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COURTS AND ARBITRATION: RECONCILING THE PUBLIC WITH THE PRIVATE

By
Susan L. Karamanian*

I. INTRODUCTION

Arbitration is an accepted form of dispute settlement in many countries, including the United States. Perhaps “popular” is a better description given the many lawyers and experts around the world now working in the field of arbitration and the many articles and conferences devoted to the subject.

Yet over the past decade, and the past few years, in particular, the tide has subtly shifted. In essays and lectures, two distinguished judges from separate common law countries have questioned the fact of and the process by which private actors control dispute resolution. In 2002, Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit lamented the decline of trials and trial lawyers.¹ His focus was on shortcomings in judicial procedure, which gave rise to alternative dispute resolution, mainly 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. He has repeated his gentle critique in various essays and articles.² Fast forward to 2016, when the Lord Chief Justice of England and Wales, Lord Thomas, questioned arbitration’s interference in law-making. In his Bailii Lecture titled “Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration,” Lord Chief Justice Thomas called for a new balance between courts and arbitration.³

Government officials, civil society and the media have joined in questioning arbitration, along with taking aim at globalization and another form of arbitration, investor-state dispute settlement (ISDS).⁴ Although the criticism of ISDS differs in certain respects as the arbitration

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¹ Patrick E. Higginbotham, Essay: *Judge Robert A. Ainsworth, Jr., Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?* 55 SMU L. REV. 1405, 1405 (2002) [hereinafter Higginbotham, *Trial Courts*].

² See, e.g., Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (2004), <http://www.rand.org/pubs/periodicals/rand-review/issues/summer2004/28.html> [hereinafter Higginbotham, *Disappearing Trial*]; Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L. J. 745, 752-55 (2010) [hereinafter Higginbotham, *Present Plight*].

³ The Right. Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration*, THE BAILII LECTURE 2016 (Mar. 9, 2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailii-lecture-20160309.pdf> [hereinafter Thomas, *Rebalancing Courts and Arbitration*].

⁴ See, e.g., Michael Nolan, *Challenges to the Credibility of the Investor-State Arbitration System*, 5 AM. U. BUS. L. REV. 429, 429 (2016).

involves a sovereign, at its heart is the concern that arbitration is a private process yet disputes are inherently of public concern.⁵

According to the critics, arbitrators are chosen and compensated by the parties and they largely act behind closed doors; courts, however, have mandates under constitutions to resolve legal differences, particularly those of public significance, and do so in an open way.⁶ In light of these developments, have courts become more skeptical of arbitration? Are there mechanisms under domestic arbitration laws or other legal authorities for courts to address the concerns?

II. THE CRITIQUE

Questioning arbitration is not new. What is new is that after years of arbitration's entrenchment in commercial matters and its relative success in meeting the needs of disputing parties and relieving overburdened courts, prominent judges are publicly suggesting that arbitration is hampering the law, in general.

The argument of Judge Higginbotham and Lord Chief Justice Thomas differs from common concerns about 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.⁷ Instead, their critique 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. Further, due to its secrecy, arbitration betrays democracy as the public is denied access to dispute resolution.

On the age-old concerns about arbitration, the United States enacted the Federal Arbitration Act (FAA) in 1925 after judicial resistance to arbitration.⁸ Further, although the United States was at the United Nations' negotiating table in 1958 for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention), it did not ratify the NY Convention and enact implementing legislation until 1970.⁹ Again, the judiciary had reservations yet there were also federalism issues, given state anti-arbitration laws.¹⁰

Other countries have been cautious about arbitration. For years, Latin American countries adhered to the Calvo Doctrine and insisted that respective local courts were the exclusive fora for

⁵ GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 9-11 (2007).

⁶ See Judith Resnik, Feature, Arbitration, Transparency and Privatization: *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804-05 (2015).

⁷ See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0.

⁸ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440, 443 (2006).

⁹ Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 29-31 (2002).

¹⁰ *Id.*

dispute resolution.¹¹ Although a number of these states shifted toward arbitration in the 1980s with the rise of foreign direct investment, some, such as Brazil, were still reluctant to accept arbitration. Brazil has now adopted an arbitration law and became a party to the NY Convention in 2002.¹² Or as another example, India enacted the Arbitration and Conciliation Act in 1996.¹³ The law aside, courts in India were slow to embrace arbitration.¹⁴ India later enacted the Arbitration and Conciliation (Amendment) Ordinance 2015 and an amending act, which were designed “to bring the existing 1996 Arbitration Act further into line with international standards.”¹⁵

In a number of States, including the United States and the United Kingdom, arbitration is now common. So when prominent judges from these countries question what many litigants and their lawyers perceive to be a success relative to the costs and benefits of litigating in court, it should give reason to pause.

