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# Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World

BY: JEAN R. STERNLIGHT\*

## INTRODUCTION

In the United States, the phenomenon labeled by its critics as “mandatory” arbitration has been highly controversial.<sup>1</sup> Since the mid-1980s, companies have increasingly used contracts of adhesion to require consumers, employees, and other “little guys” to resolve any future disputes with the company through private binding arbitration rather than in court. As will be discussed, although critics have attacked the practice as unfair and illegal,<sup>2</sup> courts for the most part have approved companies’ imposition of binding arbitration.<sup>3</sup>

By contrast, companies rarely if ever employ this strategy outside the United States. Members of the European Union prohibit mandatory arbitration in the consumer context, and seem to forbid it with respect to employment as well.<sup>4</sup> Elsewhere, the law is less clear, but this author has not found evidence that the practice of mandatory private arbitration exists outside the United States borders.<sup>5</sup>

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1. I put the term “mandatory” in quotes as a nod to those who insist that arbitration imposed through contracts of adhesion should be categorized as voluntary. Personally, however, I cannot understand how a person can be said to have “voluntarily” accepted arbitration when it is part of a small print contract of adhesion. Thus, in the remainder of the article I will use the term “mandatory” without putting it in quotation marks.

2. See *infra* notes 51-60 and accompanying text.

3. See *infra* notes 39-50 and accompanying text.

4. See *infra* notes 87-120 and accompanying text.

5. See *infra* notes 121-36 and accompanying text. It is important to distinguish the private mandatory arbitration described in this article from two other types of arbitration that exist elsewhere. First, private arbitration that is imposed pre-dispute, through contracts of adhesion, is entirely different from private arbitration that may be accepted by consumers or employees on a truly voluntary basis, post-dispute. Second, private arbitration must be distinguished from public administrative processes that may be afforded by some countries as an alternative to public court.

After quickly summarizing the landscape of mandatory arbitration both within and without the United States, this article will consider why mandatory arbitration is treated so disparately, whether it is problematic that approaches to mandatory arbitration are so varied among countries, and what the differing jurisdictions can and should learn from one another. The article concludes that the United States Congress should be very concerned with the fact that we are treating mandatory arbitration more permissively than other countries. I, along with many others, have previously presented many arguments for why mandatory arbitration is problematic. Our outlier status on this issue provides one more good reason why Congress ought to revise the Federal Arbitration Act<sup>6</sup> (FAA) to prohibit mandatory arbitration in the consumer and employment areas.

### THE MANDATORY ARBITRATION DEBATE IN THE UNITED STATES

The FAA, adopted in 1925, has long required courts to enforce pre-dispute arbitration agreements entered into by companies.<sup>7</sup> Merchants in a variety of fields have often found it desirable to agree, in advance, to have their disputes resolved privately by a neutral third party rather than in court.<sup>8</sup> They may consider such private arbitration as superior to litigation because they see it as cheaper, quicker, more private, more expert, and more final, given the fact that there is very limited opportunity to vacate arbitral decisions.<sup>9</sup>

For most of the FAA's history, however, pre-dispute arbitration agreements were not applied to transactions between businesses and individuals such as consumers or typical employees.<sup>10</sup> In 1953, the

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Sometimes, these public governmentally regulated processes are known as "arbitration," but they are not the subject of this article. See *infra* notes 118-20 and accompanying text.

6. 9 U.S.C. §§ 1-16 (2000).

7. *Id.* Section 2, the most important section of the Act, provides that "a written provision . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2.

8. See, e.g., Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850 (1961) (noting that "[t]he reasons commonly given for arbitration—speed, lower expense, more expert decisions, greater privacy—are appealing to all businessmen . . ."); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 218 (1956) (observing, in historical overview of merchants' use of arbitration in New York, that the "[e]xtensive use of] arbitration over so long a period of time in the mercantile community . . . is rather a means of dispute settling quite as ancient . . . as court adjudication"); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 148-51 (1992) (describing why diamond dealers find private dispute resolution superior to court remedies).

9. See, e.g., Mentschikoff, *supra* note 8, at 850.

10. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's*

Supreme Court held in *Wilko v. Swan*<sup>11</sup> that a securities brokerage house's margin agreements with its customers were unenforceable to the extent that they purported to require their customers to resolve their securities fraud claims against the company through private binding arbitration, rather than in court.<sup>12</sup> The Court emphasized that the customers lacked the information to knowingly select arbitration in lieu of litigation, in advance.<sup>13</sup> Similarly, in 1974, the Court held in *Alexander v. Gardner-Denver Co.*<sup>14</sup> that union employees' contractual arbitration clauses could not be used to prevent those employees from pursuing discrimination claims in court, even where the employee had previously lost on the claim in arbitration.<sup>15</sup> In light of these decisions, it is not surprising that for many years few if any companies sought to limit consumers or employees to an arbitration remedy.

The United States arbitration landscape changed abruptly in the 1980s. While Chief Justice Burger and others delivered speeches praising the use of alternative dispute resolution procedures,<sup>16</sup> the Supreme Court held in a series of decisions that arbitration was "favored" and rejected public policy claims that certain categories of cases were non-arbitrable.<sup>17</sup>

Although the initial pro-arbitration Supreme Court decisions involved arbitration clauses between two or more businesses,<sup>18</sup> it soon became clear that the Court would also support arbitration agreements between businesses and consumers or employees. In *Shearson/American Express, Inc. v. McMahon*<sup>19</sup> and then *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>20</sup> the Court not only reversed *Wilko's* premise, but also reversed its holding. Brokerage houses could now

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*Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644-49 (1996) [hereinafter Sternlight, Panacea].

11. 346 U.S. 427 (1953).

12. *Id.* at 438.

13. *Id.* at 435.

14. 415 U.S. 36 (1974).

15. *Id.* at 59-60.

16. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 3 [hereinafter Burger, *Using Arbitration*]; William H. Rehnquist, *A Jurist's View of Arbitration*, ARB. J., Mar. 1977, at 1.

17. The Court's decision in *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983), was highly significant because, for the first time, the Court stated that a policy of "favoring" arbitration should be applied in the commercial context, and not merely to collective bargaining arbitration. *Id.* at 24-25.

18. See, e.g., *id.* at 24-25 (holding, with respect to an arbitration provision contained in a construction contract, that defenses to arbitrability should be interpreted narrowly); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (holding that franchisee must arbitrate antitrust claims against franchisor).

19. 482 U.S. 220, 228-34 (1987).

20. 490 U.S. 477, 479-80 (1989).

require their customers to resolve future securities fraud or other disputes through binding arbitration rather than in court.<sup>21</sup> Moreover, while one might argue that brokerage customers are more sophisticated than most consumers, additional Supreme Court decisions soon illustrated that the Court recognized no “little guy” exception to the general enforceability of pre-dispute arbitration agreements.<sup>22</sup> In 1991, the Court held in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>23</sup> that a brokerage employee could be required to arbitrate rather than litigate his federal age discrimination claim,<sup>24</sup> and in 1995, *Allied-Bruce Terminix Cos. v. Dobson*<sup>25</sup> held that an adhesive arbitration agreement was valid for a customer who purchased termite extermination services despite state law prohibiting pre-dispute arbitration agreements.<sup>26</sup> Most recently, in *Circuit City Stores, Inc. v. Adams*<sup>27</sup> and *Green Tree Financial Corp. v. Randolph*,<sup>28</sup> the Supreme Court shut additional doors to attacks on mandatory arbitration in the employment and consumer contexts.

Together, these major decisions have inspired numerous companies to require their customers and employees to arbitrate rather than litigate future disputes. Today, many credit card providers, banks, insurers, health care providers, service providers, product sellers, and employers are using small print clauses to require individuals to trade their right to a day in court for a right to arbitrate future claims.<sup>29</sup> Pursuant to the FAA, the clauses need not be signed to be enforceable,<sup>30</sup> therefore many companies simply use envelope stuffers, warranty provisions, or employee handbooks to specify the available procedural recourse.<sup>31</sup>

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21. *McMahon*, 482 U.S. at 242; *Rodriguez de Quijas*, 490 U.S. at 485-86.

22. I introduced the “little guy” terminology. See Sternlight, *Panacea*, *supra* note 10, at 711-12.

23. 500 U.S. 20 (1991).

24. *Id.* at 23.

25. 513 U.S. 265 (1995).

26. *Id.* at 281-82.

27. 532 U.S. 105, 119 (2001) (holding that FAA applies to all employment contracts except those involving workers who transport goods across state lines).

28. 531 U.S. 79, 92 (2000) (holding that consumer could not void arbitration clause for being excessively costly based on mere speculation rather than specific evidence).

29. For discussion and criticism of this phenomenon, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996) (critiquing Supreme Court’s arbitration decisions as allowing “birds of prey” to “sup on workers, consumers, shippers, passengers, and franchisees”); and David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (“The Supreme Court has created a monster.”).

30. 9 U.S.C. § 2 (2000) (requiring only that arbitration clause be written, and not signed).

31. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (upholding validity of arbitration clause although it was not made available to customer until it arrived as part of the warranty brochure provided (with many other papers) in the boxes containing new computer ordered by phone); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (enforcing arbitration clause contained in employee handbook); *Marsh v. First USA Bank, N.A.*,

Other companies obtain a signature on a credit card or employment application,<sup>32</sup> a form filled out in a doctor's office,<sup>33</sup> or a loan agreement.<sup>34</sup> Sometimes the clauses are provided on-line, and "accepted" by the customer who clicks "enter."<sup>35</sup>

The terms of the arbitration clauses vary quite a bit from one another. All of the clauses mandate that binding decisions will be made by a private person or panel, thereby eliminating the claimant's right to present claims to a judge or jury and also preventing litigants from setting public precedents.<sup>36</sup> Additionally all of the clauses essentially provide for more limited discovery, less formal rules of evidence, and virtually no opportunity to reverse or vacate an erroneous decision.<sup>37</sup> Also, some companies have used the arbitral clause to place further limits on claimants, by, for example, shortening the statute of limitations, eliminating remedies that would have been available in court, imposing high costs, prohibiting the use of class actions, or imposing a non-neutral arbitrator.<sup>38</sup>

Following the lead of the Supreme Court, most lower courts have found mandatory arbitration clauses to be enforceable.<sup>39</sup> Although con-

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103 F. Supp. 2d 909, 919 (N.D. Tex. 2000) (holding that credit card holders were bound by arbitration agreement contained in billing insert after credit card issuer demonstrated bill was properly addressed and mailed and where the credit card holders' only evidence of non-receipt was their affidavits).

32. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109-10 (2001).

33. See, e.g., *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1014-15 (Ariz. 1992) (voiding clause required by abortionist).

34. See, e.g., *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at \*1 (N.D. Cal. July 18, 1994) (upholding clause imposed on senior citizens in mortgage loan documents).

35. For example, the auction site, eBay, requires all users to agree to arbitrate disputes in San Jose, California. eBay User Agreement, at <http://www.pages.ebay.com/help/community/png-user2.html>. Cf. *Specht v. Netscape Communications Corp.*, No. 01-7870, 2002 WL 31166784, at \*7-15 (2d Cir. 2002) (finding no agreement to arbitrate was formed when consumer downloaded software from website because although website contained arbitration clause, consumer could download software without clicking an acceptance).

36. See *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("[T]hrough perhaps not contemplated by the [plaintiffs] when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.").

