

# Is hostility against maritime arbitration back via the Arbitration Fairness Act of 2011?

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## **Introduction**

Arbitration “took its rise in the very infancy of Society” as a private and self-contained method, distinctive from litigation and not as a postscript to development of public courts<sup>1</sup>. As an alternative to litigation, maritime/commercial arbitration is assumed to be final and binding<sup>2</sup>. It is worth noting that private arbitration predates the public court system<sup>3</sup>. Arbitration began as an extrajudicial mechanism for resolving disputes<sup>4</sup>. The ancient Sumerians, Persians, Egyptians, Greeks, and Romans all had a tradition of arbitration<sup>5</sup>. Communities introduced arbitration systems intended to resolve their communal conflicts in accordance with custom, equity and internal “law.”<sup>6</sup> Anthropologists and sociologists have told that informal dispute resolution operates within systems of state law, and consequently is better portrayed on latitude of overlapping “legalities” rather than as merely an alternative to formal law and state regulation<sup>7</sup>. States have allowed and encouraged the increasing utilization of arbitration, indicative of the government belief it as serving the public good. So far as governments back and defend arbitration, it is not an exclusively

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<sup>2</sup> G Zekos, International Commercial and Marine Arbitration, 2008 Routledge-Cavendish Publishers London [www.routledge.com](http://www.routledge.com), *G. Zekos, Arbitration’s status under EU law, The Journal of World Investment & Trade 13 (2012) 390–419*, JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 25 (1918) (Quoting John Montgomerie Bell, Treatise On The Law Of Arbitration In Scotland 1 (2d ed. 1877)) at 22-27 (emphasizing special utility of arbitration despite development of reputable judicial system in mercantile cases in which arbitrator expertise in technical matters is essential).

<sup>3</sup> Burchell v. Marsh, 58 U.S. 344, 349 (1854) (“Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal.”) St. John’s Mercy Med. Ctr. v. Delfino, 414 F.3d 882, 884 (8th Cir. 2005) (noting the “strong federal policy” that favors “certainty and finality in arbitration”); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry, 92 F. App’x 243, 246 (6th Cir. 2004) (“It is clear that the FAA reflects Congressional approval of the speed and finality of arbitration . . . .”) Westvaco Corp. v. United Paper workers Int’l Union, 171 F.3d 971, 975 (4th Cir. 1999) (“Because judicial interference with an arbitrator’s interpretation threatens both the efficacy and finality of arbitration, judicial review of that interpretation is highly constrained.”) Bradley T. King, Note, “Through Fault of Their Own” —Applying Bonner Mall’s Extraordinary Circumstances Test to Heightened Standard of Review Clauses, 45 B.C. L. Rev. 943, 945 (“[F]inality [is] the crux of the arbitral bargain because if awards were precatory, then arbitration would be a mere prelude to, and not a substitute for, litigation.”).

<sup>4</sup> WILLIAM HOLDSWORTH, XIV A HISTORY OF ENGLISH LAW 187 (A.L. Goodhart & H.G. Hanbury eds. 1964).

<sup>5</sup> Sarah Rudolph, Blackstone’s Vision of Alternative Dispute Resolution, 22 Memphis St. U. L. Rev. 279 (1992). Wesley A. Sturges, A Treatise on Commercial Arbitrations and Awards 548-74 (1930), John T. Morse Jr., The Law of Arbitration and Award 383-406 (1872).

<sup>6</sup> W. Durant, The story of civilization: our common heritage 127, 361 (1935).

<sup>7</sup> Julius Henry Cohen, Commercial Arbitration and the Law, 22–27 (1918).

<sup>8</sup> Christine B. Harrington, *Informalism as a Form of Legal Ordering*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 378, 389-90, (Keith E. Whittington et al. eds., 2008).

private good, but one that falls within public jurisdiction. The legislative history of the FAA entails that Congress intended it to serve two rationales: first, to assert the validity of arbitration agreements as binding contract provisions in their own right; and second, to restrain costly and time-consuming litigation that was obstructing federal and state dockets at the beginning of the industrial revolution<sup>8</sup>. Congress itself in 1924 realized the Federal Arbitration Act to be constitutionally sound under the legislative branch's Article I power to regulate interstate commerce and the constitutionality of the Federal Arbitration Act is beyond doubt<sup>9</sup>. The consumer and any party must "knowingly and intelligently" waive the constitutional right of access to the courts and a jury trial<sup>10</sup>. It is essential that the parties undoubtedly understand that by signing a contract that includes an arbitration clause they are opting for arbitration as their exclusive dispute system and waiving their constitutional right to a judicial forum<sup>11</sup>.