In the United States, the modern questioning of arbitration’s influence on law-making started in earnest more than a decade ago with Judge Higginbotham. Of note, his original focus was on the declining number of trials, and this fundamental concern continues to drive his assessment. In his Judge Robert A. Ainsworth, Jr. Memorial Lecture, presented at Loyola University School of Law in 2002, he lamented that in recent years “[j]udges seemed to be spending more time on matters other than trials.”¹⁶ In assessing the causes, one of them is arbitration. According to Judge Higginbotham, the U.S. Supreme Court’s endorsement of arbitration “validates formal rejections of the courthouse.”¹⁷ A few years later in an essay titled “The Disappearing Trial and Why We Should Care,” published by the Rand Corporation, Judge Higginbotham observed that ADR, including arbitration, is one of the reasons for the “anti-trial culture” in civil cases.¹⁸ In 2010, Judge Higginbotham, in an often-cited article in *Duke Law Journal*, “The Present Plight of the United States District Courts,” noted that “[t]he faces of the United States district courts are fading.”¹⁹ As he described, arbitration has aided in the decline of courts:

¹¹Bernardo M. Cremades, *Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78, 80 (2004).

¹² Leonardos de Campos Melo, *Recognition of Foreign Arbitral Awards in Brazil*, 24 AM. REV. INT’L ARB. 113, 115-18 (2013).

¹³ The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996).

¹⁴ See Amelia C. Rendeiro, *Indian Arbitration and “Public Policy,”* 89 TEX. L. REV. 699, 709-10; 720-22 (2011).

¹⁵ See Joseph (Yusef) Saei, *Indian Executive’s Pro-Arbitration Power Move Sanctioned by Parliament: Transnational Ideals versus National Reality*, 41 YALE J. INT’L L. ONLINE 1, 1-2 (2016), <https://campuspress.yale.edu/yjil/files/2016/09/saei-website-ready-1-2itw31n.pdf> (noting that the reform measures “include mandatory referral to arbitration, permission of interim measures in international cases, a narrowed public policy review, and arbitral time limits and fast-track procedures”).

¹⁶ Higginbotham, *Trial Courts*, *supra* note 1, at 1405.

¹⁷ *Id.* at 1414.

¹⁸ Higginbotham, *Disappearing Trial*, *supra* note 2, at 3.

¹⁹ Higginbotham, *Present Plight*, *supra* note 2, at 745.

... arbitration and ADR are relevant to this examination of the vanishing trial not so much for their abstract value but for their insights upon the strengths and weaknesses of the federal trial courts and as significant parts of the milieu in which we ponder the courts' difficulties and private dispute resolution's ease.²⁰

Across the Atlantic Ocean, another prominent judge, the Lord Chief Justice of England and Wales, was pondering the issue of the declining role of courts, mainly decisions of appellate courts on international commercial matters. His observations were made known in his 2016 Bailii Lecture.²¹ According to Lord Chief Justice Thomas, arbitration has diverted cases away from courts, "reduc[ing] the potential for the courts to develop and explain the law."²² Further, "resolution of disputes firmly behind closed doors" results in "retarding public understanding of the law, and public debate over its application."²³

Indeed, Lord Chief Justice Thomas's concern about the lack of the development of the common law in areas of trade and finance echoed Judge Higginbotham's Rand essay. In 2004, Judge Higginbotham described as "disconcerting ... the potential loss of focus on the intent of the controlling case law in these cases" and "the perils of 'private justice' in a system designed to be public and non-discriminatory."²⁴ He did not develop his argument in great detail but his concern was duly noted.

According to Judge Higginbotham and Lord Chief Justice Thomas, dispute resolution is not solely about resolving differences between parties. Courts in common law jurisdictions play an essential public function. In a more pointed manner, Lord Chief Justice Thomas urged that "it must always be remembered that:

- a. It is the courts that develop the law. Arbitration does not.
- b. Courts articulate and explain rights, including definitive rulings on the scope and interpretation of contractual clauses, financial instruments and so on. Arbitration does not.
- c. As has been very rightly noted, 'open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.' Arbitration does not."²⁵

To address the situation, Lord Chief Justice Thomas urged a more liberal standard to appeal arbitration cases, particularly "where the question is one of general public importance."²⁶ Further,

²⁰ Higginbotham, *Present Plight*, *supra* note 2, at 755.

²¹ Thomas, *Rebalancing Courts and Arbitration*, *supra* note 3.

²² *Id.* at 10, ¶ 22.

²³ *Id.* at 10, ¶ 23. *Cf.* Pinsent Masons, *Insurance & Reinsurance, Arbitration: Is Secrecy Damaging the Market?* (Sept. 2007) (referencing a similar argument made by Appeal Court Judge Lord Justice Rix in his 2007 Bathurst Memorial Lecture).

