

DOMAIN-NAME ARBITRATION IN THE ARBITRATION-LAW CONTEXT: CONSENT TO, AND FAIRNESS IN, THE UDRP

by
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In this Article, Professor Ware surveys many of the arbitration systems that have been attacked for lacking consent or fairness. The Article begins by introducing the domain-name arbitration system and summarizing the charges that it lacks consent or fairness. This Article asserts, however, that research reveals no sustained critique that domain-name arbitration lacks consent. The Article next provides what may be the first sustained analysis of consent issues in domain-name arbitration. Professor Ware concludes the article by placing domain-name arbitration in the context of arbitration generally, and, within that context, assesses the fairness of domain-name arbitration.

I. INTRODUCTION.....	130
II. THE ARBITRATION LAW CONTEXT	131
A. <i>Introduction</i>	131
B. <i>Charges that Consumer and Employment Arbitration Lacks Consent and/or Fairness</i>	132
C. <i>Charges that Particular Arbitration Programs Lack Consent and/or Fairness</i>	134
1. <i>Securities Employment</i>	135
2. <i>Securities Investor</i>	138
3. <i>Hooters</i>	139
4. <i>Kaiser Permanente</i>	141
III. DOMAIN-NAME ARBITRATION	144
A. <i>The Basic Differences Between Domain-Name Arbitration and Typical Arbitration</i>	144
B. <i>Charges that Domain-Name Arbitration Lacks Fairness</i>	150
IV. AN ANALYSIS OF CONSENT ISSUES IN DOMAIN-NAME ARBITRATION	152
A. <i>The Relationship Between Consent and Fairness</i>	152
B. <i>Consent and the Circumstances Under Which it is Given</i>	153

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V. CONCLUSION: ASSESSING THE FAIRNESS OF DOMAIN-
NAME ARBITRATION 161

I. INTRODUCTION

The Internet's growth is raising the number of disputes over domain names, which are the unique identifiers used to find web pages, route email, and otherwise use the Internet.¹ Since 1998, certain domain-name disputes, principally those alleging trademark infringement, have been sent to arbitration rather than to court. Much of the literature on this domain-name arbitration is written by those with expertise in computer law or intellectual property law.² In contrast, I write from the perspective of one who specializes in arbitration law. My goal is to place domain-name arbitration in the context of arbitration law.

More specifically, the domain-name arbitration system can be challenged on the grounds that it is non-consensual and unfair. The same charges have been levied against other arbitration systems. This article starts with the premise that assessing issues of consent and fairness in domain-name arbitration should be done in the context of assessing those issues in arbitration generally.³

Accordingly, this Article begins by surveying many of the arbitration systems that have been attacked for lacking consent or fairness. Part III introduces the domain-name arbitration system and the charges that it too lacks fairness. Research has revealed no sustained charges that domain-name arbitration lacks consent. Part IV of this Article provides what may be the first sustained analysis of consent issues in domain-name arbitration. In conclusion, Part V integrates the aforementioned material by placing domain-name arbitration in the context of arbitration generally, and, within that context, assesses the fairness of domain-name arbitration.

¹ Michael Froomkin, *Wrong Turn In Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 37-43 (2000).

² See, e.g., DAVID BENDER, 2 COMPUTER LAW § 3D.03 (2001); Froomkin, *supra* note 1; 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 (2001).

³ STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION §§ 2.1, 2.2, 2.55 & 4.32 (2001). There are many different processes operating under the name "arbitration." There are very different bodies of law governing these different types of arbitration, *id.*, and there are good policy reasons why different types of arbitration should be treated differently by the law. This article seeks to show what type of arbitration domain-name arbitration is and to advance the debate about what body of law should govern it.

II. THE ARBITRATION LAW CONTEXT

A. Introduction

"Arbitration is adjudication in a private, *i.e.*, non-government, forum."⁴ Much arbitration arises out of a pre-dispute agreement to resolve disputes in arbitration rather than litigation. A wide variety of contracts contain such arbitration clauses. Examples include:

- a collective bargaining agreement between a labor union and an employer,⁵
- a bill of lading in an international shipment of goods,⁶
- an agreement between an investor and a securities broker,⁷
- an agreement in connection with the sale of a paint business,⁸
- a franchise agreement for a 7-Eleven store,⁹
- a contract to finance the purchase of a mobile-home,¹⁰
- an employment agreement between an individual employee and an employer,¹¹
- a home termite protection plan,¹²
- a construction contract between a university and a contractor,¹³
- a homeowner insurance policy,¹⁴
- a credit card agreement,¹⁵ and
- a consumer loan agreement.¹⁶

All of these arbitration agreements are generally enforceable under current law. Indeed, each of the examples above is followed by a citation to a case enforcing the particular arbitration agreement. According to current law, specifically the Federal Arbitration Act ("FAA"),¹⁷ arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁸ The FAA, as interpreted by the Supreme Court over the last quarter cen-

⁴ *Id.*, §1.6(c).

⁵ *See, e.g.*, *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

⁶ *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

⁷ *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

⁸ *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

⁹ *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹⁰ *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

¹¹ *See, e.g.*, *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001).

¹² *See, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

¹³ *See, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

¹⁴ *See, e.g.*, *Am. Bankers Ins. Co. v. Crawford*, 757 So. 2d 1125 (Ala. 2000).

¹⁵ *See, e.g.*, *Lloyd v. MBNA Am., N.A.*, 2001 WL 194300 (D. Del. Feb. 22, 2001).

¹⁶ *See, e.g.*, *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999).

¹⁷ Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).

¹⁸ *Id.*, § 2.

tury, generally embodies a “contractual approach” to arbitration law.¹⁹ “The contractual approach rests on the principle that arbitration law is a part of contract law and courts should treat arbitration agreements, with few exceptions, like they treat other contracts.”²⁰ The contractual approach currently applies to all arbitration agreements, including those found in take-it-or-leave-it form contracts presented to consumers, employees, and other ordinary individuals.²¹ In other words, the contractual approach of current law extends to “adhesion” contracts “imposed” on “little guys.”²² As the quoted words suggest, the contractual approach has generated substantial criticism when applied to consumer and employment arbitration agreements.

B. Charges that Consumer and Employment Arbitration Lack Consent and/or Fairness

Many critics of the contractual approach charge that consumer and employment arbitration lacks consent. For instance, the author of the article quoted in the previous paragraph, Jean Sternlight, argues “it is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration *forced upon* unknowing consumers, franchisees, employees or others through the use of form contracts.”²³ Similarly, Katherine Van Wezel Stone charges “in many recent cases, courts have applied attenuated notions of consent, compelling arbitration when consent is thin, if

¹⁹ See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001–06 (1996) [hereinafter Ware, *Arbitration and Unconscionability*]. See also Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 McGEORGE L. REV. 195 (1998) (defending the contractual approach).

²⁰ Ware, *Arbitration and Unconscionability*, *supra* note 19, at 1001.

²¹ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

²² Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 676 (1996); see *id.* at 676–77

(While the pure freedom of contract rationale has some appeal as applied to two entities engaging in an arm's length transaction, it cannot realistically be used to justify imposing binding arbitration through contracts of adhesion on unwitting consumers. . . . Thus, one cannot with a straight face justify enforcement of form arbitration agreements imposed by sellers on consumers on the ground that the consumers actually accepted the contract with knowledge of those terms.); see *id.* at 637 (“Attention All Consumers, Employees, Franchisees, and ‘Little Guys’”).

²³ *Id.* at 642–43 (emphasis added). Accord Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069 (1998). See also Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (describing consumer arbitration agreements, not as products of mutual consent, but as “predation” by those with “economic power” on those lacking such power).

not outright fictitious.”²⁴ And Jeffrey Stempel went so far as to title an article: “*Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent.*”²⁵

Consumer and employment arbitration have been criticized for not only lacking consent, but for also lacking fairness.²⁶ Some critics charge that employment arbitration is tilted in favor of employers who are repeat arbitration players, and correspondingly tilted against employees who are one-shot arbitration players. These critics cite “repeat player bias” to impugn the neutrality of “arbitrators who depend for their livelihood on repeat business.”²⁷ One critic suggests that “arbitration companies, for the sake of their own profit margins, may abandon fair procedural protections and instead cater to the employers who have hired them to perform a service.”²⁸ A similar charge has been levied against the National Arbitration Forum (“NAF”), which is an organization that administers many consumer arbitration cases. In one case, consumer plaintiffs argued that:

[The NAF] is a creditor-friendly arbitration organization. Directors for the organization are former employees of lending institutions and members of the defense bar that have specialized in representing lenders in litigation against consumers. These directors exercise significant control and authority over the arbitration process at NAF. The list of arbitrators for NAF are typically secret, and only individuals designated by the creditor become arbitrators. The arbitrators receive payment for their services based solely on the number of cases they handle. This system encourages arbitrators to rule in favor of the creditors in an attempt to garner future appointments from creditors, and in turn permits creditors to exercise significant influence over the arbitrators.

The NAF routinely solicits its business from the financial services industry and engages in inappropriate contacts with financial

²⁴ Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 962 (1999).

²⁵ Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1,381 (1996). *See id.* at 1384 n.8 (attacking the “unrealistic, formal and narrow view of contract consent and meaning demonstrated in recent [arbitration] cases”).

²⁶ *See id.* at 1383 (“arbitration zealots . . . including most of the Supreme Court” . . . “ride roughshod over individual rights and basic notions of fairness in the heat of pursuing a popular current goal”). *See also* discussion *infra* Part IV.A. regarding the distinction between consent and fairness.

²⁷ Letter from John Vail, American Trial Lawyers Association, to the United States Department of Commerce and Federal Trade Commission 4 (Mar. 21, 2000), <http://www.ftc.gov/bcp/altdisresolution/comments/vail.pdf> (on file with the Journal of Small and Emerging Business Law). *See also* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001) (providing an assessment of this assertion).

²⁸ Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN'S L.J. 267, 268 n.8 (1998).

institutions. The solicitations do not hold NAF out as a neutral decision maker, but rather present arbitration with NAF as an opportunity for financial service institutions to limit the awards for consumers on valid claims brought against members of the financial service industry. NAF has indicated its rules provide preferential treatment for creditors by reducing "collection costs" and has touted "every award is limited to the amount claimed," thereby eliminating the possibility for punitive damages, even in circumstances where the financial institution is guilty of outrageous, abusive, and predatory lending conduct. Finally, NAF has marketed its rules as an opportunity for financial institutions to "improve their bottom line" in the battle against consumers and has encouraged the industry to include a clause in all its loan agreements that compels arbitration with the NAF.²⁹

Some members of Congress have been receptive to arguments that consumer and employment arbitration lack consent or fairness. Several bills would, if enacted, generally prevent enforcement of pre-dispute consumer and employment arbitration agreements.³⁰ Some of these bills, however, have been around for several years,³¹ and face uncertain prospects in the current Congress. As noted above, current law clearly makes consumer and employment arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."³² Thus, current law rejects charges that the entire categories of consumer and employment arbitration lack consent or fairness. Rather, current law applies contract-law doctrines on a case-by-case basis to assess issues of consent and fairness.³³

C. Charges that Particular Arbitration Programs Lack Consent and/or Fairness

While current law rejects broad-brush charges that the entire categories of consumer and employment arbitration lack consent or fairness,³⁴

²⁹ *Toppings v. Meritech Mortgage Serv.*, 140 F. Supp. 2d 683, 684–85 (S.D. W. Va. 2001).

