CONTROL OVER DISPUTE-SYSTEM DESIGN AND MANDATORY COMMERCIAL ARBITRATION

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I

INTRODUCTION

The phrase "mandatory arbitration" has come to refer to binding arbitration imposed by the stronger party on the weaker in an economic relationship through an adhesive contract clause.[1] Scholars have identified emerging patterns in how arbitration is viewed and regulated based on whether the parties are repeat or one-shot players in the arbitration system.[2] As amply documented in this Symposium, critics have identified a series of concerns regarding the fairness of mandatory arbitration systems, including lack of consent, lack of due process, privatization of public law, shifting costs, and others. This Article argues that mandatory arbitration is not itself the problem. The problem is instead that in some instances, one party to the dispute has exclusive control of the design of the dispute-resolution system. Consequently, research on mandatory arbitration should concentrate on who is structuring it, how they structure it, why this is so, and how these choices affect dispute outcomes.

This Article is also available at http://www.law.duke.edu/journals/67LCPBingham.

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I am grateful for the able research assistance of Elizabeth Pitts and Clint Liveoak, both of whom are candidates for the J.D. and M.P.A. degrees at Indiana University. This research was supported by a grant from the William and Flora Hewlett Foundation to the Indiana Conflict Resolution Institute. I have benefited from stimulating discussions of this work at the Quinnipiac/Yale Dispute Resolution Workshop, the University of Miami School of Law, and the University of Missouri-Columbia School of Law. I would like to thank Christopher Honeyman, Professors Leonard Riskin, John Lande, Richard Reuben, and Jean Sternlight, and India Johnson and Florence Peterson of the American Arbitration Association for their thoughtful comments on the manuscript. In addition, Professor Thomas Metzloff's insightful editorial suggestions much improved the final product. Finally, I would like to thank all the organizers of and participants in the Symposium, from whose excellent presentations and insightful analyses I learned much. The opinions expressed here and any errors are my own.

1. *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1249 (2001) (describing mandatory arbitration as "imposed on the consumer with an absence of any meaningful choice"). The term has been criticized as misleading, since no one mandates the purchase of the good or service to which adhesive arbitration attaches. For more discussion on this point, see Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 706.

2. Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 760 (2001) (arguing that there are two types of arbitration that deserve different regulatory treatment: that practiced among repeat players, such as merchants, and that between repeat players and one-shot players, such as consumers).

Dispute systems vary across two separate dimensions of disputant self-determination or control:[3] control over the overall system design, and control within a given case using a specific process provided by the overall system design. Professors Ury, Brett, and Goldberg coined the phrase "dispute system design" to describe an organization's conscious effort to channel disputes into a series of steps or options to manage conflict.[4] Organizational dispute-system designs can take myriad forms, including a single, multi-step procedure culminating in mediation or arbitration, ombudspersons[5] programs giving disputants many different process choices, or simply a single-step, binding arbitration design.[6]

Control over dispute-system design includes making choices regarding which cases are subject to the process, which process or sequential processes are available (mediation, early neutral evaluation, or binding arbitration, for example), which due process rules apply, and other structural aspects of a private justice system. Control at the case level includes the process and outcome, such as whether within a discrete dispute the process results in a voluntary, negotiated settlement agreement or an imposed, binding, third-party decision.

Discussions of self-determination in appropriate or alternative dispute resolution (ADR) typically focus on the disputants' control over the process

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3. For purposes of this discussion, I use the term "control" to discuss the dispute-system design level of analysis. I have previously used the terms "self-determination" and "control" synonymously, recognizing that in other contexts, authors may distinguish between the two. *See* Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002).

4. *See* WILLIAM L. URY, ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 42 (1988).

5. An ombudsperson program is an organizational dispute system design in which one person, generally with direct access to upper management, serves as a contact point for all streams of conflict in the organization and assists employees and consumers with identifying an appropriate process for addressing disputes. *See* CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996).

6. For further discussion of dispute-system designs for managing conflicts among customers, business partners, and suppliers, and other non-employment conflicts, see COSTANTINO & MERCHANT, *supra* note 5.

Dispute-system design is not an activity exclusively undertaken by organizations. In environmental conflict resolution, which is characterized by the participation of many parties representing diverse stakeholders, dispute-system design is essentially the first phase of the process. *See generally* THE CONSENSUS BUILDING HANDBOOK 61-168 (Lawrence Susskind et al. eds., 1999) (discussing issues of who designs and structures a consensus process, the design phase, and the design committee). Similarly, courts and administrative agencies engage in dispute-system design when they adopt alternative dispute resolution programs. For extensive background on dispute-system design efforts in the federal government, see the Interagency Alternative Dispute Resolution Working Group webpage, *at* http://www.adr.gov/ (last updated May 28, 2004). For evaluation reports reflecting the results of dispute-system design efforts in the federal courts, see the webpage of the Federal Judicial Center, *at* http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index (last visited Oct. 23, 2003). For similar reports reflecting dispute-system designs in state courts, see the website of the National Center for State Courts, *at* http://www.ncsconline.org (last visited Oct. 23, 2003).

and outcome in the particular dispute, mostly in the context of mediation.[7] Mediator ethics codes, for example, focus on mediators' obligation not to coerce parties to agree to a particular settlement.[8] Self-determination is not a salient component of arbitrator codes of ethics. Rather, the codes focus on conflicts of interest and due process during the hearing.[9] The process that brings parties to the mediation table or arbitration hearing is often left implicit.

More recently, there has been discussion of the ethical obligations of provider organizations—those public, private, and nonprofit agencies and organizations that provide neutral dispute-resolution services for multiple parties and cases.[10] Proposed codes of ethics impose upon these organizations various duties to ensure the fairness and impartiality of dispute-resolution processes and the quality and competence of neutrals, with a sliding scale of responsibility based on the measure of control exercised by the provider organization.[11] These discussions, however, do not distinguish between self-determination at the case level and its relationship to control over dispute-system design.

ADR processes vary depending on who is designing them, their purpose, and the resulting design. Table 1 is an effort to illustrate variations in control over the outcome at the case level and control over overall dispute-system design.

7. For examples, see DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 1-118 (Phyllis Bernard & Bryant Garth eds., 2002). Current rules on self-determination are summarized in James J. Alfini, *Mediator Ethics*, *in* DISPUTE RESOLUTION ETHICS, *supra*, at 65.

8. Alfini, *supra* note 7, at 73-74.

9. *See The Code of Ethics for Arbitrators in Commercial Disputes*, *in* DISPUTE RESOLUTION ETHICS, *supra* note 7, app. C, at 275; *JAMS Ethics Guidelines for Arbitrators*, *in* DISPUTE RESOLUTION ETHICS, *supra* note 7, app. E, at 307. For a discussion and synthesis of various ethical codes for arbitrators, see Richard Chernick & Kimberly Taylor, *Ethical Issues Specific to Arbitration*, *in* DISPUTE RESOLUTION ETHICS, *supra* note 7, at 179. Chernick and Taylor devote two sections to party control over the design of the arbitration, one identifying due process concerns for adhesive arbitration imposed by one party on the other, and a second discussing assistance to parties with process choices. *Id.* at 199, 202-03. Neither identifies control or self-determination as to dispute-system design as a separate dimension of arbitral ethics.

10. *See, e.g.*, Sharon Press, *Ethics for Provider Organizations*, *in* DISPUTE RESOLUTION ETHICS, *supra* note 7, at 155; *CPR-Georgetown Commission on Ethics and Standards of Practice in ADR*, *in* DISPUTE RESOLUTION ETHICS, *supra* note 7, app. G, at 315.

11. Press, *supra* note 10, at 158-68.

TABLE 1:
SELF-DETERMINATION AT THE CASE LEVEL AND CONTROL IN DISPUTE-SYSTEM DESIGN

		Self-determination in Individual Case	
		Parties Control Outcome	Third Party Controls Outcome
Control over System Design	Both/All Parties	A. Ad hoc mediation; Ad hoc, nonbinding, evaluative processes	D. Ad hoc arbitration; Negotiated, binding processes
	One Party	B. Mandatory or voluntary mediation; Mandatory or voluntary, nonbinding processes	E. Adhesive, binding arbitration
	Third Party	C. Court-annexed mediation or nonbinding processes (mandatory or voluntary); Administrative agency mediation	F. Court or administrative adjudication; Legislated, binding arbitration

Cell A, B, and C each addresses a different distribution of control over dispute-system design in mediation and other nonbinding processes in which the parties retain control over the outcome at the case level. These are arm's length-negotiated mediation, adhesive mediation or advisory evaluative processes structured by one party, and court-connected mediation and nonbinding ADR.

Cells D, E, and F address a different distribution of control over dispute-system designs that include various forms of binding arbitration—an ADR process in which the parties cede control over the outcome to a third party, who issues a binding decision subject to limited judicial review. These three levels include arm's length-negotiated use of binding arbitration, adhesive binding arbitration imposed by a stronger contracting party on a weaker one, and binding arbitration imposed by an authoritative third party, such as a legislative body. Commentators have distinguished between two-party and one-party designs in discussions of how courts and legislatures should respond to changing uses of commercial arbitration.[12]

12. *See, e.g.*, Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171 (2003) (arguing that mutually negotiated, arm's length agreements to expand the scope of judicial review for arbitration should be enforced, but arguing against enforcement of standard-form contracts for consumer goods).

This Article addresses control in dispute-system designs in the context of binding commercial arbitration.[13] It argues that control in dispute-system design has a significant impact on the structure and operation of the resulting system.[14] Part II examines selected uses of commercial arbitration in which both or all parties control the dispute-system design. Part III examines mandatory commercial arbitration when one party controls the dispute-system design. Part IV contrasts uses of commercial arbitration in which a third party designs the system for the benefit of the disputants. These three sections are not an exhaustive catalogue of the varieties of arbitration under each form of dispute-system design; they simply illustrate patterns. The Article concludes with a call for empirical research on the impact of control over dispute-system design on process outcomes. Finally, it argues that the courts can, and should, more effectively monitor and review the fairness of mandatory arbitration systems developed by one party by examining the impact of such systems on the settlement value of claims.