²⁴ Higginbotham, *Disappearing Trial*, *supra* note 2, at 4.

²⁵ Thomas, *Rebalancing Courts and Arbitration*, *supra* note 3, at 17-18, ¶ 49.

²⁶ *Id.* at 13, ¶ 34.

he suggested that courts be given broader power “to give decisions on points of law which arise after the commencement of an arbitration but before the decision.”²⁷

Lord Chief Justice Thomas’s remarks immediately prompted considerable discussion and debate. Concerned that his “re-balance” message was misunderstood as a frontal assault on arbitration, in July 2016 he explained:

Many thought that I had made an attack on arbitration. It certainly was not ... it is very, very undesirable that we are entering into a stage where great legal minds have retired from the bench, are giving awards and setting out principles which are known only to the cognoscenti. This is not good. So I think there is a very fruitful avenue here in exploring this.²⁸

Other judges in the United States have joined Judge Higginbotham in challenging arbitration. U.S. federal district court Judge Terry R. Means, in response to Judge Higginbotham, while not agreeing that the declining number of trials is necessarily bad, wrote that “the rise of arbitration as a substitute for trial in the federal and state district courts is a trend fraught with danger.”²⁹ Judge Means, while concerned about the lax approach to evidence in arbitration, also noted:

Arbitration proceedings are conducted in private and before a privately paid arbitrator, beholden to some extent to those who bring him business, and who has not faced the vetting of the public at state election or the confirmation process of a federal judge.³⁰

Or, as another example, a federal district judge recognized that arbitration allows businesses to avoid public accountability. In one of many essays in *The New York Times* about arbitration, Judge William G. Young of the U.S. Federal District Court of Massachusetts stated that arbitration “is among the most profound shifts in our legal history” and “[o]minously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”³¹

In a recent book, U.S. Supreme Court Justice Stephen Breyer reminded courts to focus on public policy in arbitration cases. He did not get in the middle of the Judge Higginbotham-Lord Chief Justice Thomas discussion, yet noted that the failure to rigorously assess arbitration could allow it to run roughshod over policy concerns: “courts that pay little or no attention to their

²⁷ Thomas, *Rebalancing Courts and Arbitration*, *supra* note 3, at 13, ¶ 35.

²⁸ The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, LAUNCH OF THECITYUK’S LEGAL SERVICES REPORT 2016 at 4, ¶ 16 (July 20, 2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lcj-speech-launch-of-thecityuk-legal-services-report-2016.pdf>.

²⁹ Terry R. Means, *Point-Counterpoint: Two Judges’ Perspectives on Trial by Jury: What’s So Great about a Trial Anyway? A Reply to Judge Higginbotham’s Eldon B. Mahon Lecture of October 27, 2004*, 12 TEX WESLEYAN L. REV. 513, 518-19 (2006).

³⁰ *Id.* at 519.

³¹ Silver-Greenberg & Gebeloff, *supra* note 7.

nation's public policies can create, out of arbitration, a procedural method for nullifying those policies."³²

Academics, as well, have shaped the criticism. Notable among them is Professor Judith Resnik of Yale Law School. She has examined the historical underpinnings and significance of the public in the U.S. legal system. In her mind, arbitration challenges the constitutional allocation of power due to "insufficient oversight of the processes it has mandated as a substitute for adjudication and shifting control over third-party access away from courts and to the organizations conducting arbitrations and the commercial enterprises drafting arbitration clauses."³³ Likewise, Professor Amy Schmitz, in examining arbitration's privacy, has observed that even in some public arbitrations involving sports there is a failure "to produce public law," which can have ramifications when cases relating to "matters of health and safety [] escape public scrutiny."³⁴ In sum, the challenge to arbitration comes from a variety of sources. Although not widespread and dominating the discourse about dispute resolution, it is biting. Democratic values and the accepted form of law-making in common law systems are considered under threat.

III. THE RESPONSE TO THE CRITIQUE

The argument that arbitration inhibits the development of the law is curious. First, for those who have witnessed the growth of mediation since the 1970s, which encourages parties to settle their claims, it is odd that arbitration's removal of cases from the judicial docket would be considered a negative development. Indeed, lawsuits exist due to differences between parties. Surely, if parties are free to settle their differences, a practice that federal and state rules of civil procedure encourage, they should be free to remove the case from court and have another adjudicator, the arbitrator, resolve it.

Second, the attack on the decline in law-making due to arbitration is not entirely substantiated. What gaps in the law exist due to arbitration? One need only look at the many federal and state reporters of legal opinions, which have grown exponentially over the years, and wonder if there is a serious problem. If legal standards are lacking, surely corporations and individuals, the parties to lawsuits, would be expressing concern. Observers of the law in the United States, such as law professors, lawyers, and students, would be devoting energy and time to pointing out the lacunae and insisting on clarity.