37. See, e.g., JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 503-04 (2d ed. 1996).

38. See generally Sternlight, *Panacea*, *supra* note 10, at 680-86.

39. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 22-39 (1997) [hereinafter Sternlight, *Rethinking*] (discussing many courts' rejection of common law defenses); Schwartz, *supra* note 29, at 36 (noting "the Supreme Court has broadly endorsed the enforcement of adhesive pre-dispute arbitration agreements"); Carrington & Haagen, *supra* note 29, at 332 (discussing Supreme Court decisions enforcing arbitration clauses).

stitutional attacks would seem promising,<sup>40</sup> those who have tried such attacks have typically failed.<sup>41</sup> Moreover, while recognizing that Congress has the power to prohibit the use of arbitration to resolve specific statutory claims,<sup>42</sup> courts have rarely held that claims under particular federal statutes are non-arbitrable.<sup>43</sup> Similarly, although the Supreme Court has repeatedly explained that arbitration clauses can be voided on traditional contract grounds,<sup>44</sup> lower courts have held unenforceable only the most egregious and obviously unfair arbitration clauses due to unconscionability or similar reasons.<sup>45</sup> It is quite clear that the mere fact

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40. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (arguing that courts ought to be applying jury trial waiver standard, requiring voluntary, knowing, and intelligent waiver to arbitration clauses); Sternlight, *Rethinking*, *supra* note 39, at 99 (arguing that mandatory arbitration clauses may violate right to a jury trial, to due process, or to appear in front of an Article III judge); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1009-11 (2000) (arguing that state action exists and requires arbitration clauses to comport with due process requirements).

41. See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir. 1998) (concluding that government involvement in securities regulation is not sufficient to give rise to state action, and that dispute resolution is also not an inherently public function that would thereby qualify as state action); *Geldermann v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987) (concluding that commodities brokerage waived its Seventh Amendment right to a jury trial by becoming a licensed brokerage covered by regulations mandating arbitration); *Marsh v. First USA Bank, NA*, 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000) (concluding jury trial argument could not be used to invalidate arbitration clause because consumers waived jury trial right by agreeing to arbitration).

42. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (noting that Congress could preclude arbitration of claims under a particular statute).

43. See, e.g., *id.* at 23 (holding claims under federal Age Discrimination in Employment Act are arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) (holding antitrust claims are arbitrable); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220-24 (1987) (holding RICO claims are arbitrable); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998) (holding Title VII claims are arbitrable).

44. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (quoting the Federal Arbitration Act, 9 U.S.C. § 2); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1985).

45. Some recent examples of clauses that have been voided include *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002) (holding unconscionable an arbitration clause that was not mutual, that limited relief available to employees, that imposed a shortened statute of limitations, and that required employees to split the cost of the arbitrators' fees with the company); *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001) (finding arbitration clause unenforceable on ground that company's promise to provide arbitration was "illusory" in that "[n]othing in the contract provides any details about the nature of the forum that EDS will provide or sets standards with which EDS must comply"); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (holding, in sexual harassment case, that particular dispute resolution process was too biased to be called arbitration or enforced by court). On the other hand, numerous courts have upheld arbitration clauses despite consumers' or employees' claims of unfairness. See, e.g., *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1013-14 (M.D. Ala. 1997) (refusing to void, on ground of unconscionability, an arbitration clause imposed on consumer who purchased car under installment sales contract, although clause lacked mutuality, where plaintiffs "have not demonstrated to the court . . . that resolving their claims against FMCC

that an arbitration clause was either unsigned, contained in small print, or buried in the middle of a long agreement, is not sufficient to void the provision.<sup>46</sup> Even when clauses contain particularly unfair provisions, courts sometimes sever that piece of the clause rather than void the arbitration provision in its entirety.<sup>47</sup> Finally, although quite a few state jurisdictions have legislation proscribing the use of mandatory arbitration in certain areas,<sup>48</sup> or mandating particular procedural protections,<sup>49</sup> the Supreme Court's decisions preempt virtually all such statutes as applied to transactions involving interstate commerce.<sup>50</sup>

Commentators in the legal academy and the popular press have been far less hospitable to the mandatory arbitration phenomenon. The vast majority of legal academics who have written on the issue have been critical, attacking mandatory arbitration on both policy and legal grounds.<sup>51</sup> Similarly, many major newspapers and news magazines have written at least one significant piece exposing how companies are eliminating an individual's right to sue.<sup>52</sup>

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through arbitration significantly deprives them of remedies for the wrongs they feel they have undergone"); *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613 (DLC), 1996 WL 44226, at \*6 (S.D.N.Y. Feb. 5, 1996) (requiring arbitration of Title VII claim by plaintiff securities analyst, even though arbitration agreement required plaintiff to waive rights to attorney fees, injunctive relief, and punitive damages).

46. *See, e.g.*, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (refusing to void clause contained in small print in warranty booklet provided in box with computer).

47. *See, e.g.*, *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (severing punitive damages clause denying plaintiff remedial rights mandated by statute).

48. *See, e.g.*, KY. REV. STAT. ANN. § 336.700(2) (Banks-Baldwin 2001) (employment claims); R.I. GEN. LAWS § 10-3-2 (1997) (employment & insurance claims).

49. *See, e.g.*, *Sternlight, Panacea, supra* note 10, at 705-06 (discussing notice requirements imposed by several states); VT. STAT. ANN. tit. 12, § 5652(b) (2000) (requiring written acknowledgement of arbitration to be signed by each of the parties and displayed prominently when located in same document as agreement to arbitrate); TENN. CODE ANN. § 29-5-302(a) (2001) (stating that a written arbitration agreement is "valid, enforceable and irrevocable, . . . provided, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties").

50. *See infra* notes 70-76 and accompanying text.

51. In addition to my own works see, for example, Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999) (stating that "arbitration is not an effective forum in which to satisfy the public policy goals of employment discrimination statutes, even when employees are accorded a fair hearing"); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019 (1996) (noting that "[i]n recent years . . . a new trend has emerged that threatens to turn back the clock on workers' rights . . . [the requirement that] workers . . . assert their statutory rights in the forum of private arbitration"); Carrington & Haagen, *supra* note 29, at 401 (describing Supreme Court's interpretation of arbitration law as allowing "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); Schwartz, *supra* note 29, at 36 (discussing arbitration decisions and stating that "[t]he Supreme Court has created a monster").

52. *See, e.g.*, Reynolds Holding, *Millions Are Losing Their Legal Rights: Supreme Court*



From a policy perspective, critics have attacked the practice of mandatory arbitration on a variety of grounds. First, they have urged that consumers and employees are not agreeing to arbitration voluntarily, in any meaningful sense of the word. They emphasize the small print and buried nature of the clauses, and further urge that even the use of larger print would provide little help on a pre-dispute basis.<sup>53</sup> Second, critics urge that while binding arbitration may save money for the companies that impose it, the procedural device may be inferior from the perspective of the consumer or employee.<sup>54</sup> Even the “fairest” clauses will deny the individual access to a public judge or jury trial, as well as to discovery that is often essential in order to prevail in such disputes.<sup>55</sup> Moreover, the companies that draft the clauses will inevitably be tempted to use the clauses to deter individuals from filing claims, to prevent them from securing legal representation, and to decrease their chance of securing significant relief if they do bring claims.<sup>56</sup> Companies are increasingly using arbitration clauses to prohibit explicitly the use of class actions either in litigation or in arbitration, making it impossible for consumers with small claims to secure any relief.<sup>57</sup> The neu-

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*Forces Disputes from Court to Arbitration—A System with No Laws*, S.F. CHRON., Oct. 7, 2001, at 1; Caroline E. Mayer, *Hidden in Fine Print: “You Can’t Sue Us”: Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1; Stephanie Armour, *Arbitration’s Rise Raises Fairness Issue: What Happens When Workers Give Up Right to Sue? In Some Cases, Bankruptcy*, USA TODAY, June 12, 2001, at 1B.

53. See Sternlight, *Panacea*, *supra* note 10, at 676; Schwartz, *supra* note 29, at 56-57 (noting that “[due to their immateriality to the core of the transaction, pre-dispute arbitration clauses] receive little attention from the adherent,” and also explaining that even if the adherent reads and understands the arbitration clause, “[it is] extremely unlikely [that she will] be able to assess the value of a judicial forum for future disputes”); see also *Ting v. AT & T*, 182 F. Supp. 2d 902, 929-30 (N.D. Cal. 2002) (discussing the irrelevance as to “whether the Legal Remedies Provisions were ‘hidden in a prolix printed form’” because of AT&T’s research finding “that only 30% of its customers would actually read the entire CSA and 10% would not read at all”).

54. In *Ting*, the court observed that there was no reason to assume that savings achieved by the company would be passed down to the consumer. *Ting*, 182 F. Supp. 2d at 931 n.16. For further discussion of the economics of mandatory arbitration see Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 65 Law & Contemp. Probs. (forthcoming spring 2003).

55. See Sternlight, *Panacea*, *supra* note 10, at 683-84. Nor are arbitral decisions typically published.

56. See, e.g., *id.* at 680-86.

57. See, e.g., *Ting*, 182 F. Supp. 2d at 902 (holding arbitration clause unconscionable in part because it denied consumers the opportunity to proceed by class action, where plaintiffs demonstrated that they could not effectively proceed on an individual basis). For a general discussion of the class action issue in arbitration, see Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) [hereinafter Sternlight, *As Mandatory Binding Arbitration Meets the Class Action*]. For a discussion of the argument that prohibiting the class action is unconscionable see Jean R. Sternlight & Elizabeth J. Jensen, *supra* note 54.

trality of the arbitrators is suspect because many companies retain a single company to provide arbitrators who will resolve all disputes involving that company.<sup>58</sup> Even the most scrupulous arbitrators and arbitral organizations may find themselves unconsciously influenced to make findings that favor their valued client.<sup>59</sup>

Critics also emphasize that even were one to assume that binding arbitration served private interests, it raises critical public policy concerns.<sup>60</sup> The public has an interest not only in resolving individual disputes, but also in ensuring that publicly promulgated laws are enforced and publicized. When litigation is brought in court, the public has the opportunity to learn about alleged illegal acts. Even before cases go to trial, reporters or participants may publicize the nature of the claims and defenses. In this way the public may learn about defective tires, workplace discrimination, fraudulent credit practices, excessive check bouncing charges, or ineffective termite extermination services. Knowledge of these problems allows members of the public to protect themselves, bring their own lawsuits, or pressure for legislative reform. In contrast, the public may never learn about these significant issues if such disputes are sent to private binding arbitration.

On the other hand, defenders of mandatory arbitration in the consumer and employment context assert that arbitration may very well favor individual claimants, the public, and the companies that impose the dispute resolution practice.<sup>61</sup> Such defenders assert that economic principles suggest that the benefits companies accrue will be passed along to customers or employees in the form of lower prices or higher salaries.<sup>62</sup> That is, if companies do not have to waste money defending

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58. See, e.g., Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18-20; Reynolds Holding, *Can Public Count on Fair Arbitration? Financial Ties to Corporations Are Conflict of Interest, Critics Say*, S.F. CHRON., Oct. 8, 2001, at A15.

59. Lisa Bingham's work has demonstrated the importance of the "repeat arbitrator" effect. See, e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGEORGE L. REV. 223, 238 (1998).

