
Rutgers Conflict Resolution Law Journal

Volume 6

Fall/Spring 2008

Number 1

Is the Arbitration Fairness Act of 2007 the right way for justice or a wrong turn?

*Georgios I Zekos**

Introduction

Arbitration is the process by which a difference among parties as to their mutual legal rights is referred and determined with binding effect by the application of law by an arbitral tribunal instead of a court. Arbitration “took its rise in the very infancy of Society” as a private and self-contained method, distinctive from litigation and not as a postscript to development of public courts¹. It is worth noting that private arbitration predates the public court system².

ADR boom is motivated by concerns about efficiency, access, and justice³. Arbitration is one form of alternative dispute resolution (“ADR”).⁴ Arbitration provides significant advantages to parties as compared to litigation.⁵ It is argued that arbitration is

* BSc(Econ), JD, LL.M., PhD zekosg@yahoo.com Attorney at law-Economist, Greece.

¹ JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 25 (1918) (Quoting John Montgomerie Bell, Treatise On The Law Of Arbitration In Scotland 1 (2d ed. 1877)) at 22-27 (emphasizing special utility of arbitration despite development of reputable judicial system in mercantile cases in which arbitrator expertise in technical matters is essential).

² WILLIAM HOLDSWORTH, XIV A HISTORY OF ENGLISH LAW 187 (A.L. Goodhart & H.G. Hanbury eds. 1964).

³ Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “the Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 6 (1991) (“In what has become a commonly recognized division in the literature and advocacy about ADR, we see two basically different justifications for processes that resolve cases short of trial—what I call quantitative- efficiency claims versus qualitative-justice claims.”). Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System,* 108 PENN ST. L. REV. 165, 170–85 (2003) (discussing the community justice, court administration, and business interest strands of the ADR movement).

⁴ Andre R. Imbrogno, *Arbitration As An Alternative To Divorce Litigation: Redefining The Judicial Role,* 31 CAPITAL UNIVERSITY LAW REVIEW 413 (2006)

⁵ Nat’l Arbitration Forum, *The Case For Pre-Dispute Arbitration Agreements: Effective And Affordable Access To Justice For Consumers: Empirical Studies And Survey Results* 1 (2004), available at

faster and more economical than trials.⁶ The U.S. Supreme Court has approved a variety of uses of arbitration⁷ and Chief Justice Warren Burger advocated wider use of ADR.⁸ Moreover, arbitration is an acceptable substitute for litigation to “further broader social purposes” of employment discrimination laws.⁹ Furthermore, arbitration continues to thrive in specialized industries permitting determinations based on field-specific norms that often are not understood or applied in public courts.¹⁰ On the other hand, the Arbitration Fairness Act of 2007 introduced in the Senate by Senator Feingold and in the

<http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf> (finding that “[s]eventy-eight percent of trial attorneys find arbitration faster than lawsuits;” “[e]ighty-six percent of trial attorneys find arbitration costs are equal to or less expensive than lawsuits;” “[s]eventy-eight percent of business attorneys find that arbitration provides faster recovery than lawsuits;” “[e]ighty-three percent of business attorneys find arbitration to be equally or more fair than lawsuits;” “[i]ndividuals prevail at least slightly more often in arbitration than through lawsuits;” “[m]onetary relief for individuals is slightly higher in arbitration than in lawsuits;” “[a]rbitration is approximately 36% faster than a lawsuit;” “[i]ndividuals receive a greater percentage of the relief they ask for in arbitration versus lawsuits;” “[n]inety-three percent of consumers using arbitration find it to be fair;” “[c]onsumers prevail 20% more often in arbitration than in court;” “[i]n securities actions, consumers prevail in arbitration 16% more than they do in court;” and that “[s]ixty-four percent of American consumers would choose arbitration over a lawsuit for monetary damages.”). H.R. REP. NO. 96, 68th Cong., 1st Sess., 1, 2 (1924) (“[T]here is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”).

