



1-1-2005

# One Judge's Perspective on Procedure as Contract

Lee H. Rosenthal

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

---

## Recommended Citation

Lee H. Rosenthal, *One Judge's Perspective on Procedure as Contract*, 80 Notre Dame L. Rev. 669 (2005).

Available at: <http://scholarship.law.nd.edu/ndlr/vol80/iss2/7>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# ONE JUDGE'S PERSPECTIVE ON PROCEDURE AS CONTRACT

*Lee H. Rosenthal\**

## INTRODUCTION

Professor Resnik does judges a great service by asking us to examine our encouragement of the resolution of disputes by means other than litigation.<sup>1</sup> She chronicles judges' progressively stronger embrace of what she terms the "outsourcing" of dispute resolution from public decisions by judges and juries in courthouses to private dispositions by arbitrators and mediators.<sup>2</sup> Recognizing that such outsourcing is here to stay, Professor Resnik asks us to think about how judges should respond to what they helped create.

Judges primarily encounter arbitration when there is a dispute as to whether and how arbitration will occur and when there is a dispute as to whether and how the results of arbitration will be enforced. Both "entrance" issues, involving the enforceability of arbitration agreements, and "exit" issues, involving challenges to the effects of arbitration, provide a useful way to think about how "contract procedure" relates to "due process procedure." This examination turns to further reflection on why different categories of litigants are seeking alternatives to litigation and whether courts can provide some reasons for them to stay.

## I. ENTRANCE ISSUES AND THE ARBITRATION OF MASS CLAIMS

It has been clear law for a generation of judges and litigants that arbitration agreements are enforceable on the same footing as other contracts.<sup>3</sup> It is less clear how to enforce arbitration agreements in

---

\* United States District Court Judge, Southern District of Texas. I would like to thank Rick Hess for his assistance in preparing this Article.

1 See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

2 *Id.* at 619-21.

3 See Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2000)); *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 483-84 (1989); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 n.4 (1964) (stating that "when a contract is scrutinized for evidence of an intention to

the form contracts many businesses use in providing services and goods to consumers. One particularly vexing issue arises at the intersection of class actions and arbitration. There is uncertainty when consumer contracts have arbitration clauses that say nothing about class actions and there is uncertainty when consumer contracts have arbitration clauses that preclude class treatment.

State and federal courts are struggling on an ongoing and increasing basis with mass claims in consumer cases.<sup>4</sup> Manufacturers and distributors of all kinds of products and services include, in boilerplate “contracts” with consumers, language eschewing courts and requiring arbitration of any disputes that might arise.<sup>5</sup> Many of those “contracts” have been silent on the question of class-wide arbitration. In *Green Tree Financial Corp. v. Bazzle*,<sup>6</sup> the Supreme Court addressed a state court’s decision ordering class arbitration under state law. The arbitration agreement was silent about whether class arbitration was forbidden or allowed. After concluding that the agreement did not expressly forbid class arbitration, a plurality of the Court held that “[u]nder the terms of the parties’ contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.”<sup>7</sup>

Under the usual construction principle, one looks to “that position taken by those Members who concurred in the judgments on the narrowest grounds.”<sup>8</sup> In *Green Tree*, Justice Stevens, whose concurrence in the judgment constituted the fifth vote, dissented to the extent that he would have permitted the state court decision allowing class arbitration to stand.<sup>9</sup> He reasoned that the decision was correct as a matter of law because nothing in the state court’s application of

---

arbitrate a particular kind of dispute, national labor policy requires, within reason, that ‘an interpretation that covers the asserted dispute be favored’) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)).

4 See, e.g., William W Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1250 (1996); Anthony J. Scirica, *Introduction: Symposium, Mass Torts*, 148 U. PA. L. REV. 1859, 1860–61 (2000); Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 223 n.2 (2004).

5 See, e.g., Robert A. Schwartz, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 809 (2003) (“Businesses have become enamored of arbitration clauses. These boilerplate contractual provisions . . . have become a part of everyday commercial life.”).

6 539 U.S. 444 (2003).

7 *Id.* at 451 (plurality opinion).