60. See, e.g., Moohr, *supra* note 51, at 456 (arguing that "arbitration is less effective in furthering the public [policy] goal of ending discrimination"); Schwartz, *supra* note 29, at 37 ("The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves."). At the symposium at which this paper was presented, the Honorable Gerald T. Wetherington presented these concerns quite eloquently, urging that our public system of justice serves significant public interests.

61. See Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695 (2001); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001) [hereinafter Ware, *The Effects of Gilmer*]; Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Redispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

62. Drahozal, *supra* note 61, at 741; Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (2001) [hereinafter

themselves in court, they will be able to reduce their prices, and indeed market pressures will often ensure that they do so.<sup>63</sup> Supporters of mandatory consumer and employment arbitration also suggest that the practice will prove beneficial to the public at large by reducing the need for, and thus cost of, judges and courtrooms.<sup>64</sup> While critics challenge the assumptions of perfect information and perfect competition that undergird these arguments,<sup>65</sup> it is clear some remain convinced that mandatory arbitration is generally beneficial.

Despite the harsh criticism of mandatory consumer and employment arbitration, legislation prohibiting the practice has progressed little in Congress. While legislation has been introduced for several consecutive years that would have rendered unenforceable pre-dispute arbitration agreements in the employment and consumer credit areas,<sup>66</sup> none of these bills has yet made it out of committee.<sup>67</sup> Indeed, the closest that federal legislation has been to prohibiting mandatory arbitration was a bill designed to protect automobile franchisees from arbitration imposed by automobile franchisors.<sup>68</sup> Noticeably absent from the bill was any provision prohibiting these franchisees from imposing mandatory arbi-

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ware, *Paying the Price*]. Another economic argument supporting binding arbitration advanced by Professor Keith N. Hylton is that a knowing and voluntary agreement to binding arbitration is beneficial to the individual when deterrence benefits are less than litigation costs. See generally Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000).

63. See Drahozal, *supra* note 61, at 741; Ware, *Paying the Price*, *supra* note 62, at 89.

64. See e.g., Burger, *Using Arbitration*, *supra* note 16, at 5.

65. See e.g., Sternlight, *Panacea*, *supra* note 10, at 688-93; Sternlight & Jensen, *supra* note 54 (pointing out that absent perfect competition, companies will be able to keep any profits they secure by imposing binding arbitration).

66. See e.g., Consumer Credit Fair Dispute Resolution Act, S. 192, 107th Cong. (2001), WL 2001 CONG US S 192 (providing that "a written provision in any consumer credit contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of the contract . . . shall not be valid or enforceable"); Preservation of Civil Rights Protections Act, H.R. 2282, 107th Cong. (2001), WL 2001 CONG US HR 2282 (providing in section 3(a) that "any agreement between an employer and an employee that requires arbitration of a claim arising under the Constitution or laws of the United States shall not be enforceable").

67. The Consumer Credit Fair Dispute Resolution Act was referred to the Senate Judiciary Committee and has not yet been referred out of that committee. Thomas: Legislative Information on the Internet, at <http://thomas.loc.gov>. The Presentation of Civil Rights Protection Act was referred to four House committees and has not yet been referred out of any of them. *Id.* Another piece of legislation, proposed by Senator Sessions, would have legalized mandatory binding arbitration so long as it met certain minimal criteria. Consumer and Employee Arbitration Bill of Rights, 146 CONG. REC. S10, 619, 10,626-27 (2000), 2000 WL 1532688.

68. The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, would amend the FAA to outlaw mandatory arbitration in franchise agreements between automobile dealers and manufacturers, unless the parties agreed to the binding arbitration post-dispute. S. 1140, 107th Cong. (2001), WL 2001 CONG US S 1140. See H.R. 1296 Cong. 107th (2001), WL 2001 CONG US HR 1296, for the house companion bill. In the 106th Congress, the House passed a related bill by voice vote. See H.R. 534, 106th Cong. (1999); Thomas: Legislature Information on the Internet, at <http://thomas.loc.gov>.

tration on their customers. Although the Senate Judiciary Committee approved this proposed legislation and fifty-nine sponsors endorsed it, the Senate nevertheless has yet to consider the bill.<sup>69</sup>

Nor have any states passed general laws that effectively protect consumers or employees from mandatory arbitration.<sup>70</sup> The Supreme Court has interpreted the preemptive scope of the FAA quite broadly, reading it to preempt any state law that is “targeted” to arbitration and has the operative effect of voiding an arbitration provision.<sup>71</sup> For example, in *Doctor’s Associates, Inc. v. Casarotto*,<sup>72</sup> the Supreme Court held that the FAA preempted a Montana statute regulating the font size and placement of an arbitration clause in a franchise agreement.<sup>73</sup> Thus, with respect to transactions involving interstate commerce, states may neither explicitly prohibit the use of mandatory arbitration nor even regulate the way in which companies may secure consumers’ “consent” to arbitration.<sup>74</sup> The only area that permits anti-arbitral state regulation is insurance, where the federal McCarran Ferguson Act<sup>75</sup> gives states the authority to legislate without fear of federal preemption.<sup>76</sup>

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69. See Bill Summary & Status for the 107th Congress, at <http://thomas.loc.gov>. The issue of mandatory arbitration was also raised in connection with the consideration of the Bipartisan Patient Protection Act, commonly known as the patients’ bill of rights. H.R. 2563, 107th Cong. § 157 (2001). The bill contains a section which ensures that “[t]he rights under this Act [including the right to maintain a civil action] may not be waived, deferred, or lost pursuant to any agreement not authorized under this Act.” *Id.* The Act permits knowing, voluntary, post-dispute agreements to arbitrate, but would not permit mandatory arbitration as to claims brought under the Act. *Id.*

70. While a few states do have protective legislation, it is largely preempted. For example, Alabama’s statute prohibiting enforcement of all pre-dispute arbitration agreements was held preempted by the Supreme Court in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

71. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

72. 517 U.S. 681 (1996).

73. *Id.* at 688. See also *Allied-Bruce Terminix*, 513 U.S. at 281 (preempting Alabama statute invalidating pre-dispute arbitration agreements); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (preempting provision of California labor law stating that wage collection actions may be maintained regardless of private agreement to arbitrate); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (preempting state law that precluded the enforcement of an agreement to arbitrate claims under the California Franchise Investment Act).

74. Many issues still remain as to how states might regulate mandatory arbitration without subjecting their legislation to preemption. For example, perhaps if the legislation covers all waivers of constitutional rights, and not just arbitration, it will not be preempted. Quite likely a state could, without fear of preemption, prohibit all contracts of adhesion in the consumer context. However this broad legislation would raise its own concerns in that few states would choose to ban all contracts of adhesion. Some, such as Professor Stephen Ware, argue for an even broader version of preemption that would allow state legislation to stand only if it covered all contracts in the state. See STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION §§ 2.9-2.14 (2001).

75. 15 U.S.C. §§ 1011-1015 (1999).

76. See, e.g., *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (holding arbitration clause in insurance contract unenforceable because Missouri Arbitration Act (MAA) prohibited the practice and, since the MAA was enacted to regulate the business of

While no general anti-mandatory arbitration legislation has been adopted, arbitration organizations have engaged in some self-regulation. In 1995, the American Arbitration Association and other organizations joined together and issued the Employment Due Process Protocol.<sup>77</sup> A few years later, a similar group convened and drafted the Consumer Due Process Protocol.<sup>78</sup> These documents take no position on whether mandatory arbitration should be permitted in the consumer or employment context,<sup>79</sup> but they do provide for certain minimal standards of fairness in any mandated arbitration. The Employment Protocol, for example, requires that arbitrators have the power to award any remedy that would be available in court under the law.<sup>80</sup> Neither protocol, however, contains an enforcement mechanism. If a consumer or employee is mandated to bring his claim to a form of arbitration that does not meet the Due Process Protocol standards, he can raise an objection with the administering organization or individual arbitrators, but it is not clear what response he will receive.<sup>81</sup> Moreover, not all arbitrators and arbi-

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insurance and the FAA was not, the MAA inversely preempted the FAA by virtue of the McCarran-Ferguson Act).

77. Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (May 9, 1995), at <http://www.adr.org> [hereinafter *Employment Due Process Protocol*]. The Task Force included the American Bar Association, the National Academy of Arbitrators, the American Arbitration Association, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution, and the American Civil Liberties Union. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 446 n.9 (1998). For a general discussion of this and similar protocols, see Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 906-07, and Michael F. Hoellering, *International Arbitration Agreements: A Look Behind the Scenes*, DISP. RESOL. J. NOV. 1998, 64, 68-69.

78. National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol* (Apr. 17, 1998), available at <http://www.adr.org>.

79. The drafters of the Employment and Consumer Protocols did not ignore the issue, but rather admitted that they could not reach agreement on this highly divisive point. A Health Care Due Process Protocol, prepared by a committee including the American Arbitration Association, however, does prohibit mandatory pre-dispute arbitration. *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes* prepared by the AAA/ABA/AMA Commission of Health Care Dispute Resolution (July 27, 1998), available at <http://www.adr.org/upload/LIVESITE/focusArea/Healthcare/healthcare.pdf>.

80. *Employment Due Process Protocol*, art. C(5), available at <http://www.adr.org>. The *Consumer Due Process Protocol*, consisting of fifteen principles functioning as "clear benchmarks for conflict resolution processes involving consumers," similarly states that arbitrators should have the power to award any relief that would be available in a court under the law, and also requires that parties retain the right to seek relief in small claims court, receive clear and adequate notice of arbitration provisions and their implications, and secure independent administration of the ADR procedure if the ADR is mandatory. See Stipanowich, *supra* note 77, at 907-08; see also Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 11-13.

81. Even when the organization's rules require compliance with a particular Due Process

tral organizations have signed on to the Due Process Protocols, so there is some risk that arbitrators will engage in a race to the bottom in order to secure large numbers of arbitration contracts.

In sum, mandatory binding arbitration is alive and well in the consumer and employment contexts in the United States. Although critics have raised serious concerns, and although courts have discarded some of the most egregious clauses, the majority of courts require consumers to arbitrate under most clauses.

#### MANDATORY ARBITRATION OUTSIDE THE UNITED STATES

The treatment of mandatory consumer and employment arbitration is quite different in countries outside the United States. I initially began to learn about these differences as I delivered presentations on the United States approach to attorneys from other countries.<sup>82</sup> When I explained the United States' general endorsement of mandatory arbitration, such attorneys typically expressed shock and amazement, making statements to the effect that "we have nothing like that in my country" and "that could never happen in my country."<sup>83</sup>

That sort of anecdotal research inspired me to undertake a more systematic investigation into whether mandatory arbitration outside of the United States exists in the consumer or employment context. As a result of this research, I cannot conclusively say that the United States is the only country in which mandatory arbitration exists or could exist. As my fatigued research assistants and reference librarians will attest, it

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Protocol, a complainant has no clear remedy if the organization nonetheless agrees to administer a clause that fails to comply with a Protocol. Although the arbitration clause at issue in *Circuit City Stores, Inc. v. Adams* violated the Employment Due Process Protocol because it restricted available relief and shortened the statute of limitations, the AAA filed an amicus brief with the Supreme Court supporting the employer's position that the clause was covered by the FAA and thus enforceable. Brief Amicus Curiae of the American Arbitration Association in Support of Reversal, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379). On remand, the Ninth Circuit ultimately found that the clause was unconscionable and refused to enforce it on that ground. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (finding arbitration agreement in employment contract unconscionable, partly due to limitation of remedies of back pay to one year, front pay to two years, and punitive damages to greater of amount of back pay and front pay awarded or \$5,000).