⁶ *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 552 (4th Cir. 2001): “[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least \$50,000 and takes two and onehalf years to resolve.”

⁷ *Wilko v. Swan*, 346 U.S. 427 (1953); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

⁸ Warren Burger, *Isn't There a Better Way?* 68 A.B.A.J. 274 (1982).

⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹⁰ Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for World Sports Disputes*, 35 VAL. U. L. REV. 379, at 380–81 (2001) (highlighting the CAS arbitrators’ application of widely accepted principles that may some day be recognized as the “*lex sportiva*”). Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization’s New Arbitration Rules* 9 TRANSNAT’L LAW. 357, 369–71 (1996) (discussing the evolution of arbitration in intellectual property disputes and emphasizing that arbitration is particularly appropriate for resolution of such disputes because it involves specialized and technical issues); Christine Lepera, *What the Business Lawyer Needs To Know About ADR: New Areas in ADR*, 13 PLI/NY 709, 711–14, 719 (1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights, online technology, and entertainment issues).

House by Rep. Hank Johnson (D-GA), requires that agreements to arbitrate employment, consumer, franchise, or civil rights disputes be made after the dispute has arisen.

Presently it is questionable the efficiency of arbitration as a dispute mechanism guarded by courts whose intervention brings inefficiencies, lack of finality and rise of costs making many parties unhappy with the outcome of many arbitrations. The question that it will be investigated in this article is whether the amendment of the FAA according to the Arbitration Fairness Act of 2007 condensing the depth of the content of arbitrability is the right road or there is a need for the establishment of an independent arbitration co-equal to courts.

Is the law of contract or arbitration the right way for the abolishment of unfair arbitration clauses in adhesion/standard form contracts?

The Arbitration Fairness Act of 2007 amends the Federal Arbitration Act to make pre-dispute agreements to arbitrate employment, consumer, franchise, or civil rights disputes unenforceable. Thus, after a dispute arises parties will have to either agree on arbitration or to follow the road of litigation. Will corporations agree on arbitration or will they prefer litigation? Have the reasons that had made the introduction of arbitration as an alternative dispute mechanism disappeared? Have courts improved their performances in such a degree that the existence of arbitration is of no use? Of course arbitration as it functions presently is not the perfect dispute method,¹¹ but neither is litigation. Arbitration however has its own advantages, and with the co-operation of the

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

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

The proposed Act has arisen from the voices of many legal scholars considered contractual arbitration as mandatory.¹² Senator Feingold¹³ thinks the Act “does not prohibit arbitration, but it will prevent a party with greater bargaining power from forcing individuals into arbitration through a contractual provision. It will ensure that citizens have a true choice between arbitration and the traditional civil court system. The Act does not apply to collective bargaining agreements”. It has to be taken into account that courts are not panacea as a dispute method. Arbitration has developed as an alternative dispute mechanism in order for parties to avoid the discrepancies of litigation. According to the approach taken by the Arbitration Fairness Act of 2007, parties will be forced to go back to litigation. The question to be answered is how much it costs in court and is litigation the most efficient way to solve the parties’ disputes on the matters referred in the Arbitration Fairness Act of 2007?

Companies require millions of consumers and employees to sign contracts that include arbitration clauses which contracts of adhesion/standard form contracts. Most of these parties have little or no considerable chance to negotiate the terms of their adhesion/standard form contracts and find themselves having to choose to either accept

¹² Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105-10 (1996) (explaining the confusion and controversy over the use of the terms “voluntary” and “mandatory” in the employment-arbitration context); see also Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (“I ask Professor Sternlight (and others) to stop calling contractual arbitration—mandatory arbitration.”)