Maritime arbitration is one form of alternative dispute resolution ("ADR") providing significant advantages to parties as compared to litigation. It is argued that maritime/commercial arbitration is faster and more economical than trials<sup>12</sup>. Economists in the 1600s preferred arbitration because courts wasted time and money<sup>13</sup>. On the other hand, in *Morrison v. Circuit City Stores, Inc.*<sup>14</sup> specified that "the potential costs of arbitrating the dispute easily reach thousands, if not tens of thousands, of dollars, far exceeding the costs that a plaintiff would incur in court." In other words it seems that the arbitration encounter has become more and more comparable to civil litigation, and arbitration procedures have become progressively like the civil procedures<sup>15</sup>. By the beginning of the twenty-first century, it was common to speak of U.S. business arbitration in terms analogous to civil litigation—"judicialized," time-consuming, costly, formalized, and theme to demanding advocacy<sup>16</sup>. Thus, arbitration has urgently to return to its roots by simplifying the whole procedure. Otherwise, arbitration will lose its advantages and so not being able to compete with an effective litigation. Professor Green<sup>17</sup> says that "formal justice" is

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<sup>8</sup> H.R. REP. NO. 96, at 1 (1924)

<sup>9</sup> *Satomi Owners Ass'n v. Satomi, L.L.C.*, 159 P.3d 460, 467 (Wash Ct. App. 2007). *United States v. Lopez*, 514 U.S. 549 (1995)

<sup>10</sup> *Kortum-Managhan v. Herbergers*, 204 F. 3d 693, 700 (Mont. 2009).

<sup>11</sup> *Marchak v. Claridge Commons, Inc.*, 633 A. 2d 531, 535 (N.J. 1993).

<sup>12</sup> *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 552 (4th Cir. 2001): "[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least \$50,000 and takes two and onehalf years to resolve."

<sup>13</sup> SIR JOSIAH CHILD, *A NEW DISCOURSE OF TRADE* 141-144 (4th ed., 1745). at 141 His chapter, "A Court Merchant," said that "this Kingdom will at length be blessed with a happy method, for the speedy, easy, and cheap deciding of differences between Merchants, Masters of Ships, and seamen by some Court or Courts of Merchant. . . ."

<sup>14</sup> 317 F.3d 646, 669 (6th Cir. 2003),

<sup>15</sup> Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, *DISP. RES. J.*, Feb.-Apr. 2003, at 37, 38 (noting that arbitration has become a legalistic method of adjudication). Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 *CARDOZO J. INT'L & COMP. L.* 281, 306-07 (2006) (describing the disadvantages of arbitration, include costs similar to litigation and lengthy discovery process and hearings);

<sup>16</sup> . Amir A. Shalakany, *Arbitration and the Third Work: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 *HARV. INT'L L.J.* 419, 434-35 (2000) (observing that international arbitration is no longer quicker than adjudication; suggesting that "American law model" is a cause).

<sup>17</sup> Leslie Green, *The Germ of Justice* 16-17 (Nov. 2005)

<http://www.law.upenn.edu/academics/institutes/ilp/2006papers/green-germofjustice.pdf>.

not a separate category of justice at all and that what is at stake in the allocative “germ of justice” is in actual fact purely the “form of justice.” There is a mushrooming of “thousands” of arbitration institutions and procedures which makes matters worse than abbreviating the substance and there is an urgent need to have an uncomplicated and standardized process for arbitration administered by a public authority. In other words, the public agent constitutionally attributed with the responsibility for justice can have two co-equal and independent without interfere one to other methods for dispute resolution of all kinds of civil disputes the one voluntary –arbitration and the other obligatory, in absence of contractual choice, –courts<sup>18</sup>.

Presently it is questionable the efficiency of maritime/commercial arbitration as a dispute mechanism guarded by courts whose intervention brings inefficiencies, lack of finality and rise of costs making many parties unhappy with the outcome of many arbitrations. The question that it will be investigated in this article is whether the amendment of the FAA according to the Arbitration Fairness Act of 2011 condensing the depth of the content of arbitrability reveals that hostility against arbitration is back instead of establishing an independent arbitration co-equal to courts<sup>19</sup>.

### **Arbitration Fairness Act of 2011**

The U.S. Supreme Court has approved a variety of uses of arbitration<sup>20</sup> and Chief Justice Warren Burger advocated wider use of ADR<sup>21</sup>. Moreover, arbitration is an acceptable substitute for litigation to “further broader social purposes” of employment discrimination laws<sup>22</sup>. It has to be taken into consideration that there is a great body of “alternative” justice – above all in the form of arbitration that, as the Supreme Court of Canada recognized in *Desputeaux*<sup>23</sup>, materializes a “fully recognized” part of a state’s overall adjudicative process. The purpose to which formal legality might be hold up as instrumentally effective in achieving other social purposes should be taken into account and so the legal rules and the advancement of law should take into consideration the social changes rather than the undeviating of the legal rules<sup>24</sup>.

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<sup>18</sup> See chapter 8 GEORGIOS I. ZEKOS, INTERNATIONAL COMMERCIAL & MARINE ARBITRATION (Routledge & Cavendish Publishers 2008) [www.routledge.com](http://www.routledge.com)

<sup>19</sup> See chapter 8 GEORGIOS I. ZEKOS, INTERNATIONAL COMMERCIAL & MARINE ARBITRATION (Routledge & Cavendish Publishers 2008) [www.routledge.com](http://www.routledge.com)

<sup>20</sup> *Wilko v. Swan*, 346 U.S. 427 (1953); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler– Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

<sup>21</sup> Warren Burger, *Isn't There a Better Way?* 68 A.B.A.J. 274 (1982).

