



YEARBOOK ON ARBITRATION AND MEDIATION 2017 SYMPOSIUM CONTROVERSIES IN ARBITRATION

ABSTRACTS

PANEL 1: ARBITRATION AND LEGAL TRADITIONS

WHAT THE ECUADOR-UNITED STATES AWARD TELL US ABOUT THE POTENTIAL FOR STATE-STATE INVESTMENT ARBITRATION

Andrea K. Bjorklund
McGill Faculty School of Law

The award in the Ecuador-United States state-state arbitration was finally made public more than four years after the decision was rendered. During this four year period public opinion against investor-state dispute settlement has grown, and alternatives, including the potential for a return to state-state arbitration, have been proposed. The very fact of the Ecuador-United States arbitration, and the way that it proceeded, already suggested that states – or at least most of them – were unlikely to favour a return to state-state dispute settlement or even a greater recourse to it as an alternative to investor-state arbitration. The issuance of the award confirms that opinion. The award was dismissed on jurisdictional grounds because there was no concrete dispute before court such that its decision would have practical consequences. Had the tribunal proceeded to the merits, the United States would have been forced to engage on the question of BIT interpretation that it declined to address, or suffer a likely default judgment. The United States patently did not want to be drawn into a discussion of the treaty article in question. The United States had many reasons for this, among which would be the inferences that might be drawn any time an investor-state arbitral tribunal rendered an award and the interpretation was not addressed. Would this silence universally be interpreted as endorsement of the approach? This particular problem might not arise should investor-state arbitration be altogether replaced by state-state arbitration. Even there, however, there is no reason to think that states would want to engage in disputes that might give rise to greater political questions, which is precisely the reason investor-state arbitration grew in the first place. As an alternative, should state-state arbitration exist as a viable parallel structure, which is arguably not precluded now,

tribunals at both the investor-state and state-state levels would be forced to grapple with questions they would rather avoid, such as whether investors' rights are direct or derivative or somewhere in between and whether state-state tribunals are hierarchically superior to investor-state tribunals.

Presenting on Controversies in Arbitration and Legal Traditions

John H. Rooney, Jr.

The Law Office of John H. Rooney Jr., P.A.

Mr. Rooney will discuss controversies grounded in the encounters between legal traditions often inevitable in international arbitration. He will focus his attention on the civil and common law traditions, realizing that other traditions exist, and that they may also engender controversies as the genre attempts to identify common elements. Among others, Mr. Rooney will discuss differences in the taking of evidence, documentary and testimonial, approaches to contracts and their interpretation, *iura novit curia*, and notions of good faith and public policy.

THE BRAZILIAN JUDICIAL POWER IN ARBITRATION ISSUES

Andrea Galhardo Palma

Judge of the Sao Paulo State Court and Penn State LLM Candidate

Traditionally, the Brazilian legal framework has focused on many adversarial processes, but not arbitration. Since the Brazilian Arbitration Act, or the Brazilian Law as we named it, was enacted in 1996, it has represented an important tool to alleviate the overwhelmed courts. Initially, lawmakers promulgated the Brazilian Arbitration Law to maintain control over arbitration due to judicial mistrust of its efficiency. Nowadays, however, arbitration has become widely recognized and respected. Many qualified arbitral institutions, such as CAM-CCBC, FIESP, and the Brazilian branch of the ICC, have successfully resolved commercial disputes both faster and more efficiently with a broad range of arbitral experts. The controversy today, however, is that our law still allows significant court intervention in arbitral issues.

This article will focus on these controversies, including: empty submission or arbitral clauses, appointed arbitrator substitution, provisional and urgent measures, and issues involving arbitration agreement or arbitral award invalidity. Even though judges are not specialists in arbitration, they must decide on many subjects with which they are unfamiliar because of the Brazilian legal framework. Legislators not only should reduce judicial intervention in order to maintain the principles of contractual freedom and autonomy of will, but also should leave such principles to the discretion of arbitrators.