8 *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

9 *Green Tree*, 539 U.S. at 454–55 (Stevens, J., concurring in the judgment and dissenting in part).

state law to allow class arbitration violated the Federal Arbitration Act (FAA), and the petitioner challenged only the merits of that decision, not whether it was made by the right decisionmaker.<sup>10</sup> Nevertheless, Justice Stevens also stated that “[a]rguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator, rather than the court.”<sup>11</sup> The four-member plurality specifically rejected the legal interpretation the state court had applied because it was a decision by the wrong decisionmaker. The grounds of the Justice Stevens concurrence also differed from the three-member dissent, which would have upheld the state court’s ability to make the decision but would have reversed on the merits of that court’s decision to allow class arbitration.<sup>12</sup> Justice Stevens did express his agreement, however, with the principle laid down by the plurality that arbitrators should be the first ones to interpret the parties’ agreement.<sup>13</sup>

In arriving at its decision, the *Green Tree* plurality relied on two considerations. First, it found that the contract’s provision to submit to arbitration “[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract” reflected the parties’ intent to commit a broad range of questions to arbitration, including the class arbitration question because that question “relat[ed] to the contract.”<sup>14</sup> Second, the plurality reasoned that there exists only a narrow exception for certain “gateway” matters that parties normally expect a court rather than an arbitrator to decide. These include: (1) “whether the parties have a valid arbitration agreement at all” and (2) “whether a concededly binding arbitration clause applies to a certain type of controversy.”<sup>15</sup> Because the question whether a contract forbids class arbitration concerns the “kind of arbitration proceeding the parties agreed to,” and not “the validity of the arbitration clause nor its applicability to the underlying dispute between the parties,” the plurality concluded that arbitrators are “well situated to answer that question.”<sup>16</sup>

If the scope of an arbitration agreement is broad and the issue concerns the kind of arbitration proceeding agreed to, the plurality, plus Justice Stevens, would conclude that “this matter of contract in-

10 *Id.* (Stevens, J., concurring in the judgment and dissenting in part).

11 *Id.* at 455 (Stevens, J., concurring in the judgment and dissenting in part).

12 *Id.* (Rehnquist, C.J., dissenting).

13 *Id.*

14 *Id.* at 448 (plurality opinion).

15 *Id.* at 452 (plurality opinion).

16 *Id.* at 452–53 (plurality opinion) (emphasis omitted).

terpretation should be for the arbitrator, not the courts, to decide.”<sup>17</sup> But the only holding of *Green Tree* is that, at least when an arbitration provision is silent—or perhaps ambiguous—on whether class-wide arbitration is allowed or not, the arbitrator is to decide whether the arbitration agreement forbids or allows class arbitration.

Despite this holding, the Court in *Green Tree* made the initial determination that the language of the arbitration agreement did not clearly forbid class arbitration. The Court stated that it “must deal . . . at the outset” with the argument that the contracts forbade class arbitration, “for if it is right, then the South Carolina court’s holding [that the contracts were silent] is flawed on its own terms.”<sup>18</sup> As the Fifth Circuit has recognized,

it is unclear why the Court would explore this issue in the first place if its ultimate conclusion was that a court, regardless of whether its interpretation of the law is right or wrong, is simply the wrong decision-maker. . . . [I]f the arbitration provision clearly did forbid class arbitration, then the arbitrators could—and under *Green Tree* should—make this call without any prior analysis by a court.<sup>19</sup>

Under the Court’s holding, it should not be necessary for a court to decide initially whether an arbitration agreement clearly forbids or permits class arbitration. Even that issue is for the arbitrator to decide.

Since *Green Tree*, courts have allowed arbitrators to decide what might be considered “entrance” issues, which courts could have asserted a legitimate basis for deciding. One federal district court considered both *Green Tree* and prior circuit law in deciding that the court, rather than the arbitrator, should interpret an arbitration clause’s putative forum selection clause.<sup>20</sup> The district court reasoned that although “venue . . . may be said to relate to ‘what kind of arbitration proceeding’ the parties agreed to”—and therefore remain an arbitrator’s decision—decisions from the First, Second, Seventh and Eleventh Circuits have held that the FAA “compels a court to interpret and enforce such forum-selection clauses.”<sup>21</sup> The First Circuit reversed, stating that the district court “lacked power to interpret the

---

17 *Id.* at 453 (plurality opinion).

18 *Id.* at 450 (plurality opinion).