³⁰ Securing a Future for Independent Agriculture Act of 2001, S. 20, 107th Cong. § 128 (2001); Civil Rights Procedures Protection Act of 2001, S. 163, 107th Cong. § 9 (2001); Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong. § 9 (2001); Consumer Credit Fair Dispute Resolution Act of 2001, S. 192, 107th Cong. § 2 (2001); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. § 17 (2001); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, H.R. 1296, 107th Cong. § 17 (2001); Predatory Lending Consumer Protection Act of 2001, H.R. 1051, 107th Cong. § 2 (2001); Truth in Savings Enhancement Act of 2001, H.R. 1057, 107th Cong. § 2 (2001); American Homebuyers Protection Act, H.R. 2053, 107th Cong. § 2 (2001); Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. § 3 (2001); Save Our Homes Act, H.R. 2531, 107th Cong. § 2 (2001).

³¹ *See, e.g.*, S. 63, 105th Cong. (2d Sess. 1997); H.R. 983, 105th Cong. (1997).

³² 9 U.S.C. § 2 (2000).

³³ *WARE*, *supra* note 3, §§ 2.9–2.14, 2.22–2.25.

³⁴ *See supra* Part II.B. on contractual approach.

these charges have been more successful when targeted at particular arbitration programs. The following pages discuss four such programs.

1. Securities Employment

Prior to 1999, an agreement to arbitrate employment disputes was required to get certain jobs in the securities industry. Federal law requires securities firms (broker-dealers) to register with the Securities and Exchange Commission ("SEC") as a condition of doing business.³⁵ The SEC has authority to regulate broker-dealers, but the SEC generally delegates the bulk of the day-to-day regulation of broker-dealers to Self Regulatory Organizations ("SROs") such as the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE").³⁶ Federal law requires broker-dealers register with and submit to the rules of an SRO as a condition of doing business.³⁷

The rules of each SRO require its members' employees who perform certain jobs to register with the SRO.³⁸ In other words, one is not legally permitted to perform certain jobs without first registering with an SRO. Prior to 1999, the SRO registration rules required securities employees to

³⁵ 15 U.S.C. § 78o (a)(1) (2000):

It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

³⁶ THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 10.2 (3d ed. 1996).

³⁷ 15 U.S.C. § 78o (b)(8); *see also* 17 C.F.R. § 240.15b9-1 (2001):

It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

³⁸ *See, e.g.*, N.Y.S.E. Guide (CCH) ¶ 2345 (1983). N.Y.S.E. Rule 345 provides:

(a) No member or member organization shall permit any natural person to perform regularly the duties customarily performed by (i) a registered representative, (ii) a securities lending representative, (iii) a securities trader or (iv) a direct supervisor of (i), (ii) or (iii) above, unless such person shall have been registered with, qualified by and is acceptable to the Exchange.

(b) No member or member organization shall permit any natural person, other than a member or allied member, to assume the duties of an officer with the power to legally bind such member or member organization unless such member or member organization has filed an application with and received the approval of the Exchange.

sign an arbitration agreement.³⁹ Effectively, a person was not legally permitted to perform certain jobs without first agreeing to arbitrate employment disputes.

Various commentators criticized this arbitration system on the ground that it lacked employee consent.⁴⁰ In 1996, for example, I emphasized the distinction between (1) individual employers choosing whether to insist on arbitration as a condition of employment, and (2) government regulation requiring all employers in a particular industry to insist on arbitration as a condition of employment.⁴¹ I argued that, though employee consent in the former situation should generally be enforced, the government regulation in the latter situation (the securities industry) should be repealed.⁴²

Effective January 1, 1999, this government regulation was repealed with respect to discrimination claims.⁴³ The rules of the NASD now provide: "A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate

³⁹ The arbitration clause appeared on the document signed by the employee. The document was typically "Form U-4." Form U-4's wording changed over the years but invariably provided for arbitration of employment disputes. For example, the Form U-4 at issue in *Moore v. Interacciones Global, Inc.*, 1995 WL 33650 (S.D.N.Y. Jan. 27, 1995), said:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 [in this case, National Association of Stock Dealers ("NASD")] as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

Prior to 1999, SRO rules required arbitration of employment disputes between securities firms (SRO members) and securities employees (registered representatives). *See, e.g.*, N.Y.S.E. Guide (CCH) ¶ 2347 (1977):

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

See also NAT'L ASS'N SEC DEALERS MANUAL (CCH) R. 10101 & 10201 (2000) (requiring arbitration of disputes among NASD members and persons associated with a member).

⁴⁰ *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 nn.102-04 (1996) (citing critics). In response to such criticism, the NASD formed an Arbitration Policy Task Force that produced the 1996 "Ruder Report." Exchange Act Release No. 34-39421, 66 SEC Docket 40 (Dec. 10, 1997).

⁴¹ Ware, *supra* note 40, at 138-59.

⁴² *Id.*

⁴³ NASD Notice to Members 99-96 (Jan. 18, 2000), http://www.nasdr.com/2610_1999.asp. *See also* Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35,299 (June 29, 1998).

it, either before or after the dispute arose.”⁴⁴ The parties, of course, are the employee and employer. The NASD rules now leave arbitration of discrimination claims to the choice of the contracting parties. This permits individual employers to insist on arbitration as a condition of employment but does not, in contrast to the pre-1999 NASD rules, require them to do so.

Not only was the pre-1999 securities employment arbitration system criticized on the ground that it lacked consent, but it was also criticized on the ground that it was unfair, particularly in discrimination cases. For example, the Wall Street Journal ran a front-page story entitled “*Riding Crop and Slurs: How Wall Street Dealt With a Sex-Bias Case.*”⁴⁵ A 1994 study of discrimination claims in securities employment arbitration estimated that 97% of the arbitrators were white and 89% were male averaging 60 years of age.⁴⁶ The arbitrators’ general inexperience in employment law yielded a New York Times headline reading “*Arbiters of Bias in Securities Industry Have Slight Experience in Labor Law.*”⁴⁷

In response to this criticism, the NASD enacted a rule in 1999 that strengthened the qualifications for arbitrators in discrimination cases. Rather than arbitrators from the securities industry, now only “public” arbitrators may serve on these cases.⁴⁸ Furthermore, the chair of the arbitration panel (or the arbitrator, if there is only one) must have a law degree, “substantial familiarity with employment law,” ten or more years legal experience, and must not have professionally represented the views of employers or employees more than fifty percent of the time in the last five years.⁴⁹ The rule changes also increased the scope of allowable discovery,⁵⁰ and added a requirement that “a statement regarding the disposition of any statutory claim[s]” be provided by the arbitrator.⁵¹

⁴⁴ NAT’L ASS’N SEC. DEALERS MANUAL R. 10201(b) (2000). The NYSE went further than the NASD. The NYSE rule now states that a “claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.” N.Y.S.E. Guide (CCH) ¶ 2347, R. 347(b) (1977). In other words, the NYSE position is that no pre-dispute agreement to arbitrate employment discrimination claims should be enforced. Though this position is in conflict with current law, *see supra* Part II.B., the Equal Employment Opportunity Commission also takes this position. This position is an example of changes effected by those who target their no-consent arguments at particular arbitration programs.

⁴⁵ Margaret A. Jacobs, *Riding Crop and Slurs: How Wall Street Dealt with a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1.

⁴⁶ *See* U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 7, 8 GAO/HEHS-94-17 (1994).

⁴⁷ Steven A. Holmes, *Arbiters of Bias in Securities Industry Have Slight Experience in Labor Law*, N.Y. TIMES, Apr. 5, 1994, at B6.

⁴⁸ NAT’L ASS’N SEC. DEALERS MANUAL (CCH) R. 10211 (2000).

⁴⁹ *Id.* R. 10211(b).

⁵⁰ *Id.* R. 10213 & 10321.

⁵¹ *Id.* R. 10214.

2. *Securities Investor*

Many securities firms require their customers (investors) agree to arbitrate as a condition of doing business, such as opening a brokerage account.⁵² Unlike securities-employment arbitration, securities-investor arbitration has never been required by government regulation. Securities-investor arbitration has always been left to the choice of the contracting parties. This standard permits individual securities firms to insist on arbitration as a condition of doing business, but does not require them to do so. From a consent standpoint, securities-investor arbitration is similar to consumer and employment arbitration.⁵³ Like no-consent charges against consumer and employment arbitration, such charges against securities-investor arbitration rest on concerns about form contracts (adhesion contracts) presented to (imposed on) ordinary individuals (those with little bargaining power).⁵⁴ Just as current law rejects broad-brush charges that entire categories of consumer and employment arbitration lack consent,⁵⁵ it also rejects charges that the entire category of securities-investor arbitration lacks consent.⁵⁶

Securities-investor arbitration has, however, been more vulnerable to charges that it lacks fairness. Richard Speidel refers to "the persistent impression that SRO administered arbitration is biased in favor of broker-dealers."⁵⁷ This impression motivated several reforms.⁵⁸ In 1987, Justice Blackmun worried that securities-investor arbitrators were "sympathetic to the securities industry and not drawn from the public."⁵⁹ At that time, Blackmun explained, SRO rules did not define who counted as a "public"

⁵² U.S. Gen. Accounting Office, *General Accounting Office Study 2000: Securities Arbitration on Review*, SECURITIES ARBITRATION COMMENTATOR 2-3 (Sept. 2000) [hereinafter *GAO Study*]. "[S]ix of the nine responding broker-dealers now require individual investors to sign PDAA's [pre-dispute arbitration agreements] as a condition of opening some or all types of retail cash accounts. Eight of nine require PDAA's for options accounts and all nine require the provision for margin accounts." *Id.*

⁵³ See *supra* Part II.B.

⁵⁴ See, e.g., Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1337 (1996) ("It is fair to say that securities arbitration is located on the dark side of the arbitration coin, since the contract to arbitrate is essentially a contract of adhesion."). See also Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1493 (1996) ("In securities arbitration there is no real consent to arbitrate."); G. Richard Shell, *Fair Play, Consent and Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365, 1366 (1996) (stating that objective consent is "an inadequate foundation on which the ground the legitimacy of securities arbitration"); Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV. 327, 339-46 (1996).

⁵⁵ See *supra* Part II.B.

⁵⁶ Speidel, *supra* note 54, at 1349-54.

