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The Fallacy of Consent: Should Arbitration Be a Creature of Contract?

Fabio Núñez del Prado

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THE FALLACY OF CONSENT: SHOULD ARBITRATION BE A CREATURE OF CONTRACT?

*Fabio Núñez del Prado**

ABSTRACT

Arbitration is a creature of contract. This paradigm is so basic that it is accepted in all the States of the world. Nevertheless, arbitration is perceived as the most suitable method for the settlement of commercial disputes. Virtually all commercial disputes are resolved through arbitration. The natural order of things has been reversed. In commercial matters, at least, arbitration is the rule, and courts the exception. Why is it, then, that parties must opt in for a solution which appears as the most natural one in the community? I propose to question this default rule and propose an extreme shift: Arbitration should become the default jurisdiction.

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INTRODUCTION

“The task is not so much to see what no one has yet seen; but to think what nobody has yet thought, about that which everybody sees”

—Erwin Schrödinger, Nobel Prize, Physics

Paradigms are one of the worst enemies of knowledge. This is because behind paradigms there are hidden innovations that we do not perceive because of our tendency to respect what has already been established. Undeniably, paradigms can condemn us to intellectual immobility.¹

The basic paradigm of arbitration is that consent is the cornerstone of arbitration. Thus, the default rule has always been that, unless the parties agree otherwise, they should resolve their disputes in courts.² This rule has been a misunderstood paradigm of history. The contractual foundation of arbitration is so internalized in the mind of arbitral actors that it is often thought that arbitration and consent are like shadow and body.³

This Article attempts to knock down the remaining columns on which the contractual foundation of arbitration was built in order to demonstrate that, at least in commercial disputes, the state should no longer be considered the default provider in resolving commercial disputes. Hence, this Article will demonstrate on its face that in commercial disputes, arbitration must be the default jurisdiction. This would imply a shift of the paradigm in which arbitration would be non-consensual.

Consent is an obstacle for the effectiveness of international arbitration. Arbitral tribunals and arbitral institutions are so aware of this reality that they frequently bypass consent without regrets. Additionally, several professors from Yale Law School have argued that default rules should reflect the preferences of the majority. At least in international commerce, virtually all disputes are resolved through arbitration. Hence, the latest surveys conducted by Queen Mary University and White & Case show that an overwhelming majority of the respondent group (ninety-seven percent) prefer arbitration as their method of resolving cross-border disputes.⁴

¹ See FABIO NÚÑEZ DEL PRADO, DESMITIFICANDO MITOS: ANÁLISIS ECONÓMICO DE LA DOBLE INSTANCIA EN EL PROCESO CIVIL: PRESENTACIÓN DE ALFREDO BULLARD [DEMISTIFYING MYTHS: ECONOMIC ANALYSIS OF THE RIGHT TO APPEAL: PRESENTATION OF ALFREDO BULLARD] 11 (Thomson Reuters 2016).

² PAUL FRIEDLAND & STAVROS BREKOUAKIS, INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 5 (2018).

³ *Id.*

⁴ *Id.*

If that is so—if it is known that the majority demands arbitration to resolve their disputes and it is known that arbitration has become the natural mechanism to resolve disputes—why isn't arbitration recognized as the default jurisdiction?⁵ It seems that the recognition of arbitration as the default jurisdiction is inevitable.

Moreover, converting to arbitration in the default jurisdiction will generate positive externalities since it would alleviate the burden of the commercial justice system by outsourcing a range of disputes to arbitration. Similarly, to the extent that the cost of the proceedings would be internalized by the litigants, it will also be an efficient mechanism to save public funds.

I. THE FALLACY OF CONSENT

Is consent inherent to arbitration? Everyone has heard at least once the phrases: “arbitration is a creature of contract,” or “like consummate romance, arbitration rests on consent.”⁶ These are two of the most ubiquitous phrases in the world of arbitration. For most lawyers, it seems obvious that arbitration must have a contractual nature. So, every time a legal system is designed, the premise is that state justice is the rule; arbitration, the exception.⁷

But when arbitration as the exception is asked why, the answer is not so obvious. Is consent inherent and part of the essence of arbitration? Once I asked

⁵ GILLES CUNIBERTI, *RETHINKING INTERNATIONAL COMMERCIAL ARBITRATION TOWARDS DEFAULT ARBITRATION* 6–7 (2017) [hereinafter *RETHINKING*].

⁶ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J. concurring) (stating “arbitration is a creature of contract”); *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 251 (1977); William H. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in *THE LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION* 553, 553 (Lawrence W. Newman & Richard D. Hill eds., 2008); see also KARIM YOUSSEF, *CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION* 2 (West 2012) (“[T]he term ‘Arbitration is a creature of contract’ was used more than 97 times in U.S. federal courts alone since the early 1970s. The seminal rule is often recited even in cases where consensual analysis is excluded in the particular case.”).

⁷ YOUSSEF, *supra* note 6, at 2. Upon knowledge and belief, in all States of the world, the judiciary is the default provider of justice. Arbitration, on the other hand, has always been viewed as an alternative dispute resolution mechanism. *Id.*

‘Arbitration is consensual by nature’ or ‘[a]rbitration is a creature of contract’ seems banal clichés even for novices in arbitration. However, the consequences of this legal obviousness command the entire legal frameworks of arbitration and extend deep into the socioeconomic and philosophical dimensions of the institution. Scholarship conceives consent as the cornerstone of the concept of arbitration and defines arbitration as a consensually chosen and organized form. A universal norm of arbitration law prescribes that the jurisdiction of an arbitral tribunal necessarily and exclusively rests on the agreement of the parties.

Id. (citations omitted).

Professor Emmanuel Gaillard if it was possible to conceive a non-consensual model of arbitration.⁸ He answered that he thinks it would be a different animal.⁹ When asked why, he answered that it was because the New York Convention had prescribed it in that way.¹⁰ This argument is not convincing because it is circular on its face. It would be as fallacious as arguing at a domestic level that things are like they are because the law has determined them in that way.

In this respect, Professor Youssef has stated that:

[T]he admission of the existence of less- or nonconsensual concepts of arbitration is conceptually problematic. Consent in arbitration is close to legal dogma. The rarity of scholarly inquiries to explain the theoretical basis for consent's centralism suggests an evident or self-reliant paradigm of consensual arbitration that would need no further justification or rationale to support it. The seminal rule is simply recited: "The existence of both parties' consent to submit the dispute to arbitration is clearly a necessity." The doctrinal transcendence of consent not only dispenses with the need for rationalization, but also does not authorize the existence or even the inquiry into the existence of alternative concepts of arbitration less attached to consent. Only one concept of arbitration exists, and that concept is consensual.¹¹

Nevertheless, the essence of institutions cannot be found in a normative text, but rather in the nature of things. Something is part of the essence of an institution if, by removing it, the institution ceases to be such. Arbitration

⁸ Interview with Emmanuel Gaillard, Professor, Harvard L. Sch., in New Haven, Conn. (Feb. 18, 2019). Professor Emmanuel Gaillard founded and heads Shearman & Sterling's 100-lawyer International Arbitration practice. He is also the Firm's Global Head of Disputes. A Professor of Law in France, he serves as a Visiting Professor of Law at Yale Law School and Harvard Law School. Professor Gaillard is universally regarded as a leading authority in the fields of both commercial and investment treaty arbitration. Emmanuel Gaillard, *Faculty Profile*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/11774/Gaillard> (last visited Aug. 27, 2020).

⁹ Interview with Emmanuel Gaillard, Professor, Harvard L. Sch., in New Haven, Conn. (Feb. 18, 2019). Once we spoke with a friend specialized in arbitration and we shared our proposal. He told us that he agreed with the idea, but that if our model was implemented, this system of dispute resolution could not be called arbitration because the latter was always contractual. For him, consent was inherent in arbitration; it was part of its essence. However, this is not a tag lawsuit. You can call it non-consensual arbitration or anything you want. If it's necessary, it can be called something else, but non-consensual arbitration is the system that should prevail today. In short, the only thing we want to convey is that the dispute resolution mechanism through which commercial conflicts are resolved must be based on freedom. *Id.*

¹⁰ *Id.*; see generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention), June 10, 1958, 330 U.N.T.S. 38.

¹¹ YOUSSEF, *supra* note 6, at 53–54. Professor Karim Youssef is founder of Youssef & Partners, a Global Arbitration Review (GAR) 100 law firm, and a regional leader in dispute resolution. Karim leads the international arbitration and international law practices at the Firm. His practice focuses on commercial arbitration, investment treaty arbitration, complex high-value disputes and international law, and is world-renowned in the respective fields. Karim Youssef, *Our People*, YOUSSEF & PARTNERS ATTORNEYS, <https://youssef.law/our-people/> (last visited Aug. 27, 2020).

without consent does not cease to be arbitration; it can perfectly exist being non-consensual. The most paradigmatic example is mandatory arbitration in controversies that involve the Peruvian State. With its implementation, the contractual foundation of arbitration was broken, and arbitrations against the Peruvian State continue to be arbitrations. In Spain, there is also a system of mandatory arbitration and nobody doubts that it is still arbitration.¹²

Additionally, in investor-State arbitration the contractual nature of arbitration is, to say the least, questionable. Many scholars have argued that the notion of consent under bilateral investment treaties is artificial on its face.¹³ This is immensely relevant for the development of international arbitration. Gary Born has recently proposed the conclusion of Bilateral Arbitration Treaties (“BATs”) in his landmark article *BITS, BATs and Buts: Reflections on International Dispute Resolution*.¹⁴ Under this theory States would agree that

¹² See Drew B. Laframboise, *Arbitrating the Great Writ: Resolving Federal Habeas Corpus Disputes Through Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 1023, 1046 (2010). Laframboise notes that:

Several arbitration models—established and proposed—have advocated and used a non-consensual, mandatory approach to arbitration, rather than a purely voluntary approach. In various employment arbitration systems, for example, mandatory arbitration has been found to provide parties with sufficient legal protection, flexibility, and binding resolutions to disputes. The growth of mandatory arbitration has been significant over the past years, as industries and businesses have recognized the mandatory arbitration process as expedient, cost-effective, and legitimate.

Id. (citations omitted).

¹³ Gary Born, *BITS, BATs and Buts: Reflections on International Dispute Resolution* 13 YAR 3 (2014). Born explains that:

The notion of consent under bilateral investment treaties was correctly understood to be artificial, at least in substantial part. Jan Paulsson coined the frequently-cited, if also not entirely accurate, phrase ‘Arbitration without privity’ - reflecting the unorthodox character of the putative agreement to arbitrate in a BIT. That description recognized the fact that in many senses the agreement to arbitrate resulting from a BIT was less a traditional example of arbitration by consent and more a generally-available legislative or regulatory regime created by the States party to the BIT for the benefit of foreign investors protected by the treaty. There was a form of consent to BIT arbitration, but it was an attenuated form of constructed consent, derived principally from the legislative framework of the treaty, rather than a traditional contractual relationship between commercial counterparties who negotiate a particular arbitration agreement.

Id. See also John Cerney, *Default Arbitration Provisions: One Step to Making “Great Trade Deals,”* 72 RORY BRADY ESSAY COMPETITION ARTICLES 51, 52 (2017) (“Such arbitration provisions were unique because they allowed the investor to commence arbitration notwithstanding the existence of an arbitration agreement with the host-state. This concept is what Jan Paulson calls ‘arbitration without privity.’”).