II

COMMERCIAL ARBITRATION WHEN BOTH PARTIES DESIGN THE SYSTEM

There are numerous examples of arbitration systems mutually designed by the parties through arm's length negotiation. The parties may themselves determine on an ad hoc basis how the arbitration should proceed, or they may enter into individual submission agreements to arbitrate a given dispute under the auspices of a particular provider's rules.[15] The parties may voluntarily choose to follow a pre-existing system administered by the American Arbitration Association (AAA),[16] JAMS,[17] the CPR Institute for Dispute

13. The term "commercial arbitration" historically referred to all uses of arbitration outside the labor relations context—that is, in contrast to "labor arbitration." The term "employment arbitration" has evolved to refer to one substantive context in which parties use commercial arbitration—that is, for disputes arising out of the employment relationship. For a more detailed discussion of this history, see JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES (1997). For purposes of this Article, "commercial arbitration" is used to refer to all uses of arbitration except to resolve labor or employment disputes.

14. This argument has been made elsewhere in the context of mediation, *see* Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, and employment arbitration, *see* Bingham, *supra* note 3.

15. It is also possible for a single party to impose arbitration under a third-party provider's ready-made system. This issue is addressed in Part III, *infra*.

16. To view the rules and standards that comprise the AAA's commercial arbitration system designs, see Am. Arbitration Ass'n, *Rules and Procedures*, *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPaid=37504 (last visited Oct. 8, 2003). For an extensive empirical review of the construction industry's use of mediation, commercial arbitration, and other forms of dispute resolution and a description of how this fits in the long-term relational model of contracting in that industry, see Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996).

17. To view JAMS designs for commercial cases, see http://www.jamsadr.com/arbitration_guide-2003.asp (last visited Feb. 17, 2004).

Resolution,[18] or another third-party provider. They may choose nonadministered arbitration by incorporating a provider's rules into their contract.[19]

The parties may feel comfortable using these systems because their organizations, their professional associations, or others representing them as stakeholders participated in the original design processes.[20] They may adopt the design after the dispute arises or as part of a predispute, arm's length contract because they mutually decide it is a superior way to manage conflicts.[21]

Dispute resolution in the construction industry, for example, has evolved into its current form (a near monopoly for the AAA in standard contract clauses) as a function of long-term relationships among contractors, design professionals, and owners.[22] Although it has standard clauses, the construction industry's dispute system has evolved in response to industry members' preferences, ascertained through periodic consultation and survey research.[23] The more recent design innovations in the industry—mediation and partnering, for example—reflect these members' interest in a dispute-resolution system that assists them in maintaining ongoing relationships.[24] The following three examples help to illustrate mutual party control over system design.

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18. For information about the CPR Institute's commercial arbitration system design, see http:// www.cpradr.org (last visited Feb. 17, 2004).

19. *See CPR Rules for Non-Administered Arbitration*, *in* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 379 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

20. *E.g.*, Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 930 (2002) ("There is a very special elite group of judges, retired judges, commercial courts, mediators, and arbitrators who provide tailor-made justice geared specifically to large business disputes—a category that includes the new wave of large class actions. This elite has its own sets of lawyers as well, and this relatively small group dominates the agenda for federal court reform as well as the elite ADR market.").

21. There is evidence that arbitral decisionmaking may be less subject to certain cognitive biases than jury decisionmaking. *See* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105 (Winter/Spring 2004). However, the empirical research on how dispute-system design affects arbitral judgments is limited. *See, e.g.*, Lisa B. Bingham & Debra Mesch, *Decision-Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671 (2000) (finding in an experimental study that the standard of decision and the makeup of the arbitrator panel made a difference in arbitral outcomes).

22. Stipanowich, *supra* note 16, at 69-76.

23. *Id*. at 79.

24. *Id*. at 81. International commercial arbitration is also generally viewed as the product of shared party control over dispute-system design. *See, e.g.*, Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-national Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 193 (2001) ("In international arbitration, the most important constraints on decision makers are *ex ante* creational checks rather than *ex post* external or internal checks. Consider first creational checking mechanisms, which arise from negotiations between the contracting parties superimposed upon a backdrop of arbitration-related national laws and treaties. Under the paramount arbitral principle of party autonomy, the parties have virtually unfettered discretion to choose the structure and rules under which their disputes will be decided. Three of their *ex ante* choices, however, are the most significant for purposes of checking the power of arbitral panels: (1) deciding between ad hoc and institutional arbitration, (2) agreeing upon the place where the arbitration will be conducted, and (3) selecting the composition of the panel.").

A. The CPR Institute

The history of the CPR Institute for Dispute Resolution is instructive. The Institute's predecessor, the Center for Public Resources, was formed by in-house counsel from Fortune 500 companies to adapt ADR rules to the unique context of their disputes with each other.[25] The arbitration rules were developed through a participatory process involving representatives from corporate law departments.[26] By signing the CPR Corporate Policy Statement, these companies all voluntarily agreed to consider using dispute resolution in appropriate cases, and implicitly endorsed the CPR Institute's dispute-system design efforts.[27]

The CPR Institute recently produced a handbook on commercial arbitration for business users.[28] It is the collaborative product of a commission consisting primarily of representatives of Institute members—lawyers from Fortune 500 companies and the law firms that represent them.[29] The authors observe that the most important advantage of binding arbitration for business users is control over the process—"the flexibility to make arbitration what you

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25. The Institute's website provides the following description:

> Founded in 1979 as the Center for Public Resources, CPR's mission is to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes. To fulfill its mission, CPR is engaged in an integrated agenda of research and development, education, advocacy and dispute resolution. It is the leading proponent of *ADR that is managed by the parties and a highly qualified neutral*, or self-administered ADR.

CPR Inst. for Dispute Resolution, *About CPR*, *at* http://www.cpradr.org/ (last modified Oct. 15, 2003) (emphasis added).

26. *See* CPR Inst. for Dispute Resolution, *The CPR OnLine Form Book*, *at* http://www.cpradr.org/formbook/index.html (last visited Jan. 29, 2003) ("The CPR OnLine Form Book is a compilation of model procedures, clauses, forms, pledges, and commitments *that have been developed by CPR and CPR members.*") (emphasis added).

27. *See* CPR Inst. for Dispute Resolution, *ADR Pledges*, *at* http://www.cpradr.org (last visited Oct. 28, 2003). The CPR Corporate Policy Statement provides:

> We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques [that] can often spare businesses the high costs of litigation.
>
> In recognition of the foregoing, we subscribe to the following statements of principle on behalf of company and its domestic subsidiaries:
>
> In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that that dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.

CPR Inst. for Dispute Resolution, *CPR Corporate Policy Statement on Alternatives to Litigation* (1984), *available at* http://www.cpradr.org/formbook/pdfs/4/pledges.pdf (last visited Oct. 28, 2003).

28. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 19.

29. *See* CPR Inst. for Dispute Resolution, *CPR Membership Information*, *at* http://www.cpradr.org/ (last modified Feb. 16, 2003).

want it to be."[30] Clearly, this presumes that business users have the power to define, through negotiation, the dispute-resolution system that culminates in arbitration.[31] This volume is not for the average consumer, upon whom arbitration is imposed without meaningful negotiation.

B. The Diamond Industry

Professor Lisa Bernstein has studied private justice systems in the diamond and cotton industries.[32] These are systems in which the contracting parties have opted out of both the traditional civil justice system and the use of third-party ADR providers. Professor Bernstein describes the New York Diamond Dealers Club (DDC), a 2000-member private organization for site holders, manufacturers, wholesalers, and brokers in the U.S. diamond industry, with elected representatives on its board of directors.[33] She observes that, as of 1992, "the sophisticated traders who dominate the industry [had] developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members."[34]

The DDC operated a private arbitration system that included mandatory, pre-arbitration conciliation; approximately eighty-five percent of the 150 disputes submitted annually settled in conciliation.[35] Professor Bernstein observes that the procedural rules for arbitration were "structured to give the parties control over the dispute resolution process and to create financial incentives to settle."[36] While members were obligated to use the system as a condition of membership in the DDC, the system was sufficiently well designed that nonmembers voluntarily used it to avoid the transaction and reputation costs of the courts.[37]

The system began with a fact-finding by the DDC's Floor Committee, which consisted of club members elected to two-year terms. If the Committee determined there was a material issue of fact, the dispute went to arbitration before the Board of Arbitrators (again consisting of members elected to two-year terms). Proceedings and awards were confidential, and the arbitration fee

30. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 19, at xxv (observing that "business parties enjoy considerable *flexibility and autonomy* in fashioning their own arbitration agreements") (emphasis added).

31. *See*, *e.g.*, *id.* at xxvi-vii (stating that issues raised by labor, employment, and consumer arbitration are outside the scope of the book).

32. *See* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Private Commercial Law*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Opting Out*].

33. Bernstein, *Opting Out*, *supra* note 32, at 119.

34. *Id*. at 115. Beyond this observation, Bernstein does not report on the nature of discussions leading to the DDC's arbitration system. The DDC does not have a website or public means of verifying the status of its current dispute resolution system. Presumably, it has not changed.

35. *Id*. at 124.

36. *Id*.