⁵⁷ *Id.* at 1361.

⁵⁸ Marc I. Steinberg, *Securities Arbitration: Better for Investors than the Courts?*, 62 BROOK. L. REV. 1503, 1511-17 (1996).

⁵⁹ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 260-61 (1987).

arbitrator and who counted as an “industry arbitrator.” Accordingly, public arbitrators can often “be attorneys or consultants whose clients have been exchange members or SROs.”⁶⁰ The SRO rules were changed in 1989 to ensure that “public” arbitrators are more distant from the securities industry.⁶¹ At the same time, changes were made to improve document discovery in securities-investor arbitration and to add a pre-hearing conference.⁶²

3. *Hooters*

Annette R. Phillips worked as a bartender at a Hooters restaurant in Myrtle Beach, South Carolina.⁶³ She was employed by Hooters of Myrtle Beach (HOMB), a franchisee of Hooters of America (Hooters).⁶⁴ Phillips alleged that a Hooters official, and the brother of HOMB’s principal owner, sexually harassed her.⁶⁵ After appealing to her manager for help and being told to “let it go,” she quit her job.⁶⁶ Phillips then contacted Hooters through an attorney claiming a violation of her Title VII rights. Hooters sued to compel arbitration on the ground that Phillips had signed an arbitration agreement, which stated:

[T]he employee and the company agree to resolve any claims pursuant to the company’s rules and procedures for alternative resolution of employment-related disputes, as promulgated by the company from time to time (“the rules”). Company will make available or provide a copy of the rules upon written request of the employee.⁶⁷

The employees of HOMB were given a copy of this agreement but were not given a copy of Hooters’ arbitration rules and procedures.⁶⁸

⁶⁰ *Id.* at 261.

⁶¹ Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35,299 (June 29, 1998). SEC. INDUS. CONFERENCE ON ARBITRATION, UNIF. CODE OF ARBITRATION § 8(a)(2) (June 1994); NAT’L ASS’N SEC. DEALERS MANUAL, CODE OF ARBITRATION PROCEDURES (CCH) R. 10308(c)–(d) (2001). A majority of the arbitration panel must be comprised of public arbitrators. Generally, an industry arbitrator is an individual who:

1. Is currently associated with a broker/dealer, municipal securities dealer, or has been associated with one in the last three years;
2. Is retired;
3. Has a spouse or other household member associated with a securities entity; or
4. Is a professional outside of the securities industry who has devoted 20% or more of his or her individual work effort to securities industry clients within the industry during the previous two years.

Id.

⁶² *Id.*

⁶³ *Hooter’s of Am., Inc. v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 936.

⁶⁸ *Id.*

After Phillips quit her job, Hooters sent Phillips' attorney a copy of the Hooters rules then in effect.⁶⁹ Hooters' suit to compel arbitration was rejected by both the district court and the Fourth Circuit.

This case has been aptly described as "a textbook example of how not to implement an arbitration program."⁷⁰ The Fourth Circuit stated:

The Hooters [arbitration] rules . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding. The rules require the employee to provide the company notice of her claim at the outset, including "the nature of the Claim" and "the specific act(s) or omissions(s) which are the basis of the Claim." Rule 6-2(1), (2). Hooters, on the other hand, is not required to file any responsive pleadings or to notice its defenses. Additionally, at the time of filing this notice, the employee must provide the company with a list of all fact witnesses with a brief summary of the facts known to each. Rule 6-2(5). The company, however, is not required to reciprocate.

The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. Rule 8. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.

Nor is fairness to be found once the proceedings are begun. Although Hooters may expand the scope of arbitration to any matter, "whether related or not to the Employee's Claim," the employee cannot raise "any matter not included in the Notice of Claim." Rules 4-2, 8-9. Similarly, Hooters is permitted to move for summary dismissal of employee claims before a hearing is held whereas the employee is not permitted to seek summary judgment. Rule 14-4. Hooters, but not the employee, may record the arbitration hearing "by audio or videotaping or by verbatim transcription." Rule 18-1. The rules also grant Hooters the right to bring suit in court to vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel

⁶⁹ *Id.*

⁷⁰ Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should be Considered by a Consumer Lender*, SF81 ALI-ABA 215, 258 (May 10, 2001).

exceeded its authority. Rule 21-4. No such right is granted to the employee.

In addition, the rules provide that upon 30 days notice Hooters, but not the employee, may cancel the agreement to arbitrate. Rule 23-1. Moreover, Hooters reserves the right to modify the rules, "in whole or in part," whenever it wishes and "without notice" to the employee. Rule 24-1. Nothing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding.⁷¹

There may be no clearer case of an unfair arbitration program than that promulgated by Hooters. Courts have also held other arbitration programs unconscionable because those programs had some of the flaws of the Hooters program.⁷²

4. *Kaiser Permanente*

Kaiser Permanente is the largest health maintenance organization (HMO) in the United States.⁷³ A "pioneer" in the arbitration of medical malpractice claims,⁷⁴ Kaiser has required its California members to arbitrate medical malpractice claims since the early 1970's.⁷⁵ One of those members was Wilfredo Engalla, who enrolled in a Kaiser group health plan offered by his employer, Oliver Tire & Rubber Company ("Oliver Tire").⁷⁶

Over several years, Engalla repeatedly complained of respiratory problems, and Kaiser health care professionals repeatedly diagnosed him with common colds and allergies.⁷⁷ Eventually, X-rays revealed lung cancer. By this time, Engalla's condition was inoperable.⁷⁸ On May 31, 1991, the Engallas sent Kaiser a letter alleging that Kaiser negligently failed to timely diagnose Engalla's lung cancer.⁷⁹ This letter expressed "unqualified willingness" to arbitrate the claim and also referenced Engalla's terminal condition and his desire to expedite the proceedings.⁸⁰

Kaiser's arbitration program called for tripartite arbitration in which one arbitrator would be appointed by each party and a third appointed by the other two. Once a member served Kaiser with a written demand

⁷¹ *Hooter's*, 173 F.3d at 938-39.

⁷² WARE, *supra* note 3, § 56 & nn.259-262.

⁷³ Erick Schonfeld, *Can Computers Cure Health Care?*, FORTUNE, Mar. 30, 1998, at 111.

⁷⁴ Jim Moore, *Note, Bad Facts, Good Law - Thoughts on Engalla v. Permanente Medical Group*, 26 W. ST. U. L. REV. 135 (1998-1999).

⁷⁵ *Id.* (citing Linda O. Prager, *Kaiser Looks to Overhaul Arbitration*, AM. MED. NEWS, July 28, 1997, at 1); *see also* Madden v. Kaiser Found. Hosps., 552 P.2d 1178 (Cal. 1976).

⁷⁶ Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 908 (Cal. 1997) .

⁷⁷ *Id.* at 909.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 910.

for arbitration, each side had thirty days to designate its party arbitrator.⁸¹ After the party arbitrators were in place, the arbitrators were to agree on a third arbitrator, the neutral arbitrator, within thirty days.⁸²

Kaiser did not respond to the Engallas's initial letter demanding arbitration.⁸³ The Engallas sent a follow-up letter two weeks later and in response, Kaiser provided a copy of the arbitration clause and requested a \$150 deposit.⁸⁴ Delays began when Kaiser informed the Engallas that it would not name its party arbitrator until after the Engallas named theirs.⁸⁵ The Engallas objected to this condition, but having heard nothing further from Kaiser, proceeded to designate their choice of arbitrator on July 8.⁸⁶ Kaiser designated its arbitrator on July 17, nine days after the Engallas' selection and 47 days after service of the claim.⁸⁷

Once the two party arbitrators were in place, the process of selecting a neutral arbitrator began. The Engallas asked for a schedule that would have allowed the arbitration to begin in September.⁸⁸ During the arbitrator-selection process, the Engallas wrote more than a dozen letters to Kaiser in an attempt to secure Kaiser's agreement to this schedule.⁸⁹ Two of those letters arrived after September 5, and expressed the Engallas' agreement to use one of the arbitrators suggested by Kaiser, on the condition the arbitrator be "available to commence this matter this month."⁹⁰

When Kaiser responded, it indicated that it was uncertain whether the parties had agreed to the identity of the neutral arbitrator.⁹¹ The Engallas reiterated their acceptance of the Kaiser-suggested neutral arbitrator and their need for confirmation that that arbitrator would be available "in the very near future."⁹² On October 7, Kaiser sent another letter to the Engallas stating the parties were still not in agreement about the identity of the neutral arbitrator.⁹³ Although the Engallas had agreed to the neutral arbitrator, they conditioned their agreement on the arbitrator's immediate availability.⁹⁴ Kaiser said the time constraint was an "unrealistic condition" that the Engallas attached to the selection, which caused Kaiser to question whether the parties reached an agreement.⁹⁵ The Engallas responded they were "incredulous" that Kaiser still ques-

⁸¹ *Id.* at 909.

⁸² *Id.*

⁸³ *Id.* at 910.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 911.

⁸⁹ *Id.*

⁹⁰ *Id.* at 912.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

tioned whether they assented to the neutral arbitrator.⁹⁶ They said they had repeatedly informed Kaiser that they accepted its choice.⁹⁷

Kaiser confirmed its agreement with the Engallas about the identity of the neutral arbitrator on October 22.⁹⁸ Wilfredo Engalla died the next day.⁹⁹ The arbitrator-selection process took 144 days from the service of the demand letter to the final agreement between Kaiser and the Engallas.

Engalla's death caused his wife's loss of consortium claim to merge with the claim for wrongful death and thus lowered Kaiser's liability exposure.¹⁰⁰ The Engallas asked Kaiser to stipulate that the loss of consortium claim survived; Kaiser refused to do so.¹⁰¹ In response, the Engallas discontinued the arbitration proceedings and filed a complaint in court.¹⁰²

In addition to the underlying malpractice claim, the Engallas' complaint added a fraud allegation both as an affirmative claim for damages and as a defense to enforcement of the arbitration clause.¹⁰³ Kaiser responded by filing a motion to compel arbitration.¹⁰⁴ The trial court denied this motion, and this ruling was ultimately upheld by the California Supreme Court.¹⁰⁵ The California Supreme Court held that Kaiser misrepresented the speediness of its arbitration program,¹⁰⁶ and by its delay, had waived its right to enforce the arbitration clause.¹⁰⁷

Though the legal reasoning on issues of misrepresentation and waiver are debatable, clearly "Kaiser lost on the facts, not the law."¹⁰⁸ As administered in the *Engalla* case, Kaiser's arbitration program struck the court as unfair. Like the unfairness of Hooters' arbitration program, the unfairness of Kaiser's arbitration program seems to have arisen from the fact that the program was self-administered or "captive."¹⁰⁹ Neither Kaiser's nor Hooters' arbitration agreement specified an outside organization to administer the arbitration. Such outside organizations include the American Arbitration Association, the Judicial Arbitration and Mediation

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 914.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 915.