¹⁴ Professor Gary Born is the chair of the International Arbitration Practice Group. Professor Born is widely regarded as one of the world’s preeminent authority on international commercial arbitration and international litigation. He has been ranked for the past 20 years as one of the world’s leading international arbitration practitioners and the leading arbitration practitioner in London. *People: Gary Born*, WILMERHALE, <https://www.wilmerhale.com/en/people/gary-born> (last visited Aug. 27, 2020).

international commercial disputes—disputes involving business-to-business (“B2B”) transactions—would be submitted to arbitration as a default mechanism under a BAT.¹⁵ The irony of the BAT proposal is that consent is conspicuous in its absence.¹⁶

As explained by Professor Born:

And yet is a BAT really inconsistent with the basic concept of party autonomy? Although BATs may be a step further than the mode of constructive consent in BITs, adopting such treaties are not that much of a further step beyond what we already recognize to be effective consent to international arbitration in BITs. And, insofar as this form of consent is a step beyond past models, it is one that is sensible and justified. . . . Of course, there is no express consent to arbitration under the proposed BAT, which is in some tension with the traditional maxim that “arbitration is a creature of consent” and that “without an arbitration agreement, there can be no arbitration.”¹⁷

To make matters worse, virtually all American adhesion contracts include arbitration clauses.¹⁸ So, what happens if consumers do not want to resolve their controversies in arbitrations? They have no choice—no margin of negotiation at all. Consumers cannot refuse or find a substitute that allows them to evade arbitration. In the United States, there is de facto mandatory arbitration in consumer law. Does that mean that this phenomenon cannot be called arbitration? Of course not.

As Felix Cohen has suggested, reasoning in an exclusively legal way necessarily leads to a circular reasoning that tends to contain what is defined in the definition.¹⁹ The contractual nature of arbitration is so circular that it looks like a traffic circle with no exit streets.²⁰

¹⁵ Born, *supra* note 13, at 9.

¹⁶ Cerney, *supra* note 13, at 6 (describing criticisms of DAPs as follows: “Perhaps the biggest concern with DAPs is that they would require an arbitral tribunal to exercise jurisdiction over a dispute between parties which have not consented to have their disputes heard by that tribunal. As noted previously, this is fundamentally at odds with the core of arbitration.”).

¹⁷ Born, *supra* note 13, at 10.

¹⁸ J.R. Stemlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631, 1633 (2005) (discussing how American adhesion contracts include arbitration). Mandatory arbitration directly imposed by the law of regulatory agencies is not infrequent in domestic settings. *Id.* The United States, leading this trend, is an example of a legal system in which diverse forms of compelled domestic arbitration are gradually displacing the judiciary. *Id.*

¹⁹ NÚÑEZ DEL PRADO, *supra* note 1, at 11. See generally Felix Cohen, *Felix Cohen: Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814–17 (1935) (discussing what is in a Trade Name).

²⁰ NÚÑEZ DEL PRADO, *supra* note 1, at 11.

The essence of arbitration is the maximization of freedom (i.e., the maximization of party autonomy). This includes the freedom to appoint the arbitrators, tailor the arbitral procedure, and choose the applicable law. If parties are deprived of these freedoms, the essence of arbitration is snatched from its being. This system of dispute resolution could no longer be called arbitration.

II. PROBLEMS CAUSED BY THE CONTRACTUAL FOUNDATION OF ARBITRATION

The contractual foundation of arbitration creates countless problems of the most diverse nature. Before exposing the seven problems identified in this Article, this Section reviews a case illustrating various obstacles generated by the contractual nature of arbitration.

A. A Case to Illustrate

Mr. Bender owns a million-dollar property in Peru. In 2008, due to the financial crisis, Mr. Bender had serious liquidity problems, which led to trouble paying his debts. So, he immediately put the property up for sale. Several businessmen from other cities showed interest in the property. Because the market value of the property was not enough to pay all his debts, he thought his best option was to sell the same property to several people at the same time.

Mr. Bender sold the property to individuals who lived in various countries: Mr. Haissiner (Argentina), Mr. Oñate (Mexico), Mr. Padilla (Chile), and Mr. Girón (Colombia). Each buyer had a subjective interest in the property, paying millions of dollars for it. None of the buyers knew the property was simultaneously being sold to other people.

In each of the purchase contracts, Mr. Bender strategically included incompatible arbitration agreements: nothing coincided in them. They had different arbitral institutions, different number of arbitrators, different mechanisms to appoint the arbitrators, and so on. Moreover, each of the contracts contained different applicable law, creating a distinct transfer of property system within each. Worse, Mr. Bender added a provision stating that each party would assume the cost of arbitration equally.

After entering into the purchase contracts and receiving payments, Mr. Bender informed the creditors that he would not be able to relinquish the property. Annoyed, the creditors decided to file arbitrations against Mr. Bender individually. Of course, at that time they did not know there were other creditors

who were claiming ownership rights in the same property. Since each had an interest in the property, they sought specific performance.

Time passed and the arbitral procedures advanced. The creditors eventually learned that Mr. Bender had sold the property to several people simultaneously and contacted each other. Meeting in Lima to discuss the matter, they concluded that if they really wished to resolve the dispute effectively, they needed to consolidate the arbitrations.

They consulted with their attorneys—arbitration specialists—who agreed that the consolidation alternative was impossible. There were several problems: the arbitration agreements were incompatible, and since all the cases would have to be consolidated into one, it was unclear which of the four arbitral procedures should take precedence in the arbitration. Moreover, to the extent that the applicable law of the contract had various criteria for transfer of ownership, each of the creditors wished the other arbitral procedures to be consolidated to theirs.

Furthermore, the lawyers told their clients that in order to consolidate the arbitral procedures they needed the consent of Mr. Bender. They could not believe it. It was absurd to demand Bender's consent because, as Mr. Haissiner pertinently said, "it would be like digging his own grave." All the counsels answered in the same way: "regretfully, in arbitration, consent is sacred."

The lawyers reminded them that each had agreed with Mr. Bender about how their respective controversies would be resolved and, therefore, the consent to arbitrate must be respected. They were astonished: It seemed impossible that in the face of this fraud, they were helpless. The counsels reiterated: "It is a problem. We are aware of that. But the contractual foundation of arbitration must be respected."

The controversies were resolved in isolated arbitrations, which was an equivalent to not resolving them at all. The claimants continued their arbitral procedures and prevailed. Consequently, the arbitral tribunals recognized the property rights of all four claimants but did not provide the slightest indication of which of the four should be preferred. Contradictory awards were rendered, of which at least three were unenforceable. Obviously, the four claimants could not own the property at the same time, meaning the arbitral procedures were useless. Arbitration is intended to resolve disputes, but in this case, it only served to delay the final resolution of the dispute. The arbitral awards existed only on paper and were far from being effective in reality. The fault, then, was entirely attributable to the contractual foundation of arbitration.

While this anecdote is purely fictitious, it is drawn directly from reality. This is daily bread for those working in the field of arbitration. Although the principles of arbitration were strictly respected in all the arbitral procedures, contradictory awards were rendered and, at least three, were unenforceable. The anecdote speaks for itself. The contractual foundation of arbitration is, indeed, highly problematic.

B. The Countless Problems Created By the Contractual Nature of Arbitration

“[C]onsensualism is so deeply rooted in international arbitral theory and practice that evoking *noncontractual* or *less-contractual* international commercial arbitration would have seemed, until recently, a self-contradiction or an abuse of language. However, as all empires rise and fall, the empire of consent in arbitration, believed eternal, is falling.”²¹ As suggested by Professor Graves, “real ‘consent’ arguably ceased to be the touchstone of arbitration law some time ago.”²²

The truth is that the contractual foundation of arbitration is a clear obstacle to the efficiency of the arbitral procedure, which explains why consent is in decline.²³ The following Section analyzes seven problems that the contractual foundation of arbitration creates.

1. The Risk of Contradictory and Unenforceable Arbitral Awards

Contradictory and unenforceable awards are a staple of arbitration.²⁴ This is because the contractual basis of arbitration is founded on a conceptual mistake: a conflict is equated with a sole legal relationship. It is true though that in many cases conflicts involve one single legal relationship, but that is not always the case.²⁵

²¹ YOUSSEF, *supra* note 6, at 2–3.

²² Jack Graves, *Court Litigation Over Arbitration Agreements: Is It Time for a New Default Rule?* 23 AM. REV. INT’L ARB. 1, 16 (2012) (citation omitted) (discussing arbitration as the default). Professor Graves is Director of Digital Legal Education, Director of the FlexTime J.D. Program and Professor of Law. Jack Michael Graves, *Resume*, TOURO COLL. L. CTR., https://www.tourolaw.edu/AboutTouroLaw/uploads/faculty_cv/Graves_Jack_2.pdf (last visited Aug. 30, 2020).

²³ Gilles Cuniberti, *Beyond Contract. The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L. L.J. 419, 432 (2008) (discussing disadvantages of arbitration).

²⁴ YOUSSEF, *supra* note 6, at 3.

²⁵ *Id.*

In this respect, Professor Youssef has stated that:

Arbitrations involving complex jurisdictional questions have become commonplace. The *simple* classic setting of two parties, one contract, and one arbitration agreement is doubled with multiparty, multicontract, or multi-issue disputes that have flourished tremendously, as a natural by-product of the universal development of arbitration and the complexity of global commerce. . . . Nevertheless, an arbitration agreement by virtue of its inherent *privity* and required *formalism* falls short of addressing the jurisdictional complexity of multiparty or multicontract relations. . . . ‘The law of arbitration cannot ignore those situations [complex arbitrations] which have become the norm in present day international commerce.’ It had to adapt.²⁶

In effect, cases involving conflicts with two or more legal relationships abound. These are called complex arbitrations.²⁷ In such cases the tribunal cannot resolve the dispute without analyzing all relevant legal relationships simultaneously.²⁸ The difficulty, however, is that many times these legal relationships have incompatible arbitration agreements and parties do not consent to consolidate the arbitrations at the outset.²⁹

Since arbitration is based on consent, and the terms agreed by the parties in the arbitration, agreements must be strictly respected; it frequently happens that a single controversy ends up being isolated in several arbitrations.³⁰ Indeed, the contractual foundation of arbitration determines that closely interrelated controversies end up being resolved separately.

As a natural consequence, the focus of the controversy is lost. Since arbitration agreements are incompatible, it is impossible to consolidate the arbitral procedures. This illustrates the risk of contradictory and unenforceable awards and, consequently, it undermines the credibility of the legal system.

In summary, as in the case of Mr. Bender, the arbitral awards ultimately serve no purpose. This is not remediable, because the consolidation of arbitral

²⁶ *Id.* at 3.

²⁷ *Id.* (“[S]tatistics suggest that complex arbitrations constitute about one-third of all new cases submitted to the International Chamber of Commerce (ICC). The percentage of arbitrations involving more than two parties increased from 20.4% of ICC cases in 1995 to 30% in 2001.”).

²⁸ *Id.* at 4–5.

²⁹ *Id.*

³⁰ *Id.* at 3. Youssef describes arbitration proceedings as being “initiated by multiple claimants or by one claimant against multiple respondents.” *Id.* Adding that “[n]onparties may seek to join the proceedings or may be ordered to. Several contracts between the same or different parties may contribute to the implementation of a global economic operation, and raise difficult questions of consolidation of claims arising under the different contracts and often governed by distinct jurisdiction clauses.” *Id.*

procedures requires the consent of all parties, which rarely happens. What is undeniable, however, is that a system in which there is a risk of contradictory and unenforceable awards must be rethought.