37. *Id*. at 126.

was small.[38] The arbitrators allocated the fees and expenses of arbitration, but they could also decide to refund the fee. There was a right to appeal to a five-arbitrator board of elected members who had not heard the original case. The filing fee for an appeal was three times the amount of the initial fee, and members deposited funds or security to cover any judgment. Parties also had the right to counsel.[39]

The DCC could refuse to arbitrate claims outside the diamond business (its area of competence), claims involving nonmembers, and claims implicating "complicated statutory rights."[40] Moreover, the DCC would refuse to arbitrate on grounds of *forum non conveniens* if the claim was burdensome or inconvenient to handle in the Club. If the DCC declined to arbitrate, the parties could resort to other remedies.[41] The representative structure of the DDC permitted those affected by its dispute-system design to affect its structure, with the resulting process appearing balanced and fair.

C. The Cotton Industry

In another example of mutually negotiated use of arbitration in a private justice system, the cotton industry has replaced the public legal system with a venerable system of private commercial law. This system is governed by trade rules and arbitration provisions built into contracts for the purchase and sale of cotton between merchants or between merchants and mills. Parallel to the DDC, professional associations within the industry operate through a democratic structure that provides for representation of the members' interests.

There are two main sources of arbitration services: the Board of Appeals created by the American Cotton Shippers Association (ACSA) and the American Textile Manufacturers Institute (ATMI) (primarily for disputes between merchants and mills), and the Memphis Cotton Exchange (MCE) arbitration tribunal (primarily for disputes between merchants).[42] Both tribunals are the result of a quasi-legislative process among the members of the respective professional associations. Members of these associations agree, as a condition of their membership, to submit disputes to arbitration and to build arbitration into their contracts. Membership can bring the advantage of better contract terms.[43] Participation in this system is not mandatory, however; contracting parties need not be members of these associations and remain free to negotiate other terms.

The impact of mutual control over dispute-system design is evident in the procedural rules for these arbitral bodies. For example, the Board of Appeals consists of one arbitrator appointed by the president of each of the two

38. *Id*. at 125.
39. *Id.* at 126.
40. *Id*.
41. *Id*. at 127.
42. Bernstein, *Private Commercial Law*, *supra* note 32, at 1726-27.
43. *Id*. at 1769-70.

collaborating professional associations, the ACSA and ATMI, based on the appointees' industry experience and reputation for fairness and integrity.[44] The Board conducts a paper review of the briefs and documentary evidence, but without knowing the parties' identities, which are redacted from all documents. Professor Bernstein observes that this feature is intended to control arbitrator bias toward a particular individual, although the Board does know which party is merchant or mill.[45] She notes that public circulation of the Board's written opinions, which include the names of the arbitrators, discourages Board members from systematically favoring one industry segment over the other; disputants could observe any pattern and choose arbitration under other industry auspices.[46]

The MCE panel has seven arbitrators, whom the MCE board of directors appoint annually.[47] The panel holds oral hearings and permits cross-examination of witnesses, but does not publish its written opinions. There is a norm of consensus decisionmaking; from 1944 to 1991, only four of ninety-two decisions were not unanimous. Professor Bernstein observes that the seven-member constitution of the panel may also constrain arbitrator bias.[48] Both arbitration bodies permit limited discovery and representation by counsel.

One of the reasons the cotton industry system works is that the parties have also negotiated detailed, standard, bright-line rules for inclusion in their contracts.[49] Professor Bernstein states that this private legal system works "extraordinarily well"; it resolves disputes "expeditiously and inexpensively," and it keeps transaction costs, error costs, legal system costs, and collection costs low.[50] It also yields a body of written decisions that reflect coherent jurisprudence and that are both respected and promptly, voluntarily implemented.

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These examples illustrate the impact that shared control over dispute-system design can have on system process and function. Industry members have control over dispute-system design through the representative democratic organization of the professional associations adopting the system. In the cotton and diamond industries, the resulting systems have a natural, organic mutuality and balance; they are self-regulating. They evenhandedly represent the interests of both disputants because both participated in the system design, either directly or through their representative industry group.

44. *Id*. at 1728.
45. *Id*. at 1744 & n.90.
46. *Id*.
47. *Id*. at 1728.
48. *Id*. at 1744 n.90.
49. *Id*. at 1731-39.
50. *Id*. at 1725.

Designing a system for resolving conflict can be a quasi-legislative process, much like rulemaking. It is accepted wisdom in negotiated rulemaking and consensus processes that interested parties or their representatives should be at the table; unrepresented parties' interests may not be reflected in the product of the negotiated rulemaking process, and their absence may undermine its credibility.[51] Similarly, a commercial arbitration system is more representative of parties' interests if these parties have some control over its design.

III

COMMERCIAL ARBITRATION WHEN ONE PARTY DESIGNS THE SYSTEM

Most of the commentary on mandatory arbitration focuses on circumstances in which one party has complete control over dispute-system design and exercises it to impose binding arbitration on the other party—that is, Cell E of Table 1.[52] These uses of mandatory arbitration cover, among others, disputes between debtors and creditors, patients and health care providers, and consumers and service providers. The criticisms of these uses of arbitration essentially boil down to discomfort with one party's control over dispute-system design and with the ways this manifests itself in the resulting arbitration process. This Part examines how institutional players can use control over dispute-system design to alter the settlement value of claims brought against them. It then turns to the efforts of third-party dispute-resolution service

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51. *See* Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra* note 6, at 90-93; David Laws, *Representation of Stakeholding Interests*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra* note 6, at 263-69; Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra* note 6, at 108-10; Lawrence Susskind, *A Short Guide to Consensus-Building*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra* note 6, at 38.

52. *See, e.g.*, Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 IOWA J. CORP. L. 331 (1996); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Harry T. Edwards, *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112 (1993); Colin P. Johnson, *Has Arbitration Become a Wolf in Sheep's Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 HAMLINE L. REV. 511 (2000); John P. Roberts, *Mandatory Arbitration by Financial Institutions*, 50 CONSUMER FIN. L.Q. REP. 365 (1996); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Christine Stegehuis, *Mandatory Arbitration and the Medical Malpractice Plaintiff*, 27-May COLO. LAW. 77 (1998); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 FORDHAM URB. L.J. 311 (1999). For a review of the case law treating consent to arbitration clauses, see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (Winter/Spring 2004). For a cogent criticism of current Supreme Court jurisprudence on arbitration, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; *see also* 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.

providers to exercise some constraint on institutions with the economic power to impose mandatory arbitration.

A. One-Party Control and the Settlement Range

Large corporations and other institutional players pay legal professionals and consultants good money to help them manage conflict, liability, and risk.[53] Typically, the closest an individual comes to risk management is buying insurance, making a will, and getting regular health care. It is unsurprising, then, that institutional players attempt to structure their relationships with individuals to minimize exposure to loss. Some research suggests that these players overreact to perceived risk,[54] especially the risk of litigation and large damage awards.[55] Repeat players operate within a legal framework that affords opportunities to structure relationships and to set limits on liability; for example, they can impose disclaimers, adopt liquidated damages clauses, and revise adhesive contracts for the next similar transaction based on experience.[56] The resulting structure may affect the scope of their risk from a particular kind of claim or dispute.[57]

In his classic article on the quality of settlement, Professor Marc Galanter argues that all dispute resolution occurs in the shadow of the civil justice system.[58] In a series of simple examples showing the reservation price[59] and

53. *See, e.g.*, COSTANTINO & MERCHANT, *supra* note 5, at 69-94 (discussing consulting relationships in dispute-system design); Garth, *supra* note 20, at 930 (arguing that an elite group of professionals representing the interests of large businesses helps to negotiate rules that favor their clients by structuring ADR to hold down conflict and expense).

54. *See*, *e.g.*, Lauren B. Edelman et al., *Professional Construction of the Legal Environment: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992).

55. *See* JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY (1992); JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION (1988); Linda J. Demaine & Deborah R. Hensler, *"Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (Winter/Spring 2004) (providing empirical evidence of the prevalence of mandatory arbitration and suggesting that there is little strategic reason for a business to prefer a less costly or more expeditious forum, and that the more likely motivation is risk management).

56. The strategic advantages that repeat players enjoy in the civil justice system compared to one-shotters such as consumers have been outlined with clarity and eloquence by Marc Galanter. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). For discussions applying Galanter's framework to dispute resolution, see, for example, Alderman, *supra* note 1, at 1253-58; 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 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

57. For a thoughtful discussion of how institutional players are using arbitration to manage their risk from personal injury claims, see Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (Winter/Spring 2004).

58. Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 55.

59. The reservation price is the lowest or least advantageous agreement a party will actually accept; anything worse and that party will implement her best alternative to a negotiated agreement and walk away from the negotiation. It is also sometimes called the "bottom line." DAVID A. LAX &

transaction costs for each of two litigating parties, he demonstrates that the settlement range[60] is often produced by a combination of differences in parties' estimates of the outcome in court and the known costs of pursuing litigation.[61] Sometimes, the settlement range is entirely a function of transaction costs.[62] In the civil justice system, lawyers estimate outcomes based on substantive legal knowledge and an understanding of how the relevant court system functions in a particular jurisdiction, including the reasonably foreseeable costs of litigation.[63]

Control over dispute-system design allows a disputant to change the formula. With mandatory arbitration designed by one party, the other party finds herself bargaining in the shadow of something different from the civil justice system. This can alter the settlement range of cases to such an extent that, in some circumstances, it may no longer be cost-effective for the non-controlling party to make a claim at all.

Most claims or disputes have a range of values within which the parties can reach a negotiated settlement. This "bargaining set," or "settlement range," is defined by each party's reservation price—defined as the walk-away value, or the maximum the party is willing to pay or accept. Anything worse will cause the party to break off negotiation. The reservation price is in turn partly defined by each party's alternatives to negotiation. All settlement occurs in the shadow of the alternative, referred to as the "best alternative to a negotiated agreement," or the "BATNA."[64] Often, this alternative is litigation.[65] Mandatory arbitration changes the BATNA from litigation to arbitration. Negotiation scholars observe that changing the alternatives to a negotiated

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JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 51 (1986).