Nevertheless Judge Higginbotham's challenge has some merit. My colleague, Professor Gregory E. Maggs, an expert in commercial law, has noted the absence of judicial opinions in the field of credit card contracts.³⁵ While it is generally believed that all credit card contracts have arbitration clauses, it appears this is not quite correct.³⁶ Nevertheless, due to arbitration or for other reasons, the law relating to certain aspects of their use is not developed. For example, under

³² STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 194 (2015).

³³ Resnik, *supra* note 6, at 2810.

³⁴ Amy J. Schmitz, *Secrecy and Transparency in Dispute Resolution: Untangling the Privacy Paradox in Arbitration*, 54 KAN. L. REV. 1211, 1217 (2006).

³⁵ Conversation with Gregory E. Maggs, Professor, George Washington University Law School (Mar. 17, 2017).

³⁶ See Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 17-18 (2013).

the Truth in Lending Act, a credit card holder is not liable for amounts exceeding \$50 due to unauthorized use of the card.³⁷ When fraudulent activity occurs above the \$50 amount, the credit card company may seek to push back the charges on the merchant. Logically, when faced with this request, the merchant may challenge whether the activity was unauthorized in the first instance. According to Professor Maggs, there is a dearth of cases dealing with what would constitute authorized v. unauthorized conduct to guide the merchant as to that issue. Further, the holder of a business card may have recurring charges. At what point is the holder estopped from seeking to limit liability? Again, the case law is limited. Professor Maggs also referenced 15 U.S.C. section 1666i, which gives the credit card holder defenses under state law when the transaction was in the same State as the mailing address that the credit card holder provided “or was within 100 miles from such address.”³⁸ Would the defenses under section 1666i apply when the purchase is made via the internet through Amazon? According to Professor Maggs, the case law is not fully developed on this issue.

Lord Chief Justice Thomas was not as specific in identifying substantive gaps in commercial law. Instead, he observed:

... across many sectors of law traditionally developed in London, particularly relating to the construction industry, engineering, shipping, insurance and commodities, there is a real concern which has been expressed to me at the lack of case law on standard form contracts and on changes in commercial practice.³⁹

In response, however, Sir Bernard Eder, formerly of the High Court of England and Wales, has noted that “the common law continues to develop at a pace with a constant stream-indeed flood-of cases over a wide area of jurisprudence.”⁴⁰

If allowing greater judicial engagement is needed in the arbitration process, merely for the sake of enabling the development of the common law, then at what cost? As Lord Saville, former Supreme Court Justice and chair of the UK’s Departmental Advisory Committee on Arbitration Law, asked pointedly in response to the Lord Chief Justice: Why should the parties “be obliged to finance the development of English commercial law?”⁴¹ The cost: it would “drive international commercial arbitration away from London, to the great loss of this country.”⁴² And it would further signal a lack of respect for party autonomy as to arbitration yet not as to mediation.⁴³

³⁷ The Truth in Lending Act, 15 U.S.C. § 1643 (a)(1)(B) (2017).

³⁸ 15 U.S.C. § 1666i(a)(3).

³⁹ Thomas, *Rebalancing Courts and Arbitration*, *supra* note 3, at 10-11, ¶ 23.

⁴⁰ Sir Bernard Eder, Essex Court Chambers, Keynote Address at the Chartered Institute of Arbitrators (London Branch): Does arbitration stifle development of the law? Should s. 69 be revitalised? 4, ¶ 10 (Apr. 28, 2016), <http://arias.org.uk/wp-content/uploads/2016/05/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf>.

⁴¹ Lord Mark Saville, *Reforms will Threaten London’s Place as a World Arbitration Centre*, THE TIMES (Apr. 28, 2016), <http://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd>.

⁴² *Id.*

⁴³ *Id.* (quoting Lord Devlin, who in 1979 observed that “[t]he next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law”).

A more compelling concern is arbitration's removal of matters from public purview. Due to arbitration, no doubt cases of public significance are being handled outside of the public realm. Yet, is arbitration completely removed from any scrutiny? As noted below, various arbitration agreements and awards are vetted by courts and the judiciary is engaged in other aspects of the arbitration process.

