be members of the National Association of Securities Dealers.[253] To the same unfair effect, consumer contracts leveraged by large consumer product producers include arbitration clauses waiving class

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Kaiser's self-administered arbitration system was corrupt and Kaiser intentionally delayed the arbitration process so the hearing would occur after Engalla's death. *Engalla*, 15 Cal. 4th at 951. The California Supreme Court affirmed the policy of enforcing arbitration agreements, but stated that where a party acts wrongfully and fraudulently, the enforceability of the arbitration clause may be limited. *Engalla*, 15 Cal. 4th at 951. The court's finding was that Kaiser's arbitration program was "designed, written, mandated and administered by Kaiser." *Engalla*, 15 Cal. 4th at 962. Kaiser did not disclose that it designed and administered the arbitration procedure to Engalla through the arbitration clause in the service agreement, nor through any publications on the procedure. *Engalla*, 15 Cal. 4th at 962. Kaiser's reserved control of the arbitration system enabled Kaiser to repeatedly delay steps in the arbitration process, such as the timeliness of selecting the arbitrators. *Engalla*, 15 Cal. 4th at 962. The arbitration agreement provided for each party to select an arbitrator, then the two arbitrators select a third, neutral arbitrator. *Engalla*, 15 Cal. 4th at 962. "[I]n reality, the [neutral third arbitrator] selection is made by defense counsel after consultation with the Kaiser medical-legal department. Kaiser has never relinquished control over this selection decision." *Engalla*, 15 Cal. 4th at 965. The court further noted that the arbitration panel should have been established within sixty days. *Engalla*, 15 Cal. 4th at 965. But, due to Kaiser's systemic delays, the process took three additional months, until the day before Engalla's death. *Engalla*, 15 Cal. 4th at 965. Evidence revealed these delays were widespread and commonplace, and that Kaiser knew of the problem. *Engalla*, 15 Cal. 4th at 965. The California Supreme Court remanded the case to resolve factual disputes related to Kaiser's fraud. *Engalla*, 15 Cal. 4th at 965. If the lower court found Kaiser was fraudulent, it could strip Kaiser of its ability to compel arbitration. *Engalla*, 15 Cal. 4th at 965. *Engalla*, and the broad abuse it exposed, thus demonstrates that where one party is completely autonomous in its forum selection and arbitration procedures, critical unfairness, such as delaying arbitration until a terminally ill patient dies, can result. *Engalla*, 15 Cal. 4th at 965.

[253] Julia Kagan, *National Association of Securities Dealers (NASD)*, INVESTOPEDIA.COM, https://www.investopedia.com/terms/n/nasd.asp; FindLaw Attorney Writers, *NASD Arbitration of Securities Disputes*, CORPORATE.FINDLAW.COM, https://corporate.findlaw.com/litigation-disputes/nasd-arbitration-of-securities-disputes.html; *Registration, Exams, and CE,* FINRA.ORG, https://www.finra.org/registration-exams-ce/individuals.

actions and punitive damages, making the pursuance of consumer claims economically unsupportable.[254] Is there neutrality when the mere designation of arbitration means loss of the right of neutral disposition, as where certain industries, applying their leverage against employees and labor unions, insert arbitration clauses that limit the nature and extent of the complaints that can be brought before the arbitrator, thereby diminishing labor rights?[255]

An even more insidious unfairness than outright bias or inherent leverage can result from the economic interest of the arbitrator harnessed by a party who presents the implied promise of repeat business as the reward for a favorable result.[256] This dynamic is entirely absent from judicial litigation; however, in arbitration, it favors the party who presents the greater potential for future business for the arbitrator.[257] The implicit economics of a dispute involving an arbitrator with a once-only party on the one side and a potential repeat customer on the other may bias results.[258] This dynamic, sometimes identified as "the repeat player advantage," typically means favoring the large over the small, the company over the consumer or employee, and even the state over its citizens.[259] The potential for the operation of this dynamic in any particular case should