60. The settlement range is also sometimes referred to as the bargaining set. It is defined as the difference between the parties' reservation prices. *Id.* at 119-21. If, for example, the seller has a reservation price of $10 (the least she will accept) and the buyer has a reservation price of $12 (the most he will pay), there is a settlement range of between $10 and $12. If the seller instead has a reservation price of $12 and the buyer $10, there is no settlement range at all.

61. Galanter, *supra* note 58, at 69-71.

62. If *A* expects to recover $100 and *B* to pay $100 in damages, both expect to pay $20 in transaction costs such as attorneys' fees, and *A* expects to lose $5 while *B* gains $5 in interest on the use of the money during the delay, these transaction costs produce a settlement range of between $75 as the lowest *A* will accept, and $115, as the most *B* will pay. If *A* and *B* have different estimates of what will happen in court, the transaction costs make the difference. If *A* thinks she will recover $110, but *B* expects to pay only $90, and there are no transaction costs, there is no settlement range. If you factor in the $20 in attorneys' fees or costs and $5 for the time-value of money, you now have a settlement range between $85, as the least *A* will accept, and $105, as the most *B* will pay. *Id.*

63. For a detailed discussion of the settlement range, see LAX & SEBENIUS, *supra* note 59, at 46-62.

64. This alternative is what each party can do unilaterally, without the agreement of the other, to meet its own needs or interests. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97-106 (2d ed. 1991); *see also* LAX & SEBENIUS, *supra* note 59.

65. Most cases result in "litigaotiation," or settlement in the shadow of litigation, with full adjudication occurring with relative infrequency. For a review of the decline in contract litigation and a survey of available empirical findings on its extent and causes, including referral to ADR, see Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 596.

agreement can have a powerful effect on the bargaining set.[66] In fact, one effective negotiation strategy is to worsen the other side's alternatives and improve one's own.[67]

The courts have opened the doors to institutional experimentation in designing dispute systems to minimize the settlement value of claims through their support for the general enforceability of adhesive arbitration clauses in standard-form contracts under the Federal Arbitration Act.[68] Through these clauses, one party can select all the dispute-system design elements that are legally permissible, or at least have not yet been held unconscionable or otherwise unenforceable. These adhesive clauses can stipulate: time limits for filing; whether there will be nonadministered arbitration or a third-party administrator; whether a panel or a single arbitrator will be used; the method of selection of the arbitrator(s); the location of the arbitration hearing; the apportionment of filing fees, arbitrator fees, and disputants' attorneys' fees; the extent of discovery available; the substantive standard to be applied; the scope of the arbitration; the extent of confidentiality of the process; the extent of confidentiality of the award or outcome; the remedies available; the availability of class action relief; the availability of written, reasoned decisions; the standard of review for errors of law; and whether new legal precedent can be established, to name just a few.[69]

The examples described below illustrate how one party with exclusive control over dispute-system design can use mandatory arbitration to alter the settlement range for certain kinds of claims through establishing and allocating arbitration fees and costs, through precluding class actions, through specifying the location of the arbitration, and through allocating responsibility for attorneys' fees. In general, through a variety of different design elements, institutions can both impose new costs on the claimant and reduce likely recovery. This shifts the settlement range to favor the institution by lowering the payment necessary to satisfy the claim, sometimes down to zero.

1. The Fees and Costs of Arbitration

Transaction costs in arbitration have several components. There are filing fees to initiate a claim, forum fees to pay for hearing space and case administration, and fees to pay the arbitrator or arbitrators. These are all separate from the transaction costs for obtaining legal counsel or witnesses that are present in both private and public justice systems. One recent study examined how these costs compare to court costs by researching filing fees,

66. *See, e.g.*, LAX & SEBENIUS, *supra* note 59, at 55-60.

67. *Id.* at 55.

68. *See, e.g.*, Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped With Goods*, 96 NW. U. L. REV. 403 (2001) (reviewing the state of the law with respect to standard-form contracts shipped with computers after telephone or internet orders). A critique of the current case law is outside the scope of this Article.

69. *Id.* at 430-35.

administrative case-management fees, hearing or arbitrator fees, room fees, subpoena fees, discovery-request fees, motion fees, continuance fees, post-hearing memo fees, and written findings charges at the AAA, the National Arbitration Forum (NAF), JAMS, and the Cook County, Illinois, Circuit Court.[70] For a $2,500 claim, it found that total forum costs in court consisted only of the $81 filing fee. The AAA total was $125, the NAF's $120, and JAMS's a minimum of $700 (a $250 case-management fee and minimum $450 per diem for the arbitrator).[71] For a $20,000 claim, the court costs consisted of a $221 filing fee. The AAA total was $375, the NAF total $4,625, and the JAMS total a minimum of $3,750.[72] The third-party providers have disputed some of these figures, which do not appear to take into account an arbitrator's discretion to allocate filing fees as part of a remedy. One provider has recently changed its policy on costs for employment arbitration to reduce the cost to claimants.[73] Moreover, it is of course possible for a party with control over design to provide a plan that provides for reimbursement.[74]

However, these organizations and arbitrators are not bound to shift the costs to the institutional disputant. Let us assume for the sake of argument that a hypothetical third-party arbitration provider, Arbitration Unlimited, did in fact charge what JAMS was reported to charge.[75] These comparisons suggest that through mandating arbitration with Arbitration Unlimited in lieu of court, a party could design a dispute system to shift the settlement value of a $2,500 claim by at least $619 in that party's favor. A similar design choice would shift the settlement value of a $20,000 claim by at least $3,529.

Moreover, this effect is in addition to the fact that financial hardship might preclude the filing of a claim altogether. Some litigants have argued that the initial filing fee is so high in relation to their income that it precludes them from pursuing a claim at all.[76] Others have argued that the amount of the fee is substantively unconscionable[77] because it is excessive in relation to the value of

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70. *See* PUBLIC CITIZEN'S CONGRESS WATCH, THE COSTS OF ARBITRATION (2002).

71. *Id*. at 42.

72. *Id*.

73. *See* AM. ARBITRATION ASS'N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (revised Nov. 1, 2002), *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\employment\AAA121current.html.

74. Some systems provide for reimbursement of filing fees, or for the arbitrator to award them as part of costs to a prevailing claimant. *See* Demaine & Hensler, *supra* note 55, at 70-71. And arbitrators have broad discretion to tailor a remedy. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 269-81.

75. Apart from rules prohibiting price-fixing among them, there is no state or federal regulation of how dispute-resolution service providers set their fees and charges.

76. *See* Melissa Briggs Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 606 n.68 (2002) (describing *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33 (Ala. 1998), in which a minister who earned $19,000 per year claimed he could not afford to pay the $1,500 minimum required to initiate arbitration).

77. *See* Mahdi, *supra* note 68, at 430 (discussing substantive and procedural unconscionability in consumer contracts, and describing contracts of adhesion involving a gross imbalance in bargaining power and a lack of knowledge of the contract terms as examples of procedural unconscionability).

the claim, as was the case in *Brower v. Gateway 2000, Inc.*,[78] in which the nonrefundable portion of the filing fee ($2,000) exceeded the value of the average computer.[79] In addition many consumers who would be eligible for the even less expensive forum of small claims court, may instead be forced to arbitrate.[80] The Supreme Court recently addressed the issue of allegedly prohibitive arbitration costs.[81] It imposed on the claimant the burden of proving that costs are *actually* excessive, not simply estimated to be so.[82] Commentators have begun to call for a different approach, specifically, a court-created rule that would shift the fees and costs of arbitration away from the consumer and back to the business or entity designing the mandatory arbitration program.[83]

2. Class Action Preclusion

The class action provides a means for many claimants with small amounts of money at stake to pursue precedent-setting litigation by aggregating their claims. Adhesive arbitration, however, may be used to preclude class actions.[84] For example, major credit card companies are using arbitration clauses that expressly disallow consumers from joining or consolidating with other card members or acting as a representative or member of a class or in the capacity of a private attorney general.[85] Professor Alderman has noted that a business using mandatory arbitration can prevent class action litigants from establishing precedent or effectively using discovery.[86]

78. 676 N.Y.S.2d 569 (App. Div. 1998) (holding an arbitration clause in a standard-form sales contract substantively unconscionable when it designated the International Chamber of Commerce in Paris, France, as third-party administrator, and when that forum had a $4,000 filing fee, $2,000 of which was nonrefundable, even if the claimant prevailed).

79. In contrast to these instances reflecting one party's decision to impose a relatively high filing fee on the other party, in the diamond industry, the fee is low, and it is within the arbitrators' discretion to refund the fee. Bernstein, *Opting Out*, *supra* note 32, at 125.

80. Alderman, *supra* note 1, at 1252.

81. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (holding that an arbitration agreement's silence on costs and fees is insufficient to render it unenforceable as precluding the litigant from effectively vindicating her federal statutory rights). For a detailed analysis of *Randolph* and its impact on consumers, see Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (Winter/Spring 2004); *see also* Alderman, *supra* note 1, at 1252 (stating that excessive costs may be sufficient to invalidate a predispute mandatory arbitration agreement if they effectively preclude the claimant from vindicating her federal statutory rights).

82. *See* 531 U.S. at 92.

83. *See, e.g.*, Julia A. Scarpino, Comment, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 AM. U. J. GENDER SOC. POL'Y & L. 679 (2002) (arguing in favor of fee- and cost-shifting analogous to the rule for employment arbitration created in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997)).

84. Alderman, *supra* note 1, at 1254, 1258-62; Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson*; *Or*, *Where Have You Gone Learned Hand*, 10 B.U. PUB. INT'L L.J. 366, 366-67 (2001); Sternlight, *supra* note 52.