IV. JUDICIAL ENGAGEMENT ON THE ISSUE: PAST AND FUTURE

Arbitration is not exclusively private. The irony is that courts are essential to arbitration's smooth functioning.⁴⁴ When parties have entered into a written agreement to arbitrate, one of them may need to seek judicial intervention to enforce the agreement. In the United States, for example, the FAA recognizes that arbitration agreements are enforceable like any contract and that courts can stay judicial proceedings and order arbitration.⁴⁵ During the arbitration, the law of the place of arbitration may enable a party to ask a court for orders regarding appearance of witnesses and production of documents.⁴⁶ After an arbitration award has been entered, a party may need to seek judicial enforcement of the award,⁴⁷ or the non-prevailing party may seek to vacate the award under the law of the place of arbitration.⁴⁸ As to an award under the New York Convention, a court may not enforce it for a number of fairly technical reasons yet it does recognize that a violation of public policy could give grounds for non-enforcement.⁴⁹ In addition to FAA grounds for not confirming or vacating an award, certain U.S. courts have devised other standards to vacate an award, including, as to domestic arbitration awards, manifest disregard of the law.⁵⁰ Of additional note, arbitrating disputes involving a patent is far from shrouded in secrecy as the arbitral award is required to be filed with the U.S. Patent and Trademark Office.⁵¹ So, have statutory and other mechanisms enabled courts to perform the guardian role as to matters of public concern?

Courts are engaged on public issues as they relate to arbitration. This focus has occurred at various stages of the arbitration process. It belies the notion that arbitrations are entirely secret. Further, it signals that courts are more than by-standers. In fact, courts are generating substantial law related to the arbitration itself. This development may not satisfy those concerned about the

⁴⁴ See generally Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L. REV. 519 (1960).

⁴⁵ Federal Arbitration Act, 9 U.S.C. §§ 2-4; see also 9 U.S.C. §§ 202, 206.

⁴⁶ *Id.* § 7.

⁴⁷ *Id.* § 9; see also *id.* § 207.

⁴⁸ *Id.* § 10.

⁴⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter *NY Convention*].

⁵⁰ See Amina Dammann, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 443 (2008).

⁵¹ 35 U.S.C. § 294(d) (2012); cf. § 294(c) (the award is binding only between the parties to the arbitration).

lack of published judicial opinions on certain substantive issues but, at a minimum, it evidences new jurisprudence, one of public value.

For example, U.S. courts have woven an entire body of law on when an arbitration clause acts to waive the right to proceed as a class action. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the U.S. Supreme Court exercised considerable review by holding that an arbitral tribunal cannot conduct a case as a class action when the arbitration clause did not so provide.⁵² This conclusion is logical given that arbitration is founded in contract. Further, as the Court noted, important public policy concerns would be raised by “the shift from bilateral arbitration to class-action arbitration.”⁵³ A year later in *AT&T Mobility LLC v. Concepcion*, the Court summarized the concerns as follows:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.⁵⁴

In *Concepcion*, the Court examined California’s *Discover Bank* rule, under which a class action waiver in an arbitration agreement in certain consumer contracts was unconscionable and thus, not enforceable.⁵⁵ The rule also authorized a party to a consumer contract to demand class-wide arbitration after the fact.⁵⁶ The lower courts had ruled in the plaintiffs’ favor and refused to compel arbitration based on an arbitration clause in a cellular telephone contract with AT&T.⁵⁷ The Supreme Court found that the FAA pre-empted the *Discover Bank* rule and thus reversed the lower court.⁵⁸ Recently, the U.S. Supreme Court in *DIRECTV, Inc. v. Imburgia* reviewed a contract in which California customers agreed to arbitrate.⁵⁹ The clause, however, prohibited class arbitration and provided that if the “law of your state” disallows the waiver of class arbitration, then the arbitration clause “is unenforceable.”⁶⁰ The Court, relying on *Concepcion*, held that a California court’s reading of the contract, which struck down the arbitration clause, was

⁵² *Stolt-Nielsen S.A. v. AnimalFeeds Intl’l Corp.*, 559 U.S. 662, 687 (2010).

⁵³ *Id.* at 686.

⁵⁴ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

⁵⁵ *Id.* at 340.

⁵⁶ *Id.* at 346.

⁵⁷ *Id.* at 337-38.

⁵⁸ *Id.* at 352.

⁵⁹ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

⁶⁰ *Id.*

inconsistent with other approaches a California court would take to a contract and thus did not put the arbitration clause on the same footing as a contract.⁶¹

The judiciary's conversation about the relationship between arbitration and class claims is not ending.⁶² The U.S. Supreme Court recently granted the petition for writ of certiorari on whether the National Labor Relations Act's requirement of collective bargaining precludes enforcement of an arbitration clause that mandates arbitration on an individual versus a collective basis.⁶³ The critical aspect of the case is the perceived conflict between two federal laws that reflect entrenched principles, namely, freedom of contract and the mandatory federal regime supporting employees' rights to act in concert. In short, the Court will be afforded the opportunity to shed insight into two issues of public significance and generate critical legal analysis in the process.

