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KEEPING ARBITRATIONS FROM BECOMING KANGAROO COURTS

Jeffrey W. Stempel*

Introduction

As the contributions to this Symposium suggest, there is a lot that could be done to improve arbitration, particularly the sort of “new” or “mass” arbitration that has sprouted during the past 25 years resulting from the judiciary’s modern favorable attitude toward enforcement of arbitration clauses, even those imposed upon consumers, employees, small vendors, and debtors as part of a standardized contract of adhesion. In a separate article,¹ I present a more comprehensive list of what I regard as the necessary steps that must be taken to insure minimally acceptable quality and fairness in mass arbitration. In this article, I focus more specifically on the questions of impartiality, adherence to substantive law, and judicial review, although these concerns are of course also dimensions of any reasonably broad inquiry into quality.

Part I of this article outlines a number of areas of concern regarding arbitral fairness relative to that of courts. Part II briefly recaps the modern pro-arbitration jurisprudence of the Supreme Court that led to the explosion of mass arbitration during the late 20th Century, which in turn created much greater potential that arbitration could become an unfair forum for dispute resolution. Of particular concern is the impartiality and competence of the arbitrator, consistency with substantive law, and quality control through appellate review. Part III advances three operational proposals for achieving this rough equivalency between arbitration and litigation: (1) a licensing system for arbitrators in “mass” arbitrations; (2) a default rule that arbitration follow substantive law and reach results consistent with substantive law; and (3) replacement of the current deferential standard of review for arbitration awards with appellate review similar to that accorded trial court decisions. Part IV clarifies that parties in traditional commercial arbitration may avoid the requirement of using licensed arbitrators bound to follow substantive law and may stipulate to restricted judicial review.

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¹ See Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CINN. L. REV. [Text Accompanying Note [“TAN”] 2-14] (forthcoming 2007)(manuscript on file with the *Nevada Law Journal*).

I. The Rise of Arbitration and the Specter of Kangaroo Courts

The dramatic expansion of arbitration has been one of the most significant developments of modern law.² Prior to the 1980s, arbitration was relatively common but largely confined to particular business and professional spheres. In the 1980s,³ legal constraints confining arbitration in those spheres were substantially retracted by the U.S. Supreme Court, which announced a strong national policy in favor of enforcing arbitration agreements. The 1960s presaged some of these developments⁴ and the 1970s saw the rise of the “alternative” dispute resolution (ADR) movement, in which arbitration was heralded as an effective means of streamlining adjudicative dispute resolution that

² See Stempel, *Mandating Minimum Quality*, *supra* note 1 [TAN 27 and generally TAN 2-37] (noting prominence of change in arbitration law relative to other legal developments of the late 20th Century; describing in detail differences between traditional commercial arbitration and new, “mass” arbitration that essentially operates as wholesale privatization of dispute resolution in many sectors of the economy); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fair Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 334-40 (1996) (describing rapid ascent of ADR during last quarter of 20th Century and development of “new” mass arbitration); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 107-08 (collective contracting of the type taking place in mass arbitration systematically undermines traditional notions of contract consent and favors commercial entities drafting self-serving contract provisions, including arbitration clauses). See also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (describing traditional role of arbitration in guild); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991) (noting use of arbitration by merchants in middle ages). See generally IAN MACNEIL, RICHARD SPEIDEL & THOMAS STIPANOWICH, *FEDERAL ARBITRATION LAW* Ch. 1 (1995) (describing background and history of FAA, legislation sought by shippers, traders, and other commercial entities); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926) (same). In addition, of course, arbitration has long been the common means of resolving disputes arising under a union’s collective bargaining agreement. See STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 14 (2d ed. 2006); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 922 (1979).

³ See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that FAA creates body of substantive federal law that must be applied in either state or federal court; state laws creating different treatment for certain arbitration contracts trumped by FAA; arguably overruling *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), which most observers read as applying FAA only to federal court proceedings and viewing FAA as federal procedural statute rather than one setting forth substantive national law applicable in state courts as well); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (requiring arbitration of construction and commercial dispute; applying FAA to require stay of litigation while question of arbitrability decided; stating that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”). But see *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) (permitting parties, by choosing particular state’s law as substantive law governing the contract, to avoid some applications of the FAA).

⁴ In the “Steelworkers’ Trilogy,” the Supreme Court had taken a supportive and expansive view of labor arbitration some twenty years prior to its arbitration revolution of the 1980s. See *United Steelworkers v. Enter. Wheel & Car. Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). But these were labor arbitration cases. Under substantive U.S. labor law and policy, arbitration between unions and management was specifically encouraged as a means of achieving industrial peace.

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Court held that defense of fraud in the inducement to contract directed at the contract as a whole must be first presented to the arbitrator and was not exempt from arbitration, a major victory for arbitration proponents that continues to have modern impact. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

would save time and reduce costs.⁵ Arbitration decisions prior to the 1980s had begun to display a more favorable judicial attitude toward enforcement of predispute arbitration agreements.⁶ But it was in the 1980s that the Court became smitten with what I have termed “arbitral infatuation” and modified or reversed several precedents that restricted arbitration.⁷ The Court has continued to have something of a “crush” on arbitration rather than a more mature view of its positive and negative traits.⁸

⁵ See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR From Ideology*, 2000 J. DISP. RESOL. 247 (describing rise of both community-based and business-based ADR movements during the late 1960s and 1970s); Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation From Custody to Full Service*, 35 WILLAMETTE L. REV. 485 (1999)(same).

⁶ See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)(refusing to apply statutory/public policy arbitration of *Wilko v. Swan*, 346 U.S. 427 (1953), to international arbitration involving foreign investment); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)(enforcing arbitration clause in towing agreement for salvage of ship in international waters notwithstanding nontrivial argument that agreement was signed under duress by marooned ship owner).

⁷ See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996). See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)(overruling *Wilko*, 346 U.S. 427, and finding no statutory or public policy bar to mandatory arbitration of claims made pursuant to Securities Act of 1933); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)(rejecting “intertwining doctrine” of some lower courts which prevented arbitration of claim concededly subject to arbitration agreement when claim was intertwined with one outside scope of arbitration clause or claim subject to statutory or public policy exception to arbitration; noting strong federal policy favoring arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)(rejecting contention that antitrust claims, being statutorily based, are consequently too public to be resolved through arbitration).