¹⁰⁶ *Id.* at 922.

¹⁰⁷ *Id.* at 924.

¹⁰⁸ Moore, *supra* note 74, at 169. See also Edward Dauer, *Engalla's Legacy to Arbitration*, ADR CURRENTS, Summer 1997, at 1.

¹⁰⁹ Not all such programs are unenforceable. See *Selznik v. BDO Seidman*, No. 507/95 (Sup. Ct., Westchester County, N.Y., June 12, 1995), reprinted in STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION: CASES AND MATERIALS* 392-93 (1998).

Service, as well as the NAF mentioned above. The California Supreme Court stated:

Kaiser entered into the arbitration agreement with knowledge that it would not comply with its own contractual timelines Though Kaiser is not obliged by law to adopt any particular form of arbitration, the record shows that it did not attempt to create within its own organization any office that would neutrally administer the arbitration program, but instead entrusted such administration to outside counsel retained to act as advocates on its behalf. In other words, there is evidence that Kaiser established a self-administered arbitration system in which delay for its own benefit and convenience was an inherent part, despite express and implied contractual representations to the contrary.¹¹⁰

Kaiser has since reformed its arbitration program to use a third-party administrator.¹¹¹

III. DOMAIN-NAME ARBITRATION

A. *The Basic Differences Between Domain-Name Arbitration and Typical Arbitration*

The preceding section introduced arbitration and surveyed many of the arbitration systems that have been attacked as lacking consent or fairness. With that background and context, we can turn to domain-name arbitration and begin to place it in the context of arbitration law generally.

Domain names are the unique identifiers used to find web pages, route email, and otherwise use the Internet. As a practical matter, one cannot obtain a domain-name without agreeing to arbitrate.¹¹²

Since 1998, the domain-name system has been administered by ICANN, the Internet Corporation for Assigned Names and Numbers.¹¹³ To register a domain name in the ".com", ".net", or ".org" domains,¹¹⁴ a registrant must contract with an ICANN-approved registrar.¹¹⁵ All such registrars require each registrant to agree to arbitrate disputes.¹¹⁶ Regis-

¹¹⁰ *Engalla*, 938 P.2d at 917–18.

¹¹¹ *Id.*

¹¹² See *infra* Part IV.B. discussing theoretical possibility of an alternative internet.

¹¹³ ICANN, FREQUENTLY ASKED QUESTIONS, at <http://www.icann.org/general/faq1.htm> (last visited Jan. 28, 2002) [hereinafter ICANN FAQs]; see also *infra* notes 168–213 and accompanying text (discussing evolution of ICANN).

¹¹⁴ ICANN, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (Aug. 26, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter UDRP] ("This policy has been adopted by all accredited domain-name registrars for domain names ending in .com, .net, and .org.").

¹¹⁵ ICANN FAQs, *supra* note 113 ("Only registrars accredited by the Internet Corporation for Assigned Names and Numbers (ICANN) are authorized to register .com, .net and .org names in the registry.")

¹¹⁶ See UDRP, *supra* note 114, § 1 (requiring registrant agreements to incorporate the UDRP); ICANN, UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION

trars require arbitration because their own contracts with ICANN require them to do so.¹¹⁷

ICANN may be considered the center of a web of contractual relationships. Through contract, ICANN requires those it deals with to require arbitration of those they deal with. One must agree to arbitrate if one wants to become part of this contractual web. And one must become part of this contractual web to become part of the World Wide Web.

As noted above, all ICANN-approved registrars require each registrant to agree to arbitrate disputes. More specifically, registration agreements incorporate by reference the Uniform Domain Name Dispute Resolution Policy ("UDRP").¹¹⁸ Paragraph 4 of the UDRP provides in part:

4. Mandatory Administrative Proceeding.

This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed at www.icann.org/udrp/approved-providers.htm (each, a "Provider").

a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present

Two things about this arbitration clause stand out. First, it is not an "arbitration" clause. It is a "mandatory administrative proceeding" clause. The possible significance of this terminology is discussed below.¹¹⁹ The second thing that stands out about UDRP paragraph 4(a) is that it covers only a narrow category of disputes. Though the typical arbitration clause

POLICY, GENERAL INFORMATION, at <http://www.icann.org/udrp> (last visited Nov. 12, 2001) [hereinafter UDRP INFORMATION] ("All registrars in the .biz, .com, .info, .name, .net, and .org top-level domains follow the Uniform Domain-Name Dispute-Resolution Policy"); *Parisi v. Netlearning, Inc.*, 139 F.Supp.2d 745, 747 (E.D. Va. 2001).

¹¹⁷ ICANN, REGISTRAR ACCREDITATION AGREEMENT, ¶ 3.8 (May 17, 2001), at <http://www.icann.org/registrars/ra-agreement-17may01.html>. See also ICANN, REGISTER ACCREDITATION PROCESS, (July 26, 2001), at <http://www.icann.org/registrars/accreditation-process.htm>.

¹¹⁸ UDRP, *supra* note 114, § 1.

¹¹⁹ See *supra* Part II.A.

is written broadly to cover any “controversy or claim arising out of or relating to this contract, or the breach thereof,”¹²⁰ the UDRP covers only claims that the registrant’s domain name infringes on a trademark or servicemark.¹²¹ Relatedly, the UDRP says “[t]he remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant.”¹²² This is a stark contrast to the typical arbitration clause that allows the arbitrator a broader choice of remedies than even a court has.¹²³

Although not referenced in paragraph 4(a), there are two other important differences between the UDRP and the typical arbitration clause. First, the UDRP gives the complainant the right to choose which ICANN-approved “provider” will administer the arbitration of the complainant’s claim against the registrant.¹²⁴ There are four approved providers: CPR Institute for Dispute Resolution, the National Arbitration Forum, the World Intellectual Property Organization, and the Asian Domain Name Dispute Resolution Centre.¹²⁵ Allowing the complainant to choose the provider contrasts with the typical arbitration in which the provider is selected by mutual agreement of the parties.¹²⁶ Perhaps related to the fact that the UDRP complainant gets to choose the provider, the UDRP complainant is required to pay all fees charged by the

¹²⁰ IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 20.2.2 (1994).

¹²¹ UDRP, *supra* note 114, § 5:

All Other Disputes and Litigation. All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available.

¹²² UDRP, *supra* note 114, § 4(i).

¹²³ See, e.g., AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL DISPUTE RESOLUTION PROCEDURES, R-45 (Sept. 1, 2000) (“The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.”).

¹²⁴ UDRP, *supra* note 114, § 4(d).

¹²⁵ ICANN, APPROVED PROVIDERS FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, at <http://www.icann.org/udrp/approved-providers.htm> (page updated Apr. 14, 2001). Until it ceased accepting business in November 2001, eResolution was one of the four ICANN-approved providers. See Press Release, eResolution (Nov. 31, 2001), at <http://www.eresolution.com/default.htm>. On February 28, 2002, Asian Domain Name Dispute Resolution Centre filled the void left by eResolution. See ICANN, APPROVED PROVIDERS FOR UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY, at <http://www.icann.org/dndr/approved-providers.htm> (last visited Mar. 14, 2002).

¹²⁶ That agreement can be pre-dispute or post-dispute.

provider.¹²⁷ This contrasts with typical arbitration in which the fees are split between the parties.¹²⁸

The final, and perhaps most important, difference between the UDRP and typical arbitration is that UDRP proceedings are subject to *de novo* review in court.¹²⁹ By contrast, none of the arbitration discussed in Part II of this article is subject to *de novo* review. In fact, that arbitration is barely subject to any judicial review at all. This point is well explained by a recent case, *Parisi v. Netlearning, Inc.*¹³⁰

¹²⁷ UDRP, *supra* note 114, § 4(g) ("All fees charged by a Provider in connection with any dispute before an Administrative Panel pursuant to this Policy shall be paid by the complainant."). If, however, the respondent chooses a three-member panel, the complainant and respondent split the fees. See Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process* 6 J. Small & Emerging Bus. L. 191, 204 n.48 and accompanying text (detailing UDRP fee structure).

¹²⁸ WARE, *supra* note 3, § 78.

¹²⁹ UDRP, *supra* note 114, § 4(k) (emphasis added). *Parisi v. Netlearning, Inc.*, 139 F.Supp.2d 745, 752 (E.D. Va. 2001) ; *Strick Corp. v. Strickland*, 162 F. Supp. 2d 372 (E.D. Pa. 2001). An earlier case said that "this Court is not bound by the outcome of the ICANN administrative proceedings. But at this time we decline to determine the precise standard by which we would review the panel's decision, and what degree of deference (if any) we would give that decision." *Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc.*, 2000 WL 562470, at *2 (N.D. Ill. May 3, 2000). See also *Referee Enters., Inc. v. Planet Ref, Inc.*, No. 00-C-1391 (E.D. Wis. Jan. 24, 2001), http://www.loundy.com/CASES/Referee_Ent_v_Planet_Ref.html (overruling UDRP arbitration decision). *De novo* judicial review seems to be the best interpretation of the UDRP which provides for "independent resolution" by a court either before or after a mandatory administrative proceeding is concluded. UDRP section 4(k) provides:

k. Availability of Court Proceedings. The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.

¹³⁰ *Parisi*, 139 F. Supp. 2d at 745 .

In that case, Dan Parisi registered the domain name “netlearning.com” with an ICANN-approved registrar, Network Solutions Inc. (“NSI”).¹³¹ Netlearning, Inc. initiated arbitration (UDRP administrative proceedings) challenging this registration.¹³² The three-member arbitration panel voted two-to-one in favor of Netlearning.¹³³ The panel directed NSI to transfer the registration for “netlearning.com” to Netlearning.¹³⁴ Parisi filed a declaratory judgment action seeking a declaration that his use of the domain name was lawful.¹³⁵ Netlearning moved to dismiss on the ground that Parisi’s complaint was in effect a motion to vacate an arbitration award and that Parisi had failed to assert cognizable grounds for doing so under the Federal Arbitration Act.¹³⁶ The court, per Judge Brinkema, denied Netlearning’s motion to dismiss.

Judge Brinkema distinguished between “binding”¹³⁷ and “non-binding”¹³⁸ arbitration awards. Binding awards are not subject to *de novo* review in court. They may only “be vacated in narrow circumstances of arbitrator misconduct, serious procedural flaws, or ‘manifest disregard of the law.’”¹³⁹ These narrow circumstances are found in § 10 of the FAA and the case law from cases governed by the FAA.¹⁴⁰ In contrast, Judge Brinkema held, “judicial review of UDRP decisions is not confined to a motion to vacate an arbitration award under § 10 of the FAA. . . . [T]he extreme deference of [FAA § 10 is limited] to proceedings intended by the contracting parties to be binding.”¹⁴¹

¹³¹ *Id.* at 748.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Specifically, he sought a declaration of lawful use under the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1114(2)(D) (2000), as well as a declaration of non-infringement under the Lanham Act, 15 U.S.C. § 1125(a) (2000).