<sup>22</sup> *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>23</sup> *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178 at para. 41,

<sup>24</sup> Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 542 (1988) (“Because rule-bound decision making is inherently stabilizing, it is inherently conservative, in the non-political sense of the word. By limiting the ability of decision makers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future.”). ARISTOTLE, THE POLITICS 219–24, 226 (T.A. Sinclair trans., rev. ed. 1981) (“Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like

Arbitration has substantial law-making aptitude qualified of elaborating and converting public norms by giving them connotation in environment and meaning in essence<sup>25</sup>. Furthermore, arbitration continues to thrive in specialized industries permitting determinations based on field-specific norms that often are not understood or applied in public courts<sup>26</sup>. On the other hand, the Arbitration Fairness Act of 2011 is its third major proposed enactment<sup>27</sup>. The Arbitration Fairness Act of 2007 introduced in the Senate by Senator Feingold and in the House by Rep. Hank Johnson (D-GA), requires that agreements to arbitrate employment, consumer, franchise, or civil rights disputes be made after the dispute has arisen<sup>28</sup>. Professor Emmanuel Gaillard<sup>29</sup> notified that the act “pos[ed] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate.” Moreover, The Arbitration Fairness Act of 2009 was intended at preventing the utilization and enforcement of pre-dispute arbitration agreements in all franchise, consumer, employment contracts, and with regard to claims under disputes under statutes protecting civil rights. Both bills (2007, 2009) outlawed pre-dispute arbitration agreements respecting employment, consumer, franchise, or statutory civil rights disputes. Neither the 2007 nor the 2009 versions of the AFA was enacted into law.

The AFA was re-introduced in identical Senate and House versions in May, 2011. Regardless that at present arbitration provisions are employed in all kinds of contracts, making arbitration a wide-ranging substitute for civil trial<sup>30</sup>, the AFA 2011<sup>31</sup> specifies that “Notwithstanding any other provision of this title, no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute”. Moreover, it is specified that not only the applicability of this chapter to an agreement to arbitrate but also the validity and enforceability of an agreement will be decided by a court, rather

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a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetit[e].”)

<sup>25</sup> Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 745-47 (1988-1989). Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. OF DISP. RESOL. 1 (2007) (exploring ADR’s potential to generate public norms);

<sup>26</sup> Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for World Sports Disputes*, 35 VAL. U. L. REV. 379, at 380-81 (2001) (highlighting the CAS arbitrators’ application of widely accepted principles that may some day be recognized as the “*lex sportiva*”). Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization’s New Arbitration Rules* 9 Transnat’l Law. 357, 369-71 (1996) (discussing the evolution of arbitration in intellectual property disputes and emphasizing that arbitration is particularly appropriate for resolution of such disputes because it involves specialized and technical issues); Christine Lepera, *What the Business Lawyer Needs To Know About ADR: New Areas in ADR*, 13 PLI/NY 709, 711-14, 719 (1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights, online technology, and entertainment issues). Kyrón Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 1033 (2000) (“Aristotle insists on the rule of law, not of men, on the ground that only governance by reason can be impartial and even-handed.”).

<sup>27</sup> Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007). Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

<sup>28</sup> G. Zekos, *Is the Arbitration Fairness Act of 2007 the right way for justice or a wrong turn?* Fall/Spring 2008 Rutgers Conflict Resolution Law Journal 69

<sup>29</sup> Emmanuel Gaillard, *International Arbitration Law*, 2008 N.Y.L.J. 3 at 3.

<sup>30</sup> Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839-44

<sup>31</sup> 429 S. 987 §402.

than an arbitrator. This provision breaks with the existing practice of allowing an arbitrator to rule on the validity of an arbitration agreement. Therefore, courts interfere into arbitration by legislation bypassing all courts' stare decisis and precedent showing a willingness to minimize the role of arbitration. Stare decisis is not an end in itself, but an instrument to serve important principles in the legal system<sup>32</sup>. Courts have gambled their legitimacy upon obedience to precedent<sup>33</sup>. Moreover, obedience to precedent adds to the uprightness of a constitutional system of government both in appearance and in fact<sup>34</sup>. On the one hand, Congress has specified legislative power to pass a statute abolishing stare decisis<sup>35</sup>. On the other hand, common law courts do not abide by precedent merely for the reason that some earlier court affirmed such to be the law; more accurately, common law courts adhere to precedent because that is, in reality, what they perform<sup>36</sup>. Furthermore, according to AFA 2011 court's intervention takes place regardless of whether the party opposing arbitration challenges the arbitration agreement exclusively or in conjunction with other terms of the contract containing such agreement.