Another example of judicial engagement in the arbitration realm is jurisprudence on when a non-signatory to an arbitration clause could compel arbitration or be bound to arbitrate. The U.S. Supreme Court recognized in *Moses H. Cone Memorial Hospital v. Mercury Construction* that non-parties cannot be compelled to arbitrate.⁶⁴ The rationale is consistent with the fundamental notion that arbitration is grounded in consent. Nevertheless, U.S. courts have carved out exceptions to this rule. To hold otherwise could mean inefficiency due to the likelihood of multiple courts and tribunals examining identical issues and the possibility of conflicting decisions. Also, the FAA requires a court to compel arbitration when there is "an agreement in writing" yet it does not mandate that a party in the lawsuit be a party to that agreement. Hence, in *Arthur Andersen LLP v. Carlisle*, the Supreme Court opened the door for application of state law principles in determining the status of non-signatories.⁶⁵ As Justice Antonin Scalia wrote: "If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled."⁶⁶

Relying on the principle of equitable estoppel, courts have recognized that non-parties can compel arbitration.⁶⁷ In a similar vein, non-parties can be bound to arbitrate in certain instances.⁶⁸ The cases are many and the volume does not appear to be slowing.

⁶¹ *Imburgia*, 136 S. Ct. 463, at 471.

⁶² See Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 Y.B. ON ARB. & MEDIATION -- (2017).

⁶³ *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3340, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285) (No. 16-300) (No. 16-307).

⁶⁴ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983).

⁶⁵ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009).

⁶⁶ *Id.* at 631.

⁶⁷ Michael A. Rosenhouse, Annotation, *Application of Equitable Estoppel by Nonsignatory to Compel Arbitration – Federal Cases*, 39 A.L.R. FED. 2d 17 (2009) (discussing multiple legal principles as to why a party to an arbitration clause could be estopped from preventing a non-party from compelling arbitration and identifying cases applying the principles).

⁶⁸ Michael A. Rosenhouse, Annotation, *Application of Equitable Estoppel to Compel Arbitration by or Against Nonsignatory-States Cases*, 22 A.L.R. 6th 387 (2007).

Also, an arbitration award could benefit non-parties to the arbitration in a later lawsuit. In *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's award of summary judgment, which dismissed the plaintiff's claims for monopolization and attempted monopolization under the Sherman Act.⁶⁹ The defendants in the lawsuit were entities affiliated with Medtronic, Inc.⁷⁰ One of the grounds for dismissal was that the plaintiff had arbitrated claims against a non-party to the case and thus it was precluded from re-litigating the claim.⁷¹ By the plaintiff's admission, the nonparty, MSD USA, was affiliated with Medtronic and other Medtronic subsidiaries so that the Medtronic entities constituted a single enterprise.⁷² In the previous case, a federal district court stayed the case pending the plaintiff's arbitration against MSD USA; after arbitration, the federal district court confirmed the arbitral award, which was in favor of the plaintiff, and entered an order dismissing all claims with prejudice.⁷³ According to the Tenth Circuit, before dismissing the case, the plaintiff should have amended its complaint and asserted claims against the antitrust defendants even though those claims were not subject to arbitration.⁷⁴

U.S. courts are not the only ones engaged in guiding parties and tribunals as to non-parties. Courts in numerous jurisdictions, such as the United Kingdom and Singapore, have issued published decisions on when a non-party can or cannot be part of an arbitration.⁷⁵

Second, in addition to generating considerable new law related to enforcing the agreement to arbitrate and the consequences of arbitration, courts are active in supervising certain aspects of the arbitration process. In the United States, under the FAA, "the arbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them" documents material to the case.⁷⁶ U.S. courts have the power to enforce this provision.⁷⁷ As a result, and not without surprise, U.S. courts have been asked to guide tribunals and parties on evidentiary matters arising out of Section 7. For example, in *Stolt-Nielsen Transportation Group, Inc. v. Celanese AG*, the Second Circuit affirmed the district court's order that non-parties appear pursuant to a subpoena before the tribunal to present testimony and requested documents.⁷⁸ The court recognized that such a hearing is not a pre-merits

⁶⁹ *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1246 (10th Cir. 2017). The Tenth Circuit affirmed on the basis of claim preclusion, which is different than the grounds for the district court's dismissal. *Id.* at 1246.

⁷⁰ *Id.* at 1226-28, 1235.

⁷¹ *Id.* at 1245-46.

⁷² *Id.* at 1230.

⁷³ *Id.* at 1228-29.

⁷⁴ *Medtronic*, 847 F.3d at 1245.

⁷⁵ See William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, IN MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1 (Belinda Macmahon ed., 2009).

⁷⁶ 9 U.S.C. § 7.