85. Johanna Harrington, *To Litigate or Arbitrate? No Matter—The Credit Card Industry is Deciding for You*, 2001 J. DISP. RESOL. 101, 102 (citing the Discover Platinum Cardmember Agreement).

86. *See* Alderman, *supra* note 1, at 1256.

The law regarding class action preclusion is still under development.[87] But during this period of uncertainty, one party can use class action preclusion to ensure that the other has high individual transaction costs. Rather than claimants being able to combine to pursue a common claim with common counsel, each must seek separate counsel, pay separate filing fees, and lose all of the benefits of economies of scale. Again, this dispute-system design choice can alter the settlement range of an underlying claim and make pursuit of a small consumer claim economically irrational.[88]

3. Location of Forum

An arbitration hearing must be held somewhere, at least until video teleconferencing and webcasting become more prevalent media for conducting dispute resolution.[89] Many arbitration clauses designate a particular city as the site of hearings.[90] Professor Drahozal's study of franchise agreements found that franchisors typically designate a location close to their home.[91] Analysis of the predatory mortgage-lending industry finds that predatory loans frequently contain mandatory arbitration clauses that force the borrower to arbitrate in a forum favorable to the lender, often a far-off location for the borrower.[92] In contrast, the standard AAA Commercial Arbitration Rules permit a party to object to the other's request for a specific locale, and thus give the ultimate decision on location to the AAA.[93]

The ability to designate place is the ability to impose the costs of travel and lodging on the other party. It may also be the ability to impose on the other party the cost of retaining local representation. These costs may be minimal, or

87. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court held that an arbitration clause did not bar the EEOC from pursuing vindication of statutory employment rights in the form of a class action. The Court has not yet addressed the issue in the context of consumer claims. For a detailed analysis of how this issue may fare in the Supreme Court, see Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (Winter/Spring 2004).

88. *Id.* at 85-88.

89. For a review of current forms of on-line dispute resolution, see Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55 (2001) (reflecting on the limited use of ODR at present and why this is the case).

90. In *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998), for example, the arbitration clause specified that hearings would take place in Chicago, Illinois. *Id.* at 570.

91. *See* Drahozal, *supra* note 1, at 733 (arguing that these are not dissimilar from standard forum-selection clauses and that there may be compensating economic benefits for consumers and others).

92. Anne-Marie Motto, Comment, *Skirting the Law: How Predatory Mortgage Lenders are Destroying the American Dream*, 18 GA. ST. U. L. REV. 859, 866 (2002) (observing that this is a particular hardship on the elderly, but citing cases in which several courts have rejected motions to compel arbitration when lenders rushed elderly borrowers through the signing of a stack of documents). These clauses provide interesting contrasts with the express exclusion from arbitration of cases involving inconvenient forums in the diamond industry. *See* Bernstein, *Opting Out*, *supra* note 32, at 126.

93. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-1 (amended July 1, 2003), *available at* http:www.adr.org/index2.1.jsp?JSPssid=15747 &JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm#R10.

they may be significant, depending on the facts of the particular dispute and on whether one nationwide location is specified or multiple locations are available to serve different regions. In most cases, presumably, these costs will exceed what someone would incur to travel to the nearest small claims court.

Of course, parties have long engaged in forum shopping, a related but distinct activity that allows one party to impose travel costs on the other to some degree.[94] However, the substantial distinction is that in mandatory arbitration, one party is designing the forum, not simply picking one that a governmental-third party has designed. Once one party selects a judicial forum, a third party controls the remaining aspects of dispute-system design; moreover, that third party is operating in a constitutional framework with public accountability.

The problem with one-party control over dispute-system design is that the various costs that may be shifted to the non-controlling party are not simply cumulative. The decision to pursue a claim is a binary decision: yes or no. The various transaction costs will combine in such a way that, at a given point, the claimant will abandon the claim.

In mandatory arbitration, an increase in transaction costs related to designation of forum locale interacts with other shifts in transaction costs. This directly affects the settlement range or bargaining set, predictably lowering the settlement value of claims. And these costs can ultimately combine to force the party bearing them over the threshold between pursuing and not pursuing a claim, as when the costs of arbitration exceed the value of a claim or a claimant's personal resources.

4. Apportionment of Attorneys' Fees

The American Rule on attorneys' fees provides that each party pays the cost of its own legal counsel in the absence of a statute specifically authorizing fee shifting.[95] Through contract, however, parties can shift the burden of attorneys' fees to the losing party. Attorneys' fees are widely variable and hard to estimate at the outset of a claim. The claimant has no control over whether the other party pays the claimant's counsel on a flat fee or hourly basis, for example, or, under either method, the actual rate of pay.

The uncertainty associated with attorneys' fees makes it hard to estimate their impact on the settlement range. It is possible that the potential recovery of attorneys' fees for the prevailing claimant may make it easier to institute a claim in a case of clear liability;[96] by altering the settlement range in the claimant's favor, this may also encourage the institution to settle before arbitration. But the uncertainty over attorney's fees makes free-shifting

94. Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 286, 290 (1999); Note, *Forum Shopping Revisited*, 103 HARV. L. REV. 1677 (1990). Forum shopping describes one or more party's efforts to take advantage of one particular dispute-system design created by a third party—for example, the civil justice system as it functions in a particular jurisdiction, including its body of precedent.

95. *See* Drahozal, *supra* note 1, at 759-60.

96. *Id.*

arbitration clauses a powerful deterrent to bringing a claim when there is any ambiguity regarding liability. Particularly in cases involving new theories of liability, the risk of having to pay the other party's attorneys' fees may dissuade a prospective claimant from pursuing a claim. Thus, the ability of a party controlling dispute-system design to control the allocation of attorneys' fees could have the effect of causing some greater percentage of claimants to abandon their claims than would in the absence of that element.

* * *

The Supreme Court has held that arbitration is merely a change in forum; it does not affect substantive rights.[97] The question, however, is this: Does a change in forum that directly affects the settlement range of a claim represent a change in substance? One can argue that the settlement value of a claim is always fluid and subjective because it is subject to influences apart from the merits of the claim, such as the charisma of a particular litigant or witness, the political context in which litigation occurs, or the timing of the case in relation to other similar litigation that may have set a pattern for jury awards. On the other hand, most litigation is about money, a pool of potential recovery that transforms a person's subjective sense of aggrievement[98] into the *res*, that thing in which legal counsel may acquire an interest. Even if we cannot know in absolute terms the cash value of hypothetical case *X*, we can identify whether and how a one-party dispute-system design shifts the settlement value of case *X*. If that change is substantial, indeed substantial enough to make pursuing a claim at all impossible, is this not a change in the substantive rights of the parties?

The ultimate question is one of public policy. If we assume that the civil justice system reflects state and national policies on what is fair and appropriate access to justice, we may wish to find ways to curb one-party control over dispute-system design in private justice systems. Conversely, we may believe that permitting one party to exercise this control is either fair and appropriate or economically efficient.[99]

B. Third-Party Providers and One-Party Control

In some of the most egregious cases of slanted, one-party arbitration designs, courts have noted the absence of an independent, third-party dispute-

97. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("In these cases we recognized that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

98. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . ., 15 LAW & SOC'Y REV. 631 (1980-81).

99. *See* Drahozal, *supra* note 1, at 764-65.

resolution service provider to administer the program.[100] Third-party ADR administrators, in particular the AAA, have made efforts to develop protocols to regulate the arbitration process in employment and consumer cases.[101] In fact, third-party providers may refuse to endorse whole categories of arbitration. The AAA, for example, no longer administers arbitrations between individuals and health care providers unless there is a post-dispute arbitration agreement; in other words, it will not administer mandatory arbitration through predispute clauses.[102] The AAA's Employment Protocol and Consumer Protocol[103] represent attempts by a third-party provider to temper the true effect of one-party control in the design of arbitration systems, guaranteeing claimants the right to participate in the selection of the arbitrator, the right to counsel, the right to reasonable discovery, the right to a written award, and other procedural safeguards generally described by the term "due process." In both cases, the AAA convened a working group or advisory committee intended to represent the interests of all the parties to arbitration[104]

100. For a concise discussion, see Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP*, 6 J. SMALL & EMERGING BUS. L. 129, 139-45 (2002) (discussing the systems designed by Hooters and Kaiser Permanente).

101. *See, e.g.*, AM. ARBITRATION ASS'N, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995) [hereinafter AAA, EMPLOYMENT PROTOCOL], *available at* http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload\LIVESITE\Rules_Procedures\Protocols\..\..\focusArea\employment\protocol.html; AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE (1998) [hereinafter AAA, CONSUMER PROTOCOL], *available at* http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload\LIVESITE\Rules_Procedures\Protocols\..\..\Resources\EduResources\consumer_protocol.html. Professor John Lande has suggested that third-party efforts to regulate one-party control may warrant separate treatment in analysis of control in dispute-system design.

102. The AAA announced the changes as follows:

> As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate. In order to provide sufficient notice to provide for an orderly transition, this change will become effective on January 1, 2003.
>
> AAA, the world's largest provider of alternative dispute resolution services, has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute.
>
> Distinguishing a patient undergoing health care treatment from other situations involving an individual, AAA has determined that they will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, as long as there are appropriate due process safeguards as defined by the courts.

Press Release, Am. Arbitration Ass'n, AAA Announces Change in Health Care Policy: Cases Involving Patients Must Have Post-Dispute Agreement to Arbitrate (June 13, 2002), *available at* http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/focusArea/Healthcare/HEALTH%20CARE%20POLICY%20STATEMENT.htm.

103. *See* AAA, EMPLOYMENT PROTOCOL, *supra* note 101; AAA, CONSUMER PROTOCOL, *supra* note 101.