⁸ See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)(holding that FAA preempts and precludes application of Montana statute requiring that arbitration clause be typed in underlined capital letters on first page of agreement if clause is to be enforceable); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995)(giving FAA provision of its applicability to any “contract evidencing a transaction involving commerce” broad reading to the limits of the federal Commerce Clause power); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)(enforcing arbitration clause; rejecting argument that arbitration provision constitutes limitation on liability forbidden under Carriage of Goods at Sea Act (COGSA)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(rejecting argument that claims pursuant to the Age Discrimination in Employment Act (ADEA) may not be arbitrated, implicitly rejecting argument that Section 1 of the FAA, 9 U.S.C. § 1 (2006), precludes arbitration of employment disputes. Section 1 specifically states that the Act does not apply to arbitration agreements in a “contract of employment;” Court avoids conflict with this seemingly clear textual bar to arbitration enforceability by treating arbitration agreement of broker Gilmer as not being part of his “contract of employment” because of standard securities industry practice of requiring arbitration in employer-employee disputes). But see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)(ruling that Court must grant some deference (rather than de novo review) to arbitrator’s determination of arbitrability of dispute but holding in particular case that scope of arbitration clause was sufficiently narrow to require judicial scrutiny of whether arbitration clause encompassed dispute between the parties); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)(permitting arbitrators to award punitive damages in securities arbitration notwithstanding the brokerage contract contained New York choice of law clause and New York state law prohibits punitive damages awards in arbitration).

The Court continues to privilege arbitration.⁹ But the arbitration so lionized by the Court is no longer confined to specialized commercial spheres but has become a massive privatization of the adjudicatory function. In addition to the traditional parties and disputes historically found in arbitration, a genre of “new” arbitration now exists in which arbitration is essentially imposed upon a large, general class of consumers and workers. Retailers and employers frequently provide in standard contract forms that disputes with their customers or workers are to be arbitrated through ad hoc, self-administered, or “in house” arbitration tribunals rather than under the auspices of an established arbitration provider such as the American Arbitration Association (AAA).

Consumers, employees, and many legal scholars have attacked the use of mass arbitration, arguing that:

- the Supreme Court engaged in improper judicial activism in misinterpreting the Federal Arbitration Act of 1926 to create a national rule of arbitration clause enforceability that outstripped any reasonable view of the intent of the enacting Congress;
- expansive application of the FAA resulted in workers being forced to arbitrate work-related disputes, a result inconsistent with at least the spirit of the law, which includes a specific section that can reasonably be read as taking employment matters outside the scope of the Act;

⁹ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (holding that defense to arbitration based on contract illegality is for the arbitrator in first instance; “challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator”); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (question of whether arbitration agreement “silent” on question of class actions permitted classwide arbitration was initially for arbitrator rather than court; question of whether contract forbids class treatment of claims is not a question of arbitrability that must first be decided by court); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (question of whether contract provision restricting punitive and other damages prohibited treble damages pursuant to plaintiff physicians’ claim under Racketeer Influenced and Corrupt Organizations Act (RICO) was for arbitrator rather than court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (applicability of NASD six-year time limit for bringing securities claim is matter “presumptively for the arbitrator, not for the judge”); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) (construing the venue provisions of the FAA (9 U.S.C. §§ 9-11) regarding confirmation, vacation, or modification of arbitration to permit proceedings in either district where award made or in any federal district available under general venue statute, 28 U.S.C. § 1391 (2006)); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (arbitration clause silent regarding costs not sufficient to preclude compelled arbitration on ground proceeding may be prohibitively expensive for consumer).

See generally THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (4th ed. 2007) (collecting and reviewing caselaw on arbitration); HUBER & WESTON, *supra* note 2 (same); CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* (2d ed. 2006) (same). See also Stephen J. Ware, *The Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. (forthcoming 2007); William W. Park, *The Arbitrator’s Power to Address Jurisdictional Questions*, 8 NEV. L.J. (forthcoming 2007); Alan S. Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. (forthcoming 2007). But see Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. (forthcoming 2007) (extensive criticism of *Buckeye Check Cashing*, *Casarotto*, and *Bazzle* as insufficiently respectful of state judicial and legislative authority).

- the new jurisprudence imposed arbitration upon individuals who certainly made no conscious agreement to arbitrate and arguably did not give even de facto or constructive consent to arbitrate;
- displacement of public adjudication with private arbitration impoverishes the growth and development of law by reducing the amount of recorded precedent and detailed opinion writing;
- increased arbitration removed too much of the normative function from dispute resolution;
- arbitration potentially would restrict the procedural advantages afforded by litigation;
- in particular, mass-market private arbitration would undermine class actions and injunctive relief; and that
- results in arbitration would tend to lower compensation to injured parties, particularly regarding “non-economic” injuries such as mental distress and pain-and-suffering, as well as reducing the prospects for an award of punitive damages even in cases of egregious business behavior toward consumers.¹⁰

¹⁰ See, e.g., Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123 (2005); Sara Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73 (2005); Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1 (2004); Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts With Arbitration Provisions*, 56 SMU L. REV. 819 (2003); Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991 (2002); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); David S. Schwartz, *Enforcing Small Print*, *supra* note 2; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Stempel, *Gomorrah*, *supra* note 7; Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); Stempel, *A Better Approach to Arbitrability*, *supra* note 2; Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259.

This is not to suggest that legal scholars were uniformly skeptical about the Court’s emerging arbitrability doctrine or the efficacy arbitration itself. Several have defended the Court’s pro-arbitration jurisprudence and criticize suggestions for change or restrictions on arbitration. See, e.g., Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004);

Each of these criticisms (and their derivative cousins) has its own intellectual emphases. But in general, the criticisms¹¹ posit that replacing litigation with arbitration produces inferior outcomes or favors the institutional disputants that draft mass arbitration clauses. Potentially disadvantaged in the new world of mass arbitration are investors, consumers, employees, and buyers.