19 *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex.*, 343 F.3d 355, 360 (5th Cir. 2003).

20 *Richard C. Young & Co. v. Leventhal*, 298 F. Supp. 2d 160, 166–68 (D. Mass. 2003).

21 *Id.* at 167–68 (citing *KKW Enters., Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1st Cir. 1999); *McCullagh v. Dean Witter Reynolds, Inc.*, 177 F.3d 1307, 1310 (11th Cir. 1999); *Bear, Stearns & Co., Inc. v. Bennett*,

forum selection clause.”<sup>22</sup> Because the dispute was clearly arbitrable, the appellate court concluded that under *Green Tree* and *Howsam v. Dean Witter Reynolds, Inc.*,<sup>23</sup> the arbitrator had to interpret the contract’s forum selection clause, not the court.

Because *Green Tree* applies to arbitration agreements governed by a hybrid of both the FAA and state law, it is less clear what the result would be if the arbitration provision were governed exclusively by state arbitration law. Courts have held that “just as parties may select the arbitral *rules* governing arbitration, they may also ‘specify the *law* governing interpretation of the scope of the arbitration clause.’”<sup>24</sup> The parties may select state law and may specifically exclude the application of federal law. It is unclear whether arbitration agreements governed exclusively by state law would be controlled by the Court’s holding in *Green Tree*. Nothing in Texas arbitration law, for example, mandates that a court rather than an arbitrator determine whether an arbitration agreement contemplates class arbitration.<sup>25</sup>

*Green Tree* and subsequent cases continue the tradition of courts supporting arbitration and narrowing the judicial role in the “entrance” or “gateway” decisions that precede arbitration. Courts are, however, more assertive when the threshold issues move from “contractual procedure” to “due process procedure.” When the issue is not whether the arbitration agreement permits class arbitration, but whether an arbitration agreement that clearly forbids class actions is enforceable, courts make the decision, albeit inconsistently.<sup>26</sup> The Ninth Circuit has struck down an arbitration agreement for, among other reasons, the inclusion of a bar on class arbitrations, applying California law to hold that it is so one-sided and substantively unconscionable as to be unenforceable.<sup>27</sup> California state law recognizes the availability of class-wide arbitration on the ground that state law doc-

938 F.2d 31, 32 (2d Cir. 1991); *Snyder v. Smith*, 736 F.2d 409, 418 (7th Cir. 1984), *overruled on other grounds by* *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)).

22 *Richard C. Young & Co. v. Leventhal*, No. 04-1124, 2004 WL 2415056, at \*4 (1st Cir. Oct. 28, 2004).

23 537 U.S. 79 (2002).

24 *Pedcor Mgmt. Co.*, 343 F.3d at 361 (quoting *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 248 (5th Cir. 1998)).

25 See TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (Vernon 1997 & Supp. 2004–2005).

26 See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 78 n.13 (collecting cases).

27 *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (applying California law); see also *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) (applying Washington law).

trines such as unconscionability apply in state court actions under the FAA.<sup>28</sup> Pennsylvania has also permitted class arbitrations.<sup>29</sup> Other courts have enforced arbitration clauses containing class action prohibitions, in some cases rejecting unconscionability arguments, and in other cases finding an insufficient basis for concluding that the arbitration would be inadequate to vindicate statutory rights.<sup>30</sup> The outcomes of the cases are inconsistent, varying in ways that reflect differences in state law as well as differences among the courts. But the courts are clear that whether an arbitration agreement can validly preclude class actions is an issue for the court, not the arbitrator. When the gateway procedural issue is not one of contract, but of fundamental fairness—due process procedure, to use Professor Resnik's term—the courts have maintained their role and have not deferred to the arbitrator.

The future of class arbitrations is not clear. The scant empirical information available shows a variation in the prevalence of arbitration clauses by industry, with the most frequent use in industries that depend on written contracts with consumers, such as financial services.<sup>31</sup> When arbitration clauses were used in consumer contracts, fewer than one-third prohibited class actions within the arbitration

---

28 See *Keating v. Superior Court*, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779, 791–93 (Cal. Ct. App. 1998); *Lewis v. Prudential-Bache Sec., Inc.*, 225 Cal. Rptr. 69, 75–76 (Cal. Ct. App. 1986). *But see Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 407–09 (Cal. Ct. App. 2003), *review granted and opinion superceded by* 65 P.3d 1285 (Cal. 2003). Two Ninth Circuit cases after *Discover Bank* apply the prior rule. See *Ingle*, 328 F.3d at 1176 n.15 (rejecting *Discover Bank* as contradicted by state precedent and by text and judicial interpretations of FAA); *Ting v. AT&T*, 319 F.3d 1126, 1150 n.15 (9th Cir. 2003) (rejecting *Discover Bank* as contrary to U.S. Supreme Court precedent and stating that state law, including contract doctrines like unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA).