82. I am fortunate to teach in an LL.M. program at the University of Missouri that attracts students from all over the world. I have also met foreign attorneys at various symposia sponsored by the American Bar Association, the Association of American Law Schools, and other organizations.

83. For a similar discussion of reactions from other countries' attorneys, see Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1242 n.18 (2001) (explaining that following a presentation on mandatory consumer arbitration at an international law conference in New Zealand, "nearly every representative present reported that such mandatory arbitration provisions were prohibited in consumer transactions in his or her country").

is quite difficult to research the law of other countries, particularly when those countries are not English-speaking. It is also very difficult to research the treatment of a phenomenon that seems not to exist in most other countries. If mandatory consumer arbitration does not occur in a particular country, does that mean that it could not occur, or merely that companies have not yet thought to impose the practice? Because the European Union includes fifteen countries,<sup>84</sup> and because the European Union position on these issues is relatively clear, I will focus much of my attention on European Union law.<sup>85</sup> I will then discuss more briefly how some non-European Union countries, outside the United States, might handle mandatory consumer and employment arbitration.

In considering how mandatory arbitration is treated outside the United States, it is important to place the differences that will be encountered in a more general context. Specifically, whereas many other countries rely heavily on government agencies to protect the rights of consumers and employees, the United States tends to rely on individual legal enforcement actions.<sup>86</sup>

## EUROPEAN UNION

### CONSUMER ARBITRATION<sup>87</sup>

In the European Union it seems quite clear that companies cannot mandate that their customers resolve disputes using binding arbitration rather than litigation. In 1993, the Council of the European Union issued a directive on “Unfair Terms in Consumer Contracts”<sup>88</sup> (the “Directive”). The Directive covered a variety of subjects and provided, *inter alia*, that “unfair” terms used in consumer contracts are not valid,<sup>89</sup>

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84. The current members of the European Union are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom, *available at* [http://www.europa.eu.int/abc/governments/index\\_en.html](http://www.europa.eu.int/abc/governments/index_en.html).

85. I use the term “law” here loosely to refer to European Union directives and other pronouncements.

86. For a discussion of some of the key differences between the United States approach to law, and that of the rest of the world, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (arguing that the American approach, characterized of “adversarial legalism,” involves highly decentralized legal activism, in contrast to many countries’ more bureaucratic approach).

87. As used in this article, the term “consumer arbitration” refers to arbitration between a business and a consumer, not between two or more consumers.

88. Council Directive 93/13 of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, WL OJ 1993 L95/29. From an American perspective, Council Directives are akin to Community laws. Once they have been issued, European Union member states are required to draft or revise existing legislation to conform to the Directive within a certain period of time. Treaty of Amsterdam, art. 249, *in* THE ROME, MAASTRICHT, AND AMSTERDAM TREATIES: COMPARATIVE TEXTS 171 (1999).

89. Council Directive 93/13, art. 6, 1993 O.J. (L 95) 29, WL OJ 1993 L95/29.

and that contractual terms that are not individually negotiated<sup>90</sup> shall be considered to be unfair if they cause a “significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”<sup>91</sup> In an annex, the Directive set out a list of terms that “may” be regarded as unfair if they cause a significant imbalance in rights to the detriment of the consumer. One of the items on this “gray list,” contained in Paragraph Q, was a contractual provision “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.”<sup>92</sup>

Although the Directive takes a gray list approach that does not by its terms unequivocally bar all mandatory arbitration in the consumer area,<sup>93</sup> subsequent European Union statements reflect that a prohibition has effectively been adopted. In 1998, following a series of reports on the implementation of the Directive, the European Commission issued a “Recommendation” on the “Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes”<sup>94</sup> (the “1998 Recommendation”). While denominated a “recommendation,” such pronouncements are known as “soft law” which, while technically not binding, have a strong practical effect on member countries.<sup>95</sup> Citing

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90. The Directive explains that adhesive contracts are not considered to be individually negotiated: “A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.” *Id.* at art. 3(2).

91. *Id.* at art. 3(1).

92. Council Directive 93/13, annex (1)(q), 1993 O.J. (L 95) 29, WL OJ 1993 L95/29.

93. A legalistic reading yields several ambiguities. First, the terms described in the annex only “may” be unfair. A company might argue, as many have in the United States, that its particular arbitration clause does not put consumers at a disadvantage, but rather is beneficial for both company and consumer. Second, as Professor William Parks has pointed out, the “Directive does not make clear exactly what is meant by arbitration provisions that are ‘exclusive’ and ‘not covered by legal provisions.’” WILLIAM W. PARK, *INTERNATIONAL FORUM SELECTION* 158 (1995). That is, the company might argue that because its arbitration clause allows or requires arbitrators to apply the law, the clause is not proscribed by the Directive. *See also* William W. Park, *The New English Arbitration Act*, 13 No. 6 MEALEY’S INT’L ARB. REP. 21 n.49 (1998) (noting that “several constructions of these words have been suggested, none entirely satisfactory”); NICHOLAS LOCKETT & MANUS EGAN, *UNFAIR TERMS IN CONSUMER AGREEMENTS: THE NEW RULES EXPLAINED* 49 (1995) (stating that “it remains unclear whether the Directive intends to prohibit such [arbitration] clauses in the event that the arbitration body in question is completely unregulated or only partially so”); G.H. TREITEL, *THE LAW OF CONTRACT* 251 (9th ed. 1995) (suggesting that exclusion only applies to an arbitration clause that seeks to exclude absolutely the power of courts to review arbitrators’ determinations).

94. Commission Recommendation 98/257 of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31, WL OJ 1998 L1 15/13 [hereinafter 1998 Recommendation].

95. *See* JO SHAW, *LAW OF THE EUROPEAN UNION* 247-48 (3rd ed. 2000); *see also* Fiona Beveridge & Sue Nott, *A Hard Look at Soft Law*, in *LAWMAKING IN THE EUROPEAN UNION* 285-309 (Paul Craig & Carol Harlow eds., 1998).



article 6 of the European Human Rights Convention, which it characterizes as providing that “access to the courts is a fundamental right that knows no exceptions,”<sup>96</sup> the 1998 Recommendation provides that “out-of-court alternative[s] may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised.”<sup>97</sup> It further spells out that all out-of-court settlement procedures must comply with a series of principles including the “principle of liberty,” which provides: “The consumer’s recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.”<sup>98</sup> In other words, the 1998 Recommendation takes precisely the same position as have many mandatory arbitration critics in the United States: it is inherently unfair for a company to require a consumer to resolve future disputes through binding arbitration rather than in court.<sup>99</sup>

The European Commission has also expressed its opposition to mandatory binding consumer arbitration in a specific practical context. In June 2000, the United States Federal Trade Commission convened a public workshop to discuss the potential use of alternative dispute resolution (ADR) to resolve disputes arising from on-line commercial transactions.<sup>100</sup> At the workshop, it became clear that there was a sharp difference of opinion regarding the permissibility of mandatory binding arbitration.<sup>101</sup> The European Union made it clear that it was opposed to permitting such a practice in on-line transactions that might involve European Union citizens. It stated: “But ADR and legal redress are two separate issues. Access to the latter should not be made conditional on the use or even exhaustion of the possibilities offered by the former.”<sup>102</sup>

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96. 1998 Recommendation at 32. Article 6 of the European Human Rights Convention will be discussed in further detail. See *infra* note 113 and accompanying text.

97. *Id.* at 33.

98. *Id.* at 34.

99. Apparently the European Union takes the same position as many United States arbitration critics, which is that consumers can only clearly weigh the advantages and disadvantages of a particular dispute resolution process once the dispute has actually arisen. See also Schwartz, *supra* note 29, at 132; Carrington & Haagen, *supra* note 29, at 401.

100. Federal Trade Commission/Department of Commerce, Summary of Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, available at <http://www.ftc.gov/bcp/altdisresolution/summary.pdf>. (June 6-7, 2000) [hereinafter FTC Workshop].

101. “One fairness issue over which there was little agreement was whether ADR programs should be permitted to be binding and/or mandatory.” *Id.* at 10.

102. Comments by the European Commission, Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, Department of Commerce/Federal Trade

Explaining the rationale for its position, the European Union argued that companies would undermine the perceived fairness of their own system by mandating the use of binding arbitration.<sup>103</sup> Again making the same point as many United States critics of mandatory arbitration, the European Commission further stated that compulsion should not be needed as long as the process is fair. "An effective, fair and rigorous ADR scheme that gives consumers confidence will be used without the need for compulsion."<sup>104</sup>

As one would expect, given this strong European Union position, specific European countries have adopted their own laws explicitly prohibiting the use of mandatory pre-dispute arbitration in the consumer context.<sup>105</sup> Analyzing the situation in Great Britain, Professors Drahozal and Friel explain that pursuant to statute, all pre-dispute arbitration clauses are ineffective when the amount of a potential claim is less than £5,000.<sup>106</sup> In claims for larger amounts, the validity of the pre-dispute arbitration clause is judged on a case-by-case basis to determine whether it is unfair under the European Union Directive.<sup>107</sup> As a practical matter, however, it appears that mandatory pre-dispute arbitration clauses are generally prohibited in consumer transactions in Britain.<sup>108</sup> My own preliminary research also shows that France expressly bans the use of

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Commission Invitation to Comment and Public Workshop, ¶ 23 (May 30, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/postworkshopcomments/eurocommission.pdf>.

103. "The use of any exhaustion principles for ADR (i.e., requiring a consumer to agree to exhaust all ADR remedies before being allowed to start a court action) would seriously undermine consumer confidence." *Id.* The European Commission further explained: "The advantages to an efficient and well run ADR over court litigation are easy for anyone to see. By producing an agreement that gives with one hand and takes away with another is unlikely to fill a consumer with confidence." *Id.* "In addition, in many jurisdictions such compulsion would be viewed as unfair." *Id.*

104. *Id.*; see also Sternlight, *supra* note 39; Schwartz, *supra* note 29, at 132; Carrington & Haagen, *supra* note 29, at 401.

105. Nor do I mean to suggest that European Union countries permitted mandatory consumer arbitration prior to the 1993 consumer directive. In Britain, for example, the Consumer Arbitration Agreements Act of 1988 "provided that any such agreement entered into by a consumer before a dispute arose would not be binding on the consumer." Robert Bradgate, *Experience in the United Kingdom*, in *The Integration of Directive 93/13 into the National Legal Systems*, at 32, available at [http://europa.eu.int/comm/dgs/health\\_consumer/events/event29\\_ol.pdf](http://europa.eu.int/comm/dgs/health_consumer/events/event29_ol.pdf).

106. Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the EU and the US*, 28 N.C. J. INT'L L. & COM. REG. (forthcoming 2002) (manuscript on file with author).

107. *Id.* at 10-11.

