

Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury

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Courts in the United States routinely enforce consumers' and employees' pre-dispute agreements to arbitrate.¹ Jean Sternlight is a leading opponent of such contract enforcement.² Among her many arguments for allowing consumers and employees to breach such contracts, she notes that this is precisely what courts outside the United States do.³ Outside the United States, judicial enforcement of consumer and employment arbitration agreements is, Professor Sternlight tells us, rare to non-existent. She cites, in particular, the laws of the European Union and its member nations,⁴ as well as a few non-European nations, such as Brazil.⁵

So the United States is out of the mainstream with respect to arbitration law. What, if anything, should be done about it? Jean Sternlight favors harmonizing U.S. arbitration law with that of the rest of the world, *i.e.*, changing U.S. law so that pre-dispute consumer and employment arbitration agreements are no longer enforceable.⁶

It is important to distinguish between this harmonization argument and Jean Sternlight's other arguments for changing U.S. arbitration law.

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1. *See, e.g.*, *Circuit City Stores v. Adams*, 632 U.S. 105 (2001); *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See generally* STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* §§ 2.9-2.14 (2001) (collecting cases on Federal Arbitration Act (FAA) preemption of state law impeding contract enforcement).

2. *See, e.g.*, Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002) [hereinafter Sternlight, *Is the U.S. Out on a Limb?*]; Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001); Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 TUL. L. REV. 1 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 676 (1996).

3. Sternlight, *Is the U.S. Out on a Limb?*, *supra* note 2, at 843-57.

4. *Id.*

5. *Id.* at 851 n.125.

6. *Id.* at 861-64.

This short article addresses only the former. Professor Sternlight's other arguments for changing U.S. arbitration law,⁷ and my arguments against doing so,⁸ are published elsewhere and do not need repeating here.⁹ So, to reiterate, the following pages address only the harmonization argument for changing U.S. arbitration law.

The first thing to say about harmonization, *i.e.*, uniformity of law across jurisdictions, is that it is not an unalloyed good. There is a case against uniformity, as well as a case for uniformity. In this article, I take no position on whether the case for or against uniformity is stronger. I seek only to briefly summarize the case for each side in the following two paragraphs.

The case against uniformity celebrates diversity. On this view, it is a good thing that different places have different laws. This, of course, is

7. See, *e.g.*, *supra* articles cited in note 2.

8. See, *e.g.*, Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, (Apr. 18, 2002), available at <http://www.cato.org/pubs/pas/pa-433es.html>; Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89; 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); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law*, 29 MCGEORGE L. REV. 195 (1998); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Assocs., Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

9. I cannot resist, however, responding to one point in Jean Sternlight's contribution to this symposium. She refers to arbitration "imposed through contracts of adhesion" as "mandatory" because she "can not understand how a person can be said to have 'voluntarily' accepted arbitration when it is part of a small print contract of adhesion." Sternlight, *Is the U.S. Out on a Limb?*, *supra* note 2, at 831 n.1.

The terms of adhesion contracts are voluntary, rather than mandatory, because a person is not bound by such terms unless that person has manifested assent to them, and manifestation of assent is (except in cases of duress) a voluntary act. A consumer who signs or otherwise manifests assent to a standardized document is manifesting assent, not merely to the terms the consumer has read or understood, but "to the terms not read or not understood, subject to such limitations as the law may impose." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981). For elaboration of these points with respect to arbitration, see Ware, *Consumer Arbitration as Exceptional Consumer Law*, *supra* note 8, at 200-05; Ware, *Employment Arbitration and Voluntary Consent*, *supra* note 8, at 113-26.

Like trial-lawyer organizations lobbying against enforcement of pre-dispute arbitration agreements, see for example, John Vail, *Defeating Mandatory Arbitration Clauses*, TRIAL, Jan. 2000, at 70-71; F. PAUL BLAND JR. ET AL., CONSUMER ARBITRATION AGREEMENTS (2001), available at <http://www.tlpj.org/caa.htm>. Jean Sternlight uses the terms "mandatory" and "voluntary" arbitration as shorthand for arbitration arising out of pre-dispute and post-dispute agreements. This usage should be avoided for the reasons stated in the leading arbitration treatise:

This term ["mandatory"] is sometimes used to describe arbitration resulting from agreements to arbitrate future disputes, since once an enforceable agreement has been made, arbitration is "mandatory." This is extremely confusing language because it ignores altogether the consensual element in contracts. . . . [I]ts usage resolves linguistically the issues of the reality of consent and the effect to be given to consent by fiat, rather than by analysis revealing the nature of the issues.

IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 2.5, at 2:36 n.5 (1994).

the case for federalism within the United States, and calls to mind Justice Brandeis's famous view of states as laboratories of democracy. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁰ This case for diversity and experimentation applies among nations, as well as among states.

On the other hand, there is also a case for uniformity. The standard view among "comparativists and law reformers," as Steven Walt puts it, is that

uniform rules promote efficiency. Diverse national laws create legal costs of determining and complying with the laws of multiple jurisdictions. Ex post litigation costs of forum shopping and deciding sometimes difficult choice of law issues are also produced. Because uniform law subjects a transnational commercial transaction to a single set of rules, it reduces the legal costs associated with the transaction.¹¹

So nations receive a benefit when they harmonize their laws.¹² An individual nation pays a price when it stands outside the mainstream, refusing to harmonize. Is the United States paying such a price with respect to arbitration law?

If so, I suggest that this price is far lower than the price the United States pays by standing outside the mainstream on a far more important area of law, the civil jury. The United States is the only major nation to make extensive use of jury trials in civil cases.¹³ When comparative law books survey adjudication around the world, the aberrant presence of the civil jury in the United States (and formerly in England) receives significant discussion, while the unique arbitration law of the United States receives no mention at all.¹⁴ This is undoubtedly explained in part by

10. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting.)

11. Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 671-72 (1999).

12. Again, this short article takes no position on whether the case for or against uniformity is stronger generally, or stronger with respect to arbitration law. Whether the benefit of harmonization (uniformity) outweighs the cost is the subject of much debate and likely varies from one context to another. Thoughtful treatments of the pros and cons of uniformity are found in Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138-41 (1996), and Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999).

13. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 193-94 n.1 (1996) (referring to the abolition of the civil jury as "a course that the rest of the civilized world took long ago"); KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 267 (1977); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the EU and the US*, 28 N.C. J. INT'L L. & COM. REG. (forthcoming 2002).

14. See, e.g., MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 167 (2d ed. 1994); JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION* 1013-26 (1994).

the fact that the United States has been outside the mainstream on civil juries far longer than it has been outside the mainstream on arbitration.¹⁵ But it is also explained by the fact that extensive use of the civil jury is a far more important anomaly than enforcement of consumer and employment arbitration agreements.

The civil jury impacts nearly every aspect of civil litigation in the United States.¹⁶ To give just three examples, the civil jury bears a large share of responsibility for: (1) the cost and intrusiveness of U.S. discovery; (2) the theatrics of U.S. trials; and (3) the complexity of U.S. evidence law. These three peculiarities of U.S. civil litigation are discussed in turn.

1. *The Cost and Intrusiveness of U.S. Discovery*

There are undoubtedly many legal, historical, and even cultural reasons why discovery in the United States grew to be especially costly and intrusive. The civil jury, however, can be singled out as an obstacle to discovery reform.

In the civil law nations, where there is no tradition of civil trial by jury, . . . [t]here is no such thing as a trial in our sense; there is no single concentrated event. The typical civil proceeding in a civil law country is actually a series of isolated meetings of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on. Matters of the sort that would ordinarily be concentrated into a single event in a common law jurisdiction will be spread over a large number of discrete appearances and written acts before the judge who is taking the evidence. Comparative lawyers, in remarking on this phenomenon, speak of the "concentration" of the trial in common law countries and the lack of such concentration in civil law countries.¹⁷

The concentrated trial in the United States contributes to the scope of U.S. discovery. As John Langbein puts it,

Part of what makes our discovery system so complex is that, on

15. Cases enforcing pre-dispute consumer and employment arbitration agreements did not become common until the 1990s, although there were a few such cases from the 1970s and 1980s. See, e.g., Ware, *Employment Arbitration and Voluntary Consent*, *supra* note 8, at 95-100. By contrast, the United States has probably always been outside the mainstream regarding civil juries and certainly has been outside the mainstream since England largely abolished civil jury trial in 1933. See Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 49, § 6 (Eng.).

16. GLENDON ET AL., *supra* note 14, at 167 ("Many of the differences between the [civil law] model and the usual American trial seems attributable to the absence of the civil jury in civil law countries.").