¹³⁶ *Parisi*, 139 F. Supp. 2d at 749.

¹³⁷ *Id.* at 750.

¹³⁸ *Id.* at 750 n.10.

¹³⁹ *Id.* at 750 n.12 (citing FAA § 10).

[A] court may vacate an award:

- (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.
- (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.

¹⁴⁰ *WARE*, *supra* note 3, §§ 2.43–2.46. International law provides similarly limited grounds for vacating arbitration awards. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, articles 3 & 5, 330 U.N.T.S. 3, 40, 21 U.S.T. 2517.

¹⁴¹ *Parisi*, 139 F. Supp. 2d at 752.

Judge Brinkema uses the terms “binding” and “non-binding” as they are commonly used in the arbitration literature.¹⁴² But even “binding” arbitration is non-binding in a sense, and even “non-binding” arbitration is binding in a sense. “Binding” arbitration is non-binding in the sense that a court may vacate the arbitration award on one of the grounds found in FAA § 10 or related case law. And, “non-binding” arbitration is binding in the sense that the loser at arbitration must seek judicial review to prevent enforcement of the arbitrator’s ruling.¹⁴³ Thus, the difference between binding and non-binding arbitration is not a difference of kind but rather a difference of degree. The difference is the degree of deference courts give to the arbitrator’s decision. With respect to arbitration governed by the FAA, courts are extremely deferential in their standard of review for arbitrators’ decisions. Hence such arbitration is properly called “binding.” With respect to UDRP arbitration, courts use the least deferential standard of review possible, *de novo*. Hence, such arbitration is properly called “non-binding.”

The fact that UDRP arbitration is non-binding may be related to the fact, noted above, that the UDRP refers not to “arbitration” but to a “mandatory administrative proceeding.”¹⁴⁴ Though this may be nothing more than a semantic difference, I suspect the difference is more significant. I suspect that it shows the UDRP drafters’ understanding that their process does not conform to what people ordinarily think of as “arbitration.” Certainly, the UDRP does not fit easily into the framework of arbitration law found in the FAA and the many cases applying it.¹⁴⁵ The remainder of this Article will continue to refer to domain-name “arbitration” with the caveat that there may be significance to the term “mandatory administrative proceeding.”

¹⁴² See, e.g., Benjamin G. Davis, *The New New Thing: Uniform Domain-Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 3 J. WORLD INTELLECTUAL PROP. 525, 551 n.85 (2000)

(Where independent resolution by the State court includes fact-finding, application of the law, judgment, appeal and so on, one finds little of a binding nature in the Administrative Panel decision. Where such independent resolution is more akin to judicial review of a limited nature as in an appeal or with regard to an arbitral award, the administrative panel decision appears to be more binding and subject to deference. In this latter case, the Administrative Panel decision would begin to resemble arbitral awards of the kind found routinely in international arbitration.).

¹⁴³ WARE, *supra* note 3, § 4.32 (quoting MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 121, § 2.4.2.2) Furthermore, such arbitration may impose some disincentive to deter the losing party from pursuing litigation. Generally, that party “must deposit with the court a sum equal to the fees of the arbitrators. The deposit is returned only if the result at the trial *de novo* is more favorable to the appellant than the award of the arbitrators.” *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See also Richard E. Speidel, *ICANN Domain Name Dispute Resolution, the Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law*, 6 J. SMALL & EMERGING BUS. L. 167 (2002).

B. Charges that Domain-Name Arbitration Lacks Fairness

Research has revealed no sustained charges that domain-name arbitration lacks consent. By contrast, many commentators charge that domain-name arbitration lacks fairness. Among those pointing to unfairness in domain-name arbitration is Elizabeth Thornburg.¹⁴⁶ Like others, Thornburg portrays domain-name arbitration as a forum that favors major trademark holders, typically large corporations, over “cybersquatters” and other parties of modest means who have registered domain names now claimed by the trademark holders.¹⁴⁷ Thornburg provides plausible hypothetical cases to show how a large trademark holder can use domain-name arbitration to “achieve[] its goal: fast, comparatively inexpensive transfer of the domain name.”¹⁴⁸ She further explains the process as follows:

In the case of domain name disputes, the trademark holder is in the position of a plaintiff. Absent [domain-name arbitration], the trademark holder has to file a lawsuit against the domain name owner The lawsuit will seek cancellation or transfer of the domain name and, possibly, statutory or actual damages. The plaintiff will have to locate and serve the domain name owner. To secure a preliminary injunction hearing, it will need to assemble (and put into admissible form) the information needed to prove that it will ultimately prevail on the merits, and that it will be irreparably injured if it has to wait until the conclusion of the litigation for relief. Its lawyer will need to write a brief arguing to the court why it satisfies the requirements for preliminary relief.

¹⁴⁶ Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151 (2000).

¹⁴⁷ *Id.* at 165–68 (ICANN scenarios regarding delta.com). For other such portrayals, see, e.g., Froomkin, *supra* note 1, at 97–101; Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, UDRPINFO.COM, Aug. 2001, at ; Ian L. Stewart, Note, *The Best Laid Plans: How Unrestrained Arbitration Decisions Have Corrupted the Uniform Domain Name Dispute Resolution Policy*, 53 FED. COMM. L.J. 509, 517 (2001) (asserting that arbitrators have taken cases outside the UDRP, thus creating the “appearance that the process favors big corporations and famous individuals over the average Internet user”); Laurie J. Flynn, *Trademarks Winning Domain Fights*, N.Y. TIMES, Sept. 4, 2000, at <http://www.nytimes.com/library/tech/00/09/biztech/articles/04neco.html>; Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. SMALL & EMERGING BUS. L. 149, 163 (2000); www.domainshame.com (last visited Jan. 26, 2001); TLD Lobby website, at <http://tldlobby.com>; Brian Livingston, *Groups Cite Bias in Domain Name Arbitration*, NEWS.COM, July 7, 2000, at <http://www.news.com.com/2010-1080-281335.html>. More mild critiques of domain-name arbitration procedural fairness include Robert A. Badgley, *Improving ICANN in Ten Easy Steps: Ten Suggestions for ICANN to Improve its Anti-Cybersquatting Arbitration System*, 1 J.L. & TECH. 109 (2001); Robert A. Badgley, *Internet Domain Names and ICANN Arbitration: The Emerging “Law” of Domain Name Custody Disputes*, 5 TEX. REV. L. & POL. 343 (2001); Davis, *supra* note 142 (including critique of supplemental procedures of ICANN-approved providers).

¹⁴⁸ Thornburg, *supra* note 146, at 167.

What about the domain name holder? It will need to file an answer which, in federal court, will require a paragraph by paragraph response to the complaint. It will also be allowed to assemble evidence for the preliminary injunction hearing, including evidence showing that its use of the domain name is legitimate and that it has acted in good faith. At the hearing, it will be allowed to call its own witnesses and cross-examine the witnesses called by the trademark owner. It, too, will write a brief addressing its defenses on the merits and its probable harm should an injunction be granted.

Compare this to the ICANN process which grants the equivalent of a preliminary or even permanent injunction to a trademark holder with much lower procedural hurdles. The trademark owner files a complaint amounting to a fact pleading, and attaches evidence of the trademark. If the domain name owner has done anything in writing that suggests bad faith (such as offering to sell the domain name at an inflated price), the writing can also be attached. The trademark owner pays a filing fee. The domain name holder prepares and files a written response, and can also attach any documents that might be in its possession showing good faith. There is no discovery. There is no hearing to prepare for. There is no brief to write, except to the extent that arguments are included in the complaint or response. The substantive standards to be applied are unique to ICANN, and require somewhat less of the trademark owner than the corresponding U.S. law. The case is quickly assigned to an arbitrator, and a decision reached within 14 days. If the arbitrator rules for the trademark owner (as they have 80% of the time), the ruling results in cancellation or transfer of the domain name, which is the final relief the trademark owner seeks. In the absence of a lawsuit, then, the ICANN process operates not as a preliminary injunction but as a final, permanent one. Even if the domain name owner has the will and resources to challenge the ICANN result, the procedural advantage has shifted: it is the domain name holder, not the trademark owner, who must file a lawsuit and it is cancellation or transfer that becomes the default result.¹⁴⁹

While one can defend the domain-name arbitration process on the ground that it typically *should* provide trademark holders with fast and cheap transfers of domain names,¹⁵⁰ there seems little doubting Thorn-

¹⁴⁹ *Id.* at 192–93.

¹⁵⁰ *Id.* See *infra* Part IV. See, e.g., Christopher S. Lee, *The Development of Arbitration in the Resolution of Internet Domain Name Disputes*, 7 RICH. J.L. & TECH. 2, ¶ 76 (Fall 2000), at <http://www.Richmond.edu/jolt/v6i3/article2.html>. With the cost of Internet domain name litigation exceeding \$15,000, and the length of proceedings ranging from six months to three years, arbitration stands as a less expensive, faster alternative. The relative ease of filing, rapid pace of proceedings, and low costs are contributing to arbitration becoming the primary method by which corporations resolve Internet domain name disputes. See also Milton Mueller, *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy*, DIGITAL CONVERGENCE, Nov. 9, 2000, at <http://www.digital-convergence.org> (“the UDRP criteria for resolving

burg's point that domain-name arbitration typically *does* provide trademark holders with fast and cheap transfers of domain names.¹⁵¹

IV. AN ANALYSIS OF CONSENT ISSUES IN DOMAIN-NAME ARBITRATION

A. *The Relationship Between Consent and Fairness*

Though many commentators argue that domain-name arbitration lacks fairness, research has revealed no sustained charges that domain-name arbitration lacks consent. The following pages of this Article provide what may be the first sustained analysis of consent issues in domain-name arbitration. The value of such an analysis rests on the premises that (1) consensual issues are, on their own, important to the law, and (2) an assessment of consensual issues ought to inform the law's response to charges of unfairness.

Consent and fairness are distinct concepts. The verb "consent" is widely used to mean "to agree" and the noun "consent" to mean "agreement."¹⁵² The consent issues regarding domain-name arbitration include whether a registrant agreed to arbitrate, and if so, whether that agreement was induced by misrepresentation, duress, or other circumstances that "undermine[] the normal, presumed significance of consent."¹⁵³ These questions regarding consent are analytically distinct from the fairness of the domain-name arbitration process itself. Fairness questions raised about that process include whether it provides the domain-name registrant:

- adequately specific pleadings,
- sufficient discovery,
- sufficient opportunity to make legal arguments,
- an appropriate burden of proof,
- unbiased arbitrators, and
- proper substantive rules of decision.¹⁵⁴

One who considers these questions and concludes that the domain-name arbitration process is unfair may or may not conclude that the registrant consented to have its disputes resolved by this unfair process. Similarly, one who answers the same questions with the opposite conclusion

domain name disputes have proven to be robust and fair"); John W. White, *ICANN's Uniform Domain Name Dispute Resolution Policy in Action*, 16 BERKELEY TECH. L.J. 229, 237 nn.55–60 (2001).