2. *Arbitrators Cannot See the Forest for the Trees*

To the extent that it is not always possible for arbitral procedures to be consolidated, interrelated controversies frequently end up being resolved separately. This is extremely damaging to the decision-making process because, when resolving the dispute, arbitrators cannot see the forest for the trees, which implies that the arbitral award goes to the wrong person.

3. *An Inconsistent and Hypocritical Model in Which Consent Is Routinely Sacrificed Prevails: The Elasticity of Consensualism in Arbitration*

It is inconsistent to establish a system that holds arbitration consent as sacred, and yet routinely bypasses it. If the system chosen is one in which the foundation of arbitration is contractual, consent must be strictly respected, and exceptions cannot be permitted to occur frequently. It is one thing is to have an exception that proves the rule, and quite another to have an exception that becomes the rule.³¹

In this regard, Youssef has affirmed that:

The inadequacy of an exclusive reliance on the arbitration agreement in certain jurisdictional settings led arbitration tribunals and courts to abandon a *formalist* approach and sometimes even a strict approach to [consensualism]. Tribunals often assert jurisdiction in cases where the claimant did not sign an arbitration agreement or the respondent did not accept expressly or implicitly the jurisdiction of the tribunal. More and more, courts compel non-signatories to arbitrate and validate or enforce arbitral awards rendered for or against non-signatories. A more complex scene has emerged characterized by arbitral processes reaching in different ways beyond the original scope of the arbitration agreement which has initially founded them.³²

³¹ Cuniberti, *supra* note 23, at 434

([T]he most interesting manifestation of the pro-arbitration policy of French courts has been their willingness to bypass the contractual nature of arbitration when it is revealed as unfavorable to the efficacy of the arbitral process. Originally, the voluntary foundation of arbitration was critical to the development of this alternative mode of dispute resolution, as it was perceived as the sole means to legitimize private adjudication.)

³² YOUSSEF, *supra* note 6, at 3–4.

There are innumerable cases in which, with the purpose of converting arbitration into an effective mechanism, legislators, arbitral institutions, judges, and arbitral tribunals have bypassed consent.³³ Having consent as the cornerstone of arbitration is a serious drawback—it is bypassed on a daily basis. There are reputable arbitrators, who have established the public policies on arbitration in their respective countries, who admit without any regret that they have had to make mischief with arbitral consent to make arbitration an effective mechanism.

The case of Mr. Bender illustrates how there may be cases in which it is precisely the consent requirement that makes the dispute unresolvable. Innovative non-signatory theories, such as the group of companies, the interrelation, good faith, and many others have had to be invented to incorporate a non-signatory into an arbitration procedure and thus avoid unjust results.³⁴

What should really concern us is that, to avoid an unfair solution, the arbitrators in Mr. Bender's case might have resorted to one of the non-signatory theories to solve the controversy fairly.³⁵ Thus, even though the arbitrators

³³ Graves, *supra* note 22, at 16 (“A knowledgeable observer of U.S. jurisprudence interpreting and applying the Federal Arbitration Act might reasonably argue that, as a practical matter, the courts have already left consent far behind in deciding issues of arbitral jurisdiction.”).

³⁴ See FRIEDLAND & BREKOUKAKIS, *supra* note 2, at 10 (stating one of the main defects of arbitration is its lack of power in relation to third parties, meaning that arbitral tribunals have very often ignored consent with the purpose of making arbitration more effective); see also Cuniberti, *supra* note 23, at 437–39 (citations omitted)

([J]udgments of the Cour de cassation have been increasingly liberal in their assessment of the existence of an agreement to arbitrate. Arbitration agreements have been found to bind parties who had not concluded them originally with surprising ease. . . .

I do not argue that these recent liberal assessments of the existence of an agreement to arbitrate are evidence of the willingness of the Cour de cassation to abandon the contractual foundation of arbitration. My claim is much more limited. I submit that the faith of the French senior judiciary in the importance of the contractual foundation of arbitration has been fading. Increasingly, French senior judges are ready to ignore it in order to pursue other policies, and in particular to promote international arbitration as an efficient mode of dispute resolution.

The truth of the matter is that they are not shocked by the idea of an arbitration without consent. What does the French experience tell us? I do not claim that French solutions are better for the sole reason that they promote arbitration and are more liberal. My claim is, again, more limited. The recent developments in the French law of international arbitration beg the question that is the topic of this Article: should arbitration lose its contractual foundation? The French experience shows that the question is not only academic. The repeated attacks of French courts on such a central, unchallenged, doctrine reveal that it has tremendous practical significance.)

³⁵ See, e.g., YOUSSEF, *supra* note 6, at 33. For example: implied consent, promissory estoppel, interrelation, and good faith. *Id.*

would have rendered a fair award on the merits, they would have had to find consent when, in fact, it did not exist.

Since the contractual nature of arbitration creates several difficulties, specialists have been forced to solve them in creative and imaginative ways. These sophisticated solutions, however, have ended up relativizing genuine consent.³⁶ Arbitrators very often have to work magic when the contractual foundation of arbitration threatens to produce an unfair decision. What has ended up happening is that the importance of consent in arbitration has been relativized and is therefore slowly losing force.³⁷ There is no legal discipline in which consent is interpreted as widely as in the arbitration field.³⁸

These inconceivable events only happen in arbitration. In any other field of law, they would be unthinkable. It would be unacceptable to extend the effects of a civil contract by virtue of a non-signatory theory. For instance, it is well known that, in order to incorporate a non-signatory, the requirements to lift the corporate veil on the merits of a dispute are much stricter than in the jurisdictional phase. Unlike arbitration, in civil law the consent is given the importance it deserves.

Although the cleverness of these non-signatory theories must be acknowledged, the truth is that there is no discipline of law in which consent is more elastic than arbitration. The consent to be found in some of these theories is so thin that sometimes arbitrators must make herculean efforts to find it. The arbitration agreement is stretched to the point of unreasonableness. It would not be an exaggeration to speak about the “elastic” nature of arbitral consent.³⁹

³⁶ *Id.*

³⁷ *Id.* at 2.

³⁸ Cuniberti, *supra* note 23, at 484–85 (citations omitted)

(It happens to be that many of such rules are widely perceived as limiting to the efficacy of the arbitral process, and as such as necessary evils. One of the best examples is precisely the rule preventing joinders of third parties absent the agreement of all parties concerned. In practice, this has most often meant that arbitration could not properly cope with multi-party disputes. So, modifying the rule and allowing arbitration to deal more efficiently with multi-party disputes would not be regretted by many. The new paradigm would actually lead to an improvement of the arbitral process.)

³⁹ *Arbitration Rules Mediation Rules*, INT’L CHAMBER OF COM. 71–72 (May 2019). Another example in which consent has been sacrificed can be found in the ICC Expedited Procedure provided in Appendix VI of the ICC Rules. *Id.* Hence, Article 1 of Appendix VI of the Expedited Procedure Provisions establishes that when the amount in dispute is less than \$2,000,000 USD, the ICC Expedited Procedure Provisions shall apply. *Id.* Thus, Article 2 of Appendix VI of the ICC Rules establishes that the ICC Court may, despite any contrary provision in the arbitration agreement, appoint a sole arbitrator. *Id.* It is also established that, after the tribunal has been constituted, parties cannot add new claims, unless they have been authorized to do so by the arbitral tribunal. *Id.*

One of the theories of non-signatory parties in which consent has been sacrificed is the theory of interrelation. This Section examines cases that will help illustrate the absurdity of this theory and why it bypasses arbitral consent.

In *J. Ryan & Sons v. Rhone Poulenc Textile*—by virtue of the theory of interrelation—a company was forced to resolve its arbitral claims against the controlling party (who was a non-signatory) of its co-contractors.⁴⁰ The dispute with the parent company and the dispute with the co-contractors were based on the same facts and were, thus, determined to be inseparable by the tribunal.⁴¹ The arbitral tribunal, nevertheless, did not analyze whether the parent company had expressed its consent.

On the other hand, in *McBro Planning & Development Co. & McCarthy Brothers Co. v. Triangle Electrical Construction Co.*, the Eleventh Circuit Court of Appeals decided that, although there was no arbitration agreement between the parties, the two parties that had (with a third) interrelated contracts with identical arbitration clauses, must resolve their controversies in a single arbitration.⁴² Again, the tribunal did not analyze the consent of the parties to resolve the controversies jointly.⁴³

The arbitral tribunals made no effort to find consent in any of the above cases. The effects of the arbitration agreement were extended to the non-

Moreover, the tribunal may, after consulting with the parties, decide not to allow requests for document production or limit the number, length and scope of written submissions and written witness evidence. Last but not least, the tribunal may decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. It is undeniable that parties' consent is being undermined. Thus, although the parties have consented in their arbitration agreement to have the dispute resolved by three arbitrators, that there will be a stage for production of documents, as well as direct and cross-examinations, the arbitral tribunal has the power to ignore such agreements.

⁴⁰ *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320–21 (4th Cir. 1988).

⁴¹ *Id.* See generally *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187 (3d Cir. 2001); *MS Dealer Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757–78 (11th Cir. 1993).

⁴² *McBro Planning & Development Co. & McCarthy Brothers Co. v. Triangle Electrical Construction Co.*, 741 F.2d 342, 343–44 (11th Cir. 1984).

⁴³ See Roque Caivano, *Arbitraje y grupos de sociedades. Extensión de los efectos de un acuerdo arbitral a quien no ha sido signatario*, 1 LIMA ARBITRATION 121, 136 (2006) (citing *Hill v. G E Power Systems, Inc.*, 282 F.3d 343 (5th Cir. 2002)). The criterion of interrelation was also used by the Court of Appeals of the Fifth Circuit in *Hill v. G E Power Systems, Inc.* to compel arbitration of a non-signatory, on the grounds that the claim brought by one of the signatories of the contract contained allegations of substantially interdependent and concerted misconduct by the other signatory and a third party. See also *Hill* 282 F.3d at 349. In summary, the criteria used by the U.S. Circuits were: (i) that the controversies were based on the same facts and were essentially inseparable; (ii) that the controversy derived from interrelated contracts that contained identical arbitration clauses; and (iii) that the controversy was based on allegations of substantially interdependent and concerted misconduct of the other party and a third party. *Id.*

signatories simply because the controversies were interrelated. Consent, nevertheless, was completely ignored. The theory of interrelation, then, is a detriment of consent.⁴⁴

4. *The Contractual Foundation of Arbitration Is Very Often Strategically Used by Parties to Delay and, in Some Cases, Even Evade the Arbitration*

The contractual foundation of arbitration permits multiple grounds under which the parties may object to the jurisdiction of the tribunal. The parties, for instance, may argue that the arbitration agreement is void, that the tribunal resolved on matters not subject to its jurisdiction, that the arbitration clause is pathological,⁴⁵ or that one of the parties is not bound by the arbitration agreement. What is more, the parties can invoke these grounds to set aside the arbitral awards, threatening the arbitration with a complete loss of effectiveness.

Thus, the contractual foundation of arbitration is very often strategically used by parties to delay and, in some cases, even evade the arbitration.⁴⁶ Consent, then, constitutes an authentic obstacle to the effectiveness of arbitration.⁴⁷ As explained by Cuniberti, “the policy reason behind this solution

⁴⁴ Hill, 282 F.3d at 347–48 (explaining the inclusion of a non-signatory party due to the interrelatedness of the cases). There can be no doubt that in the case of Mr. Bender, any of the U.S. Circuits would have extended the scope of one of the arbitration agreements to the three other creditors under the theory of interrelation. This is an excellent example of how arbitrators act in detriment of consent in order to gain effectiveness in the arbitral procedure.