The AFA 2011 would invalidate and exclude enforcement of pre-dispute arbitration agreements requiring arbitration of customer disputes against securities broker-dealers. The AFA 2011 would not apply to any arbitration in a collective bargaining agreement between an employer and a labor organization or between labor organizations as well. It is worth mentioning that the proposed legislation follows the Supreme Court's April 27, 2011 decision in *AT&T Mobility LLC v. Concepcion*<sup>37</sup>, which stated that the FAA preempted a California law that made waivers of class-wide arbitration in consumer contracts unconscionable and unenforceable. Thus, the Federal Arbitration Act preempts state court decisions considering class arbitration waivers unconscionable.

According to Senator Franken, "[t]he Arbitration Fairness Act would help rectify the Court's most recent wrong [in *Concepcion*] by restoring consumer rights," while Senator Blumenthal asserted that "[t]he Arbitration Fairness Act would reverse this decision and restore the long-held rights of consumers to hold corporations accountable for their misdeeds". It could be said that enacting the AFA would tackle the anxiety of consumer groups that businesses might use arbitration clauses, merged

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<sup>32</sup> *Moragne v States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). *Dickerson v. United States*, 530 U.S. 428, 443 (2000)

<sup>33</sup> Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 577 (2001) ("Article III's grant of 'the judicial power' authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication."); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194-95 (2001) (arguing that "Congress may not by statute tell the federal courts whether or in what way to use precedent" as "Congress does not have the power to tell the federal courts how to go about their business of deciding cases").

<sup>34</sup> *Vasquez v. Hillery*, 474 U.S. 254, 265-56 (1986), *Moragne v States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

<sup>35</sup> Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000). at 1541 ("By virtue of the Necessary and Proper Clause, Congress has enumerated legislative power to pass a statute abrogating stare decisis, as an enactment appropriate to the carrying into execution of the judicial power. The exercise of such legislative power would not intrude on any constitutional province of the judiciary..").

<sup>36</sup> Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1084 (2003)

<sup>37</sup> 131 S. Ct. 1740 (2011).

with class arbitration waivers, to decrease or abolish the availability of class relief. Besides, a very recent study by the Searle Civil Justice Institute recommends that consumer arbitration by and large produces positive results for individuals, whether measured by reference to outcomes or costs.<sup>38</sup> If pre-dispute arbitration clauses are unenforceable in consumer contracts, subsequently such clauses cannot be utilized to circumvent class relief. Businesses use arbitration clauses in their consumer contracts which voluntarily are accepted by parties and they are not forced without acceptance. [The usage of class arbitration waivers fluctuated](#) thoroughly by industry to industry.

Can courts' decisions be overruled by Legislation? A prohibition on pre-dispute arbitration clauses is an overbroad means to overrule *AT&T Mobility LLC v. Concepcion* case. Making all consumer arbitration clauses unenforceable would be an overbroad reaction to fear about the effect of arbitration clauses on the availability of class relief because the established principles of contract law cannot be overruled indisputably by any arbitration's legislation. A diversity of state approaches regarding class arbitration or excluding class actions would be replaced with a uniform federal rule. Prior to *AT&T Mobility LLC v. Concepcion* case, states had taken opposed approaches to the enforceability of class arbitration waivers. On the one hand, *AT&T Mobility LLC v. Concepcion* decision changed a range of approaches with a single rule allowing class arbitration waivers. On the other hand, the AFA 2011 would go to the contrary extreme, substituting a diversity of approaches with a single rule making all pre-dispute consumer and employment arbitration clauses unenforceable whether they contain class arbitration waivers or not.

*AT&T Mobility LLC v. Concepcion* prevents states from making class arbitration waivers unenforceable, while *Southland Corp. v. Keating*<sup>39</sup> prevents states from making consumer and employment arbitration agreements unenforceable and so promoting arbitration. The parties' will is expressed by the acceptance of a contract containing an arbitration clause and it is not imposed. On the one hand, under AFA 2011 any dispute regarding the validity and enforceability of an agreement to arbitrate such a dispute would be decided under federal law, and by a court rather than an arbitrator. Moreover, the drafters of the current legislation seems to have sought to abolish any doubt that the Arbitration Fairness Act would cover claims brought by people with securities brokerage accounts against securities broker-dealers arising out of transactions in these accounts. On the other hand, there is nothing in the FAA's legislative history demonstrating that the statute was only projected to apply to disputes between "commercial entities of generally similar sophistication and bargaining power"<sup>40</sup>. Since the FAA's rationale was, and has always been, to cover enforcement of arbitration agreements, the statute's capacity has always incorporated "consumer disputes".

### **Standard-form contracts<sup>41</sup> & AFA 2011**

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<sup>38</sup> Peter B. Rutledge, ARBITRATION REFORM: WHAT WE KNOW AND WHAT WE NEED TO KNOW, 2009 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 10:579. Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* (Mar. 2009).