29 *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991).

30 See, e.g., *Randolph v. Green Tree Fin. Corp.—Ala.*, 244 F.3d 814, 817–19 (11th Cir. 2001) (holding that the Truth in Lending Act did not create a non-waiveable right to use the class action device); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374–75 (3d Cir. 2000) (enforcing an arbitration clause's class action waiver and stating that "[w]hatever the benefits of class actions, the FAA requires piecemeal resolution when necessary to give effect to an arbitration agreement" (citation omitted)); *Pick v. Discover Fin. Servs., Inc.*, No. 00-935-SLR, 2001 U.S. Dist. LEXIS 15777, at \*16 (D. Del. Sept. 28, 2001) (mem.) (rejecting argument that arbitration clauses are generally unconscionable if they preclude class actions).

31 Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) (finding that thirty-five percent of sampled businesses included

proceedings and more than two-thirds made no provision for class actions.<sup>32</sup> Class actions in arbitration are no longer a rarity. In light of *Green Tree*, the American Arbitration Association (AAA) is providing assistance in organizing consolidated or class arbitrations.<sup>33</sup> The AAA has stated that it will administer demands for class arbitration in particular circumstances and has developed rules to accommodate these types of cases.

Class arbitrations of consumer claims may siphon even more cases from the courts. The irony is that consumer claims are precisely the category of class actions that the Supreme Court has stated are most appropriately handled in federal courts under Rule 23 and state court counterparts. As the Supreme Court stated in *Amchem Products, Inc. v. Windsor*, class actions are best used to vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”<sup>34</sup> The Court cited *Mace v. Van Ru Credit Corp.*, which stated that

the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.<sup>35</sup>

Likely litigants elect in advance to require arbitration of consumer claims for a number of reasons, including a perceived risk of unjustified financial consequences if such claims can be litigated in

---

arbitration clauses in their consumer contracts, including almost seventy percent of businesses in the financial services category).

32 *Id.* at 65.

33 See Am. Arbitration Ass'n, *American Arbitration Association on Class Arbitration*, at <http://www.adr.org/index2.1.jsp?JSPssid=15753&JSPaid=43408> (last visited Nov. 8, 2004). Following *Green Tree*, the AAA

is not currently accepting for administration demands for class arbitration where the underlying agreement prevents class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit their dispute to an arbitrator or to the Association. The arbitrability of class arbitrations where the parties' agreement precludes such relief is a developing area of the law, and the Association awaits further guidance from the courts on this issue.

*Id.*

34 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

35 109 F.3d 338, 344 (7th Cir. 1997).

courts as class actions.<sup>36</sup> The targets of consumer class actions are frequently heard to complain that such cases are manufactured by lawyers who obtain large attorney's fee awards for securing insignificant benefits on behalf of a disinterested class. A recent change to Rule 23 underscores the importance of the judge's role in disciplining class action attorney's fee awards. Rule 23(h), as amended in 2003, explicitly addresses class action attorney's fee awards and emphasizes the court's responsibility to make specific findings on the value of what the class has actually received and base the fee award on that value.<sup>37</sup> Using the framework of Rule 23(h) to discipline attorney's fee awards in consumer class action cases to ensure that the amount of the fee bears a reasonable relationship to the benefits actually received by class members may temper the incentives to bring cases that will not result in a sufficient number of people actually receiving benefits so as to justify a meaningful fee.