PANEL 2: ARBITRATION IN CONSUMER TRANSACTIONS

CONSUMER CLICK ARBITRATION: A REVIEW OF ONLINE CONSUMER ARBITRATION AGREEMENTS

Jeffrey Dasteel
UCLA School of Law

It is estimated that in 2016 consumers purchased over \$400 billion in goods and services online. We reviewed 106 websites that offer goods and services to consumers to determine (1) how frequently sellers and service providers include arbitration clauses in their terms and conditions of sale, and (2) the manner in which sellers and service providers seek to bind consumers to arbitration. We then reviewed the state of the law on enforcement of online arbitration clauses to consider how courts implement the principles of voluntary agreement to arbitration and knowing waiver of the right to court access and jury trial in the context of online transactions.

Sixty-six percent of the websites we reviewed included binding arbitration in their terms and conditions. This is consistent with two other studies conducted on online arbitration. Including arbitration in online consumer transactions contrasts with our in-store anecdotal survey of eleven well-known retailers, none of whom included arbitration as part of their in-store terms and conditions, but five of whom included arbitration for their on line transactions. This anecdotal finding raises questions about whether a reasonable consumer expects ordinary consumer transactions to be resolved in binding arbitration. Although we reach no conclusion on that question based on our brief anecdotal survey, we do consider the possibility that a mismatch between in-store and online terms and conditions for the same retailers heightens the need for online sellers and service providers to provide robust notice to consumers when sellers and service providers seek to bind consumers to resolve disputes in arbitration.

We found that the manner in which sellers and service providers give notice to consumers that disputes will be resolved in arbitration falls into two basic categories. First, approximately 80% of the websites we reviewed that include binding arbitration relied on passive acceptance of their terms and conditions. In these cases, a consumer “agrees” to binding arbitration by placing an order on the website. This form of passive acceptance is commonly referred to as “Browsewrap.” The distinguishing feature of Browsewrap-type websites is that the consumer is not required to expressly agree to be bound by the terms and conditions before placing an order.

Approximately 20% of the websites that include binding arbitration rely on active acceptance of terms and conditions. In these cases, a consumer must actively agree to accept the terms and conditions of sale before placing the order. This form of active acceptance is commonly referred to as “Clickwrap.” We found two basic categories of Clickwrap agreements. The most common form in transactions that sell consumer goods is where the consumer clicks on a box to accept the terms and conditions of the transaction. To see the actual terms and conditions, the consumer must click on the “terms and conditions” hyperlink and then scroll through the terms and conditions. The other form of Clickwrap, which is most common in software and hardware transactions, provides the terms and conditions in a

scrollable box on screen and the consumer must click an acceptance box below the terms and conditions to proceed with the transaction. In some cases, the onscreen box warns the consumer that by clicking on “accept” the consumer agrees to binding arbitration. In most cases, the consumer must scroll through many terms and conditions before learning that the transaction includes binding arbitration.

Prior studies have shown that virtually no one either clicks on the terms and conditions hyperlink or reads through the list of terms and conditions when provided in a scrollable box. That leads to the question of whether either Browsewrap or Clickwrap creates a binding arbitration agreement. Arbitration is a creature of contract that requires the agreement of the parties to be effective. A party gives up the right to access to the courts and a jury trial only by a knowing waiver of these fundamental rights. Relying on principles originally developed for hard copy contracts, the leading cases consider that a consumer is bound by an arbitration agreement if the consumer has actual or constructive notice that arbitration is a part of the terms and conditions of the transaction. Under this construct, most cases find that for Browsewrap-type websites, unless the consumer has actual knowledge of the arbitration clause in the terms and conditions or the particular consumer has special knowledge, the consumer is not sufficiently on notice of the terms and conditions of sale to charge the consumer with constructive knowledge of the arbitration clause. The Consumer, therefore, is not bound by such Browsewrap arbitration clauses.

For Clickwrap-type websites, the leading cases reflect some uncertainty. For Clickwrap websites that display the terms and conditions in a box on the same screen as the “accept terms and conditions” button, leading cases enforce these arbitration agreements even if the consumer does not actually read the terms and conditions because the consumer is on constructive notice of their existence. However, for Clickwrap websites that do not show the terms and conditions on the same screen, but instead provide a hyperlink to the terms and conditions, courts will nonetheless enforce arbitration agreements if the design of the webpage is deemed to provide the consumer adequate notice that there are significant terms and conditions applicable to the transaction.