¹⁵¹ "ICANN designed the Policy to apply commonly accepted international standards to disputes in order to achieve quick and economical domain name dispute resolutions." Stewart, *supra* note 147, at 510.

¹⁵² See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 299 n.121 (1986) (quoting Webster's New World Dictionary of the American Language 302 (2d ed. 1970)).

¹⁵³ *Id.* at 318.

¹⁵⁴ Thornburg, *supra* note 146.

may or may not conclude that the registrant consented to have its disputes resolved by this fair process.

Though consent and fairness are analytically distinct, the law generally polices the fairness of a process more rigorously when the law finds a lack of consent to the process.¹⁵⁵ In other words, various procedural safeguards aimed at promoting fairness can be waived through consent. An arbitration agreement, for example, is a waiver of many of the procedural rights guaranteed in litigation. In the absence of an arbitration agreement, the law polices fairness by enforcing these procedural rights. When there is an arbitration agreement, the law tolerates more unfairness and consequently refrains from enforcing these procedural rights. The moral position implicit in the law is something like: “you consented to it so you are stuck with it.” This moral position is crucial not only to arbitration law, but also to contract law.¹⁵⁶ Moreover, arbitration law is basically a part of contract law.¹⁵⁷ It may then be worthwhile to shift the focus from the fairness of the domain-name arbitration process to consent to that process.

B. Consent and the Circumstances Under Which it is Given

As explained above, all ICANN-approved registrars require that each registrant agrees to arbitrate.¹⁵⁸ For some observers, this fact alone demonstrates that domain-name arbitration lacks consent because registrars have “no choice” but to arbitrate.

This is wrong. Each person has a choice about whether to register a domain-name. An unattractive choice is still a choice. Even a choice made at gunpoint is still a choice. Of course, the law does not enforce agreements made at gunpoint.¹⁵⁹ Such consent is given under duress, one of several circumstances that “undermine[] the normal, presumed significance of consent.”¹⁶⁰ The question in domain-name arbitration is not

¹⁵⁵ This is true, for example, in contract law generally and specifically in the doctrine of unconscionability. See, e.g., Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17 (1993).

Most statements of the law of unconscionability now hold that both procedural and substantive unconscionability are required before courts will grant relief from a challenged term. Judicial decisions have not consistently followed this principle, however, and some courts have suggested a vaguely mathematical metaphor in which a large amount of one type of unconscionability can make up for only a small amount of the other.

Id. at 17–18.

¹⁵⁶ See, e.g., Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994) (“Consent is the master concept that defines the law of contracts in the United States.”). Randy Barnett has argued persuasively that consent is the central principle of contract law. See generally Barnett, *supra* note 152, at 299.

¹⁵⁷ See *supra* Part II.A. discussing the contractual approach to arbitration law.

¹⁵⁸ UDRP INFORMATION, *supra* note 116; *Parisi*, 139 F. Supp. 2d at 747.

¹⁵⁹ RESTATEMENT (SECOND) OF CONTRACTS §§ 175–76 (1981).

¹⁶⁰ Barnett, *supra* note 152, at 318.

whether the registrant consents, but rather whether the circumstances under which consent is given are appropriate.

Those circumstances include, first and foremost, the requirement by all ICANN-approved registrars of an arbitration agreement as a condition of doing business. All sellers in the domain-name registration market require arbitration. This is analogous to some other markets in which all, or nearly all, sellers require arbitration. For instance, nearly all sellers of securities brokerage services require arbitration.¹⁶¹ Nearly all auto dealers in Alabama require arbitration.¹⁶² This unanimity does not, and should not, make arbitration agreements unenforceable.¹⁶³ In many markets, all sellers' form contracts contain some of the same clauses. This uniformity does not trouble me if it is the product of a free market because in such a market nothing prevents an individual seller from offering alternative terms. If all sellers in a free market require arbitration, not only is an individual seller free to remove arbitration from its form contract, but there is an incentive to do so if a significant number of buyers value that removal.¹⁶⁴

The market for domain-name registration, however, is hardly free. ICANN is a monopolist whose monopoly was conferred on it by the U.S. government. ICANN's monopoly, rather than competition among ICANN-approved registrars, is relevant here because ICANN prohibits registrars from competing on the arbitration clause.¹⁶⁵ ICANN requires an arbitration clause for all registrars and registrants.¹⁶⁶ With respect to consent, domain-name arbitration is like securities-employment arbitration was when SRO rules (government regulation) required all employers in that particular industry to condition employment on the agreement to arbitrate.¹⁶⁷ The market was not free with respect to the question of whether to use an arbitration clause.

The previous two paragraphs, which are the crux of the article, rest on the assertion that ICANN is a monopolist whose monopoly was conferred on it by the United States Government. This assertion is proven by

¹⁶¹ See GAO Study, *supra* note 52.

¹⁶² Stephen J. Ware, *The Alabama Story: The State's Experience with Arbitration Shows Connection of Law to Politics and Culture*, DISP. RESOL. MAG. 24, Summer 2001, at 24; Jim Burke Auto., Inc. v. McGrue, 2001 WL 1178626 (Ala. Oct. 5, 2001).

¹⁶³ Courts routinely enforce arbitration clauses in securities brokerage agreements, MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 120, § 13.2, and Alabama auto sales agreements. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999).

¹⁶⁴ "Value" in this context means valuation evidenced by behavior, specifically a willingness to pay more to avoid an arbitration clause. See, e.g., Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 [hereinafter Ware, *Paying the Price of Process*]; Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 McGEORGE L. REV. 195, 210–13 (1998).

¹⁶⁵ See *supra* notes 114–18 and accompanying text.

¹⁶⁶ See *id.*

¹⁶⁷ See *supra* Part I.C.1.

Michael Froomkin in *Wrong Turn In Cyberspace: Using ICANN To Route Around The APA and the Constitution*.¹⁶⁸ This monumental article should be at the top of the reading list for anyone interested in either domain-name arbitration or ICANN generally. Though it is far too elaborate to adequately summarize here, many of Froomkin's points about the history of the domain-name system (DNS) are in order.¹⁶⁹ Froomkin says "[t]he U.S. government came to control the DNS system because the DNS came into the hands of people whose work on it was funded by government grants. By the time the grantees sought to break free of government control, it was too late."¹⁷⁰

The heart of the DNS controversy is actually very simple. At issue is who should control a single small file of computer data kept in Herndon, Virginia, and how the power flowing from control of that file should be exercised. This "root" file or "root zone" file is the authoritative list of top-level domain names. For each name it gives the Internet address of the computer that has the authoritative list of who has registered domain names in that top-level domain (TLD). Currently there are 252 TLDs and associated addresses in the file. The data is authoritative because the right people use it—it is the file from which the thirteen computers known as the legacy root name servers get their data. And they, in turn, are authoritative because almost every computer on the Internet gets its data from one of those root servers, or from a cached downstream copy of their data. . . .

[T]he only reason the root file matters is that the root server operators choose to get their base DNS data from it and that almost all other Internet users choose to get their root data from the thirteen legacy root servers.¹⁷¹

The root file is often known as the "A" root with the other twelve root servers being known as "B" through "M." Of the twelve root servers, "seven currently are owned by the U.S. government or operated by its contractors. Only three of the servers are located outside the United States."¹⁷²

The Stanford Research Institute (SRI) was the first entity to become responsible for managing what would later become the domain-name system.¹⁷³ Peggy Karp "prepared the first hosts.txt file (the predecessor of the modern 'root' file) and turned it over" to SRI in 1972.¹⁷⁴ "For the next fourteen years, the hosts.txt file was maintained by the SRI Network Information Center (NIC), then the Defense Data Network NIC, and

¹⁶⁸ Froomkin, *supra* note 1.

¹⁶⁹ This history also is well told in Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 192–212 (2000).

¹⁷⁰ Froomkin, *supra* note 1, at 51.

¹⁷¹ *Id.* at 43–44.

¹⁷² *Id.* at 45.

¹⁷³ *Id.* at 52.

¹⁷⁴ *Id.*

then the Defense Information Systems Agency (DISA) NIC.”¹⁷⁵ While DISA gained the responsibility for maintaining the domain-name system, SRI still handled the domain-name registration duties.¹⁷⁶

In 1977, John Postel was given the duty of managing the policymaking of the domain-name system.¹⁷⁷ Postel was a graduate student at UCLA and was funded by a grant from the Department of Defense.¹⁷⁸ Postel’s responsibilities included creating new top-level domains and determining who would register the names for each domain.¹⁷⁹ When Postel left UCLA, he went to work for the Information Science Institute (ISI) at the University of Southern California.¹⁸⁰ His domain-name duties followed him there.¹⁸¹ Although ISI was given the responsibility for managing the domain-name system by DISA,¹⁸² SRI handled the registration duties.¹⁸³ In 1988, ISI renamed itself the Internet Assigned Numbers Authority (IANA).¹⁸⁴ IANA’s funding and authority came from the Department of Defense.¹⁸⁵

“In 1990, DISA recompeted the NIC contract, which was won by Government Systems Inc. (GSI), who then subcontracted the entire operation to Network Solutions, Inc. NSI started operating the NIC early in 1992.”¹⁸⁶ Around this time, DISA “concluded that the continued growth of the Internet . . . meant that the funding and management of the non-military part of the Internet’s administration belonged outside the Department of Defense.”¹⁸⁷ In 1993, the NIC began to receive its funding from the National Science Foundation (NSF) instead of from the Department of Defense.¹⁸⁸ The NSF and NSI created a five-year agreement that gave NSI the responsibility for registering “.com” domain names.¹⁸⁹ “NSI thus ran the computers that held the root zone. . . . The NSF-NSI ‘Cooperative Agreement’ gave NSI a monopoly over .com registrations that it would ultimately build into a multi-billion dollar business; the monopoly originally was scheduled to expire in September 1998.”¹⁹⁰ IANA, a defense contractor, remained in charge of the domain-name system while

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 53.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 52.

¹⁸⁴ *Id.* at 53.

¹⁸⁵ *Id.* at 53–54.

¹⁸⁶ *Id.* at 55.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 57.

¹⁸⁹ Luke Walker, *ICANN’s Uniform Domain Name Dispute Resolution Policy*, 15 *BERKELEY TECH L.J.* 289, 293 (2000).

¹⁹⁰ Froomkin, *supra* note 1, at 57.