108. A British consumer protection agency, the Office of Fair Trading, "consistently has required businesses either to delete pre-dispute binding arbitration clauses altogether or to give consumers the option to arbitrate after a dispute arises." *Id.* at 11-12. (footnote omitted) (citing decisions as to home improvement companies, computer equipment, holiday accommodations, and car auctions reported by the Office of Fair Trading in its Unfair Contract Terms Bulletin). Such decisions have been made "even in cases involving sellers of high-value consumer goods, such as automobiles." *Id.*

predispute arbitration clauses in consumer transactions.<sup>109</sup>

While one might infer from the discussion above that mandatory consumer arbitration has received a great deal of attention in Europe, this is untrue. Rather, because the practice apparently is presumed to be impermissible, it is rarely discussed. For example, a lengthy report issued by the European Commission in 1999 that discussed the implementation of the Directive did not give any particular mention to the mandatory arbitration issue.<sup>110</sup>

Despite the European ban on mandatory pre-dispute arbitration in the consumer context, consumer arbitration does take place in Europe. How can this be? Quite simply, some consumer arbitration occurs within the European Union because it is agreed to on a *post*-dispute basis.<sup>111</sup> This phenomenon is quite interesting in that many advocates of mandatory arbitration in the United States have claimed that post-dispute arbitration agreements are infeasible.<sup>112</sup>

#### EMPLOYMENT

Although the state of the law is somewhat less clear in the employment context, it also seems that companies within the European Union are not permitted to use pre-dispute form agreements to require that their employees resolve their employment disputes through private arbitration. My research has certainly not shown that any European companies require their employees to agree, in advance of a dispute, to resolve that

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109. See Alderman, *supra* note 83, at 1242 n.18 (citing C. Civ. art. 2061 (Fr.), translated in THE FRENCH CIVIL CODE 379 (John H. Crabb trans., Rothman & Co. rev. ed. 1995) (prohibiting use of pre-dispute arbitration agreements)); see also William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 259 n.180 (1998) (same). I have been informed that Luxembourg also expressly bans the use of predispute arbitration clauses in consumer transactions. E-mail from Professor Dr. James A. Graham, to Professor Jean R. Sternlight (Feb. 19, 2002) (on file with author).

110. Report from the Commission on the Implementation of Council Directive 93/13 of April 5, 1993 on Unfair Terms in Consumer Contracts, COM (2000) 248, Celex No. 500DC0248. This report is available at [http://europa.eu.int/comm/consumers/policy/developments/unfa\\_cont\\_term/uct03\\_en.pdf](http://europa.eu.int/comm/consumers/policy/developments/unfa_cont_term/uct03_en.pdf). The report grew out of a major multi-country conference, held in 1999 in order to evaluate the impact of the 1993 Directive. See [http://europa.eu.int/comm/dgs/health\\_consumer/events/event29\\_en.html](http://europa.eu.int/comm/dgs/health_consumer/events/event29_en.html).

111. The British Chartered Institute of Arbitrators describes several programs or "schemes" for handling consumer disputes at <http://www.arbitrators.org>. A "scheme" is "a set procedure under the Rules of which parties in dispute agree to have their dispute resolved." *Id.* One advantage, according to the Institute, of these schemes is that "[t]he parties in dispute are aware of the maximum cost of the procedure at the outset, and the tailor-made rules leave no room for surprises in the procedure and powers of the arbitrator." *Id.* A number of groups utilize these schemes, including the British travel industry, British Telecom, and Consignia. *Id.*

112. See, e.g., Estreicher, *supra* note 61, at 567 (asserting that, "post dispute arbitration, in all but the rarest case, will not be offered by one party or accepted by the other").

dispute through private arbitration rather than in court.<sup>113</sup>

When questioned as to whether, if mandatory employment arbitration were attempted, it would be upheld by the courts, European attorneys generally agree it would not be upheld, based on article VI of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>114</sup> Article VI states: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>115</sup> This provision has consistently been interpreted to ensure complainants' access to an effective judicial remedy.<sup>116</sup> Thus, in a series of decisions the European Court of Justice made clear that a member country could not prohibit a gender discrimination claim from being taken to the courts on grounds of public safety or national security.<sup>117</sup> Moreover, council directives prohibiting discrimination on the basis of race, ethnicity, gender, religion, disability, age or sexual orientation also explicitly preserve complainants' access to judicial or administrative procedures.<sup>118</sup> While no cases on pre-dispute mandatory

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113. See also e-mail from Flaminia Bussacchini, European Commission Directorate Generale for Employment and Social Affairs, to Professor Jean R. Sternlight (June 19, 2001) (on file with author) ("I have not heard of contractual provisions according to which employees agree to arbitrate rather than litigate.").

114. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6., in *HUMAN RIGHTS AND THE EUROPEAN CONVENTION* 231 (Brice Dickson ed., 1997).

115. *Id.*

116. See, e.g., A. BRIAN BERCUSSON, *EUROPEAN LABOUR LAW* 143 (1996) (stating that "access to the judicial process has been held to be a general principle of law which must be taken into consideration in Community law," and further stating: "The adequacy of sanctions is only one aspect of the enforcement of EC law. National procedures for obtaining redress can also obstruct the real and effective judicial protections guaranteed by EC law"); CATHERINE BARNARD, *EC EMPLOYMENT LAW* 29 (2d ed. 2000) ("In more recent years, the [European Court of Justice] has . . . ensur[ed] that the procedural and remedial laws of the Member States governing the enforcement of causes of action derived from Community law are effective.").

117. Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651 (1986) (discussing claim brought by female member of the Royal Ulster Constabulary (RUC) who was not provided with fire-arm training and then released from her contract because the RUC had no need for additional officers who did not carry guns); Case 222/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v. George Heylens and Others*, 1987 E.C.R. 4097, 4098 (1987) ("Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection of his right."). See also Case C-271/91, *Marshall v. Southampton & S.W. Hampshire Area Health Auth.*, 1993 E.C.R. I-4367 (1993) (holding that damages cap on compensation violated Article 6 of the EU Equal Treatment Directive, mandating that member states provide adequate remedies for successful claimants in sex discrimination cases).

118. Council Directive 2000/43 of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 7(1), 2000 O.J. (L 180) 22, 25 WL OJ 2000 L180/22 ("Member States shall ensure that judicial and/or administrative

arbitration have reached the European Court of Justice, European lawyers and academics seem confident that the practice would not be permitted.

Here, it is important to distinguish private United States-style arbitration from another European process also known as "arbitration." In many European countries, employment claims are resolved through specialized labor courts or administrative tribunals.<sup>119</sup> In some countries, such as Great Britain, one type of administrative process is labeled "arbitration." The process bears some resemblance to its American counterpart in that it is intended to be cheaper, quicker, private, less formal, and less legalistic than the court processes. However, there are critical differences as well. In Britain, the "arbitrators" are appointed by the government, and a statute describes their powers.<sup>120</sup> British arbitral awards are also subject to review by courts to determine if they are "obviously wrong," of "general public importance," or "open to serious doubt."<sup>121</sup>

#### COUNTRIES OUTSIDE THE UNITED STATES OR THE EUROPEAN UNION CONSUMER

Despite my attempts, I have not yet identified any countries outside the United States and the European Union in which companies are regularly using pre-dispute arbitration agreements to require consumers to resolve their complaints through private arbitrators.<sup>122</sup> My review of a

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procedures . . . are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them . . . "); Council Directive 2000/78 of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, art. 9(1), 2000 O.J. (L 303) 16, 20, WL OJ 2000 L303/16 (same). It should be noted that administrative procedures, seemingly permitted by the Directives, are quite different from private arbitration that would be established and run by the companies themselves, rather than a government agency.

119. For a brief summary of how labor disputes are handled by various European countries, see *Industrial Tribunals, A Report by Justice* (1987) (on file with author) at app. one, pp. 57-63.

120. The British Advisory Conciliation and Arbitration Service (ACAS) recently began to offer "arbitration" as an option to both employee and employer in unfair dismissal claims. Specifically, the Employment Rights (Dispute Resolution) Act of 1998 authorized ACAS to adopt the scheme of arbitration and regulations issued by ACAS to describe how it will work. ACAS Arbitration Scheme, <http://www.acas.org.uk/publications/pdf/acassche.pdf>. Significantly, this arbitration can only be accepted voluntarily, if both parties agree, on a post-dispute basis. *Id.* It is also noteworthy that the British have not chosen to make even this type of governmentally-sponsored arbitration available in employment discrimination claims. For a more detailed discussion of the British approach to resolving employment discrimination claims, see Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis* (manuscript, on file with author).

121. See English Arbitration Act, 1996, C. 23 § 69 (Eng.).

122. Professor Richard Alderman reports a similar experience. Alderman, *supra* note 83, at 1242 n.18 (reporting that representatives from a variety of other countries were shocked to hear Professor Alderman's description of "mandatory" consumer arbitration in the United States). Richard Naimark, Director of the Global Center for Dispute Resolution Research, also reports that

multi-volume treatise on international consumer protection revealed no mention of the practice in the chapters on Argentina, Australia, Canada, China, Hungary, India, Malaysia, Mexico, or New Zealand.<sup>123</sup>

However, it is also difficult to establish that such a practice would be prohibited in most countries outside the United States.<sup>124</sup> Apart from the European Union materials discussed earlier, it does not seem that the issue has been addressed in any multi-country treaties or provisions. While the United Nations Guidelines for Consumer Protection might be interpreted to prohibit the use of mandatory arbitration in some situations,<sup>125</sup> Professor Brooke Overby has noted that these guidelines do not specifically refer to mandatory pre-dispute arbitration and in any event are not binding on any countries. As to individual countries, there are a few that apparently proscribe mandatory consumer arbitration. In addition to the European countries previously discussed, Brazil seemingly would prohibit the compulsory use of arbitration in the consumer context.<sup>126</sup>

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he is "not aware of any other national activity in the mandatory arbitration arena." E-mail from Richard Naimark, to Professor Jean R. Sternlight, (Apr. 19, 2002) (on file with author).

123. INTERNATIONAL CONSUMER PROTECTION, vols. 1 & 2 (Dennis Campbell ed., 2001). See also CONSUMER LAW IN THE GLOBAL ECONOMY: NATIONAL AND INTERNATIONAL DIMENSIONS (Iain Ramsay ed., 1997) [hereinafter CONSUMER LAW IN THE GLOBAL ECONOMY] (including chapters on consumer protection in Latin America, Central and Eastern Europe, Southeast Asia, and India, none of which mentioned mandatory private arbitration). The case of Malaysia warrants further investigation, as another source mentioned that arbitration could be used by consumers where required by contractual terms, and that it is invariably required with contracts of insurance. S. Sorthi Rachagan, *Consumer Protection in the Rapidly Developing Economies of South-East Asia: A Case Study from Malaysia*, in CONSUMER LAW IN THE GLOBAL ECONOMY 97, 110 (Iain Ramsay ed., 1997). While one reading on China mentions the possibility of taking consumer complaints to an "arbitration court," it sounds like this choice would be made by the consumer, post-dispute. Rosanna Grosso & Lillian Li, *People's Republic of China*, in INTERNATIONAL CONSUMER PROTECTION, *supra* X-2. It is also unclear whether the "arbitration court" is publicly or instead privately constituted. *Id.*

124. Professor Richard Alderman reports a similar frustration, explaining that while representatives from other countries assured him the practice would be illegal, they often could not provide a citation. See e-mail from Professor Richard M. Alderman, to Professor Jean R. Sternlight (Mar. 8, 2002) (on file with author).