According to *Black's Law Dictionary*, the three established definitions of a "kangaroo court" are: **1.** A self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied. * * * **2.** A court or tribunal characterized by unauthorized or irregular procedures, esp. so as to render a fair proceeding impossible. **3.** A sham legal proceeding.¹²

Black's defines the term "kangaroo court" more negatively than would I. For purposes of this article, a kangaroo court is either a dispute resolution forum in which either the outcome is largely shaped in advance because of biases of the decisionmaker (a "true" kangaroo court in the historical meaning of the term) or a forum in which the structure and operation of the forum result in an inferior brand of adjudication even if the tribunal is not gripped with intentional bias. In particular, my view of a modern kangaroo court is one in which institutional disputants ("repeat players") have excessive and unfair structural advantages over individual disputants ("one-shot players").¹³ In this article, I focus on the issues of arbitrator neutrality and consistently accurate application of substantive law and do not specifically address the question of arbitration procedure and remedies.

Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89; Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001); Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

See also STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESS* 214 (5th ed. 2007) (noting that "theoretical advantages of arbitration over court adjudication are manifold" but "are not always fully realized." Listing expertise of decision maker, finality of decision, privacy of proceedings, procedural informality, low cost, and speed as theoretical advantages); EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006) (reviewing respective scholarly positions regarding arbitration).

¹¹ Except perhaps concern over the Court's alleged rewriting of the FAA to become substantive federal law rather than a rule applicable to federal court proceedings. This is more of a criticism of judicial method rather than a criticism of arbitration itself. See, e.g., David S. Schwartz, *My Utopian Dream of an FAA*, 8 NEV. L.J. (forthcoming 2007); Carrington & Haagen, *Contract and Jurisdiction*, *supra* note 10.

¹² See BRYAN A. GARNER (ED.), *BLACK'S LAW DICTIONARY* 282 (8th ed. 2004) (boldface in original). The term is most commonly traced to the mid-19th Century American West, where irregular or rump tribunals were sometimes quickly conferred to pass harsh judgment on suspected criminals, with the "court" making illogical "leaps" toward a conclusion of guilt and "bouncing" the defendant to the gallows. See *id.* at 382.

¹³ See Stempel, *Mandating Minimum Quality*, *supra* note 1 (addressing overall quality concerns regarding arbitration). The concept of disputing systems working differently for sophisticated, institutional, "repeat players" and "one-shot" players is now widely known but was not well defined and described until Marc Galanter's now-classic article: *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Today, analysis of legal rules and systems according to their respective impact on these two groups is widespread. See, e.g., Catherine A. Rogers, *The Have Nots Arrival in International Arbitration*, 8 NEV. L.J. (forthcoming 2007).

The proliferation of mass mandatory arbitration imposed on consumers, investors, and employees raises the concern that these arbitration forums are simply too stacked in favor of institutional disputants. The specter of mass arbitrations as kangaroo courts can thus not be summarily rejected. Lower courts appeared to tacitly recognize the problem and breathed new vitality into the venerable but atrophied contract doctrine of unconscionability.¹⁴

The Supreme Court is unlikely to revise its current caselaw that is insufficiently sensitive to the issues of arbitration clause enforcement in the arena of mass contracts affecting consumers and employees. Absent federal legislative intervention, it currently seems inevitable that mass arbitration will continue to take place subject perhaps to the ability of certain interest groups to obtain favorable legislation exempting them from the reach of mandatory predispute arbitration clauses.¹⁵ Consequently, it is in my view imperative that mass arbitration be conducted by unbiased arbitrators and required, at least as a default rule, to reach results consistent with the law. During the second quarter-century of the “arbitration revolution,” it is probably far too late to revisit (much less reverse) the arguable judicial errors that propelled the jurisprudential sea change in favor of arbitration. Rather than continuing to fight that battle, arbitration critics, courts and legislatures should focus primarily on ensuring neutrality in mass arbitration and its fidelity to substantive law.¹⁶

¹⁴ By “lower courts,” I mean courts other than the U.S. Supreme Court. *See, e.g.,* Davis v. O’Melveny & Myers, -- F.3d --, No. 04-56039, 2007 U.S. App. LEXIS 11265 (9th Cir. May 14, 2007)(applying California law); Walker v. Ryan’s Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005)(applying Tennessee law); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003)(applying California law); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997)(applying Illinois law); Simpson v. MSA of Myrtle Beach, Inc., -- S.E.2d --, No. 26293, 2007 S.C. LEXIS 125 (S.C. March 26, 2007); West Virginia *ex rel.* Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000); Showmethemoney Check Cashers, Inc. v. Williams, 27 S.W.3d 361 (Ark. 2000). *But see* Hawkins v. Aid Ass’n for Lutherans, 338 F.3d 801 (7th Cir. 2003)(recognizing unconscionability as potential defense to arbitration clause enforcement but holding that decision regarding unconscionability was for arbitrator). *See generally* Stempel, *Arbitration, Unconscionability*, *supra* note 10. The judicial revival of unconscionability also logically suggests that courts can police arbitrations according to the degree to which the arbitral forum employs sufficiently neutral and unbiased arbitrators and the degree to which arbitration results accord with those that would obtain in courts of law. *See* TAN 17, *infra*.

¹⁵ *See* Justin Kelly, *Exemption from FAA for Farm Contracts Clears First Hurdle*, ADRWORLD.COM (May 22, 2007), available at <http://adrworld.com/sp.asp?id=41102>.

¹⁶ Commentators have of course suggested that the law of compelling arbitration be changed, at least for mass mandatory arbitration currently imposed on consumers and employees. *See, e.g.,* Jean R. Sternlight, *In Defense of Mandatory Arbitration (If Imposed on the Company)*, 8 NEV. L.J. (forthcoming 2007); Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Matters*, 8 NEV. L.J. (forthcoming 2007); Richard Bales, *Applying Older Worker Benefit Protection Act Notice Standards to Employment and Consumer Arbitration under the FAA*, 8 NEV. L.J. (forthcoming 2007); Sarah Rudolph Cole, *Incentives and Arbitration: The Case against Enforcement of Executory Arbitration Agreements between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1995).