[254] *See generally* Silver-Greenberg*, supra* note 164; *see also* Bingham, *supra* note 250.
[255] Bingham, *supra* note 250.
[256] Meltzer, *supra* note 250, at 3-4 (1967); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RIGHTS AND EMP'T POLICY J., 189 (1997).
[257] Bingham, *supra* note 256.
[258] Bingham, *supra* note 256.
[259] *See* Bingham, *supra* note 256; Silver-Greenberg*, supra* note 164 (analyzing the effects of arbitration across multiple industries, especially noting the disproportionate leverage held by credit card companies, employers, and other commercial entities); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. DISPUTE RESOL. 759, 767–71 (2001) (distinguishing between arbitration practiced among repeat players, such as merchants, and that between repeat players and one-shot players, such as employees).

certainly be taken into consideration by any lawyer before choosing arbitration.

Additionally, as to the potential for bias in governmental arbitration, arbitrators, counsel, and expert witnesses in any given proceeding may have previously worked on the same matters and crossed paths in one professional context or another.[260] This reality is not unique to arbitration with government but is most pronounced where there are concentrated communities of expertise involved in particular areas of governmental activity.[261] Arbitral systems, such as that of the American Arbitration Association, are meticulous in requiring pervasive disclosures that serve to police such associations that could create conflicts of interest.[262] The Administrative Dispute Resolution Act (ADRA) requires neutrality by prohibiting any financial or personal conflict of interest.[263] For international arbitrations, the U.N. Commission on International Trade Law is also exemplary in requiring prior disclosure of any conflicts.[264] However, the nature of professional relationships and unconscious bias involved may not be fully comprehended by objective standards,

[260] *See* Drew Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evident Partiality*, 5 Y.B. ARB. & MEDIATION, 325 (2013); Lawal v. Northern Spirit Ltd. (2003) UKHL 35, 21-23; *see also* William Park, *Arbitrator Bias*, TRANSNATIONAL DISP. MGMT. BOS. U. SCHOOL OF LAW 6–7, 24–31, 33–38, 45 (2015); Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECON. POLICY INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.

[261] Katherine Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act,* 77 N. CAROLINA LAW REV. 931,1015–1026 (1999); *see genrally* Lawal v. Northern Spirit Ltd. (2003) UKHL 35.

[262]*Commercial Arbitration Rules and Mediation Procedures, R-19(a)*, AMERICAN ARBITRATION ASSOCIATION (Oct. 1, 2013), https://adr.org/sites/default/files/Commercial%20Rules.pdf.

[263] 5 U.S.C. §§571-584 (current through Pub. L. No. 116–187).

[264] U.N. Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, art. 12, 7 (1985), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

where there is past joint participation in a litigation.[265] Arbitrators hired for their expertise in particular areas of governmental regulation often confront the same counsel in different cases, whether at the state or federal level.[266]

Indeed, as previously noted in relation to the potential for compromise awards, the arbitrators are drawn from the same communities as the lawyers appearing before them.[267] Litigation judges, though drawn from the same professional communities as the lawyer appearing before them, are prohibited from operating as an advocate or expert witness through their entire service as judge, and are subject to constraint from fraternizing with the advocates who are before them or with potential witnesses.[268] Arbitration is more dependent on personal ongoing relationships, and the nature of those relationships may cross over considerably from social to legal.[269] Because arbitrators are drawn from the practice community in which they currently participate, unlike the litigation judge who may be from that same community but must cut ties, there is an ongoing natural fraternity of interest for the arbitrator, and accordingly, a more significant potential source of bias.[270] In contrast to the litigation judge, an individual who is appointed to arbitrate your case may have also participated in relatively

[265] Lawal v. Northern Spirit Ltd. (2003) UKHL 35, 21-23; *see also* Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. OF INT'L DISP. SETTLEMENT 553, 556–57, 561–63 (2013).
[266] *See generally* Hushka, *supra*, note 260; Lawal v. Northern Spirit Ltd. (2003) UKHL 35.
[267] *See* Park, *supra* note 260, at 6–7, 24–31, 33–38, 45 (2015); Stone & Colvin, *supra* note 260; *see also* Hushka, *supra* note 260.
[268] *Judge as an Expert Witness, Opinion No. 139* (1991) https://www.law.uh.edu/libraries/ethics/Judicial/jeao/101-200/jeao139.html.
[269] Cole, *supra* note 259.
[270] Thus in recognition of the subconscious bias this may engender, the British House of Lords has held that lawyers who serve as part-time judges may not appear as counsel before an Employment Appeal Tribunal, because that would create a risk of bias and undermine public confidence regarding the independence of arbitrators. Lawal v. Northern Spirit Ltd. (2003) UKHL 35, 21–23.