NSI carried out the registration responsibilities.¹⁹¹ “Since the paymaster for IANA remained the U.S. Department of Defense, the effect of this provision was to ensure that policy control of the root remained in the hands of people closely tied to the U.S. government, and especially the military, even while daily functions such as second-level domain name registration services were moving into NSF’s, and through them NSI’s, hands.”¹⁹² The NSF formally transferred the responsibility for administering the NSI Cooperative Agreement to the Department of Commerce on September 8, 1998.¹⁹³

“As the Internet grew, and as commercial considerations began to loom larger, the U.S. government’s control of the root began to be a magnet for controversy. Foreign governments began to question why the United States should control a critical component of a global network, and firms all over the world began to complain about the uneasy overlap between domain names and trademarks.”¹⁹⁴ President Clinton ordered the Secretary of Commerce to “privatize” the domain-name system.¹⁹⁵ The Department of Commerce worked on this project with an inter-agency group headed by Ira Magaziner.¹⁹⁶

On January 28, 1998, Jon Postel . . . sent an e-mail requesting that the root servers not controlled by NSI or the U.S. government start pointing to his server “B” rather than server “A” for the authoritative data on the root. Postel’s “B” server continued to mirror the data in “A,” so in the short term this shift would have changed nothing; in the longer term it would have enabled him to control the root and thus single-handedly create new TLDs [top-level domains, e.g., .com and .net]. Most of the other root servers complied. To his detractors, Postel was attempting a power grab, a single-handed hijack of the Internet, or even threatening to split the root, creating the dreaded possibility of inconsistent databases. (Recall that inconsistent data is bad because it means that which IP resolves when one types in a domain name might depend on which database—effectively which Internet—one might be connected to.) When Ira Magaziner heard of what Postel would later diplomatically call a “test,” Magaziner instructed Postel to return to the status quo. Postel did so, and the “test” was over. Magaziner was later quoted as saying that he told Postel that redirection could result in criminal charges, although it is unclear what statute would apply.¹⁹⁷

This episode demonstrates that the United States Government, through Ira Magaziner, was determined to maintain sufficient control

¹⁹¹ *Id.*

¹⁹² *Id.* at 58.

¹⁹³ *Id.* at 62 n.164.

¹⁹⁴ *Id.* at 62.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 62–63.

¹⁹⁷ *Id.* at 64–65.

over the domain-name system to prevent the root from being split. NSI, however, took advantage of this determination to strike a good deal for itself.

NSI's right to register domain names, an increasingly remunerative activity, was due to expire on March 31, 1998, although it could be extended by the U.S. government. Ordinarily, that should have given the U.S. government enormous leverage over its contractor. The picture was clouded, however, by an anomaly in the drafting of the NSI-NSF agreements, exacerbated by an amendment proposed by NSI in 1995, that created an arguable case that NSI had some sort of right to own the database of registrants. NSI claimed variously that it had no obligation to turn over the data linking registrants to domain names, or that it could keep a copy even if its MoU [Memorandum of Understanding with the Department of Commerce] expired—with the implicit threat that it might go into business on its own, setting up an alternate root. NSI used its intellectual property claim, and the very significant threat of truly privatizing the root, plus its unique experience in managing the ever-growing and ever-more-important .com domain, as leverage to negotiate an extension of its contract on favorable terms.¹⁹⁸

In June 1998, Magaziner and the Department of Commerce released the “white paper” which stated that a private non-profit corporation should take control of the domain-name system.¹⁹⁹ The “white paper”

went on to describe in a fairly detailed way what this new hoped-for corporation should look like, and how it should work. “NewCo” (as it came to be known) “should be headquartered in the United States, and incorporated in the U.S. as a not-for-profit corporation. It should, however, have a board of directors from around the world.” It should take over the existing IANA staff, and it should have the authority to “[s]et policy for and direct allocation of IP number blocks to regional Internet number registries” and “[o]versee operation of the authoritative Internet root server system”.²⁰⁰

The Department of Commerce (DOC) promised to “recognize” and contract with NewCo.²⁰¹ “Further, DoC pledged to require NSI to ‘recognize the role of the new corporation to establish and implement DNS policy’ In other words, NewCo would become NSI’s regulator in all but name.”²⁰² On October 7, 1998, the DOC and NSI agreed to separate “NSI’s registry and registrar functions, with the registry entitled to charge all registrars a fixed fee, to be determined later, for its services.”²⁰³ “Criti-

¹⁹⁸ *Id.* at 80–81.

¹⁹⁹ *Id.* at 67.

²⁰⁰ *Id.* at 68.

²⁰¹ *Id.*

²⁰² *Id.* at 70.

²⁰³ *Id.* at 81.

cally, NSI also promised not to make any changes to the root without written authorization from DoC.”²⁰⁴ According to Froomkin,

Perhaps the most significant part of [the October 7, 1998 agreement] was that DoC extracted promises from NSI regarding what would happen “as the USG [United States Government] transitions DNS responsibilities to NewCo.” The agreement stated that as NewCo took over, “corresponding obligations under the Cooperative Agreement as amended will be terminated and, as appropriate, covered in a contract between NSI and NewCo.” In other words, NewCo would more or less step into DoC’s shoes, and NSI would accept it as policy master of the legacy root.²⁰⁵

After the release of the “white paper,” John Postel incorporated what would later become ICANN,²⁰⁶ and on November 25, 1998, the DOC selected Postel’s company to become NewCo. “This was of course no coincidence: The whole point of the White Paper had been to find a more formal structure for DNS management that left it in Postel’s capable hands.”²⁰⁷ The crucial document here is the November 25, 1998 Memorandum of Understanding between the DOC and ICANN.

ICANN derives its power from contracts with DoC and acts as DoC’s agent for DNS matters. DoC could, if it wished, terminate its relationship with ICANN and choose another body to perform all of ICANN’s functions. Thus, whatever the legal formalities, DoC is the ‘but for’ cause of ICANN’s relevance, indeed its very existence, and the fundamental source of ICANN’s powers.²⁰⁸

As Froomkin emphasizes, the “DoC retains ultimate control over the root, and enjoys very substantial sources of leverage over ICANN, so much so that it almost amounts to de facto control.”²⁰⁹

On February 26, 1999, the DOC officially recognized ICANN as NewCo.²¹⁰ During November of 1999, ICANN, the DOC, and NSI signed a set of agreements.²¹¹

[T]he three parties signed a set of triangular agreements by which NSI agreed with DOC to make agreements with ICANN that would give ICANN near-total control over the root and de facto control over the contractual terms that would govern every registrant’s access to domain names in the open gTLDs: .com, .org, and .net.

The DOC-NSI Agreement. In Amendment 19 to the DOC-NSI Cooperative Agreement, DOC agreed to extend NSI’s contract for at least four more years and possibly more. DOC also agreed to ensure that NSI’s root remained the authoritative root. NSI agreed

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 84.

²⁰⁷ *Id.* at 70.

²⁰⁸ *Id.* at 70–71.

²⁰⁹ *Id.* at 105–06.

²¹⁰ *Id.* at 89 n.298.

²¹¹ *Id.* at 89–90.

to recognize ICANN as NewCo and to sign the ICANN *Registry Agreement* and the ICANN *Registrar Accreditation Agreement*. Furthermore, NSI agreed that if it were to violate those agreements and ICANN were to terminate it for cause, DOC could similarly terminate NSI. This threat ensured NSI's good behavior. NSI also promised to accept registrations only from ICANN-accredited registrars. The consequences of this promise were as significant as anything else in the tripartite set of agreements. With this promise, ICANN acquired the power, through the *Registry Agreement*, to impose any conditions it chose on registrants. Since no registrant could be listed in the legacy root without going through an ICANN registrar, and ICANN now acquired the power to determine what conditions the registrar would impose on registrants, the effect was to acquire contractual leverage over anyone wanting a functional domain name. Significantly, NSI, perhaps the only party capable of deploying an alternate root with instant worldwide acceptance, also gave up its option of creating such a competitor, agreeing with DOC that "[i]n the interest of the smooth, reliable and consistent functioning of the Internet, for so long as the Cooperative Agreement is in effect, NSI agrees not to deploy alternative DNS root server systems."²¹²

That is how the United States Government conferred upon ICANN a monopoly in the market for domain names.²¹³

There is a theoretical possibility of competition to ICANN. For example, any number of computer users could form "Internet2," which would split the root.²¹⁴ When users of Internet2 pointed their browsers to www.Delta.com they would be connected, not to the airline headquartered in Atlanta, but perhaps to a boating business in the Louisiana Delta.²¹⁵ Internet2 might succeed in attracting consumers from what it calls "Internet1" and what was formerly known as just "the Internet." Internet2 might become so successful that the airline in Atlanta eventually receives more hits through its www.DeltaAirlines.com address on Internet2 than its www.Delta.com address on Internet1. Internet2's success might prompt other computer users to start Internet3, Internet4 and so on. Competition would exist among the internets, and ICANN would control

²¹² *Id.*

²¹³ See also Gillian K. Hadfield, *Privatizing Commercial Law: Lessons From the Middle and the Digital Ages*, John M. Olin Program in Law and Economics, Working Paper No. 195, Stanford Law School (Mar. 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=220252 (on file with the Journal of Small and Emerging Business Law). "The private, competitive system for registering and resolving disputes about domain names depends, critically, on some minimal public law conditions: most importantly, the exclusive authority of ICANN to assign access to the root server system" *Id.* at 46.

²¹⁴ As Froomkin says, "the only reason the root file matters is that the root server operators choose to get their base DNS data from it and that almost all other Internet users choose to get their root data from the thirteen legacy root servers." Froomkin, *supra* note 1, at 44.

²¹⁵ This example is taken from Thornburg, *supra* note 146, at 165-66.

(sell) the domain names only in Internet1. I would not be troubled if a company called 2CANN, which sells the domain names only in Internet2, required the same arbitration clause ICANN requires. Nor would I be troubled if all those who sell domain names on all the internets required the same clause. The market for domain names would be just one of many markets in which all sellers' form contracts contain some of the same clauses.²¹⁶

However, no one thinks this will happen. As Froomkin says, splitting the root now or in the future is extremely unlikely.²¹⁷ The reason the Internet's domain-name system is so useful is precisely because it is the only one. It is perhaps a natural monopoly. Certainly, the "network externalities" in this industry are very high; that is, the Internet's value very much increases with the number of users.²¹⁸

V. CONCLUSION: ASSESSING THE FAIRNESS OF DOMAIN-NAME ARBITRATION

Though consent and fairness are analytically distinct, the law generally polices the fairness of a process more rigorously when the law finds a lack of consent to the process.²¹⁹ Because of ICANN's government-conferred monopoly, the circumstances under which registrants consent to domain-name arbitration are troubling.²²⁰ As long as this remains true, the law can appropriately police the fairness of domain-name arbitration more rigorously than it polices the fairness of arbitration generally.

Though Elizabeth Thornburg and others make strong criticisms of the fairness of domain-name arbitration and imply that the law does not police it enough, I am struck by the rigor with which the law does police it. The essential point is the distinction between binding and non-binding arbitration.²²¹ Courts review UDRP arbitration *de novo*.²²² This is the most rigorous, least deferential, standard of review possible. This is a stark con-

²¹⁶ See generally Thornburg, *supra* note 146.