The pressures that lead to arbitration of consumer claims, particularly on a class basis, are many and large. Courts have not ceded the "gateway" issues to arbitrators when those issues correspond to what Professor Resnik terms "due process procedures." Courts should continue to examine why litigants seek arbitration of specific types of cases. Courts should examine whether there are perceived inadequacies in how such cases are litigated. That can be improved, not by

---

36 See, e.g., Martin Kasindorf, *Robin Hood Is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 8, 2004, at A1 (blaming "predatory trial lawyers and biased judges who allow frivolous lawsuits by consumers to fleece businesses out of billions of dollars" and citing a \$250 million jury award to a retired steelworker with asbestos-related cancer and a \$10.1 billion verdict against a cigarette manufacturer); Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us': Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1 (noting that the National Arbitration Forum, a major arbitration provider, is encouraging adoption of arbitration clauses in contracts as a way to avoid class action lawsuits); Jane Spencer, *Signing Away Your Right to Sue: In Significant Legal Shift, Doctors, Gyms, Cable Services Start to Require Arbitration*, WALL ST. J., Oct. 1, 2003, at D1 (indicating that numerous consumer service providers are requiring arbitration in response to large class action settlement attorney fees and jury awards).

37 See FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney's fee and nontaxable costs authorized by law or by agreement of the parties . . ."). The Committee's note accompanying Rule 23(h) emphasizes that:

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process. . . . [T]he district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

FED. R. CIV. P. 23 advisory committee's note (2003 amend.).

favoring one category of litigants over another, but by improving the way in which courts do what courts do. Improving the conduct of consumer class actions in the courts is one way for courts to respond to the increase of class actions in arbitration.

## II. EXIT ISSUES AND JUDICIAL REVIEW OF COMMERCIAL ARBITRATION AWARDS

It is a truism that arbitration agreements in commercial transactions, often among sophisticated entities, reflect a number of concerns. Business entities may prefer arbitrators knowledgeable in a particular area and prefer to apply commercial standards to their disputes. In international transactions, arbitration agreements allow parties to select a forum in an unrelated country. It is also widely recognized that arbitration agreements often reflect concerns about the cost, delay, and exposure presented by litigation.<sup>38</sup> The literature, however, reflects a growing dissatisfaction with commercial arbitration.<sup>39</sup> The cases paint a picture of proceedings that can drag on for years.<sup>40</sup> The cases reflect uncertainty over the extent of obligations to

---

38 See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (noting that legislative history of arbitration laws recognizes arbitration's advantages in flexibility, speed, and cost); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (stating that parties to an arbitration trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

39 See, e.g., Dinesh D. Banani, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 B.C. INT'L & COMP. L. REV. 355, 384 (2003) (indicating that both foreign investors and developing countries "continue to grow increasingly dissatisfied with international arbitration"); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 856 (1996) (identifying rising dissatisfaction with arbitration due to increasing costs, increasing judicialization, and lack of discovery, strict rules of evidence); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 430 (1988) (noting that "proponents as well as critics of arbitration observe that it frequently fails to live up to its billing as a 'speedy and economical' substitute for litigation, especially in large or complex disputes" (footnote omitted)); Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 354-55 (1998). Stipanowich explains:

The expansion of arbitration processes to accommodate virtually the full spectrum of civil controversy has, however, recharged the ongoing debate over the adequacy of existing arbitration procedures as a "surrogate" for the court system. Perhaps for the same reasons, arbitration is now subject to many of the same criticisms heaped upon litigation.

*Id.*

40 See, e.g., *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004) (affirming the district court's confirmation of

exchange information.<sup>41</sup> And at the end of the day, very large arbitration awards present the same concerns over exposure as worries over jury verdicts. The difference is that in arbitration, these problems are not leavened by some of the virtues of litigation—predictability as to the rules that apply, particularly in discovery, and, at the end of the day, some assurance of a critical and thorough review.

In commercial arbitration, the courts are with increasing frequency facing huge awards that generate impassioned pleas to correct perceived injustices and errors underlying the tribunal's result.<sup>42</sup> The law is, of course, clear that the ability of a court to correct such problems is limited, but the grounds include what may be characterized as due process procedure.<sup>43</sup> Some contracts expand the grounds

---

foreign commercial arbitral award almost six years after initiation of the arbitration proceeding); Tom Arnold, *Delay and Cost Booby Traps in Arbitration Practice and How to Avoid Them*, in ALI-ABA, *ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE* 99, 103 (Jan. 25–26, 1996) (highlighting one arbitration that lasted over seven years, resulting in \$61.5 million in attorney's and arbitrator's fees and \$7.5 million on the merits).