⁷⁷ *Id.*

⁷⁸ *Stolt-Nielsen Transp. Grp., Inc. v. Celanese AG*, 430 F.3d 567, 581 (2d Cir. 2005).

discovery expedition as all arbitrators were present and they heard testimony and ruled on admissibility of evidence.⁷⁹ Since *Stolt-Nielsen*, the Second Circuit and other courts of appeal have clarified that Section 7 does not authorize the pre-arbitration discovery from non-parties and have ordered lower district courts to quash subpoenas directed at non-parties.⁸⁰ At least one other circuit court has held that Section 7 allows arbitrators to subpoena relevant documents before the hearing, even as to a non-party at least when the latter was “integrally related to the underlying arbitration.”⁸¹

Further, under 28 U.S.C. section 1782, Congress has authorized a federal district court to issue an “order” to a person in the district “to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.”⁸² The U.S. Supreme Court has held that the statute gives lower federal courts the discretion to grant a section 1782(a) discovery application based on certain factors.⁸³ Various federal district courts have used their power under the statute to order discovery as to an international arbitration while other courts have not recognized that 28 U.S.C. section 1782 applies to international arbitrations.⁸⁴ The Arbitration Act 1996 of the United Kingdom authorizes parties to use the “same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.”⁸⁵ As Professor Thomas Carbonneau has noted, the law enables English courts to “assist arbitral proceedings that are not located in the United Kingdom or that have yet to be localized in a particular national jurisdiction.”⁸⁶

Finally, U.S. courts have limited authority to vacate or not confirm an arbitral award. One ground for non-enforcement or vacating the award relates to concerns about public policy. Although application of the public policy exception is limited, courts have critically examined arbitral tribunals’ legal reasoning in addressing the standard. An example is *Bayer CropScience AG v. Dow AgroSciences LLC*, in which the district court was asked to confirm an arbitration

⁷⁹ *Stolt-Nielsen Transp. Grp., Inc.*, 430 F.3d at 577-78 (not reaching the issue, however, of whether section 7 authorizes pre-arbitration discovery).

⁸⁰ *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216-17 (2d Cir. 2008) (“we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings”); *see also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

⁸¹ *In re Security Life Ins. Co. of America*, 228 F.3d 865, 871 (8th Cir. 2000).

⁸² 28 U.S.C. § 1782 (1964).

⁸³ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246, 266 (2004).

⁸⁴ *See* Kenneth Beale, Justin Lugar, & Franz Schwarz, *Solving the § 1782 Puzzle: Bringing Certainty to the Debate over 28 U.S.C. § 1782’s Application to International Arbitration*, 47 STAN. J. INT’L L. 51, 53, 67-68 (2011).

⁸⁵ Arbitration Act 1996 (Eng.).

⁸⁶ Thomas E. Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. L.J. 131, 135 (1998).

award under the New York Convention for breach of a patent license agreement.⁸⁷ Defendants moved to vacate the award under FAA, 9 U.S.C. sec. 10.⁸⁸ The court readily dismissed the challenge not to confirm the award on public policy grounds, which the defendants couched in terms of a violation of the U.S. Constitution.⁸⁹ One of the issues was whether the tribunal erred in not invalidating the patents on the grounds of “double patenting.” Under the double patenting rule, an inventor is entitled to “one patent term per invention or improvement.”⁹⁰ According to the district court, the arbitrators had addressed and rejected this issue on the grounds that the referenced patents were not commonly owned.⁹¹ In refusing to re-examine all of the nuances of the award, the court noted: “For the Court to now delve into whether the majority was wrong to reject the double patenting argument would be to reopen the record and analyze the case on the merits. The Court cannot and will not do so.”⁹² As to a second argument that the tribunal manifestly disregarded the fact that a claim as to a specific patent encompassed a specific gene, which invalidated the patent, the court again recognized that the tribunal had “thoroughly analyzed” the defense and argument.⁹³ The U.S. Court of Appeals for the Federal Circuit affirmed the lower court’s confirmation of the award.⁹⁴ Nevertheless, the Federal Circuit added an interesting twist as it held that the district court’s judgment applied an inappropriate post-judgment interest rate and thus revised the judgment on the interest rate.⁹⁵

As arbitration continues to touch on areas of public concern it is likely that the work of an arbitral tribunal could be at odds with another government entity, such as an agency, that is expressly charged with the development of the law. One such area is antitrust law. In particular, in Europe, the European Commission has the power under EU law to determine whether a grant by a Member State, or state aid, complies with the Treaty for the Functioning of the European Union (TFEU). An arbitration award, which ordered a Member State to pay damages to an investor due to an EU decision previously withdrawing State aid, itself constituted a new form of State aid. As observed, in this instance, “a domestic court reviewing an award that constitutes State aid and

⁸⁷ Bayer CropScience AG v. Dow AgroSciences LLC, No. 2:12cv47, 2016 U.S. Dist. LEXIS 5571, at *11-12 (E.D. Va. Jan. 15, 2016). Why the NY Convention applied to the award is not clear other than the parties agreed that it did. *Id.* at *13. The arbitration clause provided that the place of arbitration was “the place of business of the defendant,” which is Indiana. The NY Convention applies when the arbitration award was made outside of the United States or when it is considered a non-domestic award. *NY Convention, supra* note 49, art. I.