⁴⁵ “The term ‘pathological clauses’, coined by Frédéric Eisemann, is widely used to describe arbitration clauses with apparent defect[s] liable to disrupt the smooth progress of the arbitration. Jae Hee Suh, *Interpretation of Pathological Clauses: A Cautionary Tale?*, THOMSON REUTERS PRACTICAL LAW ARBITRATION BLOG (Jan. 31, 2019), <http://arbitrationblog.practicallaw.com/interpretation-of-pathological-clauses-a-cautionary-tale/#:~:text=The%20term%20%E2%80%9Cpathological%20clauses%E2%80%9D%2C,smooth%20progress%20of%20the%20arbitration.>

⁴⁶ Cuniberti, *supra* note 23, at 420.

⁴⁷ *Id.* at 434–35 (citations omitted)

(However, as arbitration developed, it became apparent that its contractual foundation could also be used strategically by parties wishing to delay or even to avoid the resolution of their dispute. The contractual nature of arbitration began to appear as a problem. It offered multiple arguments to challenge the jurisdiction of the tribunal by challenging the existence and the validity of the arbitral agreement, and thus the power to adjudicate of the tribunal. The oldest argument was certainly the challenge of this power on the ground that the tribunal had set aside the contract containing the arbitral clause, and that, as a consequence, it had retroactively suppressed its own adjudicatory power, which flowed from the arbitration clause of the contract. The doctrine of separability was crafted to reject this argument. Now widely accepted, the doctrine provides that the arbitration clause is a peculiar clause of the contract, which as such can be separated from it, and thus may survive it if it is cancelled or otherwise terminated. The jurisdiction of arbitrators thus remains even if they rule that the (rest of the) contract has been retroactively set aside.)

is that the contractual nature of arbitration can be used strategically by defendants to delay and sometimes avoid the arbitral process[.]”⁴⁸

The world of commercial dispute resolution would be more effective if arbitration were the default jurisdiction. The endless discussions regarding the objective scope of the arbitration agreement would be eliminated. Whether the arbitration clause is broad or restricted would no longer be in dispute. The number of pathological arbitration clauses would be significantly reduced. It would not be necessary to complicate our lives with non-signatory theories. Arbitration would become a much simpler and effective mechanism, thereby promoting the peaceful settlement of disputes.

5. *Fiction Needs to Be Created to Correct the Deficiencies of the System*

The principle of separability of the arbitration agreement, a legal fiction that contravenes logic principles, was created to correct the deficiencies stemming from the contractual foundation of arbitration. If the cornerstone of arbitration were not based on consent, such principle would be unnecessary.⁴⁹

It is undeniable that the principle of separability constitutes an artificial creation. By definition, the nullity of a contract implies that all its clauses are void. The separability of the arbitration agreement is a fiction that was created to ensure that the arbitration will achieve the purpose for which it was intended.⁵⁰

⁴⁸ *Id.* at 420. Cuniberti states that “[i]t could seem astonishing that the most essential feature of arbitration . . . could appear as an obstacle to its implementation.” If arbitration was perceived as being one option of dispute resolution, among many others, “then its contractual foundation should appear as the most natural technique to allow the parties to choose it and to protect them from being dragged into an alternative derogatory mode of dispute resolution without seriously considering making that unusual, out of the ordinary, choice.” *Id.* at 420. Further, Cuniberti speaks on one way of seeing a critical shift in paradigm by interpreting an evolution, like the French one, in a way which negates the contractual nature of arbitration. *Id.* at 420-21. The chosen mode has become the natural mode of dispute resolution. *Id.* at 421. “Because it does not appear anymore as an unusual [] . . . way to resolve international commercial disputes, there is much less need, if any, to protect the consent of the parties to resort to it, and indeed to actually find such consent.” *Id.* Cuniberti addresses potential doubt by stating that “it makes sense to consider that the parties would actually agree to the natural mode of dispute resolution of the community.” *Id.* Professor Gilles Cuniberti is Professor of Comparative Law and Private International Law at the University of Luxembourg. He is also the precursor of the proposal of default arbitration. Prof. Dr. Gilles Cuniberti, *People*, Univ. Luxembourg, https://www.en.uni.lu/fdef/departement_of_law/people/gilles_cuniberti (last visited Aug. 28, 2020).

⁴⁹ Graves, *supra* note 22, at 17 (“[A]n agreement to arbitrate disputes arising under the parties’ main contract is no more than a typical majoritarian default contract term provided in a variety of contractual contexts. Admittedly, this is arguably inconsistent with the doctrine of separability, but that doctrine would be rendered [] unnecessary if arbitration were the default.”).

⁵⁰ Fiona Winnifred Lakareber, *A Critical Assessment of the Separability Doctrine, Its Impact, and Application*, 6 MANCHESTER REV. L. CRIME & ETHICS 148 (2017). If the arbitration agreement were not an autonomous contract, the defendant would always argue that the contract is null and the controversy would end

This principle, however, is only necessary when arbitration is contractual in nature. If arbitration were the default jurisdiction, the existence of the principle of separability would not be necessary, eliminating all the principles that its creation implies.

6. *Many Arbitrable Controversies Are Not Resolved through Arbitration*

This Section considers examples of arbitrable controversies that are virtually always resolved by courts.

a. *Torts Cases*

To the extent that arbitration has a contractual foundation, it is virtually impossible that an arbitration agreement exists in a torts controversy.⁵¹ Since no one knows when or with whom an accident may occur, the parties are usually not bound by any arbitration agreement.⁵²

b. *Real-Estate Cases*⁵³

In real-estate cases, controversies are usually resolved in courts, because arbitration agreements do not exist. Since real-estate controversies are of free disposition, they can be perfectly resolved through arbitration without congesting courts.

up being resolved in the judiciary, precisely what the parties wished to avoid.

⁵¹ See generally Travis Peeler, *Contract and Tort Law*, LEGALMATCH (July 17, 2017), <https://www.legalmatch.com/law-library/article/contract-and-tort-law.html> (explaining the differences between contracts and torts).

⁵² It could be argued, however, that the controversy can still be resolved through arbitration. However, after the accident occurs, the defendant has no incentive to enter into an arbitration agreement. Quite the opposite. He has every incentive to resolve the dispute in courts. Obviously, he wants the judgment to be rendered as late as possible. As Shavell points out, the benefits of arbitration are greater when agreed to ex ante than when established ex post. See generally Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995) (explaining the advantages of ex ante alternative dispute resolution). Similarly, Caplan and Stringham state that "although many people agree to arbitration after a dispute occurs, arbitration usually works best and is clearly ex ante utility-enhancing to all parties involved when stipulated in an initial contract." Bryan Caplan & Edward Stringham, *Privatizing the Adjudication of Disputes*, 9 THEORETICAL INQUIRIES L. 503, 523 (2008) (citation omitted).

⁵³ Cases in which the ownership of a property is in dispute, such as an interdict, an eviction against the sub-tenant, etc.

c. *Complex Contractual Cases Involving More Than One Legal Relationship*

The most paradigmatic example of complex contractual cases involving more than one legal relationship occurs when several creditors have claims over the same property. If they all have the same claim over the same property, how can all the claims be resolved in the same arbitration? It could be argued that this is perfectly possible because the proceedings can be consolidated. This option, however, is not plausible when the arbitration agreements are incompatible, which frequently occurs.⁵⁴

To the extent that all these disputes—torts, real-estate, and complex contractual cases—are resolved in courts, recognizing arbitration as the default jurisdiction for commercial disputes will significantly reduce the burden of the judiciary.⁵⁵ As a result, courts will be able to devote more time to criminal or administrative disputes, for example.⁵⁶

7. *The Contractual Foundation of Arbitration Is a Strong Impediment to Initiate Class-Actions*

American transnational corporations tend to include arbitration clauses in their adhesion contracts to prevent consumers from filing class-actions. They hide behind the contractual foundation of arbitration to curtail payments for

⁵⁴ Caivano, *supra* at note 43, at 154. This is precisely what happened in the case of Mr. Bender.

⁵⁵ See generally Barbara Kate Repa, *Arbitration Pros and Cons*, NOLO, <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html> (explaining the advantages of arbitration in reference to the legal process). We can also add to the list the cases in which, despite having the economic resources, the parties refuse to resolve the controversy in arbitration because they do not want to internalize the costs of their disputes.

⁵⁶ Cuniberti, *supra* note 23, at 429. Cuniberti proposes a model with two series of costs. “First, the private resolution of disputes shifts costs from the state to the litigants. The litigation costs of the parties increase. Second, courts serve functions other than dispute resolution that private adjudicators may not serve, or at least not as well. The proposed model may then entail societal costs.” *Id.*

damages.⁵⁷ This is a problem that has already been denounced in the United States.⁵⁸

Since arbitration has a contractual foundation, the arbitration clause only binds the parties who sign the adhesion contract. This makes it very difficult for the consumers to initiate arbitral class-actions because by signing the adhesion contracts that includes the arbitration clauses, the transnational company agrees to arbitrate the dispute with each of the consumers separately.⁵⁹ By definition, the arbitral class-action contravenes the contractual nature of arbitration.⁶⁰

None of this would happen if arbitration were the default jurisdiction. The transnational company could not hide behind the contractual foundation of arbitration to evade consumer class-actions. Since in the proposed model arbitration would be the default jurisdiction, consumers can join and initiate an arbitral class-action against whoever they like. The arbitration agreement would no longer be an obstacle.

III. ARGUMENTS IN FAVOR OF NON-CONSENSUAL ARBITRATION

In the following sections I will develop three interdisciplinary arguments that support the proposal of default arbitration.

⁵⁷ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015). Silver-Greenberg and Gebeloff state that:

On Page 5 of a credit card contract used by American Express, beneath an explainer on interest rates and late fees, past the details about annual membership, is a clause that most customers probably miss. If cardholders have a problem with their account, American Express explains, the company ‘may elect to resolve any claim by individual arbitration.’ Those nine words are at the center of a far-reaching power play orchestrated by American corporations, an investigation by The New York Times has found. By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.

(emphasis added); see also Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017) (emphasis added). In an effort to “circumvent the courts and bar people from pooling their resources in class-action lawsuits” “credit card companies and banks have inserted arbitration clauses into the fine print of financial contracts[.]” *Id.* “By forcing people into private arbitration, the clauses effectively take away one of the few tools that individuals have to fight predatory and deceptive business practices.” *Id.*

⁵⁸ Silver-Greenberg & Gebeloff, *supra* note 57.

⁵⁹ Silver-Greenberg, *supra* note 57 (emphasis added).