104. Members of the drafting committee for the Consumer Protocol included representatives of Consumers Union, Consumer Action, the American Council on Consumer Interests, Freddie Mac, Fannie Mae, the AAA, the Virginia and New York state consumer fraud departments, the AARP, and the Federal Trade Commission Bureau of Consumer Protection, as well as faculty from various law schools. *See* AAA, CONSUMER PROTOCOL, *supra* note 101. The participants signed in their personal

with the goal of developing the essential criteria for a fundamentally fair arbitration system.[105] In its statement of ethics as a provider organization, the AAA refuses to administer cases if the arbitration clause substantially and materially deviates from the Consumer Protocol.[106]

One might argue that when a third-party provider enforces an otherwise voluntary protocol, it changes a one-party design into a third-party design.[107] The problem with this argument is that it is up to the party controlling dispute-system design to choose whether it will designate the third-party provider as its dispute-system administrator. Control over dispute-system design still rests in the hands of the company or organization making this choice.[108] One commentator has observed that this choice is not simply forum shopping because the incomes of the provider and its neutrals are affected by one party's view of the extent to which that provider's services tilt in its direction.[109]

This section illustrates how the AAA's Consumer Protocol compensates for one-party control and evaluates the effectiveness of this arrangement as a

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capacities, but they all represented the interests of those served by their organizations. Professor Thomas Metzloff has suggested that it may be possible for those acting in a fiduciary capacity to design a balanced or fundamentally fair system for others. It is interesting that the Protocols were negotiated, not by those acting in a fiduciary relationship, but rather by representatives of political institutions and special-interest lobbying groups. In at least one case in which a fiduciary relationship arguably existed, the resulting ADR system design failed to pass muster for fundamental fairness. *See* Engalla v. Permanente Med. Group, Inc, 938 P.2d 903 (Cal. 1997) (refusing to enforce an arbitration agreement in a medical malpractice claim due to the HMO's unreasonable delay in selecting an arbitrator after fraudulent representations were made in the arbitration plan). Significantly, the AAA has also refused to administer arbitration between individual patients and health care providers. *See supra* note 102.

105. *See* AAA, CONSUMER PROTOCOL, *supra* note 101, Principle 1 ("All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.").

106. AM. ARBITRATION ASS'N, STATEMENT OF ETHICAL PRINCIPLES FOR THE AMERICAN ARBITRATION ASSOCIATION, *at* http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/Rules_Procedures/Ethics_Standards/principals.html (last visited Jan. 31, 2003) ("For consumer cases with claims under $75,000, the AAA reviews the contract clause to determine if it substantially and materially deviates from the Consumer Due Process Protocol. The AAA reserves the right to refuse to administer arbitrations with consumer clauses that violate the Consumer Due Process Protocol.").

107. Professor India Johnson, Remarks at the Roscoe Pound Institute's Second Annual Lawyers' Conference, *The Coming Crisis in Mandatory Arbitration* (Oct. 4, 2002).

108. An analogous situation exists in certain third-party designs approving a limited set of third-party ADR administrators if the third party gives one of the disputants the power to designate which provider it will use. Professor Michael Froomkin has observed that in the context of ICANN's process, complainants can unilaterally designate a provider, which leads providers to market their services to the complainants with friendly rules like those of the National Arbitration Forum (NAF). *See* A. Michael Froomkin, *ICANN's Uniform Dispute Resolution Policy'—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 676 (2002). *See generally infra* Part IV.B. NAF allows parties to file an extra brief five days after the ordinary close of pleadings for $150; since the ordinary close of pleadings is marked by the registrant's response, and there is only one such five-day period, the result is to allow complainants to sandbag registrants with supplemental pleadings of unlimited length. *Id.* Some have described the NAF as biased toward complainants. *Id.*

109. *See id.* Interestingly, Professor Froomkin suggests that the best solution is to require parties to mutually agree upon a provider, converting a one-party choice into a two-party choice. *Id.* at 691.

means of minimizing the impact of one-party systems on the settlement value of the claim.[110]

The Consumer Protocol takes the position that predispute arbitration agreements ought not to preclude consumers from seeking relief in small claims court "for disputes or claims within the scope of [such a court's] jurisdiction."[111] The reporter's comments indicate that the committee determined that small claims court is often the least expensive, most expeditious, most convenient, and most appropriate forum for resolving consumer claims.[112] In other words, the Protocol takes a position against mandatory arbitration for claims within small claims court jurisdiction. This, in turn, essentially neutralizes any impact that arbitration might have on the settlement value of a small claim. If the consumer can still resort to small claims court at his discretion, then settlement will occur in the shadow of the civil justice system, not of arbitration.

For claims outside the jurisdiction of small claims courts, the Protocol identifies key principles for structuring the arbitration process. It provides that the cost of a consumer ADR program should be reasonable, considering the circumstances of the dispute, the size and nature of the claim, the nature of the goods and services provided, and the consumer's ability to pay.[113] The committee's rationale for this rule was comparative; the civil justice system is publicly subsidized and therefore low in cost, so a private system displacing the public system should be reasonably priced as well.[114] In addition, court-annexed ADR programs are low in cost and usually free to the consumer.[115] The committee did not explicitly require the institutional party to pay all costs of arbitration or to subsidize the consumer's legal fees; rather, it left the principle general in application, and the reporter's comments observe that it may be possible to provide arbitration at reasonable cost through the use of telephone, internet, electronic, or written submissions.[116] Although the Protocol does not expressly define the term "reasonable," one possible interpretation is that an arbitration program must have minimal impact on the settlement value of the claim.

The Protocol and the reasonable-cost standard do not have the force of law. Whether the Protocol is at all effective depends on whether the parties with

110. This discussion will focus on the Consumer Due Process Protocol because I have recently reported elsewhere on an empirical analysis of the effects of the Employment Protocol. *See* Bingham, *supra* note 3, at 895-96 (finding that employer success rates declined in mandatory arbitration after enforcement of the Employment Protocol, and arguing that the Protocol made a difference by compensating for employer control over dispute-system design). Principles 2, 3, and 4 of the Consumer Protocol emphasize the need for joint selection of competent, qualified, impartial neutrals. These have no obvious, measurable impact on the settlement range, so they are also omitted from this discussion.

111. AAA, CONSUMER PROTOCOL, *supra* note 101, Principle 5.

112. *Id.* at 5. Professor Thomas Stipanowich, a highly regarded arbitration scholar who now serves as President of the CPR Institute, was the reporter for the committee.

113. *Id.* Principle 6.

114. *Id.* Principle 6, Reporter's Comments.

115. *Id.*

116. *Id.*

design control decide to implement it, though it is true that a party with design control might choose to implement an even more balanced system.

Protocols can make a difference in the outcomes of an arbitration system.[117] The significant policy question is how many institutions with design control are making the choice to follow them, and how many are evading the protections afforded by third-party protocols through the simple expedient of setting up their own panels of neutrals or contracting with small, local providers. What is apparent is that justice systems designed by one party will often look very different from those designed mutually by the parties or those designed by third parties.

IV

COMMERCIAL ARBITRATION WHEN A THIRD PARTY DESIGNS THE SYSTEM

Under some circumstances, a third party such as a legislature, court, or administrative agency designs a dispute-resolution system for the parties.[118] The resulting system may be a form of mandatory arbitration, but it may not suffer any of the deficiencies frequently cited by the critics of mandatory arbitration. The distinction between mandatory arbitration designed by one party and that designed by a third party is this: Systems designed by one of the disputants are often perceived as favoring that disputant. Two examples, one drawn from amateur sports[119] and the other from recent developments in on-line arbitration,[120] illustrate this point.

A. Amateur Sports

The complex world of amateur sports uses arbitration at the national and international levels to resolve conflicts regarding drug use, eligibility to compete, and the interpretation and application of other rules adopted by national sports organizations (NSOs), international sports federations (IFs), national Olympic committees (NOCs), and the International Olympic Committee (IOC). Because there is no single sovereign authority that can dictate a comprehensive dispute-system design, a variety of approaches have been developed. For example, an NSO may develop its own dispute-resolution

117. *See* Bingham, *supra* note 3, at 895-96.

118. For more discussion and examples, see Bingham, *supra* note 3, at 902-07. One example is the use of arbitration under no-fault automobile insurance law in New York State. There were 101 no-fault arbitrators and 7,100 case dispositions during the year ending July 2002 in a system administered by the AAA. *See* William Considine, *Developments in No-Fault Arbitration in 2002*, *at* http://www.adr.org (last visited Apr. 2, 2003).

119. I include amateur sports cases as examples here because I am using the broadest definition of "commercial arbitration," including every use of arbitration that is neither labor nor employment. Moreover, Congress has mandated that these cases be resolved in accordance with the rules of the AAA, and they were originally treated under the AAA's commercial rules. *See* Lisa B. Bingham, *Arbitration of Disputes for the Olympic Games: A Procedure that Works*, 47 ARB. J. 33 (1992).