Based on our research to date, we tentatively conclude that existing law does not require sellers to give consumers sufficient notice that by entering into online transactions they are waiving their rights to access the courts and must proceed in binding arbitration. Websites that do not require the consumer to actively accept terms and conditions are fatally flawed because a reasonable consumer has insufficient notice that the consumer may be bound to arbitrate disputes. Although the leading cases agree that Browsewrap-type websites generally provide insufficient notice, we tentatively conclude that, absent actual notice, Browsewrap-type websites with arbitration clauses in their terms and conditions should be uniformly declared invalid.

For those Clickwrap websites that require the consumer to click on the terms and conditions hyperlink and then scroll through an extensive list of terms and conditions to determine whether the consumer is bound to arbitrate disputes, we conclude those websites also fail to provide a reasonable consumer with constructive notice. Locating the arbitration clause or even the fact of arbitration is unreasonably difficult when a consumer must click on multiple hyperlinks or scroll through a myriad of terms and conditions before

locating the dispute resolution clause. This contrasts with current case law, which generally provides this form of Clickwrap puts the consumer on constructive notice of the terms and conditions of sale so as to bind the consumer to arbitration.

We tentatively conclude that the consumer is only properly on constructive notice that the consumer is bound to arbitrate disputes when a Clickwrap website warns the consumer of binding arbitration on the same screen and in the same location as where the consumer is required to click agreement to terms and conditions. This form of Clickwrap is easily achievable for seller websites. Indeed, we have identified at least one gaming website that provides this form of notice. Where there is no actual notice of the arbitration clause, courts should refuse to enforce arbitration unless the website satisfies this form of Clickwrap constructive notice. Such refusal would be consistent with the requirement that arbitration is entered into only by the consent of the parties and any waiver of the right to access to the courts and a jury trial must be knowing.

TECHNOLOGY FACILITATED ARBITRATION: CONTROVERSIES BOTH RECOGNIZED AND UNIMAGINED
&
FAA v. NLRA: D.R. HORTON
David Allen Larson
Mitchell Hamline School of Law

Technology is evolving and becoming more powerful every day. It is inevitable that technology will be increasingly integrated into arbitration processes. We must continually ask what impact technology is having on Access to Justice.

D.R. Horton, Inc. v. NLRB addressed the question of what happens when the Federal Arbitration Act directly conflicts with the National Labor Relations Act. The United States Supreme Court granted certiorari in January 2017 to consider whether a class action waiver in an arbitration agreement violates employees' section 7 rights under the National Labor Relations Act. What should be the result?

THE UBERIZATION OF ARBITRATION CLAUSES
Jill I. Gross
Pace University School of Law

In the early part of this decade, the Supreme Court's decisions interpreting the Federal Arbitration Act (FAA) strictly enforced pre-dispute arbitration clauses (PDAs) with class action waivers and so-called "delegation" provisions in consumer contracts. Just after the Court's 2013 ruling that clauses with class action waivers did not prevent claimants from vindicating their statutory rights, Uber—a company at the heart of the "gig economy"—started inserting PDAs in agreements with its drivers and passengers. Uber's move has generated dozens of challenges to its clause in lawsuits across the country, and thus dozens of federal court opinions contributing to

modern FAA jurisprudence. This article will focus on those opinions, extracting lessons from the multitude and variety of challenges to UBER's clause. This article concludes by noting that UBER's rapid and worldwide development of a cheaper and more efficient yet controversial mode of transportation parallels the growth in companies' use of "forced" arbitration clauses to facilitate a cheaper and more efficient yet controversial mode of resolving disputes.

PANEL 3: CONTEMPORARY AND CRITICAL VIEWS OF ARBITRATION

COMMENTS FROM A QUIET CORNER: CONCERNS REGARDING REINSURANCE ARBITRATION

Jeffrey Stempel
UNLV School of Law

Most criticism of arbitration has quite rightly focused on the newer mass arbitration afflicting consumers and employees, but often proceeds from the assumption that commercial arbitration works swimmingly. This may well be an erroneous perception. Looking at reinsurance, a classic area of occasional dispute between sophisticated repeat players, one finds more than a little criticism of the state of arbitration. Criticisms include: (1) concern that the process if too expensive; (2) concerns about the length of time required to achieve a final award/judgment on the award; (3) scarcity of highly qualified arbitrators; (4) undue coziness between regular arbitrators and regular disputants; (5) problems of managing e-discovery (a driving force of expense and delay). Despite this, the area of insurance and reinsurance law continues to be committed to arbitration over litigation. Is this undue resistance to litigation as an occasionally sensible alternative to arbitration? Do the perceived problems support particular procedural or substantive responses? In particular, will a proposed Principles of Reinsurance Contract Law currently being drafted adequately address current concerns? In addition, I will briefly address some of the more frequent controversies taking place in reinsurance arbitrations.