With due respect for these suggestions, many of which I think are worth adopting in addition to my proposals, I am concerned that efforts to exempt categories of cases from arbitration will founder politically and that legislation providing notice and warning, if enacted, will not be particularly effective as a practical matter in light of the necessarily cavalier manner in which the average consumer or employee is willing to sign most any boilerplate contract containing an arbitration clause. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

II. Concerns Regarding Mass Arbitration: Neutrality, Fidelity to Law, and Quality Control

The world of mass contract arbitration is different than traditional commercial arbitration. In these high-volume, often lower-stakes cases, there will only be a single arbitrator – and he or she is more likely to be less experienced and accomplished than the arbitrators employed by AAA or JAMS (Judicial and Mediation Services) in connection with large commercial disputes. If the junior arbitrator is underemployed, the arbitration fees received may create some incentive to keep receiving cases from the arbitration service, which in turn may prompt the attorney arbitrator to refrain from any ruling that might too greatly displease the institutional disputant that crafted the arbitration program and other potential mass contractor business clients. Under these circumstances, an effective American arbitration policy is one that more self-consciously addresses issues of arbitration competence and neutrality. The bulk of unconscionability challenges to arbitration have involved companies that established their own arbitration system rather than selecting to have disputes arbitrated before an established provider.¹⁷

Any failure of mass arbitration to follow applicable substantive law raises additional concerns. In the pre-1980s world of traditional commercial arbitration, the parties often sought arbitration in order to have arbitrators familiar with a given industry apply the customary norms of the industry. But in mass arbitration, the disputes are much more likely to focus on consumer rights, employment protections, fair treatment of investors, and other statutory questions. Where arbitration is not specific to a guild, trade, or particular business activity, the traditional rationale of promoting arbitration for its “rough justice” loses much of its force. By contrast, the case for insisting that mass arbitration results be consistent with substantive law becomes strong.

A further problem surrounding arbitration is the limited appellate review of arbitration decisions. The Federal Arbitration Act and the Uniform Arbitration Act both provide only limited review of arbitration awards and create a strong presumption in favor of confirming and enforcing arbitration decisions with relatively little scrutiny as to the correctness of the decision, particularly its application of the law. In general, arbitration awards will be set aside only if the arbitrator exceeds the scope of his or her authority, acts with bias, or refuses to hear key evidence. The arbitrator’s decision need not be in accord with the prevailing law so long as the arbitrator does not demonstrate “manifest disregard” of the law, an odd and awkward yardstick for review used by some courts in order to inject some legal rigor in the review of arbitration decisions. Labor arbitrations, like commercial arbitrations, also need not follow the law so long as the arbitrator’s ruling on a grievance “draws its essence from the agreement.”

Arbitration clauses may themselves provide for no right of judicial review. Attempts to contract for expanded judicial review generally have been rejected by courts as an improper private attempt to expand the court’s jurisdiction beyond that conferred by

¹⁷ See note 14, *supra*.

the Federal Arbitration Act.¹⁸ But there is much to be gained from expanding appellate review of arbitration awards to something more closely resembling judicial review of trial court outcomes. To some extent, there has been a gradual movement in favor of making arbitration proceedings and outcomes less opaque. Until the last 20 years, most arbitration awards were mere statements of who won and who lost and the amount of any monetary award. In reaction to the sudden expansion of mass contract arbitration and criticism of the lack of transparency in arbitration, many arbitral organizations began requiring the issuance of “reasoned” awards akin to the findings of fact and conclusions of law issued by courts rendering decision after a bench trial.

The rationale for requiring reasoned awards was that the discipline of explaining the decision would encourage more reflective, carefully considered decisions by arbitrators. In addition, the explanation contained in the reasoned award is thought to not only provide greater transparency but also to inspire greater confidence in the results reached in arbitration. However, one cannot help but note the incongruity between the movement toward reasoned awards and the extremely limited review of the award, particularly its application of the law. Put another way: what good is a reasoned award that does not follow the law? Under the current system, an arbitrator can issue a reasoned award that conclusively demonstrates legal error and the reviewing court is required to confirm and enforce the award even though it would never do so if the opinion were issued by a court of law.

III. Three Proposals for Minimizing the Dangers of Mass Arbitration

This article advances three operational proposals for achieving this rough equivalency between arbitration and litigation: (1) a licensing process for arbitrators presiding over “mass” arbitrations; (2) a requirement that arbitration follow substantive law, at least as a default rule; (3) replacement of the current deferential standard of review for arbitration awards with appellate review similar to that accorded trial court decisions.

A. The Quality (both Neutrality and Competence) of the Arbitrator: The Need for More Stringent Standards and Licensing of Arbitrators Used in Mass Arbitration

The greater pervasiveness of mass arbitration as compared to traditional commercial arbitration requires increased government attention to the impartiality of mass arbitrators. As discussed in Part IV, *infra*, the current relaxed rules regarding arbitrator disqualification or “evident partiality” as a standard of review function adequately, perhaps even well, in traditional commercial arbitration. It is not sufficient, however, where the arbitration represents large-scale privatization of statutory and other legal questions rather than questions of industry custom and practice. In stark contrast to litigation, where jurists are subject to enforceable rules designed to foster impartiality and

¹⁸ See Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. (forthcoming 2007). See, e.g., *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

resist corruption, there currently is essentially no government mechanism for attempting to foster arbitrator neutrality and competence.

Mass arbitration decisionmakers should have no conscious or unconscious favoritism toward a disputant because of the disputant's identity or the persons, concepts, or entities represented by the disputant. To take an obvious example, it is unfair to have the *Smith v. Jones* arbitration presided over by Smith's brother. So strong is our commitment to the principles of neutrality and detachment that our system does not permit Smith's brother to adjudicate Smith's dispute even if there is powerful evidence that the brother and Smith are estranged or have actual enmity toward one another. In the latter case, in fact, Smith himself would have every right to eject his own brother from the role of adjudicator. Even with nearly irrefutable proof of the brothers' indifference to one another, the adjudication system insists that the brother not preside over the *Smith* case because the brother's impartiality may nonetheless be reasonably called into question by an objective observer.

Because arbitration is a substitute for adjudication by litigation, the logical default rule for assessing an arbitrator's neutrality should be the neutrality norms found in the litigation system. Years of experience and a few embarrassments have led to the development of a system of judicial disqualification that, although imperfect, provides a rational structure that works reasonably well in practice. Absent countervailing considerations, the same norms and requirements of neutrality should be imposed – at least as a default matter – upon arbitration tribunals.