120. My thanks to Professor Richard Reuben for suggesting this example.

process.[121] An NOC may adopt a dispute-system design or have one imposed on it by its government, as has been done to the U.S. Olympic Committee (USOC) through the Amateur Sports Act,[122] which requires arbitration under the rules of the AAA.[123] The finality of these processes comes into question when a dispute involves international competition.[124] As a result, the IOC, supported by stakeholders in international amateur sports, created the Court of Arbitration for Sport (CAS), an international body capable of applying the rules of the various national and international sports organizations.[125]

All of these processes involve mandatory arbitration in that athletes must agree to the applicable dispute-system design as a condition of participating in the events supervised by the relevant entity (an NSO, an NOC, or the IOC).[126] The processes' perceived success among commentators varies to some degree with control over dispute-system design. For example, the internal dispute-resolution processes of the Canadian NSOs, which are designed by one party, have come under attack with criticisms very similar to those of mandatory commercial arbitration. Cited problems include the power differential between NSOs and athletes,[127] the failure to provide a process for arbitrator selection,[128] the arbitral body's lack of independence from the NSO,[129] the lack of athlete control over selection of the arbitral panel,[130] the secretive nature of awards,[131] and the fact that the vast majority of specialized counsel familiar with arbitration of sport disputes represent the NSOs, not athletes.[132] One

121. *See*, *e.g.*, Susan Haslip, *A Consideration of the Need for a National Dispute Resolution System for National Sport Organizations in Canada*, 11 MARQ. SPORTS L.J. 245, 248-49 (2001) (observing that as a condition of funding, Canadian NSOs must develop a hearing and appeal procedure for disputes between the NSO and athletes).

122. 36 U.S.C. § 220501-29 (2000).

123. *Id.*; *see also* Konstantinos Yiannopoulos, Note, *Save Amateur Sports: Protection From Liability Under the Amateur Sports Act in* Eleven Line v. North Texas Soccer Ass'n, 8 VILL. SPORTS & ENT. L.J. 387, 392-93 (2002) (reviewing the history of the Amateur Sports Act).

124. Bingham, *supra* note 119, at 33-34.

125. Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379, 381 (2001) (stating that the CAS, established by the IOC in 1983, provides "a single, independent[,] accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations and the world[-]wide rules of the Olympic Movement Anti-Doping Code.").

126. James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 359 (2001) (stating that athletes "selected for the Olympics and other international competition must now sign a waiver form by which they agree to exclusive CAS jurisdiction over all disputes involving doping and other issues of eligibility").

127. Haslip, *supra* note 121, at 252 ("[O]nce an athlete is labeled a troublemaker or uncoachable, his athletic career is usually doomed."). Haslip also cites an independent inquiry called the Dubin Commission for the observation that if dispute resolution is left up to the NSOs, the body that applies sanctions might be the same as, or closely associated with, a party to the dispute. *Id.* at 265.

128. *Id.* at 252.

129. *Id.* at 253 ("[T]he Centre for Sport and Law . . . has been integral in assisting sport organizations with the drafting of their existing policies. This has led to the perception among . . . athletes[] that the Centre for Sport and Law is biased in favor of NSOs.").

130. *Id.* at 254.

131. *Id.*

132. *Id.* at 255 (stating that athletes appearing without counsel are at a significant disadvantage).

commentator has called for a dispute-resolution system for Canadian high-performance sport designed and administered by a third party.[133]

Commentators have similarly criticized the complex system for resolving disputes between athletes and NSOs (also referred to as the national governing bodies for sport, or NGBs) in the United States.[134] One critic observes that U.S. NSOs need more "explicit and uniform rules of eligibility and remedies for relief of legitimate grievances by athletes" because "sheer chaos reigns."[135] Moreover, an NSO will probably not fully represent a contested winner's interests[136] because, as a party to the dispute, it controls system design for the process used to resolve an athlete's eligibility grievances. This is essentially a conflict of interest.

In contrast to these one-party systems, the CAS, initially designed by the IOC (a third party in disputes between an NSO, NOC, or IF and an athlete), has earned a reputation for independence and fairness, although it, too, is a mandatory arbitration program. The CAS has an independent, twenty-member council called the International Council of Arbitration for Sport (ICAS) comprised of representatives from IFs, NOCs, and the IOC.[137] These representatives sign an agreement to perform objectively and independently in their personal capacity, and they may not serve as CAS arbitrators or counsel to a party. This structure has helped foster a perception that the CAS is independent.[138] In addition, CAS arbitrator panels are viewed as being more independent, neutral, and experienced than those set up by sport-specific organizations, such as those IFs that elect not to submit to CAS jurisdiction.[139] Moreover, CAS arbitrations are final and binding on both parties, while in at least one IF process, the federation reserves the right to alter the outcome of the arbitration award.[140] Finally, the CAS is viewed as establishing a consistent body of arbitral authority, a kind of *lex sportiva*, because of its combination of expertise and transparency.[141] Commentators have observed that the CAS can provide effective protection for accused athletes in doping cases and is developing an impressive body of decisions unique in international decisionmaking.[142] It has been suggested that Congress amend the Amateur Sports Act to replace the AAA with the CAS in supervising disputes between athletes and the USOC.[143]

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133. *Id*. at 264-73.
134. *See*, *e.g*., Nafziger, *supra* note 126, at 374.
135. *Id*.
136. *Id*.
137. McLaren, *supra* note 125, at 382-83.
138. *Id*.
139. *Id*. at 384.
140. *Id*. at 389-90.
141. *Id*. at 405.
142. Frank Oschutz, *Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARQ. SPORTS L.J. 675, 701 (2002).
143. Nafziger, *supra* note 126, at 359.

This example from sports arbitration suggests that the problem with mandatory arbitration is not that it is mandatory, but that the design of the systems is too often controlled by one party, who may use that control to shape the process in its favor or at least be perceived as doing so. Systems designed unilaterally by NOCs and IFs are subject to substantial criticism based on many of the same problems observed in mandatory commercial arbitration because one party is designing a system in its own best interests to handle its disputes with the other party. The CAS system, designed and administered by a neutral third party, is free from these problems even though it is a mandatory arbitration system.

B. Arbitration and the Internet: The Case of ICANN

The Internet Corporation for Assigned Names and Numbers (ICANN) is a private corporate entity to which the United States Department of Commerce has delegated the authority to resolve disputes over intellectual property in Internet domain names.[144] ICANN administers the Uniform Domain Name Dispute Resolution Policy (UDRP, or "the Policy"),[145] which establishes "fast and inexpensive on-line procedures that allow trademark owners to recapture domain names held by persons who register and use domain names containing those marks in bad faith."[146] The Policy is the product of a relatively transparent,[147] public, quasi-legislative process in which various stakeholders and interest groups had varying amounts of input and influence. Although first proposed by a consortium of Internet stakeholders,[148] the initial draft resulted from a period of study and experimentation by the World Intellectual Property Organization (WIPO).[149] WIPO conducted a "multi-staged and broad-based,"[150] nine-month, international consultative process. Among other things, WIPO solicited comments from, and invited consultations with, interested parties, convened a "geographically and ideologically balanced panel of experts,"[151] published an interim report, and invited comments on that report.[152] Among

144. Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 SMALL & EMERGING BUS. L. 1 (2002) (arguing that this delegation is constitutional and represents a conscious political judgment to privatize the policymaking and administration associated with the nonnational domain-name system).

145. Helfer & Dinwoodie, *supra* note 24, at 149; *see also* ICANN, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (effective Oct. 24, 1999), *available at* http://www.icann.org/udrp/udrp-policy-24oct99.htm; ICANN, RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (effective Oct. 24, 1999), *available at* http://www.icann.org/udrp/udrp-rules-24oct99.htm.

146. Helfer & Dinwoodie, *supra* note 24, at 152-53.

147. *But see id.* at 168. Helfer and Dinwoodie question whether the process was "truly broad-based and transparent," contrasting it with traditional World Intellectual Property Organization work in rulemaking, which generally goes through additional review by national governments. *Id.* Nevertheless, compared to one-party dispute-system design, this process was certainly accessible to the public.

148. *Id*. at 153.

149. *Id*. at 163-78.

150. *Id*. at 166.

151. *Id*.

152. *Id*. at 166-67.

the stakeholders consulted were national governments, intergovernmental organizations, professional associations, private corporations, and individuals.[153] WIPO used a trilingual website, a listserve, mass mailings, and open regional meetings to keep stakeholders involved in the process.[154]

WIPO submitted the resulting UDRP to ICANN, where there was additional period of public comment and review.[155] Although ICANN's procedures for public participation have been criticized,[156] they vastly exceed the opportunity for public input when one party designs a system unilaterally. Moreover, ICANN evidently narrowed the UDRP's scope in response to input.[157]

The resulting product reflects this third party's efforts to take into consideration the interests of the various stakeholders. As with two-party arbitration designs, it has certain hallmarks of mutuality and balance. The basic arbitral process occurs on-line, freeing both parties from imposing forum-location costs. Appeals (which provide de novo review) are limited to national courts of "mutual jurisdiction," defined as where either the registrar or the domain-name holder is located.[158] ICANN approved three third-party ADR providers: WIPO, the National Arbitration Forum, and eResolution.[159] The complainant may select the provider and pays all fees for a single arbitrator, thus insulating the respondent from transaction costs; if the respondent requests a three-member panel, the parties split the costs.[160] For disputes heard by a single arbitrator, the third-party provider appoints the arbitrator.[161] For three-member panels, however, the parties have input as to arbitrator selection.[162]

A more significant hallmark of this third-party design is the fact that all decisions are published and available for inspection.[163] This provides a valuable

153. *Id*.

154. *Id*.

155. *Id*. at 178-79.

156. Commentators have suggested that ICANN pressed forward on the policy while it had an interim board of directors that was not representative of the stakeholders, that it allowed too short a time-frame for public comment, and that there was inadequate participation by stakeholders favoring a narrow policy, such as the Non-commercial Domain Name Holders Constituency. *See*, *e.g., id*. at 180-81.

157. *Id*. at 184.

158. *Id*. at 186.

159. *Id*. at 187.

160. *Id*. at 186-87. Professor Froomkin has termed this rule "a very significant decision about the assessment of costs that benefited registrants." *See* Froomkin, *supra* note 108, at 665. He notes that initial proposals would have allowed arbitrators to order losing registrants to pay arbitral fees and costs, and that the trademark bar believed that this was simply a legitimate strategy "aimed at lowering settlement values and creating incentives for cybersquatters to throw in the towel," but that others objected it was a "recipe for intimidating individual registrants" at a time when these fees and costs ranged from $1,000 to $3,000. *Id.*

161. Helfer & Dinwoodie, *supra* note 24, at 187.

162. *Id*.