<sup>39</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

<sup>40</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 12-14, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

<sup>41</sup> MARK R. PATTERSON, STANDARDIZATION OF STANDARD-FORM CONTRACTS: COMPETITION AND CONTRACT IMPLICATIONS, 2010 *WILLIAM AND MARY LAW REVIEW* 327, Vol. 52:327

Standard-form contracts are a common characteristic of commercial dealings in a globalised trade because they present the benefit of lower transaction costs<sup>42</sup>. The European Union's impetus toward integration of the European economy has led to the object of harmonizing European contract law, and standard contracts have been developed as one means of accomplishing such harmonization.<sup>43</sup> Basically, the standardization of contracts is a standardization of the terms presented to customers such as the shippers, in much the same way as is standardization of a product and a service such as the carriage of goods. Contract standardization offers increased competition among companies, because a standard contract makes comparison among companies' aids and terms easier. For instance, it is easier to review the substance of price and quality of carriage of goods. Very few standardized contracts portray troubles, either of fairness or competitiveness<sup>44</sup>. The reasons for standardizing contracts are as expected to stem from pro-competitive effects<sup>45</sup>. The contract tests for unconscionability and unfairness of terms<sup>46</sup> in standardized contracts consider the marketplace within which standardization takes place<sup>47</sup>.

As mentioned earlier, the Arbitration Fairness Act of 2011 amends the Federal Arbitration Act to make pre-dispute agreements to arbitrate employment, consumer, or civil rights disputes unenforceable. Thus, after a dispute arises parties will have to either agree on arbitration or to follow the road of litigation. Will corporations agree on arbitration or will they prefer litigation? Have the reasons that had made the introduction of arbitration as an alternative dispute mechanism disappeared? Have courts improved their performances in such a degree that the existence of arbitration is of no use? Of course arbitration as it functions presently is not the perfect dispute method<sup>48</sup>, but neither is litigation. Arbitration however has its own advantages, and

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<sup>42</sup> 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 18:13 (Richard A. Lord ed., 4th ed. 1993 & Supp. 2009) ("But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.")

<sup>43</sup> Commission of the European Communities, Communication, *European Contract Law and the Revision of the Acquis: The Way Forward*, at 6-8, COM (2004) 651 final (Oct. 11, 2004), [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/com2004\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com2004_en.pdf)

<sup>44</sup> *Brown v. Soh*, 909 A.2d 43, 49 (Conn. 2006) ("The most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining processes of ordinary contracts,' and they tend to involve 'standard form contract[s] prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms.'")

<sup>45</sup> Joseph M. Perillo, *Neutral Standardizing of Contracts*, 28 PACE L. REV. 179, 181 (2008)

<sup>46</sup> GRAEME MCEWEN, CHALLENGING STANDARD FORM CONTRACTS UNDER THE UNFAIR CONTRACT TERMS LAW, Victorian Property Law Conference at the Sebel and Citygate, Queens Road, Albert Park. Thursday 17 February 2011

<sup>47</sup> *Ting v. AT&T*, 319 F.3d 1126, 1148-49 (9th Cir. 2003)

<sup>48</sup> James L. Guill & Edward A. Slavin, Jr., *Rush Unfairness: The Downside of ADR*, Judges' J., Summer 1989, at 8, 11 (1989) ("[A]n arbitrator's decision might be influenced by the desire for future employment by the parties.... Some arbitrators openly solicit work. They write to parties noting their availability, sometimes enclosing samples of their awards.") (citations omitted); Kirby Behre, *Arbitration: A Permissible Or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66 (1986) (discussing possibility "that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties—that is, an arbitrator's decision might be influenced by the desire for future employment by the parties.").



with the co-operation of the parties and the right choices avoiding to mimic formal litigation, arbitration procedures can be ideal in individual occasions.

Companies require millions of consumers and employees to sign contracts of adhesion/standard form contracts that include arbitration clauses. Most of these parties have little or no considerable chance to negotiate the terms of their adhesion/standard form contracts and find themselves having to choose to either accept an arbitration clause or to turn down securing employment or needed goods and services. But this is a matter of contracts law and not a matter of arbitration. Parties are not being forced into contractual arbitration against their wishes. Arbitration is a contract's creation<sup>49</sup>. Moreover, Arbitration is not mandatory when it arises out of all types of contracts because contracts are accepted voluntarily<sup>50</sup>.

Parties have more power negotiating a pre-dispute arbitration agreement connected with a deal rather than after the conclusion of a contract. After a dispute has arisen, corporations will have the power to force parties into litigation which they cannot afford. Hence, the parties' choice might become a one-way road towards litigation. On the other hand, a better and more effective arbitration by amending its discrepancies is the right solution. Is the development of an independent and co-equal to courts arbitration the right way for a justice bringing satisfaction?