125. See A. Brooke Overby, *Contract, in the Age of Sustainable Consumption*, (forthcoming 27 J. Corp. Law 7-10, 25-32 (2003) (on file with author)). The United Nations Guidelines for Consumer Protection (as expanded in 1999), available at [http://www.un.org/esa/sustdev/dec54\\_449.pdf](http://www.un.org/esa/sustdev/dec54_449.pdf) (last visited May 16, 2002), state that "[c]onsumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers." *Id.* at para. 21. The Guidelines also provide that: "Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible. Such procedures should take particular account of the needs of low-income consumers." *Id.* at para. 32.

126. Alderman, *supra* note 83, at 1, 242 n.18 (citing Brazilian Consumer Protection Code, LAW No. 8078 of Sept. 11, 1990, tit. 1, ch. VI, § II, art. 51 (VII) (declaring that a contract provision that requires the compulsory use of arbitration is null and void)).

One thing that does seem clear is that mandatory private arbitration is quite rare, if not nonexistent.<sup>127</sup> In part, this may be attributed to the fact that many countries handle consumer complaints administratively. For example, consumer disputes in India are handled by quasi judicial Consumer Disputes Redressal Agencies,<sup>128</sup> and in Australia various state and federal bodies receive and investigate consumer complaints.<sup>129</sup> Such government-sponsored administrative processes may be referred to as arbitration, as occurs in Argentina.<sup>130</sup> Similarly, consumers in Mexico can bring claims by contacting the State Attorney for Consumer Affairs. If the dispute is not resolved through conciliation, parties can voluntarily agree on a post-dispute basis to arbitrate the claim. But, if the parties do not agree to arbitration, they are free to take the claim to court.<sup>131</sup> In Venezuela and Peru, I found that although the relevant statutes would seemingly allow parties to agree in advance to arbitrate future disputes, this does not often occur.<sup>132</sup> Rather, the arbitration that does exist is generally conducted by a government entity.<sup>133</sup>

#### EMPLOYMENT

Similarly, in the employment context it appears that few if any countries allow employers to require their employees to resolve employ-

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127. Professor Chris Drahozal has informed me that before Gateway stopped selling computers overseas, it had required arbitration of all disputes with its Australian customers. E-mail from Professor Christopher Drahozal, to Professor Jean R. Sternlight (Apr. 29, 2002) (on file with author).

128. D.N. Saraf, *Key Issues in Consumer Protection in India*, in CONSUMER LAW IN THE GLOBAL ECONOMY, *supra* note 123, at 125, 126.

129. Graeme Johnson, *Australia*, in INTERNATIONAL CONSUMER PROTECTION, *supra* note 123, at Aus-X-2, X-8-10.

130. Gabriel A. Stiglitz, *Consumer Rights in Argentina and the MERCOSUR*, in CONSUMER LAW IN THE GLOBAL ECONOMY, *supra* note 123, at 177, 185-86 (describing government-sponsored arbitration tribunals). *See also* Maria R. Scafati and Martin E. Paolantonio, *Argentina*, in INTERNATIONAL CONSUMER PROTECTION, *supra* note 123, at Arg. I-2, X-2-3. *See also* Jordi Faus Santasusana & Marta Pons de Vall Alomar, *Spain*, in INTERNATIONAL CONSUMER PROTECTION, *supra* note 123, at IX-2 (discussing governmentally-established arbitration mechanisms used to resolve consumer disputes).

131. Juan Francisco Torres, Landa R. Herrera, & Ramon Bravo Herrera, *Mexico*, in INTERNATIONAL CONSUMER PROTECTION, *supra* note 121, at X-1. *See also* E-mail from Professor Dr. James A. Graham, to Professor Jean R. Sternlight (Feb. 20, 2002) (on file with author); Ley Federal de Proteccion al Consumidor (05/06/2000), Capitulo XIII, Articulo 116.

132. E-mail from Manuel Gomez, Stanford JSD candidate, to Professor Jean R. Sternlight (Feb. 20, 2002) (on file with author) (discussing Venezuela); e-mail from Javier Caravedo, U. Missouri LL.M., to Professor Jean R. Sternlight (Jan. 25, 2002) (on file with author) (citing Peruvian General Arbitration Law, Ley 26572, § 11, available at <http://www.internationaladr.com/e.html> (stating that adhesive arbitration agreements are enforceable so long as the terms were known or able to be known using ordinary diligence)). Terms that were not knowable in advance can only be enforced if they were later accepted explicitly and in writing.

133. *Id.*

ment disputes through private arbitration. In many countries labor disputes are instead resolved through specialized labor courts or administrative tribunals. Professor James Graham reports that labor disputes are not resolved through private arbitration in Mexico.<sup>134</sup> Similarly, labor disputes in Bolivia are expressly reserved to the courts.<sup>135</sup> In Venezuela, labor arbitration is reportedly conducted only by public entities.<sup>136</sup> Elsewhere, such as Peru, where mandatory arbitration seems to be allowable, it nonetheless apparently does not occur.<sup>137</sup>

#### WHO SHOULD LEARN FROM WHOM?

The existence of this significant disparity between the United States and other countries raises several interesting questions, such as: Why is there such a disparity? Are any problems posed if these jurisdictions continue to maintain their very different approaches? And should either the United States or non-United States jurisdictions learn any lessons from each other?

#### WHY SUCH A DISPARITY?

The disparity between the United States and other jurisdictions regarding the permissibility of mandatory arbitration of "little guy" claims is a recent phenomenon. Mandatory consumer and employment arbitration did not exist in the United States until the mid-1980s. Prior to that date, United States companies assumed, as companies elsewhere in the world largely continue to assume, that they could not use mandatory pre-dispute arbitration clauses in the consumer or employment contexts. So, why did companies become more daring? Why did United States courts permit them to use arbitration in this fashion? What fueled this important social change?

While no clear answer can ever be provided to questions such as these, a few key elements can be identified. First, companies' imposition of mandatory pre-dispute arbitration clauses in both areas is clearly linked to their desire to decrease their legal costs and liabilities. While companies typically do not publicly trumpet their desire to decrease

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134. E-mail from Professor Dr. James A. Graham, to Professor Jean R. Sternlight (Feb. 20, 2002) (on file with author).

135. Article 6 Section 11 states "Las cuestiones laborales quedan expresamente excluidas del campo de aplicacion de las presente ley, por estar sometidas a las disposiciones legales que les son propias." That is, labor questions are expressly excluded from the application of the present law, to instead be submitted to their proper legal fora.

136. E-mail from Manuel Gomez, Stanford JSD candidate, to Professor Jean R. Sternlight (Feb. 20, 2002) (on file with author).

137. E-mail from Javier Caravedo, University of Missouri LL.M., to Professor Jean R. Sternlight (Jan. 25, 2002) (on file with author).



legal liabilities, in their more private communications some companies' attorneys acknowledge that mandatory arbitration is obviously intended to help them reduce their payouts not only to their attorneys, but also to claimants.<sup>138</sup> For example, some defense lawyers have suggested that arbitration clauses can be used to eliminate class actions, thereby reducing "predatory" attacks by consumers on banks.<sup>139</sup> Similarly, some have suggested that mandatory arbitration may be a "cure" for employment disputes, helping to relieve employers of the burdens of "runaway juries" or "endless appeals."<sup>140</sup> In a prior article I labeled the imposition of mandatory arbitration "do it yourself tort reform," meaning that companies were (inappropriately in my view) using arbitration clauses to accomplish tort reform such as lower payouts, but without having to endure the hassle of obtaining passage of legislation.<sup>141</sup> I did not mean the phrase as a compliment. Yet, one advocate of mandatory arbitration proudly accepted the label.<sup>142</sup>

Assuming that a company's desire to reduce legal liability is one of the factors underlying the growth of mandatory arbitration in the United States, why has this trend not spread elsewhere? Surely companies in other jurisdictions are also interested in reducing their legal liability. Professors Drahozal and Friel identify one factor that may be at play, suggesting that United States courts are more hostile to business defendants than are courts in foreign jurisdictions.<sup>143</sup> They emphasize that the availability of the jury trial, punitive damages, and the potential of class actions provide plaintiffs with opportunities they do not have in other

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138. Cf. Ware, *The Effects of Gilmer*, *supra* note 61, at 748 (arguing that arbitration benefits employers by reducing awards to employees).

139. See, e.g., Carroll E. Neesemann, *Trumping the Class Action with Arbitration*, A.B.A. DISP. RES. MAG. (forthcoming 2002) ("A principal motivation for using arbitration is a desire to reduce the cost of dispute resolution in general, and, in some cases, to avoid the exposure and expense of class actions."); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May-June 1998, at 24 ("Consumers have been ganging up on banks. But now [binding arbitration institutions] have found a way to defend themselves."); see also *id.* at 26 ("Stripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue.").

140. William H. Floyd III & Phillip A. Kilgore, *Mandatory Arbitration: A Cure-All for Employment Disputes?*, S.C. LAW, Jan./Feb., 2002, at 15. Cf. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 401 (2000) (arguing that imposing mandatory binding arbitration does not necessarily serve companies' self-interest).

141. See Sternlight, *As Mandatory Binding Arbitration Meets the Class Action*, *supra* note 57, at 11 (explaining that a company can use an arbitration clause to obtain much of what it might hope to obtain through legislative reform, but without having to "convince any legislature to pass revised laws, nor persuade any judicial body to change court rules . . .").

142. See Roger S. Haydock, *The Supreme Court Creates Real Civil Justice Reform*, Nov. 2001, METRO. CORP. COUNS. 45.

143. Drahozal & Friel, *supra* note 106, at 22-24.

fora.<sup>144</sup> Where some might see the United States approach as overly generous, others such as myself would characterize the jury trial, punitive damages, and class action features of the United States system far more favorably. We see these features as a key source of justice, as something of which to be proud. Given that few resources are put into bureaucracies that might enforce the law, we would argue that strong remedies and procedures are essential to ensure that companies obey the law. However, whether one sees the United States system as overly generous or barely fair to plaintiffs, it does seem clear that the United States courts are perceived as more hospitable to plaintiffs than are those of many jurisdictions, obviously giving companies an added incentive to evade liability in the United States.<sup>145</sup>

The disparity between the United States and other jurisdictions may also be due to the fact that companies in the United States have more political clout than in many other places. Even assuming companies want to reduce their liability, they cannot assume they will be successful in obtaining the legislative or judicial support that would be necessary to allow them to accomplish the goal. In the United States, the setup of our political structure gives companies a great deal of leverage with both legislatures and courts. On the legislative side, it is well recognized that the amazing growth in company campaign contributions has given businesses substantial influence in Washington, as well as in state legislatures.<sup>146</sup> By contrast, in countries elsewhere in the world, such as Austria and Sweden, state subsidies function as the primary source of income for political parties.<sup>147</sup> Even to the extent that companies else-

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144. In his remarks at this conference Professor Stephen Ware stated that he would also add discovery to this list.

145. The attractiveness of the United States as a forum for plaintiffs is a factor in the Supreme Court's law of *forum non conveniens*. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252, 254 (1981) (noting that American courts are "extremely attractive to foreign plaintiffs" and concluding that personal injury claim could be dismissed, for refiling elsewhere, so long as plaintiffs could not show that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . ."); see also GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 3-5 (3d ed. 1996) (explaining why United States courts are particularly attractive to plaintiffs).