current time frame as an advocate, consultant, or expert witness (hired by the parties or by the tribunal itself).[271] Often such ongoing experience is what is deemed to qualify an individual to serve as arbitrator.[272] This experience presents a particularly rich potential for bias however long the list of disclaimers of conflict of interest that may be required by the arbitral forum.

iii. THE SALUTARY INFLUENCE OF EPISTEMIC COMMUNITY

Here, though, is the profound irony in arbitration with Government, and potentially its saving grace. The same community of interest that holds potential to bias the arbitrator, can be an important source of support for the realization of public policy. Those who arbitrate government contracts are a community of shared expertise with kindred professional values born of common education in the public policies involved in pertinent statutory and adjudicative authority. As a sociological and political reality, such communities of shared values and sensibilities have been sometimes identified as "epistemic communities."[273]

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[271] As Judge Posner of the U.S. Court of Appeals for the Seventh Circuit has observed, in choosing to arbitrate, "(t)here is a tradeoff between impartiality and expertise," and therefore the test for disqualification must turn on evidence of the arbitrator's impartiality. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679–80 (1983).

[272] *Merit*, 714 F.2d at 166.

[273] *See* Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) wherein 'epistemic communities' are defined as: "network(s) of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which can then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes (3); shared notions of validity –that is, intersubjective, internally defined criteria for weighing and

As a threshold matter when arbitration is employed by government, there are the formal constraints of disclaimers of conflict of interest required by virtually every arbitral institution, which today can be quite detailed and far reaching, purporting to cover all avenues of potential conflicts of interest such as any of a wide variety of relationships to the parties, or elements of self-interest.[274] But shared interests and responsibilities can also by their very nature engender therapeutic constraint against bias, and the realization of socially beneficial public policy. Though there is no review of the arbitrator's judgment on the merits, there is the informal constraint of the arbitrator's professional ethics and reputational concern, albeit related to the arbitrator's economic concern to be chosen for future business.[275] An able government counsel will advance any governmental policy or fairness concern that can trigger the arbitrator's own sense of social responsibility and reputational interest. This, of course, indicates the importance both of the choice of arbitrator, and the skills of interpersonal diplomacy the lawyers and arbitrator bring to the table in any given case.

Requirements of full disclosure through articulated disclaimers of conflict of interest and pre-vetted arbitrator lists can go a long way in enlisting this positive aspect of shared policy concerns and interests. The Constitutional illegitimacy of a proposed federal bureaucracy, as discussed above, to determine when state public policy or the pro-arbitration policy of the FAA should prevail, does not

validating knowledge in the domain of their expertise; and (4) a common policy enterprise—that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of conviction that human welfare will be enhanced as a consequence." *Haas*, *supra*.

[274] *See generally*, Rogers, *supra* note 46; American Arbitration Association, *supra* note 17; Singapore International Arbitration Center, SIAC Rules 2016 6th ed. (Aug. 1, 2016), https://www.siac.org.sg/our-rules/rules/siac-rules-2016.

[275] Garvey, *supra* note 222.

preclude the inclusion of a bureaucratic authority to select an arbitrator from among a list of those qualified by education and experience to serve as the neutral decision maker.[276] Indeed, for certain governmental arbitration U.S. statutes and regulations so provide, by way of designation of a governmental official with the authority to designate an arbitrator from a pre-vetted official or unofficial list.[277]

There are also in service of the better aspects of epistemic community interest, the shared standards of professional ethics,[278] rules of procedure to ensure fairness,[279] transparency and improved informational resources for the selection of arbitrators, and increased transparency for the challenge of arbitrators.[280] Moreover, major arbitral institutions have established training and certification programs, which are often made mandatory for would-be arbitrators.[281]

It is clearly in the interest of government lawyers to support such developments. The party autonomy that is the foundation of arbitration means that the government lawyer is positioned to accomplish a great deal as to all provisions to ensure fairness by selecting and demanding adherence to these requirements of fairness as the *sin qua non* of the choice to arbitrate.