⁶⁰ *Id.*

A. Economic Argument: Arbitration Must Be Recognized as the Default Jurisdiction Because under Economic Theory the Default Rules Should Be Designed Based on What the Majority Prefers

In common law, many authors have argued that, as a general rule, default rules should be based on majority preference.⁶¹ In this regard, Professors Ayres⁶² and Gertner⁶³ have contended that:

⁶¹ Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87 (1989). Two distinct classes governing the legal rules of contracts and corporations exist. *Id.* “The larger class consists of “default” rules that parties can contract around by prior agreement, while the smaller, but important, class consists of “immutable” rules that parties cannot change by contractual agreement.” *Id.* There are default and immutable rules. *Id.* “Default rules fill the gaps in incomplete contracts; they govern unless the parties’ contract around them. Immutable rules cannot be contracted around; they govern even if the parties attempt to contract around them.” *Id.* See also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 372 (Little, Brown and Company eds., 3d ed. 1986) (arguing that the default rules should “economize on transaction costs by supplying standard contract terms that the parties would otherwise have to adopt by express agreement”); Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 *COLUM. L. REV.* 396, 400–01 (2009). Ben-Shahar notes that:

there is a troubling paradox surrounding one of the most basic tenets of contract law that gaps in contracts should be filled with terms that mimic the will of the parties—terms that most parties would have jointly chosen. On the one hand, this conception of gap filling makes basic sense: It minimizes the need of the parties to contract around the default rule, and it spells out performance provisions that maximize the parties’ joint well-being. But on the other hand, the mimic-the-parties’-will principle assumes that the parties’ joint will exists. It assumes that there is a single term such that, if only the parties spent the time and attention dealing with the gap, they would have jointly supported the drafting of this term. Yet the existence of a gap in a contract is often an indication that a consensus could not be reached—that a single jointly preferable term does not exist. The claim from which the analysis in this paper begins is that there are situations in which more than one term satisfies the standard conception of the joint will of the parties to a contract. Absent a more powerful prescription, then, the will-mimicking principle would be indeterminate and too amorphous to fill the gap.

Id.; Douglas Baird & Thomas Jackson, *Fraudulent Conveyance Law and its Proper Domain*, 38 *VAND. L. REV.* 829, 835–36 (1985) (stating that the default rules governing the debtor-creditor relationship “should provide all the parties with the type of contract that they would have agreed to if they had had the time and money to bargain over all aspects of their deal”); Michael Whincop & Mary Keynes, *Putting the Private Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 *MELB. U. L. REV.* 515, 523 (1997)

(The Coasian insight that it should reduce the costs of transacting was easy to specify, but difficult to put into operation. The most obvious response was that the rules should take a form which could be justified by ‘majoritarian’ preference. That is, the default rule should be formulated in a way which appeals to more parties than any alternative formulation. Thus, contracting costs would be lower because fewer parties would want to opt out.)

⁶² Professor Ian Ayres is a lawyer and an economist. He is Deputy Dean and the William K. Townsend Professor at Yale Law School and a Professor at Yale’s School of Management. Ian Ayres, *Our Faculty*, *YALE L. SCH.*, <https://law.yale.edu/ian-ayres> (last visited Aug. 28, 2020).

⁶³ Professor Robert Gertner is Joel F. Gemunder Professor of Strategy and Finance; John Edwardson Faculty Director Rustandy Center for Social Sector Innovation. Robert H. Gertner, *Faculty Directory*, *UNIV.*

[A]s transaction costs increase, so does the parties' willingness to accept a default that is not exactly what they would have contracted for. Scholars who attribute contractual incompleteness to transaction costs are naturally drawn toward choosing defaults that the majority of contracting parties 'would have wanted' because these majoritarian defaults seem to minimize the costs of contracting.⁶⁴

Lawmakers should choose a default rule reflecting the majority's preference. It is essential to analyze which dispute settlement mechanism is most desired by the business community for commercial matters. The optimal default jurisdiction can be determined by knowing the preferred dispute mechanism.⁶⁵

In the business community, arbitration is perceived as the most suitable and dominant method for settlement of commercial disputes.⁶⁶ Virtually all commercial disputes are resolved through arbitration.⁶⁷ The natural order of things has been reversed. In commercial matters, at least, arbitration is the rule; and in courts, the exception. Why is it, then, that parties must opt in for a solution which appears as the most natural one in the community?⁶⁸

In this regard, Professor Cuniberti has stated that:

It is however, paradoxical that a natural mode for the resolution of any disputes not be, if not mandatory, which is exceptional in a commercial context, at least a default solution. In other words, one wonders why, if arbitration is the natural mode for the resolution of international commercial disputes, it is not the default solution when the parties have not provided for the mode of resolution of their disputes and, in particular, have not included a jurisdiction clause in their contract.⁶⁹

CHI. BOOTH SCH. BUS., <https://www.chicagobooth.edu/faculty/directory/g/robert-h-gertner> (last visited Aug. 28, 2020).

⁶⁴ Ayres & Gertner, *supra* note 61, at 93.

⁶⁵ Whincop & Keynes, *supra* note 58, at 516. Whincop and Keynes describe a default rule as one that "is supplied by the state to complete an agreement that the parties leave incomplete." *Id.* They further explain that "[a]lthough the default rule influences the form of the parties' exchange, the adjective 'default' emphasizes that the rule merely supplements agreement; it does not thwart or override it." *Id.* Whincop and Keynes distinguish between a default rule and a mandatory or immutable rule. *Id.* "The normative thrust of law and economics research has been the advocacy of default rules, and the rejection of mandatory rules, at least in cases of bargains between persons of full capacity." *Id.* Further, "[d]efault rules can reduce the costs of contracting, whereas immutable rules increase those costs, if preferences for legal rules are not homogeneous." *Id.*

⁶⁶ FRIEDLAND & BREKOUAKIS, *supra* note 2, at 2.

⁶⁷ *Id.*

⁶⁸ Cuniberti, *supra* note 23, at 421.

⁶⁹ *Id.* at 419.

Similarly, Professor Youssef has stated that:

Arbitration's universal development has brought a serious challenge to the idea that state justice is the natural judge . . . The frequency of reference and the enforcement of arbitration even beyond the scope of formal reference is turning, *in fact*, arbitral justice into the *default* forum of international commerce. The structure of international jurisdiction theory based on the *exceptionalism* of private dispute settlement is being *informally* altered; and today, arbitration can be said to 'prevail by default.'⁷⁰

It is curious, to say the least, that arbitration is often considered an alternative mechanism of dispute resolution. The truth is that arbitration has become, undeniably, the natural mechanism for resolving commercial disputes.⁷¹ It is the rule, and, by definition, the rule cannot be an alternative.⁷²

In this regard, in a survey conducted by Queen Mary University and White & Case it was expressly stated that:

International arbitration is still the preferred method of resolving cross-border disputes—with a twist

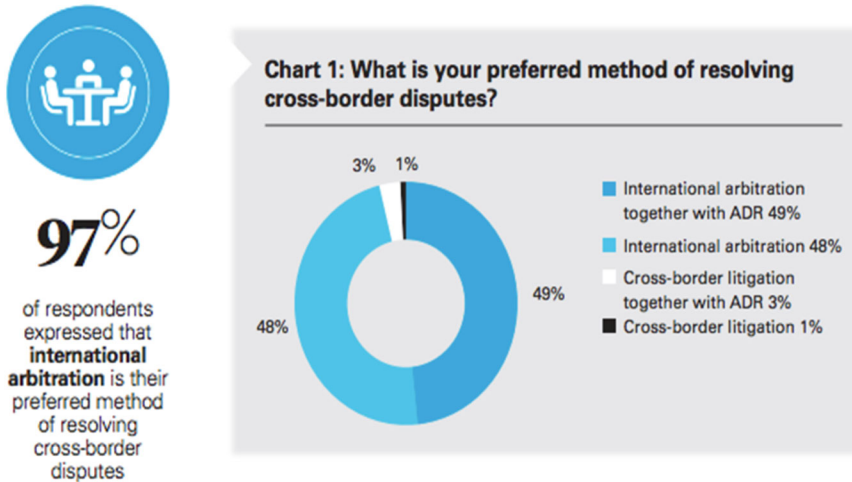
Previous surveys by Queen Mary University of London have confirmed that arbitration is by far the preferred dispute resolution mechanism for cross-border commercial disputes. As was the case with our previous 2012 and 2015 international arbitration surveys, private practitioners, full-time arbitrators, in-house counsel, experts and other stakeholders were invited to complete our questionnaire. An overwhelming majority of this diverse respondent group (97%) showed a clear preference for arbitration as their preferred method of resolving cross-border disputes, either as a stand-alone method (48%) or in conjunction with ADR (49%).⁷³

⁷⁰ YOUSSEF, *supra* note 6, at 39 (citation omitted); *see also* Born, *supra* note 13, at 10 ("If one asks international businessmen or businesswomen how their commercial disputes should be resolved, they say that they want those disputes resolved neutrally, expertly, efficiently and enforceably. They do not know the details of how this occurs, but that is their expectation and desire.").

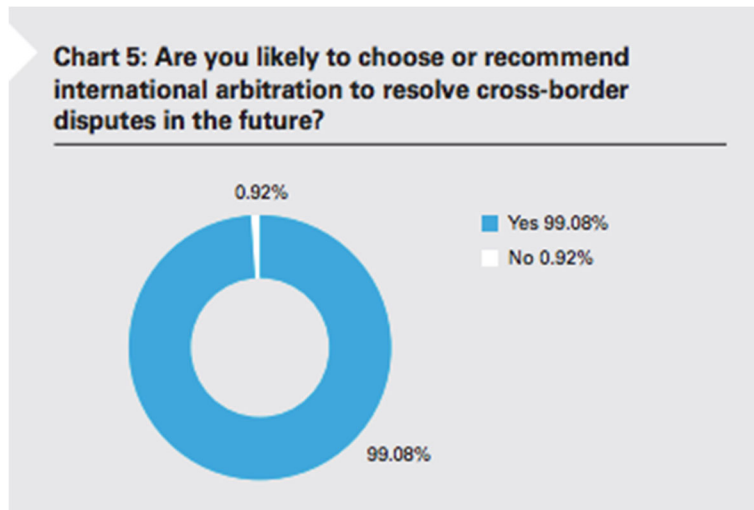
⁷¹ Cuniberti, *supra* note 23, at 436 (discussing disadvantages of arbitration).

⁷² Alfredo Bullard González, *Comprando Justicia: ¿Genera el Mercado de Arbitraje Reglas Jurídicas Predecibles?*, 53 THEMIS L.J. 71, 86 (2007) (explaining that today in Peru it is difficult to imagine conflicts of important commercial contracts that are solved in the judiciary because virtually everything is resolved through arbitration).

⁷³ FRIEDLAND & BREKOUAKIS, *supra* note 2, at 5 (emphasis added).



*Fig. 1 – International Arbitration: The Status Quo*⁷⁴



*Fig. 2 – International Arbitration: The Status Quo*⁷⁵

⁷⁴ *Id.* fig. 1.

⁷⁵ *Id.* at 8, fig. 2.

In the same sense, Varady stated that international commercial arbitration “has become the dominant method of settling international trade disputes.”⁷⁶ Additionally, Professors Drahozal and Naimark⁷⁷ affirmed that 90 percent of international contracts include an arbitration clause.⁷⁸ What is more, they also mentioned that the number of proceedings administered by leading international institutions doubled between 1993 and 2003, and tripled for the American Arbitration Association.⁷⁹

Finally, Lew has affirmed that, “[a] detailed examination of the evidence on international commercial contracts concludes that around 80 percent of these contracts had arbitration clauses at the time of his study, for example, and that over time, ‘more and more [international traders] . . . turn to arbitration.’”⁸⁰

The rationality behind the economic theory of default rules is precisely to respond to market demand.⁸¹ Then, if it is crystal clear that arbitration is the preferred dispute mechanism, it should be recognized as the default jurisdiction.⁸² This suggests that recognizing arbitration as the default

⁷⁶ Tibor Varady, *On the Option of a Contractual Extension of Judicial Review of Arbitral Awards Or: What Is Actually Pro-Arbitration*, 56 ZBORNIK PFZ 455, 455 (2006). Professor Tibor Varady is an internationally recognized scholar and expert on international commercial arbitration, private international law, and international business transactions. Tibor Varady, *Faculty Emeritus*, EMORY UNIV. SCH. L., <https://law.emory.edu/faculty/faculty-emeritus/varady-emeritus-profile.html> (last visited Sept. 7, 2020).