¹³ Senator Feingold, Representative Johnson Introduce Measure To Preserve Consumer Justice , Legislation will ensure Americans are not forced into mandatory arbitration , July 17, 2007 By Senator Feingold Washington, District of Columbia AHRC NEWS Services; Eliminating Mandatory Arbitration Clauses In Consumer Contracts, The Arbitration Fairness Act of 2007 July 17, 2007 By Senator Feingold AHRC NEWS Services.

an arbitration clause or to turn down securing employment or needed goods and services. But this is a matter of contracts law and not a matter of arbitration. Parties are not being forced into contractual arbitration against their wishes. Arbitration is a contract's creation.¹⁴ Moreover, Arbitration is not mandatory when it arises out of all types of contracts because contracts are accepted voluntarily¹⁵. Arbitration cannot be used to deprive parties in employment, consumer, and franchise disputes of their constitutional right to use the civil justice system because parties have concluded an arbitration agreement prior to commence of arbitration.

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

An underlying element of a fair justice system is that both parties to a dispute have equal access to that system. Since the beginning of the Republic, Congress has accepted this underlying principle that the plaintiff and the defendant in a civil case have

¹⁴ *May v. Higbee Co.*, 372 F.3d 757, 763–64 (5th Cir. 2004) (stating that “arbitration is a matter of contract” and state contract law will determine whether a valid agreement to arbitrate was formed). Stephen J Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 711 (1999) (“The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law.”) *See id.* at 754 (stating “[a]rbitration privatizes the creation of law.”).

¹⁵ Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (“I ask Professor Sternlight (and others) to stop calling contractual arbitration—mandatory arbitration.”). Christine Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1225 (2002) (empirical research demonstrates that employees “do not understand the remedial and procedural consequences of consenting to arbitration” and that “[v]ery few are aware of what they are waiving.”).

equal access to federal court. Is arbitration a voluntary alternative dispute system? Can parties choose their own judge? It is argued that the FAA, as applied to consumer, employee and franchisee cases, violates this fundamental principle by giving the defendant the sole right to determine whether a case will be heard in federal court. The FAA enforces valid pre-dispute arbitration agreements which have been accepted by parties. David S. Schwartz argues that “the Supreme Court discovered that the FAA could be used as an extensive docket-clearing device to move large numbers of cases out of the court system and into a system of private dispute resolution.”¹⁶ But courts and the Supreme Court merely interpret and enforce the contractual agreement of the parties to solve their dispute before an arbitral tribunal instead of a court. It has to be taken into consideration the fact that the policy favouring arbitration does not go so far as to authorize courts to force arbitration when the parties have not agreed to arbitrate. Therefore, in *Wachovia Bank N.A. v. Schmidt*¹⁷, the Fourth Circuit Court of Appeals denied a petition to compel arbitration by a bank accused of fraudulently inducing an investor’s participation in a tax shelter. The court determined that in spite of two broadly worded arbitration clauses in documents connected to the underlying transaction about which the investor complained, the dispute was not arbitrable. Hence, arbitration clauses in documents connected to, but not themselves at the heart of the dispute are an insufficient basis to compel arbitration.¹⁸

¹⁶ David S. Schwartz, Mandatory Arbitration: Do-it-yourself Court Reform Becomes Do-it-yourself Tort Reform, Testimony presented at the hearing on “Mandatory Binding Arbitration Agreements: Are They Fair For Consumers?” before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, June 12, 2007 p 1.

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

¹⁸ *U.S. Small Business Administration v. Chimicles*, 447 F.3d 207 (3d Cir. 2006) (receiver’s claims against investment fund subscription agreement not subject to arbitration clause of fund’s partnership agreement); *Suburban Leisure Center, Inc. v. AMF Bowling Products, Inc.*, 2006 U.S. App. LEXIS 28508

Does arbitration deprives parties of a jury trial which would be more favourable than arbitration? Since arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he/she has not agreed so to submit,¹⁹ parties are not deprived by contractual arbitration. On the one hand, there is *ratio decedendi* in arbitration which does not follow the road of certainty of courts. On the other hand, due process norms apply in arbitration²⁰ and arbitrators as judges have to apply legal principles to the facts revealed in a dispute.²¹ Arbitration now rivals court adjudication as the preferred means of resolving civil disputes based on expert knowledge in the adjudication of the dispute.²² Moreover, under current American law, it seems unavoidable that consumer arbitration will ultimately replace litigation.²³