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[276] Garvey, *supra* note 222.
[277] *See* 5 U.S.C. § 577(a) (1990); 14 C.F.R. § 17.35 (2011), which provides that the Office of Dispute Resolution for Acquisition (ODRA), upon agreement of the parties, may designate an ODRA Dispute Resolution Officer (DRO) to serve as arbitrator, or alternatively that the ODRA make qualified personnel to serve as arbitrator.
[278] Rogers, *supra* note 114; American Arbitration Association, *supra* note 17.
[279] *See* Emmanuel Jolivet, *Access to Information and Awards,* 22 ARB. INT'L. 265 (2006). This development importantly includes improving the efficiency of arbitration as to time and cost; *see also* Harold S. Crowter & Anthony G.V. Tobin, *Ensuring that Arbitration Remains a Preferred Option for International Dispute Resolution*, 19 J. INT'L. ARB. 301 (2002).
[280] *See, e.g.*, Director General's Review of 2006, London Court of International Arbitration, 1 (2006).
[281] Florian Grizel, *Control of Awards and Re-Centralisation of International Commercial Arbitration*, 25 CIV. JUST. Q. 166, 167 (2006).

There is also therapeutic value the parties themselves can craft into the arbitral process, such as stipulating for reasoned awards and their publication when possible.[282] This can serve importantly in minimizing the risk of bias or the risk that important public policy will be ignored. The government lawyer, given party autonomy as the foundation of arbitration, can take the initiative to insist on such requirements.

Providing for a reasoned award and its publication establishes the opportunity to promote and enhance predictability in all relevant arenas of governmental interest, ranging from employer–employee relations to public–private partnerships and social services. Even if not of precedential value, such opinions can create at least informal standards for regulation of virtually all areas of governmental concern and regulation: such as in the workplace, government, or commerce, setting guidelines for economic development and social welfare in all its diverse aspects. The requirement of a reasoned award, as articulated and exploited by the government lawyer, can serve to engage awareness of the arbitral tribunal that it will be compelled to justify its award, can serve to motivate engagement and a higher level of analysis and scrutiny than the mere issuance of an award, and can force the arbitral tribunal to obtain better knowledge of the law as the background for the award, notwithstanding that the award is unsusceptible to reversal on the merits.[283] Exposure achieved by the requirement of a fully reasoned and published award is indeed protection against unprincipled decision, confronting the arbitral tribunal with the prospect of critique compelling self-examination and requiring justification.[284] Such accountability encourages well-reasoned decisions, as well as providing a basis for the lawyers on both sides of the

[282] Grizel, *supra* note 282, at 167.
[283] Stephen Hayford, *Law in Disarray: Judicial Standards for Vactatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 798–99 (1996).
[284] Hayford, *supra* note 283, at 798–99, 841–42.

dispute to better evaluate the quality of an arbitrator for future selection, and for rejecting the incompetent.

The net result of a process subject to scrutiny, in terms of the public perception and the public interest, is greater legitimacy for arbitration and its results, and a greater willingness to employ its advantages of more expeditious dispute resolution than in the formal litigation system, while achieving the cost savings that usually can be secured by dispute resolution through arbitration.[285] However, to maximize the benefits, it is up to the government lawyer to proactively articulate and refine the detail of desired award, both in the drafting of the arbitration clause and later when engaged within the arbitral process.

A proactive participation of the government lawyer similarly can enhance the process by which the arbitral tribunal deliberates the merits, most importantly in achieving maximal transparency. The demand for transparency in all possible aspects, just as for a thoroughly reasoned award, should be articulated in drafting the arbitration clause and throughout the process. Transparency and publication can also provide information for policymakers for collaterally evaluating public law and public administration.[286] Moreover, it is the government lawyer who is best situated to engage and promote the public interest by encouraging and allowing information and argument, such as through amicus filings by civil society organizations and other affected third parties, especially where there are significant impacts on third parties and society at large, as for example, in cases of regulatory takings.[287] All this also can be accomplished in the drafting of the arbitration agreement and creative interjection of the

[285] Sarah Rudolph Cole, *Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count*, 68 ALA. L. REV. 179, 185 n.22 (2016).
[286] Amy Schmitz, *Secrecy and Transparency in Dispute Resolution: Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1238–41 (2006).
[287] Schmitz, *supra* note 286, at 1238–41.

government lawyer during the operation of the arbitral process.