⁷⁷ Professor Christopher R. Drahozal is the John M. Rounds Professor of Law at the University of Kansas. Christopher R. Drahozal, *Directory of Distinguished Professors*, UNIV. KAN., <http://distinguishedprofessors.ku.edu/professor/drahozal-c> (last visited Sept. 7, 2020). Professor Richard Naimark is Senior Vice President of ICDR Global Operations. Richard W. Naimark, *Biography*, INT’L CTR. FOR DISP. RESOL.

⁷⁸ CHRISTOPHER R. DRAHOZAL & RICHARD NAIMARK, *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION* 59 (Kluwer Law International ed., 2005).

⁷⁹ Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 (2006).

⁸⁰ Brian L. Benson, *7500 Arbitration: Literature Review*, ENCYC. L. & ECON. 159, 159 (1999); JULIAN LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: A STUDY IN COMMERCIAL ARBITRATION AWARDS* 589 (Dobbs Ferry, Oceana Publications 1978). Professor Julian Lew is a full-time arbitrator in international commercial and investment disputes, and is also Professor of International Arbitration and Head of the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. Professor Julian DM Lew, Academic Staff, *Queen Mary Univ. London*, <https://www.qmul.ac.uk/law/people/academic-staff/items/lew.html> (last visited Sept. 7, 2020).

⁸¹ Ayres & Gertner, *supra* note 61, at 91.

⁸² Graves, *supra* note 22, at 16–17

(Any suggestion for treatment of arbitration as a ‘default rule’ for dispute resolution raises obvious and significant questions regarding ‘consent.’ It is often repeated that consent is the cornerstone of arbitration, and this same ‘consent’ mantra was recently invoked by Professor Alan Rau in seemingly dismissing the idea of a rule making arbitration the default means of international commercial dispute resolution as a proposal ‘displaying analytical confusion.’ However, ‘consent’ comes in many forms. An international commercial transaction is always based on consent, as a matter of universal contract law. The vast majority of contract regimes

jurisdiction would be the confirmation of a phenomenon that has been stealthily strengthening for decades. As a matter of fact, arbitration already works as the default rule.⁸³ Arbitration has already become the “natural mode of [commercial] dispute resolution.”⁸⁴

B. Empirical Argument: Evidence That Demonstrates That Consent Is Not Inherent to Arbitration—the Successful Story of Mandatory Arbitration

The Law of Acquisitions of the Peruvian State has prescribed mandatory arbitration in disputes that are derived from contracts that the State executes, either with respect to the acquisition of goods and services or with respect to the execution and supervision of works.⁸⁵ Peru is the only country in the world in which this measure has been adopted.⁸⁶

Many arguments have been made against this law, for example: the implementation of a mandatory arbitration system is unconstitutional; the implementation of a mandatory arbitration system contravenes the contractual

provide a broad array of default terms, typically based on normative business behavior. In one respect, an agreement to arbitrate disputes arising under the parties' main contract is no more than a typical majoritarian default contract term provided in a variety of contractual contexts. Admittedly, this is arguably inconsistent with the doctrine of separability, but that doctrine would be rendered largely unnecessary if arbitration were the default.)

⁸³ Alfredo Bullard González, *Justicia Injusta*, EL COMERCIO (May 31, 2014), <https://elcomercio.pe/opinion/columnistas/justicia-injusta-alfredo-bullard-325066>.

⁸⁴ Cuniberti, *supra* note 23, at 421.

⁸⁵ Law No. 30225 art. 45, para 1, Jan. 2017 (Peru) (“Disputes that arise between the parties regarding the execution, interpretation, resolution, non-existence, ineffectiveness or invalidity of the contract are resolved through conciliation or institutional arbitration, in accordance to the agreement of the parties.”).

⁸⁶ Jorge Correa et al., *Poder Judicial y mercado: ¿Quién debe pagar por la justicia?* COLECCIÓN INFORMES DE INVESTIGACIÓN 32–33 (Apr. 1, 1999) (“In this direction are found, in the case of arbitration, measures tending to enhance . . . the extension of forced arbitration to all commercial conflicts that exceed a certain amount, which would be the definitive abandonment of the wrong conception of civil justice as a public good.”).

nature of arbitration; or justice is too important to leave justice in the hands of the market.⁸⁷ However, no argument is more powerful than the empirical one.⁸⁸

So far, mandatory arbitration in Peru is a success story.⁸⁹ This experience clearly shows that consent is not inherent to arbitration. Peru has gone from a reality in which the Judicial Power had a sort of monopoly to resolve commercial disputes (in which arbitration was virtually non-existent) to a reality in which arbitration has become mandatory for some types of disputes.⁹⁰

Although the implementation of mandatory arbitration broke the contractual nature of arbitration, it is undoubtable that the arbitrations filed by virtue of the Legislative Decree No. 1017, Law of Acquisitions of the State, are still arbitrations. Historically, some denounced the unconstitutionality of mandatory arbitration, arguing that arbitration was contractual in nature. Years later, nevertheless, Peru proved mandatory arbitration to be a great success.⁹¹

Although there is room for improvement, this measure has been very useful to decongest the judicial branch. Therefore, recognizing arbitration as default jurisdiction would be nothing more than the confirmation of a phenomenon stealthily configuring for decades. Arbitration functions de facto as the default rule.

⁸⁷ See, e.g., *IPA–Peruvian Institute of Arbitration, José Daniel Amado, Chairman: IPA’s Biggest Accomplishment Is Getting People to Unders*, LEADERS LEAGUE (Jan. 5, 2017), <https://www.leadersleague.com/en/news/ipa-peruvian-institute-of-arbitration-jose-daniel-amado-chairman-ipa-s-biggest-accomplishment-is-getting-people-to-understand-th>. Many argue that the mandatory arbitration provided for in this law is unconstitutional because it violates the contractual nature of arbitration. E.g., Alfredo de Jesus O., *Autonomia del Arbitraje Comercial Internacional a la Hora de la Constitucionalizacion del Arbitraje en America Latina*, 4 REV. BRAS. ARB. 45 (2008). This is wrong. This phenomenon, which happened in an absolutely unnoticed manner, occurred spontaneously and praxeologically. Arbitration in disputes with the State may have been envisaged by law, but this was the response to a market demand. See Alexandra Molina Dimitrijevic, *Arbitration as a Dispute-Solving Mechanism in Public Procurement: A Comparative View Between Peruvian and Spanish Systems*, 4 INT’L PUB. PROCUREMENT CONF., 1–20 (2010); see also Paul McMahon, *Nature of Arbitration*, MCMAHON LEGAL (2018), <http://mcmahonsolicitors.ie/nature-of-arbitration/>. Many have argued that the mandatory arbitration provided for in this law is unconstitutional because it violates the contractual nature of arbitration. This is wrong. All this evolution, which has happened in an absolutely unnoticed manner, has occurred spontaneously and praxeologically. Arbitration in disputes with the State may have been envisaged by law, but this was the response to a market demand.

⁸⁸ See generally Elina Mereminskaya and Claudio Inostroza, *Corruption in State Arbitration in the Republic of Peru: Cases, Lessons and Possible Solutions*, ARB. J. (Mar. 14, 2020), <https://journal.arbitration.ru/analytics/corruption-in-state-arbitration-in-the-republic-of-peru-cases-lessons-and-possible-solutions-/>.

⁸⁹ Alfredo Bullard, *Perú: El Arbitraje Peruano es una Historia de éxito*, EL COMERCIO (Aug. 22, 2015), <https://www.elcato.org/peru-el-arbitraje-peruano-es-una-historia-de-exito>.

⁹⁰ Mario Castillo Freyre & Rita Sabroso Minaya, *Arbitraje Obligatorio y de Derecho en la Contratación Pública*, REVISTA OFICIAL DEL PODER JUDICIAL 237, 241 (2009).

⁹¹ Bullard, *supra* note 89.

C. Axiological Argument: Arbitration Must Be Recognized as the Default Jurisdiction Because This System Would Be More Compatible with Party Autonomy

The choice of the default rule should not be viewed exclusively from an economic perspective. It should not only be the one that the majority wants, but also one that is more compatible with party autonomy. Under the rule of law, the freedom of individuals is the rule; and its restriction, the exception. Consequently, the default rule should always maximize party autonomy. As will be further analyzed, arbitration maximizes party autonomy, which implies that it should be chosen as the default jurisdiction.

One could argue that this is an ideologized argument without practical impact. Quite the opposite. The fact that the legislature restricted party autonomy by recognizing state justice as the default jurisdiction directly affects humans of flesh and blood. In effect, this argument seeks to demonstrate that the constructivist design of completely artificial procedures has violated, not only freedom and party autonomy, but many fundamental rights of human beings.

1. A Case to Illustrate the Problem

Imagine a very complex torts case. The company Quick Buildings LLC (Quick Buildings) builds a big complex in six months at the request of a prestigious law firm. Before the inauguration of the new office, the building collapses, causing serious damage to the adjacent building in which the company Diamonds LLC (Diamonds), the subsidiary of a French transnational gemstone company, operates. The accident destroyed everything. The resulting damages incurred by Diamonds were valued in the millions.

Diamonds proposed to resolve the dispute with Quick Buildings through arbitration. However, Quick Buildings—knowing arbitration would force payment of millions in compensation in a very short period of time—refused and expressed that, since they did not have an arbitration agreement, they would resolve their dispute in court. Quick Buildings unwillingness to arbitrate negatively impacted the administrators of Diamonds. From one day to the next, Diamonds business in Peru was destroyed. Additionally, their lawyers told them that, at best, the trial before courts could last five years and, although it was evident that the law was on their side, anything could happen in the Peruvian judicial system.

Diamonds' lawyers also explained that since the other party refused to resolve the dispute through arbitration, Diamonds would not be able to appoint

its own arbitrator. At first, the administrators of Diamonds did not think that this was a big deal because they thought that in Peru—as in many other countries—judges were highly specialized persons with unblemished ethics. Their disappointment was enormous when their lawyers told them Peruvian judges were—with a few exceptions—exactly the opposite, and dramatically so. When they reviewed the corruption indexes of the Peruvian judiciary and noticed how poorly prepared the judges were, they realized how serious not being entitled to choose their own arbitrator was. The state stole that freedom.

The worst part was when the administrators of Diamonds told their lawyers they would like to agree with the other party on how the procedure was designed. They told their lawyers that since the controversy was extremely complex, it was essential for them to have at least ninety days to prepare pleadings; to have a second round of pleadings; to include a document production phase in the proceedings; to be able to submit a pre-hearing brief in which the expert reports could be analyzed; to have a hearing that can last at least two weeks; and to agree on the deadline for the judge to render their judgment.

The lawyers sadly told them that all this was impossible because the Peruvian Civil Procedure Act already designed a mandatory procedure that was fully applicable to the present case (and, in fact, to thousands more). Accordingly, Diamonds was told that both parties would have thirty days to submit their pleadings (no more no less); that it would be impossible to have two rounds of pleadings; that it would be impossible to include a document production phase; that it would not be possible for them to submit a pre-hearing brief; and that it was impossible for the parties to determine the deadline of the court to render its judgment.