In operation, this means that, at a minimum, an arbitrator should not sit on a case where the same arbitrator should not be permitted to sit as a judge or a juror.¹⁹ Because arbitrators are generally private actors rather than public officials and hear far fewer disputes than do judges, application of the principle should not be difficult. However, the difficulty is increased where the arbitrator is chosen by an arbitration services provider and where the litigants are provided little background information about the arbitrator. Particularly in smaller stakes disputes, the disputants are unlikely to invest substantial resources for investigating arbitrators and challenging arbitrator assignments. The “repeat player” or “insider” problem is of particular concern in that arbitration clauses are normally drafted and imposed by particular disputants (e.g., sellers, manufacturers, employers) who have an economy of scale, greater bargaining power, greater disputing expertise, and potential leverage over individual arbitrators or arbitral organizations.²⁰

Although the Revised Uniform Arbitration Act (RUAA) and arbitration best practice protocols make substantial steps in this direction, they are insufficient to adequately address the quality concerns surrounding mass arbitration. The Act provides that an “individual who has a known, direct, and material interest in the outcome of the

¹⁹ Regarding judicial disqualification, see 28 U.S.C. § 455 (2006); Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589 (1987) (reviewing history and operation of judicial recusal; criticizing status quo of individual U.S. Supreme Court justices making unreviewable individual decisions regarding their participation in cases).

²⁰ See Galanter, *supra* note 13.

arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as [a neutral arbitrator].”²¹ Although this admonition is a distinct improvement over the status quo, which tends to take arbitrator conflict seriously only if palpably manifested during the proceeding itself, it is not a stringent a standard as the rules of judicial disqualification.

Further, RUAA, promulgated by the Uniform Law Commissioners in 2000, has been enacted in only a handful of states. For now, RUAA is likely to be viewed by many courts in many cases as only a suggestion rather than a statutory directive. In addition, the legal force of RUAA is unclear in cases involving interstate commerce and the Federal Arbitration Act (FAA) because of preemption issues. The rules of arbitration providers are likewise easily avoided by mass contractors through simply failing to retain these more ethics-conscious providers for their arbitration programs. Similarly, voluntary protocols are just that – voluntary and nonbinding.

The mass arbitration system thus needs enforceable disqualification rules equivalent to those of courts. This in turn requires that RUAA be strengthened in this regard and enacted by state legislatures. More important, in light of the broad scope of preemption currently accorded the FAA, is that the FAA be amended to include improved requirements for arbitrator impartiality.

To help effect this regime of mass arbitration impartiality equivalent to that of courts, I also propose a licensing process for arbitrators. In this manner, states can take helpful action to reduce biased mass arbitration even if they are unable to reverse the current law of arbitration preemption or to obtain amendment of the FAA. In addition, the licensing entity would be responsible for assembling and making accessible basic information regarding arbitrators and their decisional track records.

Under my proposal, only licensed arbitration providers could be used in mass arbitrations. Failure to specify a licensed arbitration provider would make the arbitration clause unenforceable or subject to reformation (to substitute a licensed arbitrator) at the request of the party in dispute with the contract drafter.

Licensing could take place by regulators at either a federal or state level. If licensing is done by the federal government, logical loci for the licensing function would be the Justice Department, the Federal Trade Commission, or the Administrative Office of the U.S. Courts. State-based licensing could be administered by the state Attorneys General, Secretaries of State, or an appropriate state consumer protection organization. If the federal government entered the licensing arena, states would retain the option to bar use of a federally licensed arbitration service in disputes involving their residents, businesses, or property located in the state if the responsible state agency were to find the arbitration provider not to meet the state’s minimal criteria for neutrality and competence.

²¹ See RUAA, § 11(b) (reprinted in Weston & Huber, *supra* note 2, at Appendix C). Section 12(a) of RUAA requires that a prospective arbitrator disclose “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator. . . .”

The licensing would work as follows: A prospective arbitrator would apply to be licensed by the relevant agency. The application would require the arbitrator to provide background information as to his or her qualifications and information sufficient for the licensing agency to be satisfied that the arbitrator is sufficiently independent and likely to disqualify herself when a potential mass arbitration case requires such disqualification according to the standards applicable to judges. The agency would determine whether to issue the license based on the applicant's compliance with standards requiring sufficient neutrality and competence to merit receipt of a license. In order to get licensed, an arbitrator would need to make at least a modest showing that he or she has minimum education and training in the importance of impartiality and that he or she has a sufficient guarantee of livelihood that is not dependent on a particular disputant or arbitration provider. As part of the effort to ensure sufficient neutrality in arbitration, the licensing process should require that arbitrators be selected in a manner reasonably likely to ensure that the arbitrators do not have pre-existing bias in favor of mass contractors utilizing their services.

In addition, a prospective mass arbitrator would also have to satisfy the licensing agency that he or she has adequate competence to render decisions consistent with substantive law. The mass arbitrator need not be a lawyer, but should have at least some legal training or be familiar with the subject matter of the arbitration (e.g., consumer lending, workplace norms). At a minimum, the mass arbitrator must have an educational level sufficient to satisfy the licensing agency that he or she can be adequately educated on the law as necessary by the disputants. As with other types of licensing, the governmental licensing authority could request further information in cases of doubt.

In addition, the system must provide for supervision and enforcement after licensing. Mass arbitrators should be required to renew their licenses annually, through a process that requires updating personal information and reporting as to the arbitrator's arbitration activity during the prior year. In particular, arbitrator decisions and parties affected should be reported.

To facilitate ongoing supervision, mass arbitration disputants should be advised that the arbitrator is subject to licensing and that party complaints can be reported to the licensing agency. The agency is then charged with investigating complaints and taking adequate action in response, including possible suspension or revocation of licenses.

Licensing fees should be sufficiently high to produce revenue sufficient to operate this type of extensive licensing and supervision. Mass arbitrator licensing would resemble bar association regulation of attorneys. Where the mass arbitrator is a lawyer, the licensing agency would be empowered to refer complaints to the applicable disciplinary authority for attorneys in addition to taking whatever action the arbitration licensing agency deems appropriate.

Although effectively implementing the licensing process will of course be neither perfect, nor easy, nor swift, it offers substantial advantages to the dispute resolution system. Currently, arbitral organizations to a large extent compete for business by

attempting to woo the producers of mass standardized contracts containing (or that have the ability to contain) arbitration clauses. This creates an undue tendency for the arbitration provider and its arbitrators to structure and market itself as an organization that will serve the business interests of the mass contract producer and not as an organization that will best serve the cause of neutral and competent justice. To put it bluntly: an arbitration provider is unlikely to be chosen for use by Ralph's Retail Emporium by trumpeting its consumer-friendly arbitrators, its suspicion of high interest rates, and its aversion to aggressive creditor's remedies.