(8th Cir. 2006) (claims based on earlier oral agreement not subject to arbitration clause of later written agreement containing merger and integration clause); *Titile v. Enron Corp.*, 463 F.3d 410 (5th Cir. 2006) (dispute among insureds about division of insurance policy proceeds not subject to arbitration clause in insurance contract that required arbitration of claims between insureds and insurer). *Cf.* *Lipton-U. City, LLC v. Shurgard Storage Crts., Inc.*, 454 F.3d 934 (8th Cir. 2006) (clause providing that if purchase option was exercised the parties would arbitrate “additional terms . . . not contemplated by” the contract did not require arbitration of price term that had been contemplated by the contract but rescinded by the court on the basis that there had been no meeting of the minds).

¹⁹ *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).

²⁰ Edward Brunet, *Arbitration and Constitutional Rights*, 71 N. CAR. L. REV. 83 (1992) (arbitrators do apply due process norms in administering hearings); William W. Park, *The Procedural Soft Law of International Arbitration* 145, in *Pervasive Problems in International Arbitration* (Kluwer International Arbitration Law Lib. (2006)) (asserting appropriately that “due process lies at the core of what litigants seek in both arbitration and litigation”). Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated, “the standard due process entitlement to an impartial tribunal is relaxed when the tribunal is an arbitral tribunal rather than a court.” *United Transp. Union v. Gateway Western Railway Co.*, 284 F.3d 710, 712 (7th Cir. 2002).

²¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²² G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 626-27 (1988) (“Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes.”). *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998) (“[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the ‘language and workings of the shop,’ may best serve the interest of the parties.”); *Nat’l Union Fire Ins. Co. v. Belco Petrol. Corp.*, 88 F.3d 129, 133 (2d Cir. 1996) (“The advantages of arbitration are well-known. Arbitration is ‘usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules’” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration”).

²³ *The Privatization Of Justice? Mandatory Arbitration And The State Courts—Report Of The 2003 Forum For State Appellate Court Judges* (2006 Pound Civil Justice Institute) *See also 2004 ABA Annual*

The parties' intention as defined by their agreement is the dominant theme that characterises and distinguishes arbitration. Arbitration promotes the autonomy of parties by enforcing their agreement to arbitrate. Arbitration is about enforcing consensual arrangements for private dispute resolution. Many scholars wrongly use the term "Mandatory arbitration" for arbitration based on a parties' pre-dispute arbitration agreement.²⁴ Arbitration based on a party's contract is not a mandatory arbitration but a contractual arbitration. Regardless of the fact that parties cannot avoid many times an adhesion/standard form contract containing an arbitration clause making arbitration to look as a mandatory dispute mechanism, the inclusion of an arbitration clause in a contract of adhesion does not make arbitration mandatory. Modern trade has introduced adhesion/standard contracts which are accepted and legitimized by the legal systems making in many occasions a contractual arbitration in practice to be the only mandatory road followed by the parties' will and acceptance. Adhesion/standard form contracts are valid contracts with offer and acceptance. The arbitration agreement in the form of a clause is incorporated in an adhesion contract and it is accepted as part of the contract of

Meeting--Program Materials: Bench and Bar: The Vanishing Jury Trial, available at http://www.abanet.org/abanet/litigation/mo/premium-lt/prog_materials/2004_abaannual/20.pdf "A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research." Using what is described as "Dispute Resolution Darwinism," the author concludes that, "We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem." Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. Miami L. Rev. 873 (2002).