163. As of September 2001, UDRP panels had issued over 3500 decisions, and registrar-complainants prevailed in three-quarters of those cases. *Id*. at 187-88; *see also* Froomkin, *supra* note 108, at 671.

check against hidden biases in the system.[164] It has become apparent, for example, that third-party providers have a financial incentive to compete with each other for caseload under the Policy.[165] Complainants' paying all expenses for disputes heard by a single arbitrator creates an incentive to market services to them. Some commentators argue that third-party providers are using complainant win rates to encourage complainants to use their services.[166] Clearly, not all third-party designs are perfect. However, in the case of ICANN, information about dispute-system design—namely, the identity of the third-party provider—is being used in combination with information about case outcomes to compare different dispute-system designs. This, in turn, makes possible a debate about the structure of these systems and their fairness. This debate creates political pressure for the third-party designer of the system, ICANN, to consider recommendations for change in the system.[167] This is a critical difference between third-party and one-party dispute-system designs: In one-party designs, there is no democratic check on design power.[168] At the same time, third-party designs share certain hallmarks of fairness with two-party designs. Both differ substantially from the form and structure of one-party designs.

164. On the importance of disclosure for on-line dispute-resolution system designs, see Lucille M. Ponte, *Broadening Traditional ADR Notions of Disclosure: Special Considerations for Posting Conflict Resolution Policies and Programs on E-Business Web Sites*, 17 OHIO ST. J. ON DISP. RESOL. 321 (2002); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441 (2002) (applying consumer protocol principles to on-line dispute resolution and recommending provisions for fairness and disclosure).

165. Helfer & Dinwoodie, *supra* note 24, at 211; *see also* Froomkin, *supra* note 108, at 672 ("Overall, the system gives dispute resolution providers an economic incentive to compete by being complainant-friendly."); Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 COMP. L. REV. & TECH. J. 89, 121 (2002) (discussing structural bias and recommending that the government play a stronger role in the design and implementation of private dispute systems).

166. *See, e.g.*, Helfer & Dinwoodie, *supra* note 24, at 212.

167. Froomkin, *supra* note 108, at 673 (observing that the trademark bar had argued against letting registrants select the ADR provider because it might encourage the existence of a provider biased toward registrants, but also observing that letting the complainant pick was a serious error for the same reason).

168. For a thoughtful discussion of the connection between arbitration and democratic principles of participation, transparency, rationality, and accountability, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (Winter/Spring 2004); *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997). For a call to expand a third-party democratic role, specifically that of state legislatures, through more federal/state collaboration in furthering national arbitration policy, particularly through state-designed default rules from which parties can opt out, see Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175 (2002).

V

CONCLUSION: THE NEED FOR DATA AND JUDICIAL WATCHDOGS

If it is possible for institutional repeat players with control over dispute-system design to use it to manage risk and succeed, then some would argue it is irresponsible for a corporation or other such player not to use this advantage. Indeed, stockholders might question whether management was doing all it could to safeguard profits. This is another aspect of the argument that what is good for the profit margin is good for all of us. In other words, institutions that adopt mandatory arbitration are not evil; they are doing what comes naturally. If the result is contrary to public policy, it falls to the legislatures and courts to exercise constitutional authority to change it.

There are two approaches to resolving the questions raised by mandatory arbitration: public policy analysis for the legislative branch, and healthy skepticism in the judicial branch. A combination of information and case experience may help to inform future policymaking.

A. Public Policy Analysis

The problems posed by one-party control over arbitration have prompted legislative efforts to control abuses. For example, some have called for legislation that would in certain limited contexts eliminate the power of one party to impose a system on the other and return the choice to both parties.[169] However, in a perfect world, for legislatures to conduct an informed debate on proposals for change, they need data. Systematic observations are needed of how various dispute-system designs operate to determine whether those designed by one party disadvantage the other. This research must go beyond simple win rates. One study revealed that a bank won 99.6% of all claims brought against it in a mandatory arbitration program in which the bank controlled the system's design.[170] This number is suggestive, and many would cite it as evidence of a biased system. However, it is hard to know what this number means unless it can be contrasted with a comparable set of cases in a different dispute-system design. The ability to compare results under other third-party ADR providers makes it possible to critique, and eventually to adjust, ICANN's arbitration system. This kind of comparison requires more

169. *E.g.*, Senator Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281 (2002) (citing legislative proposals to amend the Federal Arbitration Act or to require arm's length, mutually negotiated consent to arbitration for claims involving employment discrimination, automobile franchises, and consumer credit. Legislative bodies outside the United States have generally prohibited mandatory arbitration for consumer disputes. *See* Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357 (2002); Jean R. Sternlight, *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*, 56 U. MIAMI L. REV. 831 (2002). There are also efforts to regulate arbitration through state arbitrator ethics rules. *See* Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949 (2002).

170. Alderman, *supra* note 1, at 1257.

comprehensive and systematic data collection by our traditional civil justice system.[171]

A growing body of dispute-resolution research examines participant perceptions of and satisfaction with a given process or dispute-system design.[172] Parties may be satisfied with a process based on the limited information they have available. When the ADR process is nonbinding, participants' judgments may be the most important empirical information; policymakers tread on thin ice when they begin paternalistically to second-guess decisions made voluntarily, with informed consent, by competent adults, about their own self-interest. But while information about participant satisfaction is certainly relevant and helpful, it does not answer the fundamental question of what impact differing degrees of control over the design of the forum have on the range of case outcomes the forum produces, a question that is particularly relevant when the parties cede binding outcome control to an arbitrator.

Whether an ADR process effectively implements public policy by enforcing law is an entirely different question, but it is critically important when the ADR process is mandatory, binding, and precludes a litigant from serving in the role of private attorney general, as much of our law contemplates. The importance of objective outcome information is reflected in parties' desire to know the track records of individual arbitrators and their willingness to pay private services for this information. More significant still is the overall pattern of awards generated by all the arbitrators appointed to hear cases in a system, and what would happen to similar cases operating in the shadow of the civil—as opposed to the private—justice system. To determine whether mandatory arbitration undermines public policy, we need objective and comparative outcome data.

B. Judicial Skepticism

The judicial branch needs to develop (within the existing framework for judicial oversight of arbitration) new ways to police systems designed by one party. In *Green Tree Financial Corp. v. Randolph*,[173] the Supreme Court placed on the claimant seeking to avoid arbitration the burden of showing that arbitration costs are actually, not simply anticipated to be, excessive.[174] Where, though, is it written in the Federal Arbitration Act that this burden should be

171. *See* Lisa B. Bingham, *The Next Step: Research on How Dispute-System Design Affects Function*, 18 NEGOT. J. 375 (2002).

172. *See*, *e.g.*, DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT (2003); DAVID B. LIPSKY & RONALD SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (Cornell/PERC Institute on Conflict Resolution 1998); Stipanowich, *supra* note 16. There is more published survey-method research on mediation than there is on arbitration. For a review of mediation research, see Bingham, *supra* note 3.

173. 531 U.S. 79 (2000).

174. *Id.* at 91 ("The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.").

allocated in this manner?[175] The party seeking to compel arbitration must prove the existence of the arbitration agreement. Should that not include the burden of showing that the agreement is enforceable, at least insofar as the costs it imposes on a claimant? One of the rules of contractual interpretation is that ambiguous language is construed against the drafter.[176] It might be reasonable to place any burden regarding enforceability on the issue of the costs of arbitration on the party who had control over the dispute-system design. That party is likely to have more information about the resulting system.

Similarly, courts should examine how being trapped in a mandatory arbitration system designed by one party affects the settlement value of claims. In cases in which the cash value of the claim is small, and the shift in transaction costs renders it economically infeasible to pursue, courts ought to consider the arbitration system a change in substance, not simply a change in forum. Any other result allows one party to nullify public policy as embodied in law. Some courts have, in effect, begun to do this through use of the unconscionability doctrine. *Brower v. Gateway 2000, Inc.*,[177] for instance, reflects the notion that shifting transaction costs to make a right illusory vitiates an arbitration clause. Some might argue that the claims affected are *de minimus* in any event. If our civil justice system would recognize a claim for tens of dollars, brought individually in small-claims court or as part of a class action by many similarly situated plaintiffs, that claim is, by definition, not *de minimus*, but rather an important mechanism for enforcing public policy.

Policy analysts need access to the data that would allow a systematic comparison of private justice systems designed by both parties, by one party, and by a third party. Until that comparison is available, courts should treat mandatory arbitration designed by one party with a healthy dose of skepticism.

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175. "Nothing is written." Peter O'Toole, in *Lawrence of Arabia* (1962). The Court cited no specific authority for this allocation of the burden of proof on costs, but instead treated the issue as part and parcel of a different burden that the party seeking to avoid arbitration must carry—that of showing that Congress intended to preclude arbitration of the statutory claims. *See Randolph*, 531 U.S. at 92. Four dissenting justices criticized this blending of two discrete inquiries—specifically, whether the forum is adequate and whether the forum is accessible. *Id.* at 93-94 (Ginsburg, J., concurring in part and dissenting in part). This case is part of a substantial body of case law that has been criticized as a misinterpretation of the Federal Arbitration Act. *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (Winter/Spring 2004). Other scholars have suggested ways to return to the states a role in commercial arbitration. *See* Hayford & Palmiter, *supra* note 168, at 177.

176. JOHN ALLAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 7401, at 197-246 (rev. ed. 1976).

177. 676 N.Y.S.2d 569 (App. Div. 1998).