COURTS AND ARBITRATION: RECONCILING THE PUBLIC WITH THE PRIVATE

Susan L. Karamanian
The George Washington University Law School

Two distinguished judges, Judge Patrick Higginbotham of the U. S. Court of Appeals for the Fifth Circuit and the Right Hon. Lord Thomas, Lord Chief Justice of England and Wales, have expressed concerns about arbitration's interference in law-making. In particular, in 2002, Judge Higginbotham lamented the decline of trials and trial lawyers. His focus was more on shortcomings in judicial procedure, which gave rise to mediation and arbitration. Implicit in his assessment is that federal and state laws, along with judicial precedent, have opened the door for arbitrators to encroach on the judicial function. More than a decade later, in 2016, the Lord Chief Justice in his widely-discussed Bailii Lecture titled "Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration" called for a renewed balance between courts and the arbitration process.

The critique of Judge Higginbotham and the Lord Chief Justice has started to gain traction with other judges and academics. The argument differs from the usual challenges to arbitration, namely that individuals may be coerced into signing arbitration clauses or that certain subjects or relationships, such as consumer matters, should not be arbitrated. Instead, their concern is about arbitration's perceived effect on law-making; that is, areas of law once defined by judges are not being developed by way of public judicial decisions. As a result, the common law is stagnating in certain areas. Further, due to its secrecy, arbitration betrays the notion of public engagement with dispute resolution, which is at the heart of a democratic system.

This essay examines the argument and assesses: 1. are there mechanisms for courts to address the concerns; and 2. have courts become focused on the issues underlying the argument, and if so, how? It looks at multiple jurisdictions, mainly common law ones and principally the United States and the United Kingdom. The essay concludes that the critique's assumption of a firm dichotomy between trials and arbitration is questionable. In short, courts have ways to enhance arbitration's accountability to societal values and they have indeed done so in limited instances. This does not mean, however, that the concerns of Judge Higginbotham and the Lord Chief Justice should be ignored. Further, it does not mean that courts should be given broader powers in reviewing agreements to arbitrate and arbitration awards. Instead, it suggests that when reviewing agreements to arbitrate and arbitration awards, as well as requests for judicial intervention in the arbitration process when authorized, courts should be sensitive to the public aspects of what otherwise may be considered a private matter between the parties.

THE ROLE OF STATE ARBITRATION GIVEN THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

Edward Sherman

Tulane University Law School

Each state has its own law governing arbitration procedure, and eighteen states and the District of Columbia have adopted the Revised Uniform Arbitration Act (RUAA), issued by the Uniform Law Commission in 2000. The Federal Arbitration Act (FAA) does not preclude the application of state arbitration law. However, the breadth of the FAA (encompassing all arbitration agreements in "a contract evidencing a transaction involving commerce") and the Supreme Court's broad application of FAA abstention has left a narrow area for state arbitration law. State arbitration laws govern arbitrations when the FAA does not apply to the limited range of cases where the transaction does not involve interstate commerce or that concern matters that are exclusively within the province of state law. Parties are free to provide in their arbitration agreement that arbitration will be governed by state law, but FAA preemption would apply when such rules discriminate against arbitration or impose unnecessary burdens on enforcing arbitration agreements or awards. The FAA is only a bare bones statute whose principal aim when it was passed in 1927 was to make arbitration clauses and awards legally enforceable. State arbitration laws, including the uniform act (RUAA), have tended to replicate many of the FAA provisions concerning enforceability of arbitration clauses and awards, but also to specify more detailed procedures for the whole

arbitration process. Courts often look to their state's arbitration law to fill in interstices in the barebones FAA (which can also be served by rules of an arbitral institution (like AAA) if one is appointed or by more detailed provisions in the arbitration agreement itself). When there is a conflict between state and federal practice on a particular point, it has been resolved in different, and sometimes inconsistent, ways by courts, which will be discussed.