²⁴ David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration"*, *Legal Studies Research Paper Series Paper No. 1052* August 2007. Jean R. Sternlight, *Creeping Mandatory Arbitration*, 57 STAN. L. REV. 1631, 1631-32 & n.1 (2005). F. Paul Bland *Mandatory Binding Arbitration Agreements: Are They Fair To Consumers?* July 17, 2007 By, Jr AHRC News Services available at <http://www.ahrc.com/new/index.php/src/news/sub/article/action/ShowMedia/id/3692> (stating, "[t]he current system suffers from a lack of transparency, which permits and even encourages abuses"). *See also* Testimony by F. Paul Bland, Jr - Staff Attorney Public Justice (Formerly Trial Lawyers for Public Justice), to the Subcommittee on Commercial and Administrative Law of the U. S. House of Representatives' Committee on the Judiciary Hearing on: *Mandatory Binding Arbitration Agreements: Are They Fair To Consumers?* - June 12, 2007.

adhesion regardless of the principle of severability. The acceptance of an adhesion/standard form contract incorporating an arbitration clause indicates acceptance of the incorporated arbitration clause and so validating an arbitration agreement. An arbitration clause does not arise out of the blue. Problems of unfair terms in adhesion/standard form contracts can be solved under the law of contract and so the voices against standard form clauses incorporated in standard form/adhesion contracts and any suggestions for changes should be directed towards the law of contracts. On the one hand, the seller/employer/franchisor has the elite right to decide whether to include a pre-dispute arbitration clause among its “take-it-or-leave-it” contract terms in adhesion/standard form contracts. On the other hand, the consumers have got the right to accept or to reject the offer. It is a matter of contract law and not a matter of arbitration. Is it arbitration the easy target? If legal scholars consider adhesion/standard form contracts as mandatory or unfair or illegal they should say so and change the law of contract and not restrict access to arbitration. If there are unfair terms contained in a contract they should be invalidated under the law of contract. According to *William J. Woodward, Jr.* “the arbitration cases are clearly *contract law* cases, not some confusing combination of contract and conflicts principles”.²⁵ The panoply of the law of contract can be used to invalidate arbitration agreements with such defenses as unconscionability.²⁶ Additionally, fraud or misrepresentation are defenses one may use to challenge an arbitration provision.²⁷ Parties can challenge the validity of the agreement to

²⁵ William J. Woodward, Jr, *Constraining Opt-Outs: Shielding Local Law and Those it Protects from Adhesive Choice Of Law Clauses*, 40 LOY. L.A. L. REV. 1, 44 (2006).

²⁶ Eric J. Mogilnicki and Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U.L. REV. 761 (2005).

²⁷ *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) (discussing consumers’ challenge of arbitration based on fraud, along with unconscionability, duress, and revocation).

arbitrate itself.²⁸ Moreover, parties can challenge the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.²⁹ Parties can focus directly on the binding effect of the arbitration clause *itself* as a matter of contract law.³⁰ Thus, challenges to the binding effect of the arbitration clause *itself* are, actually, the only dispute courts can deal with when an arbitration clause appears in an adhesion/standard form contract.

Conclusion

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

An independent and autonomous arbitration only administered by a state authority and co-equal to courts as a dispute mechanism keeping its advantages that have made its emergence necessary is the right road.³¹ The establishment of a second degree of an arbitral tribunal which will examine only the legal basis of the first instance award will

²⁸ *Southland Corp. v. Keating*, 465 U. S. 1, 4.5 (1984) (challenging the agreement to arbitrate as void under California law insofar as it purported to cover claims brought under the state Franchise Investment Law). Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington and Haagen)*, 29 McGeorge L. Rev. 195, 202-10 (1998) (defending the contractual approach for enforcement of mandatory arbitration contracts and asserting that extant contract defenses are sufficient to protect consumers).

²⁹ *Buckeye Check Cashing, Inc. v. Cardegna*, 126 U.S. 1204 (2006).

³⁰ *Winig v. Cingular Wireless*, 2006 WL 2766007 (N.D. Cal. Sept. 27, 2006).

³¹ GEORGE I. ZEKOS, *INTERNATIONAL COMMERCIAL & MARINE ARBITRATION* (Routledge & Cavendish Publishers 2008).

give the legal status needed by arbitration in order to be established as the second pole in a legal system being able to stand autonomously and independently from any court's guardianship and guarantee.