An underlying element of a fair justice system is that both parties to a dispute have equal access to that system. Since the beginning of the Republic, Congress has accepted this underlying principle that the plaintiff and the defendant in a civil case have equal access to federal court. Is arbitration a voluntary alternative dispute system? Can parties choose their own judge? It is argued that the FAA, as applied to consumer, employee and franchisee cases, violates this fundamental principle by giving the defendant the sole right to determine whether a case will be heard in federal court. The FAA enforces valid pre-dispute arbitration agreements which have been accepted by parties. If a contract that includes an arbitration clause is discovered to violate state law doctrines defining established defenses to contract formation such as lack of assent, fraud, duress, and unconscionability, such a clause will have no force or effect.<sup>51</sup> David S. Schwartz<sup>52</sup> argues that "the Supreme Court discovered that

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<sup>49</sup> *May v. Higbee Co.*, 372 F.3d 757, 763–64 (5th Cir. 2004) (stating that "arbitration is a matter of contract" and state contract law will determine whether a valid agreement to arbitrate was formed). Stephen J Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 711 (1999) ("The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law.") *See id.* at 754 (stating "[a]rbitration privatizes the creation of law.").

<sup>50</sup> U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . law impairing the obligations of contracts."). Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) ("I ask Professor Sternlight (and others) to stop calling contractual arbitration—mandatory arbitration."). Christine Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1225 (2002) (empirical research demonstrates that employees "do not understand the remedial and procedural consequences of consenting to arbitration" and that "[v]ery few are aware of what they are waiving.").

<sup>51</sup> Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IN. L. J. 393, 400 (2004). *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

<sup>52</sup> David S. Schwartz, *Mandatory Arbitration: Do-it-yourself Court Reform Becomes Do-it-yourself Tort Reform*, Testimony presented at the hearing on "Mandatory Binding Arbitration Agreements: Are They Fair For Consumers?" before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, June 12, 2007 p 1.



the FAA could be used as an extensive docket-clearing device to move large numbers of cases out of the court system and into a system of private dispute resolution.” But courts and the Supreme Court merely interpret and enforce the contractual agreement of the parties to solve their dispute before an arbitral tribunal instead of a court. It has to be taken into consideration the fact that the policy favoring arbitration does not go so far as to authorize courts to force arbitration when the parties have not agreed to arbitrate. Therefore, in *Wachovia Bank N.A. v. Schmidt*<sup>53</sup>, the Fourth Circuit Court of Appeals denied a petition to compel arbitration by a bank accused of fraudulently inducing an investor’s participation in a tax shelter. The court determined that in spite of two broadly worded arbitration clauses in documents connected to the underlying transaction about which the investor complained, the dispute was not arbitrable. Hence, arbitration clauses in documents connected to, but not themselves at the heart of the dispute are an insufficient basis to compel arbitration<sup>54</sup>. Moreover, the Supreme Court held in *Doctors Associates*<sup>55</sup> that contracts including arbitration clauses are matter to state law governing the validity, revocability, and enforceability of the underlying agreement in finding that the Federal Arbitration Act does not preempt state common law governing the enforceability of contracts.

Does arbitration deprives parties of a jury trial which would be more favorable than arbitration? Since maritime arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he/she has not agreed so to submit<sup>56</sup>, parties are not deprived by contractual arbitration. On the one hand, there is *ratio decedendi* in arbitration which does not follow the road of certainty of courts. On the other hand, due process norms apply in arbitration<sup>57</sup> and arbitrators as judges have to apply legal principles to the facts revealed in a dispute<sup>58</sup>. Maritime/commercial arbitration now rivals court adjudication as the preferred means of resolving civil disputes based on expert knowledge in the adjudication of the

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<sup>53</sup> 445 F.3d 762 (4th Cir. 2006). See also *Salt Lake Tribune Publishing Co v Management Planning Inc.*, 390 F.3d 684 (10th Cir. 2004).

<sup>54</sup> *U.S. Small Business Administration v. Chimicles*, 447 F.3d 207 (3d Cir. 2006) (receiver’s claims against investment fund subscription agreement not subject to arbitration clause of fund’s partnership agreement); *Suburban Leisure Center, Inc. v. AMF Bowling Products, Inc.*, 2006 U.S. App. LEXIS 28508 (8th Cir. 2006) (claims based on earlier oral agreement not subject to arbitration clause of later written agreement containing merger and integration clause); *Tittle v. Enron Corp.*, 463 F.3d 410 (5th Cir. 2006) (dispute among insureds about division of insurance policy proceeds not subject to arbitration clause in insurance contract that required arbitration of claims between insureds and insurer). Cf. *Lipton-U. City, LLC v. Shurgard Storage Crts., Inc.*, 454 F.3d 934 (8th Cir. 2006) (clause providing that if purchase option was exercised the parties would arbitrate “additional terms . . . not contemplated by” the contract did not require arbitration of price term that had been contemplated by the contract but rescinded by the court on the basis that there had been no meeting of the minds).

<sup>55</sup> *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 686,87 (1996).

<sup>56</sup> *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).