The administrators of Diamonds were astonished. They did not understand why the state arrogantly decided to design a procedure instead of recognizing the right of the parties to do so in a private dispute. They wondered: Why did Diamonds need the consent of Quick Buildings to resolve the dispute in an arbitration? Wasn't freedom the rule in a state in which the rule of law prevails? If so, shouldn't the state recognize the freedom of the parties to appoint their own arbitrators and the freedom to tailor their own procedure as the default rules?

By recognizing state justice as the default rule—and, consequently, the contractual foundation of arbitration—party autonomy has been established as an exception. The freedoms to designate their arbitrators and to design their own procedure are only possible if both parties so agree. But what if one of the parties

refuses to agree on arbitration? Then they will have to resolve the controversy in an inefficient, unpredictable, and usually corrupt judiciary.

Without any explanation it has been concluded that the state is in a better position than the parties to decide who will resolve their dispute and to determine how the procedures should be designed. This is once again, as Hayek suggests, an example of fatal conceit of the state.⁹²

2. *The Recognition of the Contractual Foundation of Arbitration Is a Constructivist Phenomenon*

Arguing that state justice must be the default jurisdiction, and arbitration the exception, implies that the state knows better than the parties regarding who should resolve their disputes and how they should be resolved. This is especially true if it is a private dispute that only affects the parties.⁹³ As previously argued, the default rule must be the one that is most compatible with freedom and, consequently, with party autonomy.

The worst consequence is that often the decisions of the state have been absolutely arbitrary. The Peruvian state designed a constructivist system that lacks rationality. The following questions illustrate these issues: What is the legitimacy of the legislature to establish that in all trials exceeding a certain amount the parties must necessarily have ten or thirty days to answer or counterclaim?⁹⁴ What happens if those deadlines are not enough for an effective exercise of the right of defense? It seems that this does not matter because it is assumed the legislature knows better than the parties what their deadline should be.⁹⁵

Other questions arise: what is the rationality of the Peruvian Civil Procedural Act to grant parties only five or ten days to submit jurisdictional defenses?⁹⁶ This is a completely irrational deadline, considering parties can have a very complex problem of competence or lack of legal standing. If both parties agree to have a longer deadline to submit their pleadings, why should they not be entitled to it when the final decision will only affect them? The answer is unclear. The only

⁹² See generally FRIEDRICH A. VON HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 33 (Routledge 1988).

⁹³ See generally Alfredo Bullard González, *¿Qué es un Socialista?*, EL COMERCIO PERÚ NEWS (Apr. 9, 2016), <https://elcomercio.pe/opinion/columnistas/socialista-alfredo-bullard-184523-noticia/>.

⁹⁴ CIVIL PROCEDURE ACT [CPA] art. 478 § 5, art. 491 § 5 (Peru).

⁹⁵ See FERNANDO CANTUARIAS SALAVERRY, *ARBITRAJE COMERCIAL Y DE INVERSIONES* 131–32 n.82 (Fondo Editorial de la UPC 2007).

⁹⁶ CPA art. 478 § 3, art. 491 § 3.

thing that is clear is that the state, once more, arrogantly decided what was best for the parties.

Since it is simply impossible to tailor the myriad of procedures that the parties could wish for, the legislature created a few procedures which the parties must adapt to. It is an incredible situation in which the parties are the ones that need to adapt to the procedures, and not the procedures that need to adapt to the expectations of the parties. It is an upside-down world.⁹⁷

But that is not all. For example, the Peruvian Civil Procedural Act established that the representative of a company cannot appear as a witness in a trial.⁹⁸ This means, for example, that the administrator of a construction project cannot testify as a witness in a Peruvian trial because the legislature believes that, since the administrator has an alleged interest in the outcome of the trial, his version of the facts cannot be reliable. Nevertheless, what if he is the only person able to exhaustively explain the breaches of the other party? It seems that this did not matter to the legislature. Since the administrator of the construction project could be biased, the legislature paternalistically decided he or she cannot testify. But shouldn't this person be allowed to testify and then give the judge the power to decide if the testimony is reliable? Since the legislature arrogantly concluded that the judge was not acute enough to comply this task, it decided to prohibit the admissibility of such testimony.

What is more, the Peruvian legislature also established that each party can only submit six witness statements with their pleadings.⁹⁹ Nevertheless, what happens if one party is accusing the other of more than ten breaches in the framework of a construction contract and needs more than ten witnesses to demonstrate each of the breaches? Shouldn't the party be entitled to do so? Isn't it a violation of due process to restrict his right to submit relevant evidence? These are the problems of designing a constructivist procedure.

The Peruvian Procedural Civil Act is full of irrational rules in which the legislature believed it knew better than the parties what was best for them. The truth, however, is that the legislature was not in a good position to create all the appropriate procedures to satisfy the expectations of the parties because no one is intelligent enough to do it.¹⁰⁰

⁹⁷ EnfoqueDerecho, *#SemanaDelArbitrajeInternacional Jesús Remón sobre las ventajas del arbitraje*, YOUTUBE (Aug. 28, 2017), <https://www.youtube.com/watch?v=SS7vhxxHr-A> (view 07:07–08:21) (Enfoque Derecho conducted an interview of Jesús Remón Peñalver during International Arbitration Week).

⁹⁸ CPA art. 229 §4.

⁹⁹ CPA art. 226.

¹⁰⁰ FRIEDRICH A. VON HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL*

In Hayek's words:

Concerning our modern economic system, understanding of the principles by which its order forms itself shows us that it rests on the use of knowledge (and of skills in obtaining relevant information) which no one possesses in its entirety, and that it is brought about because individuals are in their actions guided by certain general rules.¹⁰¹

Hayek also points out in *The Use of Knowledge in Society*, that knowledge is dispersed among thousands of individuals.¹⁰² Hence, lawmakers should not be expected to know how procedures should be designed to meet the needs of the parties. It would be an impossible task because they would have to contemplate thousands of procedures in the Procedural Acts, which is irrational. Depending on the circumstances of each case, the parties will design their procedures in a certain way.

Even if it were suggested that different procedures should be included in the Procedural Civil Act, which is not a practical suggestion, lawmakers are not able to store the information that would allow them to design such an infinite number of procedures. Hayek explains that “we ought not to succumb to the false belief, or delusion, that we can replace it with a different kind of order, which presupposes that all this knowledge can be concentrated in a central brain, or group of brains of any practicable size.”¹⁰³ Professor Ferrero suggests that “[t]here seems to be only one solution for this problem: that the elite of mankind acquire consciousness of the limitation of the human mind[.]”¹⁰⁴

The biggest problem arises when the design itself ends up violating the due process of the parties. Some years ago, Professor Fernando Cantuarias, former Dean of the Universidad del Pacífico, told a curious anecdote in a class that illustrates this problem very well. He stated that one day he got a call from the

PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 32 (Routledge 2013).

¹⁰¹ FRIEDRICH A. VON HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND HISTORY OF IDEAS 13 (Routledge & Kegan Paul London and Henley, vol.1, 1978) [hereinafter NEW STUDIES IN PHILOSOPHY].

¹⁰² Friedrich A. von Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945) [hereinafter *The Use of Knowledge in Society*].

¹⁰³ NEW STUDIES IN PHILOSOPHY, *supra* note 101, at 13.

¹⁰⁴ GUGLIELMO FERRERO, THE PRINCIPLES OF POWER: THE GREAT POLITICAL CRISES OF HISTORY 318 (G.P. Putnam's sons 1942). Professor Guglielmo Ferrero was an Italian historian, journalist and novelist, author of the *Greatness and Decline of Rome*. Ferrero devoted his writings to classical liberalism and he opposed any kind of dictatorship and unlimited government. He was nominated for the Nobel Prize in Literature twenty times in six years. Guglielmo Ferrero, *People*, PEOPLEPILL, <https://peoplepill.com/people/guglielmo-ferrero/> (last visited Sept. 7, 2020).

Jorge Chávez Airport informing him that a large number of packages arrived for him. Due to the amount of packages, customs decided to retain them. Maybe with the intention of exaggerating the anecdote a little—and making it more pleasant—Professor Cantuarias said that the number of packages that had arrived could almost fill an entire room. Professor Cantuarias was bewildered when he received the call. He was not expecting a package. Great was his surprise when he discovered that it was not a gift; it was a request for arbitration accompanied by all the exhibits. There were thousands upon thousands of documents. It was, certainly, a very complex controversy. When the parties negotiated the terms of the first procedural order, they quickly agreed that it was reasonable for each party to have four months to draft their pleadings.

What would have happened if, in a controversy like this one, the parties had not included an arbitration agreement in their contract? The result would have been chaotic. Since the parties would not have had the freedom to design their own arbitral procedure, the claimant would have had all the time he would have wished to prepare his pleading, revise the witness statements and expert reports, and select the documentation that he would like to offer as evidence. This means that if he had needed six months or a year to prepare his pleading, he could have spent that time without a problem. The claimant can have as much time as they want because their claim is not time-barred. Since the request for arbitration does not exist in a trial, the defendant is destined to receive claimant's pleading and the thousand attachments without prior notice. Unlike the American court system, Peru does not take part in discovery. The defendant receives the pleading and has a deadline of thirty days to answer all the claimant's arguments.

Imagine defendants in a Peruvian trial are notified of the pleading along with thousands of documents, witness statements, and expert reports. They need several months to study the pleadings and exhibits and hire a law firm that can design an effective defense. Nevertheless, the Peruvian legislature believed that even in a case like this, thirty days was enough. This undoubtedly constitutes a flagrant violation of the defendant's right of defense. The worst part being, it is not the claimant or the judge who is violating defendant's right of defense—it is the system itself. This is because the legal system is forcing the defendant to answer a pleading of hundreds of pages along with thousands of appendixes in only thirty days.

It is unbelievable that the legislature grants the claimant six months to a year to prepare its pleading and then restricts a defendant's deadline to submit its pleading to thirty days. In fact, the violation of the right of defense is so serious that it is difficult for a lawyer to accept the case. This is because it is materially

impossible for a lawyer to perform their work with diligence in such a short and constraining deadline.

The anecdote described by Professor Cantuarias reflects how serious it is that it is the State that designs the procedures and takes away this freedom from the parties. It is the parties who are in the best position to determine how their procedure should be tailored.

In an arbitral procedure this would never occur. Arbitration constitutes a maximum guarantee that both parties will be treated with absolute equality. This is something that arbitrators take very seriously. In effect, Article 18 of the UNCITRAL Model Law states that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”¹⁰⁵

As Bullard explains:

And the data does not lie: in countries where arbitration has flexibility, pragmatism and simplicity by appropriate laws, it is flourishing, suffocating the heavy and rhetorical procedural law unable to deal with commercial disputes. It would do the same in other areas if the law released its competitive force. Today in Peru it is difficult to imagine conflicts of important commercial contracts that are solved in the judiciary. Virtually everything is resolved through arbitration.¹⁰⁶

The diversity of procedures that can be designed in arbitration is a phenomenon that occurs in a praxeological way.¹⁰⁷ The thousands of parties who participate in arbitrations every day are the only ones who are in a privileged position to design the myriad of procedures that may be necessary to meet their expectations. If legislators take away the freedom to design unique procedures, parties to an arbitration will be frustrated because the existing procedures may not satisfy their needs.