⁸⁸ *Bayer CropScience AG*, 2016 U.S. Dist. LEXIS 5571 at *12-13.

⁸⁹ *Id.* at *12, *16.

⁹⁰ *Gilead Scis., Inc. v. Natco Pharma Ltd.*, 753 F.3d 1208, 1212 (Fed. Cir. 2014), *cert. denied*, -- U.S. --, 135 S.Ct. 1530, 191 L.Ed.2d 559 (2015)).

⁹¹ *Bayer CropScience AG*, 2016 U.S. Dist. LEXIS 5571 at *16.

⁹² *Id.*

⁹³ *Id.* at *18-19.

⁹⁴ *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 2016-1530, 2016-1623, 2017 U.S. App. LEXIS 3678 (Fed. Cir. Mar. 1, 2017).

⁹⁵ *Id.* at *32-33.

that has not been notified to the Commission has to rule that it is illegal and therefore breaches public policy.”⁹⁶

Along these lines, in the United States, the tension between the goal of arbitration and the desire to have a single forum to adjudicate claims of bankruptcy has courts drawing detailed lines. In core bankruptcy matters, priority is given to the bankruptcy court over the arbitral tribunal.⁹⁷ Addressing the tension, courts painstakingly sift through aspects of claims and a host of policy issues.⁹⁸

Yet, even when not able to address fundamental concerns with the award, a court may express reservations, which in turn continues the dialogue with tribunals. For example, U.S. federal district judge Max O. Cogburn, Jr. expressed frustration over the loss of law-making authority in the context of a broker-financial institution arbitration.⁹⁹ The unfairness of arbitration was front and center as Judge Cogburn observed that “arbitration under the [FAA] is a process that, although retaining the appearance of constitutionality by involving the courts in confirming an award, does not even attempt to retain the appearance of fairness.”¹⁰⁰ He followed his remark with the observation that the claimant bank has a “clear advantage” in arbitration, noting that counsel for the bank admitted that she “has never lost a *single* case” in arbitration.¹⁰¹ Concerns aside, Judge Cogburn enforced the award as mandated by the FAA yet vacated that portion of the award on attorney’s fees. According to the court, the arbitration panel admitted that the amount of the fee award was unsubstantiated, or “pulled out of thin air,” and thus was “completely arbitrary.”¹⁰²

V. CONCLUSION

The debate about the role and value of arbitration is perhaps just beginning in earnest. It is difficult to establish that the mere fact of an agreement to arbitrate means that the public is not engaged in dispute resolution. Courts routinely review agreements to arbitrate and arbitration awards and information about the disputes is regularly disclosed in published judicial opinions. Further, courts are increasingly asked to address a range of issues related to the arbitration process. Of course, many arbitration matters never come within the review of courts; yet the courts are quite literally consumed with cases dealing with the fact of arbitration. They are producing law

⁹⁶ Damien Geradin, *Public Policy and Breach of Competition Law in International Arbitration: A Competition Law Practitioner’s Viewpoint* 14 (Tilburg Law & Economics Center, Discussion Paper No. 2016-029), <https://ssrn.com/abstract=2786370> (quoting Tribunal de premier instances francophone de Bruxelles-Juge des Saisies, 26 Jan 2016, in case R.G. 15/242/A).

⁹⁷ Polina Kushelev, *An International Approach to Breaking the Core of the Bankruptcy Code and FAA Conflict*, 28 EMORY BANKR. DEV. J. 355, 360-76 (2012).

⁹⁸ *Id.*; see also *Kraken Inv. Ltd. v. Jacobs (In re Salander-O’Reilly Galleries, LLC)*, 475 B.R. 9 (D.C. N.Y. 2012).

⁹⁹ See generally *Wells Fargo Advisors, LLC v. Watts*, 858 F. Supp. 2d 591 (W.D.N.C. 2012).

¹⁰⁰ *Id.* at 595.

¹⁰¹ *Id.* (emphasis in original).

¹⁰² *Id.* at 604.

related to contracts, the relationship of one body of law, arbitration, to other bodies, and civil procedure, to name just some areas.

Going forward, the key to ensuring that democratic values are not undermined is for courts to appreciate that within the existing legal regime there is room for oversight of the arbitration process. Second, in exercising their oversight authority, courts should send clear signals to the parties and arbitrators regarding issues of potential public concern. The process should be understood as ongoing as opposed to stagnant. With these guides, the public and private could be better harmonized.