THE FAA v. ANTI-ARBITRATION AGENCY REGULATION: A NEW FRONTIER

Kristen Blankley
Nebraska School of Law

As pre-dispute arbitration has become more widespread in the past three decades, so too have been opponents' attempts to make these contracts unenforceable. Agreeing in advance to arbitrate legal disputes – including cases implicating statutory rights – have been particularly controversial. In the 1950s, the Supreme Court, in *Wilko v. Swan*, held that statutory claims are not subject to arbitration. Roughly 35 years later, the Supreme Court overruled *Wilko*, in part, because of the national policy favoring arbitration and because of significant advances in the regulation of arbitration. The Court held that individuals are not forfeiting their rights under the statute, even if they agree for an alternate forum to hear the dispute. Today, pre-dispute agreements to arbitrate (PDAs) statutory claims are routinely enforced. In a battle between the Federal Arbitration Act (FAA) and a federal statute, the FAA will permit arbitration of the statutory claim unless the party opposing arbitration can prove that Congress intended the FAA not apply with proof in the statute's text, legislative history, or purpose. Given the political gridlock the past few decades regarding arbitration matters, Congress enacted very few statutes prohibiting PDAs, and statutory claims continue to be subject to arbitration. More recently, *federal agencies* have begun to make rules prohibiting PDAs in certain contexts or regulating arbitration within a given field of law. The courts, however, have not previously considered which would prevail in a conflict between the FAA and federal regulations. This Article considers the intersection of the FAA and agency regulation and how existing law should be extended to this new frontier. Ultimately, the Article concludes that the traditional test used when considering a conflict between the FAA and federal statute also be used in examining the FAA and an agency's enabling legislation. If the enabling legislation would meet the test and prohibit PDAs in a given area, then the resulting regulations would apply. However, if the enabling legislation would not meet the test, then an agency cannot on its own prohibit or otherwise negatively impact arbitration rights under the FAA.

END OF THE WORLD AS WE KNOW IT: THE INCREASING TENDENCY OF COURTS TO CONDUCT MERITS REVIEWS OF ARBITRAL AWARDS

H. Allen Blair

Mitchell Hamline School of Law

It is no secret that the Supreme Court of the United States loves arbitration. After several decades of battles over the scope of federal preemption in arbitration law, it appeared that any remaining questions had been relegated to marginal skirmishes or to theoretical explorations by commentators. In a series of more than fifty decisions, the Supreme Court has magnified the importance of arbitration in our system of civil justice by making federal law preemptive and eliminating the threat of the slightest inconsistent state regulation of arbitration. Recently, however, the highest courts of two states mounted a flanking maneuver that threatens the proarbitration edifice that the Supreme Court has constructed. These courts have argued that federal preemption does not apply to the backend of the arbitral process and thus that states may allow more extensive judicial review of arbitral awards than would be permitted under federal law. If true, this end around could effectively unwind nearly four decades of arbitral law.

This article assesses the arguments made by these state courts in light of recent and increasingly vociferous calls for reforms in arbitration. It concludes that, although serious normative concerns about disparate party arbitration exist, the solution to those concerns should not come in the form of state-specific post-award review, which would undermine the harmony needed for arms' length arbitration. Allowing states individually to fashion different standards of judicial review for arbitration awards would render the arbitral process, in any circumstances, so uncertain as to make it effectively unworkable.

RECOGNITION OF FOREIGN ARBITRATION AWARDS: A LOOK AT THE NEW YORK CONVENTION IN U.S. COURTS

Oluwaseun Ajayi

U.S. Department of Education

Over a half century ago, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or “Convention”) entered into force. About ten years later, the United States acceded to the Convention and it subsequently entered into force here. Since its entry into force, the New York Convention has been very successful. The last surviving participant in its drafting described the Convention as “the most successful, multilateral instrument in the field of international trade law.” This paper will explore that success specifically in United States courts, where the New York Convention has been applied routinely in recognizing and enforcing foreign arbitral awards. The paper examines common objections raised by litigants to enforcement of foreign arbitral awards. The paper concludes that courts’ embrace of the Convention has been instrumental to its success, which in turn has given predictability and stability to the field of international commercial transactions.