The government lawyer indeed can play a critical role in ensuring the fullest transparency in the public interest, by drawing on instruction other than from the domestic legal system itself, instruction that is now available to be drawn especially from international legal development. Comprehensive guidelines to maximize transparency have been fulsomely developed by way of standards recently elaborated for international arbitration.[288] Lawyers involved in government contracting accordingly should be at the forefront of articulating and requiring such standards. The power to do so is inherent to the principle of party autonomy, and the government lawyer engaging in arbitration possesses the power to require these standards as the *sin qua non* in drafting an arbitration clause or agreement.

There can surely be reasons to limit disclosure, but such limitation should be specific to the case and the facts if it is not to unduly subvert transparency. For example, the arbitrator's power includes making adequate provision for protection of trade secrets or other concerns of competitive advantage. But at least when the public interest is the elephant in the room, which is generally the case when government is arbitrating its disputes, the presumption should be in favor of transparency.

Moreover, any lawyer or arbitrator joined in the epistemic community of government lawyers and arbitrators should appreciate the therapeutic value of adoption of the procedural rules of a well-established arbitral system. Over time these rules evolve to integrate concerns of fairness and procedural restraints on discretion derived from what has been learned from arbitrations gone wrong. The administering bodies of various arbitral systems typically respond to complaints about process and modify their

[288] *See* Trans-Pacific Partnership, *supra* note 50.

procedures accordingly. There is a special safety in not trying to reinvent the wheel by proceeding to arbitrate *ad hoc*, but instead to rely on adoption of an established arbitral institution and its corpus of established and tested standards.

There is, finally, a subtle but critical aspect to the potential value of arbitration for the government lawyer that goes well beyond the accounting for public policy as embodied in statute or decisional law. Whether the government attorney is engaged in arbitration in commercial context or vis-a-vis other governments or representatives of other governmental agencies, the matter of cultural awareness is of special importance.[289] Cultural sensitivity is more likely of special importance for government attorneys considering the choice of arbitration, rather than for private sector attorneys, because of the different interests they represent.[290] In commercial arbitration, the parties—their attorneys and the arbitrator—generally represent a homogeneous cut of the national population, gauged in terms of education, professionalism, or social class.[291] In other words, commercial arbitration, being commercial, is about wealth—those who enjoy the advantages of wealth, and those who have enough wealth to afford to be fighting about it through legal process and lawyers.[292] In arbitration involving government, however, the government lawyer represents the diverse interests of society at large.[293] The client base, for a government attorney—in the ultimate respect of citizenship—includes not only the wealthy and educated, but also the poor and middle class populations—many of who are without the advantage of being able to

[289] Theodore K. Cheng, *Developing Skills to Address Cultural Issues in Arbitration and Mediation*, 72 DISP. RESOL. J. 1, 5 (2017).
[290] Cheng, *supra* note 289.
[291] Jaque I. Garvey, *ARBITRATION INVOLVING GOVERNMENTAL ENTITIES*, 1 REVISTA ELETRÔNICA DA PROCURADORIA GERAL DO ESTADO DO RIO DE JANEIRO 1, 17 [Elec. J. of the Attorney General of the State of Rio de Janerio] (2018).
[292] Garvey, *supra* note 291.
[293] Garvey, *supra* note 291.

employ lawyers to handle their disputes, many isolated and alienated from the legal system.[294]