But that is not all. The rule, imposed by the State, is that in commercial disputes, it will be a third party poorly prepared, unspecialized, frequently unreliable and with an excessive burden of files, who will be competent to resolve the dispute with *res judicata* effects. This is the case unless both parties include an arbitration agreement in their contract and submit their dispute to arbitration. Consequently, the parties would also be deprived of the freedom to choose a person in whom they trust for the resolution of their private dispute.

¹⁰⁵ UNCITRAL MODEL L. ON INT'L COM. ARB., at 14, U.N. Doc. Sales No. E.08.V.4. (2008).

¹⁰⁶ Bullard, *supra* note 68, at 86 (translated by author).

¹⁰⁷ Marco de Benito & Sonsoles Huerta de Soto, *El Arbitraje Internacional como Orden Jurídico Espontáneo*, 22 REVISTA DEL CLUB ESPAÑOL DE ARBITRAJE 113, 125–26 (2015).

As explained by Correa:

Among other conflict resolution systems—which operate as substitute goods of adversarial systems of state origin—, they show alternative costs manifestly inferior to those of the judicial system. This is explained by the greater flexibility they present. In these procedures it is possible to adapt the procedures to the characteristics of the specific case. They also allow the third party that resolves the conflict to be a person specialized in the matter on which it is based. In contrast, the judicial system is, by definition, rigid. The independence that judges must have and the procedural guarantees of trials force to structure the organization and the procedures in a way that is even more heavy and formal than that which is commonly presented by the administration of justice. We find ourselves, in this case, with judges who are immovable for life, with convoluted systems of appointment and promotion. Additionally, the guarantees that must be offered to the parties lead to the elimination of margins of discretion, which means that they have to apply procedures that are more in line with the more complex and exceptional case than the general.¹⁰⁸

These defects are directly imputable to the contractual foundation of arbitration. It is terrible that contractual arbitration has been associated with a liberal system. The truth is that the contractual foundation of arbitration is a constructivist phenomenon.

It can be argued that if the parties do not like this constructivist system designed by the state, they can always resort to arbitration. But that is not the problem. The problem is in a state where the rule of law prevails, the default rule must maximize freedom. Arbitration maximizes party autonomy.

¹⁰⁸ Correa et al., *supra* note 86, at 32 (translated by author); *accord* MURRAY N. ROTHBARD, FOR A NEW LIBERTY, THE LIBERTARIAN MANIFESTO 277 (Ludwig Von Mises Institute, 2d ed. 2006). Rothbard proposes that “[w]e should all be more familiar with the increasingly frequent use of private arbitration, even in our present society.” *Id.* He further explains that “[t]he government courts have become so clogged, inefficient, and wasteful that more and more parties to disputes are turning to private arbitrators as a cheaper and far less time-consuming way of settling their disputes.” *Id.* Rothbard describes changes to private arbitration in recent years as “a growing and highly successful profession.” *Id.* Further, “[b]eing voluntary, furthermore, the rules of arbitration can be decided rapidly by the parties themselves, without the need for a ponderous, complex legal framework applicable to all citizens. Arbitration therefore permits judgments to be made by people expert in the trade or occupation concerned.” *Id.*

IV. PROPOSAL: ARBITRATION SHOULD BE THE DEFAULT JURISDICTION

A. *What Does It Imply That Arbitration Is the Default Jurisdiction?*

At least in arbitrable disputes, arbitration must be the default jurisdiction.¹⁰⁹ Through this measure, a property regime based on contractual justice would be introduced in which each litigant would internalize the costs derived from the resolution of his disputes.¹¹⁰

Recognizing arbitration as the default jurisdiction implies eliminating the contractual nature of arbitration.¹¹¹ It is not intended, however, to shift the rule and propose for arbitration to become an “opt out.” Under the proposed model, the existence of an arbitration agreement is not implicitly presumed when two parties enter a contract. Quite the contrary; now arbitration will be the natural resolution mechanism of commercial disputes, which implies that arbitration loses its contractual foundation and becomes the default mode of dispute resolution.¹¹²

By proposing that arbitration should be the default jurisdiction, in the face of a commercial controversy—whether contractual, real-state, or torts—a party can file an arbitration against whoever they want without proving the existence of consent (even if respondent is not a party of the contract). Under the proposed model, what would have a contractual nature would be the access to public courts.

In this regard, Professor Graves has suggested that:

Instead of attempting to weave an ever tighter torpedo net against a contrary default mechanism for resolving international commercial disputes in court, why not simply recognize the obvious and make arbitration the default? With a default rule providing for arbitration, a

¹⁰⁹ Bruce L. Hay, Christopher Rendall-Jackson & David Rosenberg, *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919, 1924 (2011). The article states that “[a]lthough litigation in the court system obviously is not free to the parties, the public still bears a substantial amount of the costs of adjudication.” *Id.* The article details that a prominent cost “is the time that public officers devote to adjudication—time that the parties do not pay for and that the officials could have spent on other cases if the parties had opted for a private alternative.” *Id.*

¹¹⁰ Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?* 34 CATH. U. L. REV. 267, 269–71 (1985).

¹¹¹ Cuniberti, *supra* note 23, at 422 (stating that “[i]n the model that I propose, however, arbitration loses its contractual foundation[.]”).

¹¹² *Id.* at 451 (arguing that “[T]he question which this Section seeks to answer is whether, as a matter of theory, it is conceivable to resort to arbitration in the absence of an agreement of the parties to that effect. The answer is yes.”).

court would have no basis for exercising jurisdiction absent an affirmative agreement of the parties. Thus, the effectiveness of court actions as a means to delay or obstruct arbitration proceedings would be substantially diminished, if not largely eliminated.¹¹³

By eliminating the contractual nature of arbitration, several positive externalities would be created: (i) all irresolvable discussions regarding arbitral consent would be overcome; (ii) one would no longer have to invent absolutely convoluted non-signatory theories to create consents; (iii) the endless discussions regarding the objective scope of the arbitration agreement would not be necessary; (iv) it would no longer be disputed whether the arbitration clause is broad or restricted; (v) the cases of pathological arbitration clauses would be significantly reduced. Everything would be much simpler, generating a direct impact on the peaceful settlement of disputes.¹¹⁴

B. Consequences of Recognizing Arbitration as the Default Jurisdiction

In summary, it is possible to brush up the following benefits that will be derived directly from the recognition of arbitration as the default jurisdiction:

- a) There would no longer be a risk of contradictory and unenforceable awards;
- b) All commercial disputes, including torts and real-estate, would be settled through arbitration;
- c) Courts would be decongested because all commercial disputes would be resolved through arbitration;
- d) Courts would no longer be infested with a tragedy of the commons, and the free-riding problem would disappear;
- e) All the problems derived from the contractual foundation of arbitration would be eliminated, which would create a much more effective and consistent system;

¹¹³ Graves, *supra* note 22, at 14–15.

¹¹⁴ Cuniberti, *supra* note 23, at 484. Cuniberti states that “[w]hile most of the rules existing in the traditional model could be kept in the proposed model, certain rules of international arbitration are direct consequences of the contractual foundation of the traditional model.” *Id.* Cuniberti further explains that “arbitration raises a variety of issues in respect of third parties, who can neither be joined, nor intervene in the proceedings because they are not parties to the arbitration agreement.” *Id.* Many rules “are widely perceived as limiting the efficacy of the arbitral process, and as such as necessary evils.” *Id.* “One of the best examples is precisely the rule preventing joinder of third parties absent the agreement of all parties concerned. In practice, this has most often meant that arbitration could not cope properly with multi-party disputes.” *Id.* Cuniberti further argues that “modifying the rule and allowing arbitration to deal more efficiently with multi-party disputes would not be regretted by many. The new paradigm would actually lead to an improvement of the arbitral process.” *Id.* at 484–85.

- f) Litigants would internalize the costs of their disputes, as well as the social costs they create in society;
- g) Public resources would be saved because commercial justice would no longer be subsidized by citizens' taxes.¹¹⁵

In the words of Professor Graves:

With a default arbitration regime for dispute resolution . . . the issues of *lis pendens* and the potential for parallel proceedings virtually disappear. . . . As an additional benefit, a default arbitration regime would solve many of the existing challenges related to joinder of parties. Absent an agreement to the contrary, all parties to a given transaction or occurrence could effectively be joined in a single arbitration proceeding. This would arguably go a long way towards resolving a significant problem with the existing arbitration regime based solely on express consent.¹¹⁶

The benefits generated by the proposal of arbitration as the default jurisdiction confirms that it should be implemented sooner rather than later. We do not need to create more courts, appoint new judges, expand their competences, or create new specialties. We need proposals that break the mold. The default arbitration is an outside-the-box proposal that directly attacks the core of the problem.

CONCLUSION

This Article questions a paradigm that history has treated as a dogma. The picture is clear: the questioning of the contractual foundation of arbitration will not cease. Over time it will be increasingly obvious that non-consensual arbitration is more efficient.

Once upon a time, arbitration was seen as a means of avoiding courts in resolving parties' contract disputes. That story has ended. Arbitration is no

¹¹⁵ See generally Cuniberti, *supra* note 23, at 428–29. Cuniberti argues the issues from the perspective of the State are different, arguing that “[a]rbitration is a private mode of dispute resolution, which is entirely funded by the litigants. As a result, it obviously saves public resources.” *Id.* Further, “[a]rbitral tribunals decide disputes which would have otherwise been decided by courts. In many jurisdictions, public resources are scarce. Policies which entail public resources savings are therefore likely to be particularly appreciated by policymakers. *Id.* RETHINKING, *supra* note 5, at 185 (stating that “A model of default arbitration could also serve the purpose of reducing the caseload of the public court system and thus allow the States which would want to follow this path to better use the resources that they allocate to fund civil justice.”).

¹¹⁶ Graves, *supra* note 22, at 20–21.

longer a substitute nor an alternative mechanism; it is the natural and preferred mechanism for resolving commercial disputes.¹¹⁷

The only objection to the default arbitration proposal for domestic disputes is the fear of the unknown. As Gary Born suggests, the law exists in a particular construct according to a particular set of rules. The foundation of arbitration is consent. The default arbitration proposal is innovative; it breaks the mold. But we ought not forget that one hundred years ago the New York Convention would have been regarded similarly, and that forty years ago BITs were as well. They too were bold innovations that were, in a sense, ahead of their time. But they proved to be remarkably successful and are now parts of the orthodox legal environment.¹¹⁸

The fact that the default arbitration proposal is new and unorthodox does not mean that it lacks merit and cannot be achieved. So, let us put that fear-induced objection away and think instead about what might be, what could be, and how to make it happen.¹¹⁹

The fact that arbitration will stop being considered as an exotic exception to become the rule of a satisfactory justice is something proper to the future. Arbitration is the natural mechanism for resolving disputes; its recognition as the default jurisdiction will arrive sooner or later.

Winston Churchill famously observed that democracy was “the worst form of Government[,] except all those other forms that have been tried from time to time.”¹²⁰ I would suggest that default arbitration, with all its imperfections, “is the worst system of resolving” commercial disputes, “. . . except for all the others.”¹²¹ In the world in which we live, default arbitration has arrived, and has arrived to be implemented.

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¹¹⁷ *Id.* at 113.

¹¹⁸ Born, *supra* note 13, at 13–14.

¹¹⁹ *Id.*

¹²⁰ Winston Churchill, Address to House of Commons (Nov. 11, 1947).

¹²¹ W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 45 (Foundation Press, 2d ed. 2015).