<sup>57</sup> Edward Brunet, *Arbitration and Constitutional Rights*, 71 N. CAR. L. REV. 83 (1992) (arbitrators do apply due process norms in administering hearings); William W. Park, *The Procedural Soft Law of International Arbitration* 145, in *Pervasive Problems in International Arbitration* (Kluwer International Arbitration Law Lib. (2006)) (asserting appropriately that “due process lies at the core of what litigants seek in both arbitration and litigation”). Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated, “the standard due process entitlement to an impartial tribunal is relaxed when the tribunal is an arbitral tribunal rather than a court.” *United Transp. Union v. Gateway Western Railway Co.*, 284 F.3d 710, 712 (7th Cir. 2002).

<sup>58</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

dispute<sup>59</sup>. Arbitrators could outstrip courts in their capacity to mould public norms to individual workplace contexts<sup>60</sup>. In addition, arbitrators can significantly rectify claims based on “fairness norms that are not presently embodied in law.”<sup>61</sup> Moreover, under current American law, it seems unavoidable that consumer arbitration will ultimately replace litigation<sup>62</sup>.

The parties’ intention as defined by their agreement is the dominant theme that characterizes and distinguishes arbitration. Arbitration promotes the autonomy of parties by enforcing their agreement to arbitrate. Arbitration is about enforcing consensual arrangements for private dispute resolution. Many scholars wrongly use the term “Mandatory arbitration” for arbitration based on a parties’ pre-dispute arbitration agreement<sup>63</sup>. Maritime arbitration based on a party’s contract is not a mandatory arbitration but a contractual arbitration. Regardless of the fact that parties cannot avoid many times an adhesion/standard form contract containing an arbitration clause making arbitration to look as a mandatory dispute mechanism, the inclusion of an arbitration clause in a contract of adhesion does not make arbitration mandatory.

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<sup>59</sup> . Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 626-27 (1988) (“Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes.”). *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998) (“[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the ‘language and workings of the shop,’ may best serve the interest of the parties.”); *Nat’l Union Fire Ins. Co. v. Belco Petrol. Corp.*, 88 F.3d 129, 133 (2d Cir. 1996) (“The advantages of arbitration are well-known. Arbitration is ‘usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules . . . .’” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration . . . .”).

<sup>60</sup> Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 967 (1999)

<sup>61</sup> Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 487 (2001).

<sup>62</sup> The Privatization Of Justice? Mandatory Arbitration And The State Courts—Report Of The 2003 Forum For State Appellate Court Judges (2006 Pound Civil Justice Institute) *See also 2004 ABA Annual Meeting--Program Materials: Bench and Bar: The Vanishing Jury Trial*, available at [http://www.abanet.org/abanet/litigation/mo/premium-lt/prog\\_materials/2004\\_abaannual/20.pdf](http://www.abanet.org/abanet/litigation/mo/premium-lt/prog_materials/2004_abaannual/20.pdf) “A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research.” Using what is described as “Dispute Resolution Darwinism,” the author concludes that, “We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem.” Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. Miami L. Rev. 873 (2002).

<sup>63</sup> Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105-10 (1996) (explaining the confusion and controversy over the use of the terms “voluntary” and “mandatory” in the employment-arbitration context); see also Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (“I ask Professor Sternlight (and others) to stop calling contractual arbitration—mandatory arbitration.”) David S. Schwartz, *If You Love Arbitration, Set it Free: How “Mandatory” Undermines “Arbitration”*, *Legal Studies Research Paper Series Paper No. 1052* August 2007. Jean R. Sternlight, *Creeping Mandatory Arbitration*, 57 STAN. L. REV. 1631, 1631-32 & n.1 (2005). F. Paul Bland *Mandatory Binding Arbitration Agreements: Are They Fair To Consumers?* July 17, 2007 By, Jr AHRC News Services available at <http://www.ahrc.com/new/index.php/src/news/sub/article/action/ShowMedia/id/3692> (stating, “[t]he current system suffers from a lack of transparency, which permits and even encourages abuses”). *See also Testimony by F. Paul Bland, Jr - Staff Attorney Public Justice (Formerly Trial Lawyers for Public Justice), to the Subcommittee on Commercial and Administrative Law of the U. S. House of Representatives' Committee on the Judiciary Hearing on: Mandatory Binding Arbitration Agreements: Are They Fair To Consumers? - June 12, 2007.*

Modern trade has introduced adhesion/standard contracts which are accepted and legitimized by the legal systems making in many occasions a contractual arbitration in practice to be the only mandatory road followed by the parties' will and acceptance. Adhesion/standard form contracts are valid contracts with offer and acceptance. The arbitration agreement in the form of a clause is incorporated in an adhesion contract and it is accepted as part of the contract of adhesion regardless of the principle of severability. The acceptance of an adhesion/standard form contract incorporating an arbitration clause indicates acceptance of the incorporated arbitration clause and so validating an arbitration agreement. An arbitration clause does not arise out of the blue. Problems of unfair terms in adhesion/standard form contracts can be solved under the law of contract and so the voices against standard form clauses incorporated in standard form/adhesion contracts and any suggestions for changes should be directed towards the law of contracts. The enforcement of adhesive arbitration agreements aids society by plummeting process costs, in that way serving consumers, employees and other adhering parties<sup>64</sup>.