41 See, e.g., Wendy Ho, Comment, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 200 (1997) ("Recently, however, the efficiency of commercial arbitration has decreased as a result of extensive discovery.").

42 See, e.g., *Karaha Bodas Co.*, 364 F.3d 274.

43 The statutory grounds for vacatur of an arbitration award may be found in the FAA, 9 U.S.C. § 10(a) (2000).

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
- (1) where the award was procured by corruption, fraud, or undue means;
  - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
  - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
  - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

*Id.*

Several judicially-created grounds for vacatur have been recognized. See Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 519–20 (2002) (listing "manifest disregard of the law," "arbitrary and capricious," "public policy," and "essence of the contract" standards); *Kergosien v. Ocean Energy, Inc.*, No. 03-20953, 2004 WL 2451351, at \*9 (5th Cir. Nov. 2, 2004) (recognizing only manifest disregard and public policy as nonstatutory grounds for vacatur, and stating that "[t]he parties

available for vacatur.<sup>44</sup> Although searching, but limited, judicial scrutiny of arbitration awards is inconsistent with the notion that arbitration would free the courts of such cases and free the parties from the litigation system, it is entirely consistent with Professor Resnik's point that the courts exert authority over arbitration when the arbitration raises issues of due process procedure.<sup>45</sup>

Some litigation risks that attract commercial entities to arbitration may be changing. The Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>46</sup> limiting punitive damages may make businesses less fearful of juries and judges. Professor Resnik exhorts courts to look to arbitration, and arbitration to look to courts, to see what they can learn from each other. Arbitration may provide greater predictability in the rules that apply, particularly in international disputes. The American Law Institute is nearing completion of its project on the Principles and Rules of Transnational Civil Procedure, designed to apply in international commercial disputes.<sup>47</sup> Parties could contract to have these rules apply in arbitration proceedings, removing the uncertainty that often accompanies such proceedings as to what rules of discovery and evidence will be followed by a tribunal hearing an international or multinational dispute.<sup>48</sup> In that way, arbitration may become more like court proceedings. But judges should continue to examine whether some of the rules of litigation can and should be changed, in what they say or how they are applied, to make the courts more responsive to the needs of litigants. Courts must continue to examine ways to reduce the cost and delay of litigation without turning judicial processes into arbitration. One suggestion has been to develop a set of simplified

---

bargained for arbitration," adding that "[w]hen one bargains for arbitration, he bargains for the process as well as the results" and that "[i]f Ocean had wanted to have the rigors of a federal court proceeding, it could have had them").

44 Compare *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (noting that to allow parties contractually to expand judicial review of arbitration awards undermines the policies behind the FAA), with *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 887-90 (9th Cir. 1997) (allowing private parties to alter standards of judicial review by their arbitration contract), and *Gateway Tech., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995) (reversing the district court's refusal to permit parties to appeal "errors of law" under the arbitration contract, which "frustrate[d] the mutual intent of the parties").

45 Resnik, *supra* note 1, at 599-600.

46 538 U.S. 408 (2003).

47 See *Transnational Civil Procedure Principles Receive Final Approval; Final Action Deferred on International Jurisdiction and Judgments*, A.L.I. REP., Summer 2004, at <http://www.ali.org> (last visited Nov. 9, 2004).

48 *Id.*

rules in the federal courts for certain kinds of civil cases that would allow the parties to agree that in cases not presenting a damages potential above a certain dollar amount, the parties would engage in a reduced amount of discovery and shorten the time to trial. The Advisory Committee on the Federal Rules of Civil Procedure has proposed amendments to the discovery rules to accommodate the unique features of electronic discovery.<sup>49</sup> These proposed rule changes respond to concerns that the volume and dynamic nature of electronic information make discovery even more costly and time-consuming, which continue to lead potential litigants to seek alternatives to litigation.

The litigation issues courts encounter as parties enter into, then exit from, arbitration inevitably draw attention to the proper roles and relationship of litigation and arbitration. Whether courts can appropriately learn from and adopt some of the benefits of arbitration brings together the work of lawyers, litigants, rulemakers, judges, and all those seeking a more efficient, less costly way to resolve claims. Contract procedure and due process procedure need not—must not—inhabit different dispute resolution worlds.

---

49 See ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 2-20 (2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.