17. MERRYMAN ET AL., *supra* note 14, at 1014.

account of our division into pretrial and trial, we have to discover for the entire case. We investigate everything that could possibly come up at trial, because once we enter the trial phase we can seldom go back and search for further evidence. By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized.¹⁸

What stops the United States from abandoning its concentrated trial and the sharp division between the pretrial and trial stages of litigation? The answer is the civil jury, which makes a discontinuous trial impractical.¹⁹ Paul Carrington points out that:

In a system not bound to conduct trials to suit the convenience of jurors, it would be easier to design a mechanism for gathering evidence that would be more efficient than the one we know, for discovery could then be limited to information for which there is a specific and immediate need in the ongoing but discontinuous trial.²⁰

2. *The Theatrics of U.S. Trials*

The civil jury is also responsible for the theatrics of U.S. trials. Paul Carrington describes this very well:

The jury trial is, like radio, a “hot medium” that calls for strongly evocative, rousing artistry, in contrast to the “cool medium,” the non-jury trial, that, like television, calls for understated artistry. Consequently, there are often differences in styles and personal values of jury lawyers and non-jury lawyers. Legal professions in other countries, lacking the civil jury system, seem seldom to produce persons having the flamboyance of American jury lawyers. Perhaps this is their misfortune, but for those who prefer greater dignity in the legal system, it is an adverse consequence of the civil jury system that it rewards the abilities of the demagogue.²¹

By contrast, consider the following description of a civil trial in a nation which does not use civil juries: “German civil proceedings have the

18. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 831 (1985).

19. Historically, the concentrated trial “eliminated the problems of reassembling and controlling groups of laymen across long intervals, problems that would otherwise have bedeviled a system of routine but discontinuous jury trial.” *Id.* at 863.

20. Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 40 (1990); see also RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 446-49 (6th ed. 1998).

21. Carrington, *supra* note 20, at 41.

tone not of the theatre, but of a routine business meeting—serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage.”²²

3. *The Complexity of U.S. Evidence Law*

Finally, there is little doubt that the civil jury bears responsibility for the complexity of U.S. evidence law. Evidence law grew as a means of controlling juries,²³ and nations that have never used civil juries have less complex evidence law.²⁴

In sum, much of what makes civil litigation in the United States materially different from civil litigation elsewhere in the world can plausibly be traced back to the jury. By contrast, enforcement of consumer and employment arbitration agreements affects only a few categories of cases and, within those categories, affects only those cases in which an enforceable arbitration agreement has been formed. The civil jury is a mountain; enforcement of consumer and employment arbitration agreements is a molehill. Those who value uniformity across nations and seek to bring U.S. law into the international mainstream should be far more troubled by the civil jury than by enforcement of consumer and employment arbitration agreements.

Bringing the United States into the mainstream on the civil jury might even bring it into the mainstream on arbitration. It may not be a coincidence that the only nation with the civil jury is the only nation that enforces consumer and employment arbitration agreements. Eliminating the civil jury might eliminate the three aforementioned peculiarities of U.S. litigation: costly and intrusive discovery, theatrical trials, and complex evidence law. While each of these peculiarities may please U.S. lawyers, avoiding these peculiarities may be a common reason why businesses flee U.S. courts for arbitration. After all, arbitration is generally thought to eliminate costly and intrusive discovery,²⁵ theatrical trials, and complex evidence law.²⁶ Perhaps eliminating these peculiarities from U.S. litigation would substantially reduce the desire of businesses to flee U.S. courts for arbitration.

I conclude then, with a question for Jean Sternlight and others who

22. Langbein, *supra* note 18, at 831.

23. ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 82-84, 243-60 (2001).

24. *See, e.g.*, MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 167 (2d ed. 1994) (“The factor of the civil jury also helps to explain the relatively great number of exclusionary rules in the common law of evidence and the relatively few restrictions on admissibility in the civil law systems.”).

25. MACNEIL ET AL., *supra* note 9, § 34.1.

26. MACNEIL ET AL., *supra* note 9, §§ 35.1.2.1, 35.1.2.4.

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oppose enforcement of pre-dispute consumer and employment arbitration agreements. Are you willing to bring the United States into the mainstream on both arbitration *and* on the civil jury? If so, then perhaps a deal can be reached.