By contrast, under a licensing system, contract drafters and arbitration providers would need to assemble a "stable" of licensed arbitrators in order to enforce arbitration clauses and conduct mass arbitrations. If done correctly, this holds the prospect of minimizing the chances of arbitrations becoming kangaroo courts by making it unlikely that a key component of "kangarooism" – the self-appointed, biased, or autocratic decisionmaker – will be found in mass arbitrations, even those inspired by the ulterior commercial motives of limiting liability or giving contract drafters desired results at variance with the law.

To a degree, of course, the current system – which is largely a "free market" in which arbitration services compete for patronage – accomplishes some of the goals sought by licensing. For at least a segment of the market, there is value in choosing an arbitration provider that is reasonably well respected and not perceived as a kangaroo court. A provider of mass contracts may suffer adverse publicity and business injury if it is perceived as attempting to use kangaroo court arbitration in order to gain unfair advantage over its customers, vendors, or the public. Although these economic incentives toward arbitral fairness are not trivial, neither are they particularly powerful. A company's problematic arbitration conduct is unlikely to be significantly salient to its overall customer base or the general public.

Vendors using mass contracts are unlikely to have adequate incentives, when structuring their arbitration programs, to promote the neutrality and competence of the arbitrators. They are far more likely to be attracted to arbitration systems that may look acceptable but on average render decisions favorable to the mass contractor. In particular, the mass contractor will be looking to establish an arbitration system (and use of an arbitration service) that will give the mass contractor more favorable results than it could obtain in the litigation system. Arbitrator licensing can greatly reduce the prospect of success for this sort of self-interested behavior. It may be acceptable for businesses to seek use of industry arbitrators or individual lawyer-arbitrators to avoid the sometimes erratic or irrational behavior of juries. It is not acceptable for mass contractors to pursue arbitration in order to avoid obligations imposed by law.

Licensing holds the prospect of limiting the worst excesses of the market while allowing the market to operate with significant freedom. After licensing is in place, there will presumably be a reasonably large number of arbitration providers that may be used by mass contractors. Some mass contractors may wish to specify use of a particular arbitration provider in the arbitration clause of the mass contract. Other mass contractors

may wish to wait until after a dispute arises in order to select a licensed arbitration provider. Some mass contractors may even wish to permit the non-drafting party to commence arbitration before a licensed arbitrator of its choice. Under any of these scenarios, the government is not requiring that the mass contractor or other disputants use any particular arbitration provider. The government, through licensing, is merely requiring that arbitrations be conducted by approved, adequately neutral arbitrators.

A licensing system holds promise for avoiding kangaroo court arbitrations and creating a minimum level of arbitrator neutrality and quality. But, to perhaps state the obvious, it is hardly a panacea. Even the best licensing schemes raise the prospect that licensing may merely raise barriers to entry for service providers, increasing costs and decreasing selection. Where the licensing is poorly done, it imposes this disadvantage without any corresponding advantages. At its worse, licensing itself may become corrupt, with licenses going to the politically favored applicants that are bad service providers while higher quality applicants are denied licenses.

B. Arbitration Should Apply Applicable Substantive Law Unless There is Clear, Knowing, and Voluntary Agreement to Adopt Different Criteria for Decision. To Effect the Rule of Law in Mass Arbitration, Mass Arbitration Must be Subject to Expanded Judicial Review.

Because mass arbitration is a parallel universe of privatized dispute resolution largely imposed upon investors, consumers, and employees by institutional entities, it should as a general matter be governed by the same substantive law that would control those legal disputes in court. Allowing arbitration outcomes to be determined by the “law of the shop” makes sense where the arbitration actually involves a particular commercial or trade activity. It makes no sense when the arbitration deals not with custom and practice in a segment of the economy, but instead involves securities law, banking law, product safety, discrimination, or workers’ rights.

For mass arbitration, there is, in effect, no “shop.” Instead, mass arbitration involves the general law rather than industry practice. Consequently, mass arbitration outcomes should be consistent with the general law. Unlike traditional arbitration, mass arbitration functions as a generalist form of dispute resolution. Logically, it should be subject to the general law, at least presumptively.

As discussed in Part IV, *infra*, traditional commercial arbitration need not be bound by this approach and parties should be able to contract out of strict compliance with legal rules. This, however, leads to the problem of line-drawing and determining when party stipulation to avoid a default rule is sufficiently valid to rebut the presumption in favor of governing law (also addressed in Part IV).

This in turn requires that arbitration awards be reviewed more broadly to assure compliance with the law. The FAA and the UAA both provide only limited review of arbitration awards and create strong presumptions in favor of confirming and enforcing

arbitration decisions with relatively little scrutiny as to the correctness of the decision, particularly its application of the law.²² RUAA does not provide a significantly greater scope of review and, despite its generally admirable reformist tendencies, stops short of requiring that arbitration follow applicable substantive law.²³

Under current law, arbitration awards generally will be set aside only if the arbitrator exceeds the scope of his or her authority, acts with bias, or refuses to hear key evidence. The arbitrator's decision need not be in accord with the prevailing law so long as the arbitrator does not demonstrate "manifest disregard" of the law, an odd and awkward yardstick for review used by some courts in order to inject some legal rigor in the review of arbitration decisions.²⁴ Labor arbitrations, like commercial arbitrations, also need not follow the law so long as the arbitrator's ruling on a grievance "draws its essence from the agreement."²⁵

Adjudication carries with it the right of appeal, including full review of the trial court's application of the law (with limited review of the trial court's factual determinations). Review of arbitration awards is considerably more limited. In litigation, trial court decisions on review can involve challenges to fact-finding (evaluated under a "clearly erroneous" standard), exercises of judicial discretion (evaluated under an "abuse of discretion" standard), and application of the law (evaluated by the appellate court's "de novo" review of the law).²⁶ Arbitration would be improved by replacement of the current deferential "manifest disregard of law" standard of review for arbitration awards with appellate review similar to that accorded trial court decisions.

Arguably, the current level of respective scrutiny for arbitration and litigation is irrationally transposed. Logically, the level of review of mass arbitration decisions should be more searching than that applied to review of trial and jury outcomes. Judges, whatever their faults, generally only become judges after a substantial vetting process prior to appointment, confirmation, or election. By contrast, mass arbitrators may obtain their power over disputes without demonstrating the type of qualifications routinely insisted upon for judges. Lay jurors arguably are subject to more scrutiny than many mass arbitrators.