146. See, e.g., Steven E. Schier, *One Cheer for Soft Money*, in *CAMPAIGN FINANCE REFORM* 90 (Christopher Luna ed., 2001) (noting that one argument presented by reformers of the soft money regime is that "large corporations give huge amounts to parties to secure or defend favorable government treatment"); Joel A. Thompson & Gary F. Moncrief, *Exploring the "Lost World" of Campaign Finance*, in *CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS* 6-7 (Joel A. Thompson & Gary F. Moncrief eds., 1998) (noting that "[s]oft money has become a force in state campaigns," and referring to a 1997 study finding that tobacco companies, having specific policy interests due to an increase in attempts at regulation, had made numerous contributions to political committees in various states).

147. Gudran Klee, *Financing Parties and Elections in Small European Democracies: Austria and Sweden*, in *CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE* 178 (Arthur B. Gunlicks ed., 1993) (noting that "an extensive system of state subsidies to political

where have significant power, that power is often balanced by strong labor unions.<sup>148</sup> Moreover, although judges are supposed to be neutral and exempt from improper influence, the vast majority of state court judges in the United States are elected.<sup>149</sup> Professor Stephen Ware's excellent article outlining the apparent influence of judicial campaign contributions on a court's attitude toward mandatory binding arbitration makes the point quite baldly.<sup>150</sup> In addition, a recent series of newspaper articles raised a significant question as to whether judges might be issuing pro-arbitration decisions in order to benefit their own future careers as arbitrators and bring themselves substantial personal income.<sup>151</sup> By contrast, judges in many other countries are either appointed by the government or selected through a civil service exam.<sup>152</sup> In short, companies currently appear to wield a great deal more political power in the United States than in many other jurisdictions. Companies in other countries might recognize that they would not be permitted by the courts or legislature to deprive consumers or employees of their opportunity to bring claims in court.

Perhaps some cultural factors are also at work. Professors Drahozal and Friel suggest that the United States, with its strong tradition of autonomy, may provide a particularly hospitable environment for the growth of private arbitration.<sup>153</sup> Similarly, they suggest that European governments tend to be more protective of consumers than is the United States.<sup>154</sup> Professor Overby, in a broader comparison of the

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parties exists in Sweden and Austria, and these subsidies have become the predominant source of party income").

148. Derek Bok, *A Comment on American Difference and Indifference*, 21 *COMP. LAB. L. & POL'Y J.* 391, 394 (2000) (noting that "[u]nlike America, Europe has produced strong labor parties" and providing various reasons for discrepancy).

149. Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 *J.L. & POL.* 645, 647 (1999) ("Most states' judges face election."); Roy A. Schotland, *Introduction: Personal Views*, 34 *LOY. L.A. L. REV.* 1361, 1365 (2001) ("The people of thirty-nine states have chosen to have their judges face the voters.").

150. Ware, *supra* note 149, at 684 (arguing that "[t]here is a strong correlation between a[n] [Alabama Supreme Court] justice's source of campaign funds and how that justice votes in arbitration cases").

151. See, e.g., Reynolds Holding, *Judges' Action Cast Shadow on Court's Integrity: Lure of High-Paying Jobs as Arbitrators May Compromise Impartiality*, *S.F. CHRON.*, Oct. 9, 2001, at A13.

152. See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 *CORNELL L. REV.* 1529, 1538 (2000) (noting that "in Europe . . . judges are appointed through a meritocratic civil service process"); Pamela A. Seay, *Law, Crime and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 *IND. INT'L & COMP. L. REV.* 143, 153 (1998) (noting that judges in China need to take a civil service exam, in addition to other requirements, to enter the judiciary).

153. Drahozal & Friel, *supra* note 106, at 20 (emphasizing that the Americans tend to take a laissez faire approach, whereas the Europeans tend to be more regulatory).

154. *Id.* at 25. Note that the Europeans often protect consumers through regulatory rather than

United States and European approaches to consumer law, argues that such institutional factors as “federalism and federalization, organizational competence and constraints, economic and cultural integration, and existing systems do impact the shape and form of consumer law.”<sup>155</sup>

While it is unclear whether these cultural and other differences are causes or effects of other more fundamental factors, it does seem true that consumers and employees are ultimately left more unprotected in the United States than in many other jurisdictions. In a system that is primarily dependent on private enforcement actions, it is quite worrisome when companies are given the power to use arbitration to insulate themselves from such private enforcement.

#### WHY IS THE DISPARITY SIGNIFICANT?

Does it matter that the United States, compared to most other countries, is more hospitable to the use of binding arbitration in the consumer and employment areas? This article asserts that it does. First, in a world that is well recognized to be shrinking, significant differences between countries’ procedural laws are always important. A given company may well do business with individuals from many other jurisdictions. It is costly and inefficient for a company to have to redraft its contracts to comply with the disparate laws of each country where it does business. For example, Dell Computers, a company that sells computers all over the world, uses different on-line agreements depending on a customer’s location. Thus, Dell requires United States customers to agree to binding arbitration in lieu of litigation and does not impose this obligation on customers from Britain or Ireland.<sup>156</sup> Similarly, as companies shift their

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litigation mechanisms. *See, e.g.*, Opinion of the Committee of the Regions on the “Communication from the Commission on the Out-of-Court Settlement of Consumer Disputes and the Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes,” Official Journal C 198, 14/07/1999 at para. 3.2.4 (describing approaches various European countries take in handling consumer claims). Drahozal and Frier also attempt to explain where the British fit in, observing that while the “English common law does not conform to the civil law ethos . . . its approach is closer to that of Europe than the United States.” Drahozal & Frier, *supra* note 106, at 20. They recognize that “the common law viewed arbitration as effectively a tool for the economically powerful and thus was more likely to intervene in the arbitral process when the economic balance was not sufficiently equal.” *Id.* at 21 (footnote omitted).

155. A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT’L L. 1219, 1290 (2001). Professor Overby contrasts the treatment of mandatory arbitration in the two regimes. *Id.* at 1276-83. *See also* Kagan, *supra* note 86, at 3-14 (arguing that the American approach to law, labeled as “adversarial legalism,” in which lawyers dominate a great deal of policy making and dispute resolution, can be distinguished from other countries’ emphasis on bureaucratic administration or expert decisionmaking).

156. *See* Drahozal & Frier, *supra* note 106, at 15-16 (comparing clauses provided by Dell to United States, British, and Irish customers). They cite the following web sites: Dell Terms and Conditions of Sale—Home, Home Office and Small Business Customers ¶ 12, at [www.us.dell](http://www.us.dell).

employees among countries they will have to pay attention to whether the laws of such countries permit or prohibit them from substituting arbitration for litigation.<sup>157</sup>

Second, it is likely that various jurisdictions including the United States will increasingly attempt to develop worldwide policies, as our economies become more closely linked. The disparate policies on binding arbitration may stand in the way. For example, in recent years both the United States and various other countries have attempted to join together to foster safe and productive use of on-line commerce. Recognizing that consumers will often hesitate to use on-line dispute resolution if they do not feel that they can fairly and effectively resolve disputes that might arise out of such transactions, a variety of governmental organizations and non-governmental organizations have begun to investigate how they might assure customers that an adequate dispute resolution system exists.<sup>158</sup> The United States Federal Trade Commission fostered a set of workshops on June 6 and 7, 2000, geared to focus on these problems.<sup>159</sup> It turned out that the United States/European split in approaches regarding mandatory arbitration posed an impediment as these countries attempted to agree to mutually acceptable new policies. Whereas representatives of the European Union insisted that companies could not use the provision of on-line dispute resolution as an excuse to eliminate customers' right to bring legal actions against those companies in court,<sup>160</sup> some United States scholars urged that such a policy would

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com/us/en/gen/misc/policy\_008\_policy.htm; Dell Terms and Conditions UK ¶ 20, at [www.euro.dell.com/countries/uk/enu/dhs/local/legal\\_terms.htm](http://www.euro.dell.com/countries/uk/enu/dhs/local/legal_terms.htm).

157. See, e.g., e-mail from attorney Richard Faulkner, to Professor Jean R. Sternlight (Feb. 20, 2002) (on file with author) (stating that several U.S. companies are currently mandating the use of arbitration for resolution of disputes by extra-territorial employees and former employees in Latin America and Central Europe, but are not doing so within the European Union).

158. For example, such investigations have been conducted by the European Union. See [http://www.ecommerce.gov/joint\\_statements/EU\\_ADR-5-01.html](http://www.ecommerce.gov/joint_statements/EU_ADR-5-01.html); the Organization for Economic Development and Cooperation, at <http://www.oecd.org/EN/document/0,,EN-document-44-1-no-24-320-44,FF.html> (issuing Guidelines for Consumer Protection in the Context of Electronic Commerce "setting out the core characteristics of effective consumer protections for online business-to-consumer transactions"); Global Business Dialogue, at [www.gbde.org](http://www.gbde.org) (arguing that "[b]usinesses and governments should cooperate to provide consumers with more efficient remedial mechanisms [to resolve disputes arising from online transactions] by increased use and legal recognition of ADR").

159. Department of Commerce/Federal Trade Commission, Alternative Dispute Resolution for Online Consumer Transactions (June 6-7, 2000), at <http://www.ftc.gov/bcp/altdisresolution/index.htm>. The purpose behind the workshop was "to examine the use of alternative dispute resolution as one means of providing transparent, effective, quick, and inexpensive redress for consumers engaging in online transactions." *Id.* "Over 120 representatives from academia, consumer groups, industry and government filed 47 comments and attended the workshop." FTC Workshop, *supra* note 100, at 1 (footnote omitted).

160. Comments by the European Commission, Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, Department of Commerce/Federal Trade

be reasonable.<sup>161</sup>

Third, and most important, while the existence of divergent policies toward mandatory arbitration will not necessarily place the development of powerful, linked economies in dire jeopardy,<sup>162</sup> the existence of such a sharp difference in attitudes should at minimum convince each jurisdiction to reexamine its own approach. Once apprised of the fact that policymakers around the world do not share their welcoming attitude toward binding arbitration, policymakers in the United States should at least ask themselves whether their approach might be mistaken. Equally, policymakers elsewhere in the world should spend at least a few minutes considering whether the largest economy in the world might have developed a procedural approach that might be desirable.

#### UPON REFLECTION, SHOULD EITHER JURISDICTION CHANGE?

Should other jurisdictions permit mandatory arbitration? To date, there is little to convince other countries that the United States pro-mandatory arbitration policy is superior. Although United States companies and their representatives may assert that mandatory arbitration is quicker and cheaper for everyone, that it will increase access to justice, and that the savings it generates will redound to the benefit of all members of society, those companies cannot point to empirical evidence verifying these claims.<sup>163</sup> For example, although companies like to claim that mandatory arbitration will permit more consumers to present claims than could do so in court, the statistics released by one credit card company showed that in the year or so after it imposed mandatory arbitration just four customers filed claims against the company.<sup>164</sup> In contrast, the

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Commission Invitation to Comment and Public Workshop, ¶ 23 (May 30, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/postworkshopecomments/europeancommission.pdf> (asserting that access to legal redress should not be conditioned on the use or exhaustion of ADR remedies, and that in many jurisdictions compulsory arbitration would be seen as unfair).

161. FTC Workshop, *supra* note 100, at 11.

162. Companies that engage in multi-jurisdictional business have always had to deal with differences in both substantive and procedural laws.