On the one hand, the seller/employer/franchisor has the elite right to decide whether to include a pre-dispute arbitration clause among its "take-it-or-leave-it" contract terms in adhesion/standard form contracts. On the other hand, the consumers have got the right to accept or to reject the offer. It is a matter of contract law and not a matter of arbitration. Is it arbitration the easy target? If legal scholars consider adhesion/standard form contracts as mandatory or unfair or illegal they should say so and change the law of contract and not restrict access to arbitration. If there are unfair terms contained in a contract they should be invalidated under the law of contract. According to *William J. Woodward, Jr.*<sup>65</sup> "the arbitration cases are clearly *contract law* cases, not some confusing combination of contract and conflicts principles". The panoply of the law of contract can be used to invalidate arbitration agreements with such defenses as unconscionability<sup>66</sup>. Additionally, fraud or misrepresentation are defenses one may use to challenge an arbitration provision<sup>67</sup>. Parties can challenge the validity of the agreement to arbitrate itself<sup>68</sup>. Moreover, parties can challenge the

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<sup>64</sup> 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). *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004) ("There was unquestionably a disparity in bargaining power, as Menards is a large national company and Faber did not have the ability to negotiate and change particular terms in the form contract. Mere inequality in bargaining power does not make the contract automatically unconscionable. . . .");

<sup>65</sup> William J. Woodward, Jr, *Constraining Opt-Outs: Shielding Local Law and Those it Protects from Adhesive Choice Of Law Clauses*, 40 LOY. L.A. L. REV. 1, 44 (2006).

<sup>66</sup> Eric J. Mogilnicki and Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U.L. REV. 761 (2005). Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 158, 194 (2004) ("[A]s the use of arbitration agreements has increased, claims of unconscionability have also increased . . . .") *Coady v. Cross County Bank*, 729 N.W.2d 732, 737 (Wis.App. 2007) (unconscionability of arbitration provision and, thus enforceability, presents a preliminary inquiry into which state's unconscionability law applies).

<sup>67</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) (discussing consumers' challenge of arbitration based on fraud, along with unconscionability, duress, and revocation).

<sup>68</sup> *Southland Corp. v. Keating*, 465 U. S. 1, 4.5 (1984) (challenging the agreement to arbitrate as void under California law insofar as it purported to cover claims brought under the state Franchise Investment Law). Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington and Haagen)*, 29 McGeorge L. Rev. 195, 202-10 (1998) (defending the contractual approach for enforcement of mandatory arbitration contracts and asserting that extant contract defenses are sufficient to protect consumers).

contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid<sup>69</sup>. Parties can focus directly on the binding effect of the arbitration clause *itself* as a matter of contract law<sup>70</sup>. Thus, challenges to the binding effect of the arbitration clause *itself* are, actually, the only dispute courts can deal with when an arbitration clause appears in an adhesion/standard form contract.

## **Conclusion**

Since adhesion/standard form contracts are valid contracts accepted by parties and used in modern commerce, arbitrations' improvement by the development of an independent arbitration and co-equal to courts keeping its characteristic advantages as a dispute mechanism should be the right road not only for the resolution of occasions of maritime/commercial arbitration based on pre-dispute arbitration agreement contained in adhesion/standard form contracts but also any arbitration.

Arbitration has shown that it is a suitable dispute method to deal with all kinds of disputes. Moreover, an independent and autonomous arbitration only administered by a state authority and co-equal<sup>71</sup> to courts as a dispute mechanism keeping its advantages that have made its emergence necessary is the right way out rather than minimizing arbitrability via legislation in order to keep alive the old system of belief (dogma) that only courts convey justice. The establishment of a second degree of an arbitral tribunal which will examine only the legal basis of the first instance award will give the legal status needed by arbitration in order to be established as the second pole in a legal system being able to stand autonomously and independently from any court's guardianship and guarantee. Finally, the existence of an appellate arbitral tribunal for review of awards will eliminate the worries of *Margaret L. Moses*<sup>72</sup> or any other scholar that when arbitrators are deciding claims under public law or any other law, there is a high prospective for negative externalities via wrong decisions.

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<sup>69</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 126 U.S. 1204 (2006).

<sup>70</sup> *Winig v. Cingular Wireless*, 2006 WL 2766007 (N.D. Cal. Sept. 27, 2006). U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . law impairing the obligations of contracts.").

<sup>71</sup> Chapter 8, GEORGIOS I. ZEKOS, INTERNATIONAL COMMERCIAL & MARINE ARBITRATION (Routledge & Cavendish Publishers 2008) [www.routledge.com](http://www.routledge.com), G. Zekos, Arbitration's status under EU law, *The Journal of World Investment & Trade* 13 (2012) 390–419

<sup>72</sup> *Margaret L. Moses, Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 181 (2010) ("[W]hen arbitrators are deciding claims under public law, there is a high potential for negative externalities. For example, if an arbitrator makes a wrong decision in a matter arising under the antitrust laws, that decision may negatively affect not only the claimants but the rights of everyone else affected by the anti-competitive behavior.").