²² See FAA, 9 U.S.C. § 10; Uniform Arbitration Act § 13.

²³ See RUAA § 23-24.

²⁴ See Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. (forthcoming 2007)(expressing reservations about manifest disregard as ground for review but advocating that it be better defined, restrained, and consistently applied); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998)(criticizing manifest disregard of law standard of review as inadequate and advocating expanded review); Maureen A. Weston, *Beyond Vacatur: Revising the FAA to Provide Meaningful Remedial Options*, 8 NEV. L.J. (forthcoming 2007)(largely defending manifest disregard as grounds for reversal but advocating expanded judicial power to modify defective arbitration awards under review). See also Sarah Rudolph Cole, *Revising the FAA* *supra* note 18, (advocating greater freedom of disputing parties to agree upon expanded judicial review of arbitration awards).

²⁵ See *Enterprise Wheel & Car Co.*, *supra* note 4 (establishing "essence of the agreement" test). See also Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998)(reviewing grounds for vacating commercial and labor arbitration awards).

²⁶ See STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (3d ed. 1999).

The reasons for the different systems of review are largely historical. When the FAA was passed in 1926, it responded to the perception that courts were jealous of their jurisdiction, reluctant to share it with arbitrators, and generally hostile to arbitration. In response, the Act required courts to specifically enforce predispute arbitration agreements and imposed a deferential standard of review for arbitration awards.²⁷ The paradigmatic commercial problem addressed by the FAA was that of a “shirking vendor,” unwilling to pay a bill or perform a contractual obligation. Arbitration under the FAA was designed to achieve rapid resolution of these disputes so that the shirking vendor would not unduly delay its obligations by engaging in litigation-related delaying tactics. Arbitration was expected to render swift decisions consistent with commercial norms. Under Section 10 of the FAA, arbitration awards were to be confirmed absent certain limited problems with the award, including an arbitrator’s exceeding of the scope of his or her authority, or the arbitrator displaying evident partiality.

The system of commercial arbitration (and the FAA was concerned only about commercial arbitration and gave no thought to consumer arbitration, another indication of the datedness of the Act) thus greatly constrained appellate judicial review not only to expedite commercial dispute resolution but also out of fear that hostile courts might unduly meddle in arbitration decisions. For labor arbitration, which became legally protected years later from legislation and judicial receptivity to labor arbitration, the standard of review was even more deferential.²⁸

Today’s world of mass arbitration is substantially different. Courts no longer resist arbitration but embrace it. Arbitration has spread widely beyond its original specialized merchant-to-specialized merchant core and has become the new, mass-arbitration of consumer and other mass contract disputes. Arbitration organizations and the number of disputes have mushroomed. Arbitrators are no longer drawn almost exclusively from the ranks of a trade or industry’s “wise men” knowledgeable in the unwritten norms of the trade, but may be lawyers or businesspersons with only passing experience in the subject matter of the dispute. And, of course, some of the arbitration providers and arbitrators may be unduly oriented toward pleasing the mass contractors that create much of the arbitration business.

Under these circumstances, it seems only logical that modern arbitration awards – particularly in areas of mass arbitration such as consumer matters – should be subjected to a level of scrutiny at least roughly comparable to that applied to litigation outcomes at trial. Quality control helps to ensure that dispute outcomes accord with substantive law and that proceedings are substantively fair. Appellate review is quality control. Unless proponents of mass arbitration can marshal evidence to suggest mass arbitration outcomes are more frequently correct than trial court outcomes, it seems only logical

²⁷ See Sources cited in notes 1-5, *supra*, regarding background and purpose of FAA.

²⁸ As previously discussed (*see* TAN 24-25, *supra*), a labor arbitration award was to be confirmed and enforced by the courts so long as the award “drew its essence from the agreement,” no matter how badly the arbitrator may have construed the collective bargaining agreement and the grievance at hand.

that both means of dispute resolution should be subject to equivalent levels of quality control.²⁹

Increasing the scope of appellate review of arbitration awards thus would provide a major protection against low quality or unfair arbitration rulings. To the extent possible, arbitration awards should receive appellate review as searching as that applied to court cases of similar magnitude and complexity. In application, this would mean that arbitration results under appellate scrutiny would be subject to a clearly erroneous review of the factual determinations of the arbitrator, that arbitrator rulings on conduct of the hearing would be reviewed under an abuse of discretion standard, and that the arbitrator's pure legal rulings would be subject to de novo review.

Applying the traditional standards of appellate review to arbitrations would not be an expensive or cumbersome process. The record in most arbitrations is thin and would not require extensive judicial resources for factual review. Applying a clearly erroneous standard, the court would upset arbitrations for factual error only where the party challenging the arbitration can demonstrate that a material mistake was made. Where the party seeking to set aside an arbitration award has paid for a hearing transcript, the challenging party would still be required to point to portions of the record demonstrating a fact-finding mistake by the arbitrator.

An arbitration that makes an obvious and important error of law should not stand. Under the current system of arbitration review, many courts see themselves as powerless to vacate an arbitration award even where legal error is apparent. Other courts will intervene if they find "manifest disregard of the law," but this standard is far weaker than the traditional de novo review applied in litigation. Under the manifest disregard standard, the arbitrator must be clearly apprised of the law and more or less expressly enter an award at variance with this known law.³⁰ Although courts have substantial creative room in applying the "manifest disregard" standard, it remains an overly limited, cumbersome tool. Full scale de novo review of an arbitrator's legal decisions would provide a more rational means of quality control.³¹ It would also eliminate the legal gymnastics and arguably judicial subterfuge that can occur under the current model when courts occasionally strain to find that legal error was "manifest disregard of the law," or

²⁹ To a degree, the "market" of dispute resolution is speaking on this issue in that many parties to arbitration agreements appear to wish to receive expanded judicial review akin to that accorded trial court decisions rather than the truncated review provided by the FAA. See, e.g., *Kyocera Corp.*, *supra* note 18, (refusing to abide by arbitration clause provision for expanded judicial review); *Bowen*, *supra* note 18 (same); *Chicago Typographical Union No. 16 v. Chicago Sun-times, Inc.*, 935 F.2d 1501 (7th Cir. 1991)(same).