163. For example, Professor Christopher R. Drahozal asserts as a matter of economic theory that seemingly "unfair" arbitration clauses may be better for all concerned, see Drahozal, *supra* note 61, at 695, but presents no data supporting this assertion. Are the savings that companies accrue actually passed down to consumers or employees? Does arbitration really provide a cheaper, quicker form of dispute resolution or does it deter disputants from filing claims? See also Hylton, *supra* note 62, at 209 (suggesting that arbitration agreements should be enforced when they are entered into by parties who have full information, but recognizing that where informational disparities exist, enforcement may not be socially desirable). For a critique of the argument that companies' savings will trickle down to benefit consumers and employees see Sternlight & Jensen, *supra* note 54.

164. Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1 (discussing policy implemented in early 1998).

company filed 51,622 claims against customers in this same period.<sup>165</sup> Of course, these statistics do not even begin to get at the question of whether customers who bring claims have any realistic chance of prevailing in binding arbitration.<sup>166</sup>

Indeed, United States companies' attempts to impose binding arbitration are highly controversial and generate much criticism in the academic and popular press. For example, a recent series in the *San Francisco Chronicle* argues that mandatory arbitration has deprived citizens of numerous legal rights, disregards conflicts of interest within arbitration firms, and tempts judges to issue pro-arbitration decisions in hopes of obtaining high-paying jobs as arbitrators after leaving the bench.<sup>167</sup> Similarly, prior stories in such publications as the *New York Times*,<sup>168</sup> *Washington Post*,<sup>169</sup> and *U.S. News and World Report*,<sup>170</sup> have emphasized the deprivation of certain legal rights resulting from companies' increased use of binding arbitration.

Moreover, the mandatory arbitration phenomenon has generated a great deal of litigation. Although the Supreme Court has generally been supportive of companies' use of adhesive pre-dispute arbitration provisions,<sup>171</sup> courts have repeatedly stepped in to strike down some of the most egregious provisions.<sup>172</sup> As Professor Michael Z. Green argues, it

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165. *Id.*

166. Virtually no studies have been done on this important question because data on arbitration is typically private and unavailable for empirical analysis. Even to the extent that customers prevail, the question remains: how much do they recover?

167. See Holding, *supra* note 52, at 1; Reynolds Holding, *Can Public Count on Fair Arbitration?: Financial Ties to Corporations Are Conflict of Interest, Critics Say*, S.F. CHRON., Oct. 8, 2001, at A15; Reynolds Holding, *Judges' Actions Cast Shadow on Court Integrity: Lure of High-Paying Jobs as Arbitrators May Compromise Impartiality*, S.F. CHRON., Oct. 9, 2001, at A13.

168. Meier, *supra* note 52, at A1 (arguing that "companies have unilaterally wiped out customers' right to sue by sending out notices of new arbitration requirements in the form of envelope stuffers").

169. Mayer, *supra* note 52, at A1 (discussing the increase in companies use of binding arbitration).

170. Margaret Mannix, *No Suits for You: Mad at a Firm? Arbitration Could Be Your Only Recourse*, U.S. NEWS & WORLD REP., June 7, 1999, at 58 (discussing increase in companies' use of arbitration and noting that "[t]here's never been a better reason to read before you sign").

171. See Sternlight, *Panacea*, *supra* note 10, at 660-74, for a summary of relevant Supreme Court precedents through 1996. Since then, the Court has continued to endorse mandatory pre-dispute arbitration quite enthusiastically. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that arbitration clauses governing employment disputes are not exempt from Federal Arbitration Act, and are thus typically enforceable); *Green Tree Financial Corp.—Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000) (refusing to void clause mandating arbitration of consumer disputes under Truth in Lending Act merely because consumer asserted arbitration would not be financially feasible).

172. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (finding arbitration agreement in employment contract unconscionable, in part, due to the limitation of remedies of back pay to one year, front pay to two years, and "punitive damages to the greater of

is not even clear that it is beneficial from the company's perspective to impose mandatory arbitration, much less that this practice redounds to the benefit of society at large.<sup>173</sup> Thus, while the practice of mandatory arbitration obviously exists in the United States, there is currently little empirical evidence to commend the practice to other countries' policy makers.

Professor Stephen Ware, responding to an early version of this paper, suggested that the United States invention of mandatory binding arbitration might be analogized to other highly desirable United States inventions such as the automobile and the light bulb, and that other countries should follow our creative lead in imposing this practice.<sup>174</sup> However, other countries would be well advised to examine the new United States product carefully before taking home a procedure that may prove quite disappointing or even dangerous. Why copy the Edsel? Indeed, mandatory arbitration is arguably far worse than the Edsel, an ugly car that sold poorly, but at least ran. Instead, a more appropriate automotive analogy might be the Corvair, ultimately impugned as unsafe at any speed.<sup>175</sup> Another analogy might be carbon monoxide, a gas which silently and secretly has a deleterious impact on the global environment. Permitting companies to use mandatory pre-dispute arbitration clauses to prevent consumers and employees from enforcing their rights may ultimately have a devastating impact on the laws that are intended to ensure that employees and consumers are treated fairly.<sup>176</sup>

#### SHOULD THE UNITED STATES PROHIBIT MANDATORY ARBITRATION AS TO CONSUMERS AND EMPLOYEES?

The fact that the United States position is unilateralist, rejected by other countries in the world, should in itself give United States policy-makers some food for thought. Whereas United States companies like to claim that it is only United States trial lawyers' self-interest that has prevented the wholesale embrace of mandatory arbitration as cheaper

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the amount of back pay and front pay awarded or \$5,000"); *Ting v. AT & T*, 182 F. Supp. 2d 902, 934 (N.D. Cal. 2002) (voiding arbitration clause imposed by phone service provider due to high cost and elimination of certain remedies and shortening of statute of limitations).

173. Green, *supra* note 140, at 400 ("As a matter of general practice, the use of mandatory arbitration as a dispute resolution mechanism for employment discrimination claims has failed to give employers an overall advantage.").

174. Comments in response to symposium presentation, March 2, 2002.

175. See RALPH NADER, *UNSAFE AT ANY SPEED; THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

176. I will not, in this short piece, fully develop the arguments for why I believe mandatory arbitration is a bad practice. I, and many others, have spelled out these arguments in detail elsewhere. See *supra* notes 51-60 and accompanying text.



and better for everyone,<sup>177</sup> it is quite hard to argue that United States trial lawyers have successfully influenced policy makers all over the world. Rather, it seems that these policy makers have concluded, on their own, that public and private interests are not well served by allowing companies to elude responsibility for their misconduct in court. United States policy makers should rethink whether these other countries might have it right. While defenders of United States mandatory arbitration like to assert that principles of economic theory will ensure that consumer and employee interests are protected, upon reflection it instead seems that problems of imperfect information, predictable cognitive biases, and market failures will permit companies to use binding arbitration to take advantage of consumers and employees. If nothing else, hasn't the Enron debacle demonstrated once and for all that government regulations are sometimes necessary to protect individuals from corporate malfeasance?

An examination of dispute resolution around the world should also lead policy makers to challenge the assertion that because voluntary post-dispute arbitration could never be accepted by both sides to a dispute, mandating arbitration on a pre-dispute basis is the only practical way to provide binding arbitration to disputants whom it could benefit. Asserting that the trial lawyers will inevitably reject voluntary post-dispute binding arbitration in good cases, advocates for mandatory arbitration have claimed that when companies mandate arbitration they ensure that this mechanism will be available for all disputants.<sup>178</sup> They urge that post-dispute voluntary arbitration is unworkable because claimants would refuse to arbitrate strong claims and companies would refuse to arbitrate weak claims.<sup>179</sup>

However, reflection on other countries' approaches to these issues shows several weaknesses to the argument that mandatory arbitration is necessary to provide consumers and employees with access to justice. First, it seems that at least some voluntary binding arbitration is occurring on a post-dispute basis. For example, as noted earlier, the British Chartered Institute of Arbitrators administers post-dispute binding arbitration with respect to a variety of consumer claims involving such

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177. See, e.g., Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Change*, Policy Analysis No. 433 at 1, 5-6, 10, available at <http://www.cato.org/pubs/pcs/pa-433es.html>; David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99-100 (1999) (asserting that arbitration is generally most favorable for all involved except plaintiff's attorneys, who would supposedly prefer to settle cases by investing little time than to adjudicate those cases); Estreicher, *supra* note 61, at 567-68 (attacking plaintiffs' attorneys for being hostile to arbitration).

178. See, e.g., Ware, *supra* note 177, at 5-6; Estreicher, *supra* note 61, at 567-68.

179. Estreicher, *supra* note 61, at 567-68; Ware, *supra* note 176, at 8-9.

issues as travel and mortgage lending.<sup>180</sup> Second, to the extent that companies would refuse to engage in binding arbitration voluntarily on a post-dispute basis, perhaps it is they and not consumers or employees who should be compelled to arbitrate. As the European Commission has recognized, it is appropriate to regulate companies through codes of conduct. These codes of conduct may be used to require the company to offer a reasonable form of dispute resolution.<sup>181</sup> That is, to the extent that economic or other logistical issues are preventing consumers or employees from presenting their claims against companies, it could be appropriate to encourage or even require companies to offer the option of binding arbitration to those consumers or employees.<sup>182</sup> Such arbitration that was mandatory for the company but not the consumer would go a long way toward presenting consumers and employees with the fair, efficient justice we all claim to value. It would also prevent companies from using their own potential unwillingness to arbitrate small claims as an excuse for requiring consumers to arbitrate rather than litigate all claims.

The fact that the United States approach to mandatory arbitration in the consumer and employment areas is unique is not sufficient on its own to justify elimination of the practice. Indeed, as Professor Ware has observed, if this criteria were employed the United States might need to eliminate such practices as the civil jury trial, punitive damages, and class actions. Each is rarely employed by other countries. However, several words of caution are in order. First, the fact that a country's position is unique should encourage a country to rethink the practice, but not necessarily abandon it. To the extent that we are convinced that the civil jury trial, punitive damages, and class actions serve valid purposes we should retain them; otherwise, we should not. Second, decisions about our system of justice should be made by our legislature, and not by individual companies. Just as companies should not be permitted to exempt themselves from jury trials, punitive damages, or class actions just because they find them displeasing, so too should we think long and hard about allowing companies to exempt themselves from judicial procedures. Third, we should consider what kind of dispute resolution is desirable within the broader context of how laws are enforced in the United States. Our relative lack of bureaucratic and regulatory enforce-

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180. *See supra*.

181. Comments by the European Commission, *supra* note 160, at ¶ 12 (“[Codes of Conduct] should also include effective monitoring, sanctions and consumer complaint mechanisms. Most codes of conduct also include subscription to an ADR scheme, so that if a dispute does arise, a simple, cheap and informal channel for resolving matters is available.”).

182. Of course, depending on the way such a law were designed, companies might argue that a mandatory arbitration requirement violated their jury trial right, in some cases.

ment mechanisms may call for a stronger private litigation system than is needed in other countries.

#### CONCLUSION

The United States approach to mandatory binding arbitration in the consumer and employment areas appears to be highly unusual, if not unique. When United States policy makers, courts, and commentators discuss the permissibility of the practice, they should take into account the fact that the United States approach is out on a limb. There are many reasons to question whether companies should be allowed to deprive their consumers and employees of a court remedy that would otherwise be available. As I and many other commentators have argued elsewhere, the practice is highly questionable as a matter of public policy and basic fairness. In examining these arguments, courts, policy makers, and commentators should consider whether the uniqueness of the United States approach reflects a brilliant new discovery akin to the light bulb, or whether it instead represents the unusual ability of United States corporate interests to control public policy in our country.