²¹⁷ See Froomkin, *supra* note 1, at 45–47.

²¹⁸ Daniel A. Farber, *Speaking in the First Person Plural*, 85 MINN. L. REV. 1483, 1513 n.140 (2001). See also Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 551–61 (1998). A product or service is subject to network externalities if consumers' demand for the product or service increases when it also is purchased by other consumers. See Michael Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 96 (1994). Thus, a larger phone system is better than a smaller one. Similarly, a posting on the Internet can reach more people, for about the same cost, as a posting on an internal company network. These network externalities provide an incentive to technical standardization and wide availability. Other externalities arise because people are sociable and like to hook up with others who share their particular interests; these externalities represent the value of community to individuals.

²¹⁹ See generally Barnett, *supra* note 152, at 319–21.

²²⁰ See UDRP, *supra* note 114.

²²¹ See generally WARE, *supra* note 3, § 2.2.

²²² See, e.g., *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 752 (E.D. Va. 2001).

trast to the no-rigor, extremely deferential, standard of review courts give to arbitration under the FAA.²²³

Non-binding arbitration is completely different from binding arbitration. Binding arbitration is like litigation. Binding arbitration resolves a dispute by giving the adjudicator's decision the force of law. It is backed by the sheriff or marshal's badge and gun.²²⁴

In contrast, non-binding arbitration resolves disputes in a completely different way. "Non-binding arbitration has less in common with arbitration than it does with mediation and other processes in aid of negotiation," like the summary jury trial, mini-trial, and early neutral evaluation.²²⁵ The purpose of these processes is to help the parties value their case and to promote a settlement.²²⁶ Like these processes, non-binding arbitration produces only an "advisory" decision by the arbitrator that either party is free to disregard. It does not resolve a dispute through an adjudicator's decision backed by force. If it resolves a dispute at all, it does so by providing information that helps the parties value their case. Domain-name arbitration seems to be working well in precisely this way. According to Elizabeth Thornburg, "[t]here have been more than three thousand ICANN proceedings disposed of by decision, and only about twenty five lawsuits filed to challenge the result."²²⁷ The arbitrators seem to be doing an excellent job of valuing cases, hence mimicking the courts' results without the courts' expense and delay.

One might reply that this is naïve. Domain-name arbitration is not some warm and fuzzy process that merely encourages settlement. Domain-name arbitration is a kangaroo court created at the behest of the major trademark holders who use it to pummel "cybersquatters" and other parties of modest means.²²⁸ To assess this charge, we can put aside for a moment the fact that domain-name arbitration is subject to *de novo* review and we can assess the fairness of the domain-name arbitration process in light of other arbitration programs that have been successfully challenged in court.

²²³ See, e.g., *id.* A similarly deferential standard of review is used in international arbitration. See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), June 10, 1958, arts. 3 & 5, 330 U.N.T.S. 3, 40, 21 U.S.T. 2517.

²²⁴ Under the FAA, arbitrators' decisions are routinely confirmed by courts and then are "enforced in the same manner as other court judgments, through judgment liens, execution, garnishment, etc." WARE, *supra* note 3, § 2.40.

²²⁵ *Id.*

²²⁶ Non-binding arbitration, summary jury trial, neutral evaluation and mini-trial are all processes in aid of negotiation. *Id.* §§ 4.31–4.35. These processes aim to "reduce party over-optimism and thus make the parties' expectations about the results of litigation converge." *Id.* § 4.36(a).

²²⁷ Thornburg, *supra* note 127, at 224 n.137.

²²⁸ See commentators cited *supra* note 147.

Unlike Hooters²²⁹ and Kaiser Permanente,²³⁰ claimants in domain-name arbitration do not have a self-administered or “captive” arbitration program. On the other hand, domain-name claimants do get to pick which ICANN-approved provider will administer the case. As Elizabeth Thornburg and others argue, this choice allows claimants to steer cases toward arbitrators who tend to be more favorable to claimants.²³¹ Though this seems no worse than the forum-shopping that plaintiffs are allowed to do in civil litigation, it is worse than the usual arbitration practice of having the adjudicator selected by mutual consent of the parties.²³² There, consent contributes to ensuring fairness. Perhaps the UDRP should be reformed to require that cases be assigned randomly among ICANN-approved providers if the parties fail to agree on their choice of provider.

In some ways, arbitrator selection under the UDRP resembles arbitrator selection in securities arbitration. In both securities-employment and securities-investor arbitration, there is some reason to believe that the backgrounds and demographics of the arbitrators tend to make them generally favorable to the securities firms.²³³ Similarly, Elizabeth Thornburg and others suggest that the backgrounds of UDRP arbitrators tend to make them generally favorable to trademark holders, that is, claimants.²³⁴ Perhaps, ICANN should follow the lead of the late-1990’s securities arbitration reforms in seeking a more diverse pool of arbitrators.

Thus, some of the charges that domain-name arbitration lacks fairness are comparable to charges that have succeeded with respect to other arbitration programs. But those programs, to reiterate, produce *binding* arbitration awards. In contrast, UDRP arbitration is non-binding. As explained above, there is simply less at stake in UDRP arbitration than there is in binding arbitration.

Again, it is true that trademark owners who prevail in (non-binding) arbitration have succeeded in shifting the burden of upsetting the status quo. As Elizabeth Thornburg says, “it is the domain name holder, not the trademark owner, who must file a lawsuit”²³⁵ And this burden may be significant given the possibility that the only court with jurisdiction is outside the registrant’s (domain-name holder’s) nation.²³⁶ Litigation is

²²⁹ See *Hooter’s of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

²³⁰ See *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997).

²³¹ See Thornburg, *supra* note 127, at 219-24 (discussing decisionmaker bias), 220 n.119 (citing King).

²³² See WARE, *supra* note 3, § 2.22.

²³³ See Ware, *supra* note 40, at 155-59.

²³⁴ Thornburg, *supra* note 146, at 192; Helfer & Dinwoodie, *supra* note 2.

²³⁵ Thornburg, *supra* note 146, at 192. If the registrant (domain-name holder) sues within 10 days, the registrar will leave the domain name with the registrant pending litigation. If the registrant sues after 10 days then the registrar will transfer the domain name to the claimant pending litigation. *Id.*

²³⁶ See generally Helfer & Dinwoodie, *supra* note 2. A UDRP arbitration complaint must “[s]tate that Complainant will submit, with respect to any challenges to a

generally quite expensive and international litigation is especially expensive.²³⁷ The party pleased with a status quo that can only be upset with international litigation has a valuable asset. The party displeased with a status quo that can only be upset with international litigation has a costly burden. Domain-name arbitration generally places this burden on the registrant.²³⁸ This may be where the burden ought to remain. It may well be that, on the legal merits, trademark owners should hold the vast majority of disputed domain-names. Domain-name trademark infringement cases may, in this regard, resemble cases by creditors seeking to collect unpaid debts. In both categories of cases, the plaintiff deserves a judgment in the vast majority of disputes.²³⁹ Thus, greasing the procedural wheels leading toward a plaintiff's victory increases justice over the run of cases.

Even leaving our presumptions about the average case's merits aside, there is much to be said for greasing the procedural wheels. The procedures of ordinary civil litigation are terribly rusty. Access to justice is a big problem precisely because the ordinary civil case confronts the plaintiff with so many serious obstacles before the merits are really heard by an adjudicator. For example, Thornburg points out that in litigation, plaintiffs must "locate and serve" defendants, while in domain-name arbitration this is no problem.²⁴⁰ This is a point in favor of domain-name arbitration, and the litigation system might learn from it. Perhaps it

decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction." ICANN, RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>. The UDRP defines "Mutual Jurisdiction" as follows:

Mutual Jurisdiction means a court jurisdiction at the location of either (a) the principal office of the Registrar (provided the domain-name holder has submitted in its Registration Agreement to that jurisdiction for court adjudication of disputes concerning or arising from the use of the domain name) or (b) the domain-name holder's address as shown for the registration of the domain name in Registrar's Whois database at the time the complaint is submitted to the Provider.

Id.

²³⁷ See, e.g., Helfer & Dinwoodie, *supra* note 2; see also *id.* at 157 ("litigating even easy cases under national laws in national courts imposes significant costs, creating incentives for trademark owners to pay the ransom cybersquatters demand rather than litigate").

²³⁸ This bothers those who believe that costly burdens should always be placed on the party with greater ability to pay that cost. I suspect that much opposition to the UDRP derives from the simple redistributionist impulse to place costly burdens on large corporate trademark-holders rather than on domain-name registrants of modest means.

²³⁹ With respect to debt collection actions, see, e.g., Ware, *Paying the Price of Process*, *supra* note 164, at 97-98 (citing authority) ("Collection actions against consumers often result in default judgments, so the challenge for the lender-plaintiff is not winning judgments but collecting them from often insolvent or judgment-proof debtors.").

²⁴⁰ Thornburg, *supra* note 146, at 192.

would be a good thing if all people had to publicly designate a registered agent for service of process the way corporations do.²⁴¹

Furthermore, Thornburg points out that evidence in litigation must be in admissible form, while domain-name arbitration lacks formal rules of evidence.²⁴² This may be another point in favor of domain-name arbitration, and arbitration generally, because the rules of evidence in civil litigation may do more to increase lawyers' control over adjudication than to promote justice. Thornburg also points out that litigation generally has more elaborate pleadings, discovery, briefs, and hearings than domain-name arbitration.²⁴³ These may be yet more points in favor of arbitration because these aspects of litigation may also do more to raise costs and enrich lawyers than to promote justice.²⁴⁴

More process is not always better.²⁴⁵ Especially when more process raises costs to the point that parties who deserve to win on the merits cannot get access to adjudication and thus lose. Domain-name arbitration seems to do a far better job than civil litigation of avoiding this.

²⁴¹ See MODEL CORP. BUS. ACT § 2.02(a)(3).

²⁴² Thornburg, *supra* note 146, at 193.

²⁴³ Thornburg, *supra* note 146, at 193.

²⁴⁴ The problem is nicely put by Gene Nichol:

Given the enormous complexities of our legal system and the professional expertise required to navigate it, two options have been open to us to comply with the demands of equal justice. We could either supply [government-subsidized] lawyers in a broad array of cases to a substantially larger subset of Americans; or we could revamp and dramatically simplify the system so as to make representation unnecessary.

Gene R. Nichol, *Law's Disengaged Left*, 50 J. LEGAL EDUC. 547, 556 (2000). While Nichol laments that "[w]e have done neither" of these options, the ongoing expansion of arbitration may constitute the latter option. *Id.*

²⁴⁵ See, e.g., Hadfield, *supra* note 213, at 40–41; Ware, *Paying the Price of Process*, *supra* note 164.