³⁰ See *Duferco Int'l Steel Trading v. T. Klaveness Shipping*, 333 F.3d 383 (2d Cir. 2003); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377 (5th Cir. 2004)(to constitute "manifest disregard of law," the arbitrators must have "appreciated[d] the existence of a clearly governing principle but decided to ignore or pay no attention to it" and the law in question must have been "well-defined, explicit and clearly applicable")(citations omitted); *Drahozal*, *Codifying Manifest Disregard*, *supra* note 24 (collecting variant definitions and applications of manifest disregard standard).

³¹ See Poser, *supra* note 24. See also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

outside the scope of an arbitration submission. In England, a country with a legal system hospitable to arbitration, awards may be reviewed on grounds of legal error.³²

IV. Appreciating the Distinctions Between Traditional Arbitration and Mass Arbitration – and The Implications for Regulating Neutrality, Application of Substantive Law, and Judicial Review

Arbitration today is no longer the small world of diamond dealers, cotton merchants, and shippers agreeing to resolve disputes according to industry norms in a streamlined all-in-the-extended-commercial-family process. That sort of traditional, “old” arbitration of course still exists – but it no longer represents the bulk of arbitration. Today, “new” arbitration imposed by mass contract and formalist contract construction dominates the field, at least in volume if not funds at state. More importantly, this type of new mass contract arbitration forms the great bulk of arbitration of concern to commentators. The forced arbitration of consumer, employment, civil rights, statutory disputes, and other matters implicating public policy is what has concerned commentators critical of the perceived excesses of the modern new arbitration regime.

Appreciating the differences between old and new arbitration provides a principled means of distinguishing their treatment by the legal and political system. For the most part, traditional arbitration (including labor arbitration pursuant to a collective bargaining agreement) should be permitted to continue largely as it has in the past. However, the system should take some pains to ensure that new, mass contract arbitration is governed by the more regulatory regime proposed in Part III of this article. This would ensure that specialized arbitration among sophisticated parties would not be unduly stifled, leaving room for these methods to act with informality and achieve contextual rough justice. At the same time, impoverished legal outcomes can be avoided in mass contract arbitrations.

Validly consenting parties should be permitted to avoid the default rules of the system for regulating mass arbitration. For today’s traditional commercial arbitration, this generally means a presumption of minimal mandates regarding the arbitration and its review. For mass arbitration, the presumption should be in favor of fidelity to the applicable substantive law. However, even in mass arbitrations, freedom of contract principles should enable the parties to agree to criteria for decision other than strict application of the law. To be effective, such agreements must possess sufficient evidence of knowing, informed, voluntary agreement, particularly by the party adhering to a mandatory arbitration clause, who is usually an unsophisticated, one-shot player.

³² See Common Law Procedure Act, 17 & 18 Vict., c. 125, § 5 (Eng.), Arbitration Act of 1889, 52 & 53 Vict., c. 49, § 7 (Eng.); Arbitration Act of 1996, c. 23, 45 (preliminary issues) & 69 (post-award appeal) (Eng.). See also HUBER & WESTON, *supra* note 2, at 595 (in permitting reversal of an arbitration decision that is “obviously wrong” or that poses “serious doubt” about its correctness, “the English Arbitration Act does not make general provision for review of questions of law, but the possibilities for review for claimed errors of law is far greater than under the FAA or the UAA.”).

My proposed limited avenue for contracting out of the mandate that arbitration follow the law is a simple corollary of the established view that parties can generally contract around default rules so long as this is done clearly, knowingly, and voluntarily. In this way, parties who find the regulatory regime too constraining can exit the system and tailor arbitration to their particular needs.

In the bulk of mass contract arbitrations, the realities of the contracting process are inherently unlikely to present a situation in which it can be said that the parties have knowledgeably and freely chosen to escape or modify the default rules imposed by the legal-political system. A consumer at a big-box retail outlet is not realistically able to conclude that her interests are best served by arbitrating all disputes before a select arbitration provider subject to limited remedies and to voluntarily form an agreement to that effect with the retailer. If anything, sounder contractual analysis suggests that consumers in this situation do not validly consent to such arrangements even when they sign papers containing text purporting to consent. The problem gets worse when any text requiring arbitration is found on the back of a ticket stub, in a package invoice, or interposed as something that must be clicked to reach the next section of a website order form.

In view of the problems of policing mass contracts for consent, information exchange, and correct interpretation, the legal system and the public would be far better off requiring a minimum level of neutrality and legality through implementation of the measures proposed in Part III. Without such policing, the risk of kangaroo court outcomes will cloud mass arbitrations. Licensing, stricter standards regarding recusal, a presumption in favor of following the law, and meaningful appellate review will add a measure of fairness and stability to mass arbitration at little cost.

Where more sophisticated parties wish to customize any arbitration between them, this should be presumptively permitted. In mass arbitrations, the parties should still be permitted to escape the default rule of following the law (rather than general principles of fairness, equity, or a relevant trade) – but only upon a showing of actual agreement by the parties under circumstances that do not justify required application of the law to protect the weaker party.

This article leaves for another day the question of how the legal system separates traditional arbitration from mass arbitration for purposes of enforcing the controls and protections advocated in the article. Crafting an operational definition for assigning arbitration to the two respective spheres will require some care. Line-drawing may be difficult in a few individual cases. But in practice, arbitration clauses and arbitrations tend to divide in readily apparent ways. One can distinguish between an employer's forms required when a new worker comes to the job (mass arbitration) and an arbitration clause contained in a sales agreement between merchants (traditional arbitration). The legal system needs to begin making and applying the distinction.

Conclusion

The Supreme Court's jurisprudential commitment to arbitration remains strong even if its reasoning and appreciation of reality remains open to criticism. Within the fait accompli world of law and politics, we are unlikely to see any complete about-face or substantial curtailment of the pro-arbitrability doctrine the Court has constructed. The realistic response of consumer advocates and other arbitration skeptics should be a focus on arbitral impartiality and adherence to substantive law rather than undue resistance to arbitration clause enforcement. If these factors are present, the U.S. dispute resolution system can be reasonably confident that arbitrations will not become kangaroo courts. To the extent these traits are lacking, arbitration skeptics will continue to have substantial grounds for continuing to criticize the modern world of court-enforced, mass-standardized arbitration.