These parties and their interests, whether physically participating in a given arbitration or not, may be detached and alienated from the court litigation system—except as represented by the government lawyer.[295] The same is true for the government lawyer in arbitration—who is by nature of the office of government lawyers—charged with defending and enforcing the public trust.[296] The challenge for the government lawyer in arbitration is to work on behalf of a much more diverse population of interests than the private commercial attorney, and to do so—for reasons here explained—before a neutral third party not mandated by public policy, but rather by party autonomy.[297] Accordingly, this mutually appointed third party is freer than the litigation judge to ignore or respect the public trust.[298] The greatest challenge, therefore—especially for the government attorney engaged in arbitration—is to represent those members of society who are more outside the legal system than within it.[299] The need for legal representation of the disenfranchised and disabled imposes a greater responsibility for the government lawyer in arbitration.[300]

There are procedural means to best realize the diversity of interests that the government lawyer should represent. One technique that can be very effective to ensure that the ruling of the arbitrator conforms to the societal interests inherent in a dispute, is for the arbitrator, after hearing on the merits—but before the rendering of the award—to ask the parties themselves to provide the arbitrator with a draft order of the result that would work best

[294] Garvey, *supra* note 291.
[295] Garvey, *supra* note 291.
[296] Garvey, *supra* note 291.
[297] Garvey, *supra* note 291.
[298] Garvey, *supra* note 291.
[299] Garvey, *supra* note 291.
[300] Garvey, *supra* note 291.

for their circumstances and constituency.[301] This may well produce results much more accommodative to the diversity of interests involved—and for all the parties involved, whether impacted directly or indirectly—than an arbitrator ruling without a refined background of understanding of the particular problems and potential solutions an award should ideally reflect.

Relatedly concerning the social responsibility implicit in arbitration with government, there is the psychological dimension that a good lawyer should take into account—that we all experience a selective and biased process in our perception of external stimuli.[302] This "golden rule" has long been recognized—the lawyer representing one side must stand in the shoes of the other.[303] Recognition of the same difficulty appears in modern psychology, by way of the evidence of selective perception, whereby the same events can be interpreted very differently by two individuals.[304] We tend see what is familiar—i.e., what is personally and culturally most akin to our community, whether cultural and/or professional.[305] But as the golden rule requires, representation requires empathy.[306] For the government lawyer—who represents the large national community of a more diverse mix of social class and ethnic and cultural affinity than any lawyer in private

[301] Garvey, *supra* note 291.
[302] Garvey, *supra* note 291.
[303] Garvey, *supra* note 291.
[304] *See, e.g.*, James W. Bagby, *Cross-Cultural Study of Perceptual Predominance in Binocular Rivalry*, 54 J. ABNORMAL & SOC. PSYCHOL. 331, 331–34 (1957). A classic study in which one eye of subjects from the United States viewed, for a second, stereograms in which one eye was exposed to a baseball game and the other to a bull fight. *Supra* at 331–34. The subjects from the United States generally saw only the baseball game and the Mexican subjects saw only the bullfight. *Supra* at 331–34.
[305] *See, e.g.*, Bagby, *supra* note 304, at 331–34.
[306] Bagby, *supra* note 304.

practice—the need to step into the shoes of the other is especially a moral and psychological imperative.[307]

Social science literature and jury psychology studies all indicate a fundamental truth about adjudicative neutrality—that the more diverse the group that engages in judgment (and therefore the more diverse the perceptions, observations and opinions engaged), the more likely the adjudicative body is to arrive at an objective assessment of the facts and analysis.[308] It follows that the government

[307] *See* Guiguo Wang, *The Belt and Road Initiative in Quest for a Dispute Resolution Mechanism*, 25 ASIA PAC. L.R. 1 (2017); *see also* Chris Horton, *The Costs of China's Belt and Road Expansion*, THE ATLANTIC (Jan. 9, 2020), https://www.theatlantic.com/international/archive/2020/01/china-belt-road-expansion-risks/604342/. An innovative example of how to provide for maximizing cultural sensitivity in arbitration, is the provision for the "Blue Book" for dispute resolution that has been made within the major "Belt and Road" initiative of China. Wang, *supra.* This trade and investment initiative, unveiled in 2013, seeks to facilitate and generate trade and investment across a broad swath of Asia, by means of measures for a broad integration of international trade between China and its neighbors, stretching through multiple and diverse cultures. Wang, *supra.* These measures include, as importantly embodied in The Blue Book, a new set of rules covering conciliation, arbitration and appeal procedures, plus a set of transparency rules and code of conduct for conciliators and arbitrators. Wang, *supra.* Most notably in relation to the cultural challenges the Belt and Road initiative presents, the Blue Book permits the parties to agree that "at least one arbitrator shall have specific professional qualifications or expertise and/or understanding of local or regional culture and practices." Wang, *supra.* This is in addition to the qualification requirements of objectivity, reliability and observance of rules of international conduct. Wang, *supra.* Whether China's aggressive trade expansion generates pushback to China's Belt and Road initiative that belies this accommodation to cultural diversity is, of course, yet to be determined. Wang, *supra.*

[308] *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 104 (Harv. Univ. Press ed., 1994) (citing, among other studies, Nancy J. King, *Post-Conviction Review of Jury Discrimination: Measuring the Effects of Juror Decisions*, 92 MICH. L. REV. 63 (1993); JON VAN DYKE, JURY SECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (Ballinger Pub. Co. ed., 1977); Shirley S. Abramson, *Justice and Juror*, 20 GA. L. REV. 257, 257–98 (1986); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006); DOAK BISHOP & EDWARD G. KEHOE, THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 519–581 (2d ed. 2010))

attorney, seeking to represent society at large, should be especially inclined to maximize the diversity of experience and viewpoints available through arbitration. Therefore, a government attorney agreeing to arbitration should seek to appoint an arbitrator who has a diversity of experience, both social and legal, and, where economically viable for the parties, appoint more than one arbitrator to achieve the greatest diversity of social and professional experience available.

VI. CONCLUSION

Ultimately, it is party autonomy, the source of arbitral power, that controls arbitration to ensure that it serves rather than undermines good government.[309] Because the arbitral process can be what the parties design it to be, the government lawyer, who anticipates the concerns and meets challenges here addressed, is best positioned to minimize the risks to the public interest that arbitration presents and to maximize its advantages.[310]

The foundational principle of party autonomy empowers the government attorney to affect all aspects of arbitration.[311] This even includes, when appropriate and desirable, rejection of arbitration for resolution of particular aspects of a particular dispute, or its limitation through exclusions to protect the public interest by narrowing or limiting the issues to be arbitrated.[312] Party autonomy empowers the use of arbitration to achieve social good, so long as the government lawyer appreciates the proactive role that arbitration requires.[313] Party autonomy makes possible negotiation and stipulation as to virtually all substantive

("[R]esearch indicates that when jurors of different ethnic groups deliberate together, they are better able to overcome their individual biases . . . .").
[309] *See* Bockstiegel, *supra* note 57, at 25.
[310] *See* Bockstiegel, *supra* note 57, at 25.
[311] Garvey, *supra* note 222, at 444.
[312] Garvey, *supra* note 222, at 444.
[313] Garvey, *supra* note 222, at 444.

rights and obligations, and remedies of the parties, and all significant procedural aspects, whether presentation of witnesses, confidentiality, cross examination, preclusion of potential conflicts of interest and bias, and cultural representation. Creative control through design of the arbitral proceedings can include the most useful requirements to serve the public interest at a significant level of specificity; for example, even detailed requirements such as concerning admission and use of expert witnesses and whether the arbitral panel can call its own expert, or witnesses, or conduct its own research.

As the examination here reveals, there is much that can be accomplished by the government lawyer working within arbitral process to serve the public trust. For the government lawyer, therefore, arbitration *is ultimately* an empowerment to serve the public interest.[314] Success, however, depends on the government lawyer's in-depth understanding of the complex opportunities presented within the arbitral process and understanding where the critical judgments in designing that process must be made. There are no doubt risks. Arbitration, despite its advantages, may override constraints that have enlightened the formal legal system through lessons learned in evolving the formal legal system towards better rule of law and justice.[315] The government lawyer and arbitrator, who appreciate the risks but understand the capacities of arbitration to serve the public good, can fill an important role in bringing that same enlightenment to the alternative dispute resolution universe of arbitration.

[314] *Mitsubishi*, 473 U.S. 614.
[315] McConnaughay, *supra* note 117.