Why Arbitration Clauses May Make Sense in Cyber Insurance Policies

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I. INTRODUCTION

Arbitration tends to work best when both parties buy into the process from the beginning. Alternatively, the process often works poorly when one party feels that arbitration was imposed on them.[1]

In the commercial insurance context, arbitration can sometimes feel imposed, even to sophisticated policyholders.[2] This comes about through mandatory arbitration clauses in form policies that are usually non-negotiable, and includes domestic, excess and surplus lines London and Bermuda policies.[3] Also, policyholders may perceive elements of unfairness in the arbitration process created by such clauses.[4] But arbitration does not have to be either imposed or unfair in the insurance context. There are circumstances where policyholders may actually want to be part of a confidential arbitration, particularly when the dispute involves a core business process that has failed.[5] A policyholder may wish to avoid publicity over the presence or absence of insurance coverage for such a loss, and they may want confidentiality over documents and testimony that pertain to that business failure. Cyber breach is a case in point.

In this Article, we will argue that policyholders should ask for an arbitration clause in their cyber policies and negotiate over the terms. We will also argue that insurers should offer more options in this space. In this regard, modular arbitration clauses can prove useful for both sides and lead to an effective dispute resolution mechanism for dealing with what may turn out to be a flood of cyber coverage disputes.[6]

We will start with a discussion of the principal objections policyholders often have to mandatory arbitration clauses. Then we will discuss why some of these objections may cut differently for policyholders with cyber risks. Finally, we will discuss some of the options the cyber insurance marketplace could offer.

II. POLICYHOLDER OBJECTIONS

The first policyholder objection concerns the fundamental nature of arbitration. Like other arbitrations, insurance arbitrations are decided by a private tribunal through a confidential process and produce (mostly) confidential results.[7] There is no jury. There is no judge who will write and potentially publish an opinion. And there is only a lim-

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ited avenue for appeal on narrowly circumscribed grounds.[8] Generally, there is also no media coverage.[9]

Policyholder lawyers have argued that confidentiality gives the insurance company license to take more extreme positions than it would in court.[10] While there isn't data to support or refute this assertion, it is an enduring policyholder concern.[11] In our experience, extreme positions are rarely rewarded, as arbitrators can get as frustrated as judges and juries do with overreaching. But there is no doubt that a public process creates leverage that usually benefits the policyholder.

For example, litigation risks of creating adverse precedent in a published opinion that may impact language that the insurer or even the insurance industry has used over and over is a significant piece of leverage that does not exist in arbitration.[12] This "portfolio risk" is one of several ways in which policyholder lawyers may increase pressure on insurers to settle insurance coverage disputes.[13] Arbitration eliminates the risk. Each arbitration ruling stands on its own. Other arbitration panels will not know about the rulings and cannot cite to them as precedent.[14]

Second, policyholders may view the pool of potential insurance arbitrators as skewed toward those with significant insurance industry experience.[15] This can come about through specific requirements in the arbitration clause, i.e., specific educational, professional or occupational requirements.[16] It can also come about just through the arbitration selection process.[17]

In three-person panels, each side will pick an arbitrator they like, and the two chosen arbitrators will pick a third person.[18] Inevitably, the third person will likely have some connection with the industry and some inside knowledge that may be seen as a predisposition or bias.[19] This may simply mean that arbitrators drawn from this pool are not likely to view a coverage dispute in the same way that a judge or jury or other non-insurance expert would.[20] When coupled with the fact that insurance companies are often repeat customers with insurance arbitrators, while policyholders usually are not, this may be a significant risk. While many policyholder lawyers are skilled at finding arbitrators more likely to lean their way (policyholders are usually not repeat customers for arbitrators, but policyholder law firms are), this can be a difficult task, especially when arbitration clauses require arbitration in London or Bermuda, and the panel to comprise former insurance company executives, as some clauses do.[21]

Third, relief in an arbitration may be more limited than what can be obtained in court.[22] This can be accomplished by limiting or eliminating the possibility of recovering attorneys fees, limiting punitive damages, or interest on the amount in dispute.[23] Limiting relief can also be accomplished by limiting the availability of extracontractual or bad faith damages[24] or through a choice of law provision.[25] In these situations, insurers often choose New York law, which has been viewed specifically as insurer friendly for a long time, including on issues concerning allowing policyholders to recover attorney's fees and bad faith damages.[26] From the perspective of affording leverage or increasing the risk to insurers, litigation provides more potential leverage for policyholders to bring to bear maximum risk to insurers.

Fourth, the rules of interpretation are often changed in the arbitration clause. Common law rules require interpretations in favor of the policyholder where there is ambiguity (*contra proferentum*). Arbitration clauses may be altered to allow for something closer to an interpretation that assumes equal bargaining power between the parties.[27] In court, a tie goes to the policyholder.[28] In arbitration, a tie may go either way. Also, such clauses may limit the introduction of parole or extrinsic evidence to aid in policy interpretation, a tactic that can work in impacting the outcome.[29]

Fifth, in most arbitration clauses each party generally bears their own cost, at least initially.[30] This means each party pays for arbitrator time.[31] In a three-person panel, this means each party pays its own selected arbitrator as well as a portion of the umpire. For one-person arbitration, the sides will split the fees. To compound the problem, many arbitrations, particularly in London, have a loser-pays rule, so if the policyholder arbitrates and loses, it could be out of pocket quite a lot of money.[32] The American court system, in contrast, is nearly free.[33] Other than some minimal filing fees,

court personnel and juries are paid by tax dollars, and the "American Rule" prevents most fee shifting in litigation.[34] So a policyholder faces significant potential expenses it otherwise would not face in court.[35]

Sixth, companies purchasing large limits through a tower made up of multiple insurers may face different arbitrations with different insurers at different levels, thereby having to litigate and relitigate coverage as it moves up the tower, rather than having everything handled in a single consolidated lawsuit in court.[36]

In addition to all of these objections, additional evidence that arbitration clauses may be one-sided exists in the form of state statutes, in nearly half of the states, which forbid the use of mandatory arbitration clauses in some or all insurance contracts.[37] These laws coexist with a strong federal policy in favor of arbitrating disputes, as codified in the Federal Arbitration Act, 9 U.S.C. sections 1–16 (2001), and state statutes in nearly every state making agreements to arbitrate future disputes valid.[38] In the state of Washington, the Washington Supreme Court has held that mandatory arbitration clauses are unenforceable even in the excess and surplus lines market, where insurers are more lightly regulated.[39] Given the risk of unenforceability, most insurers in the cyber context are resorting to some form of optional arbitration clause.

III. WHY CYBER RISKS MAY BE DIFFERENT

Litigation over ADR clauses in cyber policies is already happening.[40] If one of the purposes of arbitration is to obtain a more cost-effective resolution of a dispute, litigation over the dispute resolution method defeats that purpose and thereby defeats other purposes of arbitration as well.[41] It may be useful to step back and consider the policyholder objections in the cyber context, particularly in the context of a marketplace that may be amenable to negotiation around arbitration clauses.

The first policyholder objection is the private and confidential nature of the process.[42] There is no judge, no jury, only a limited avenue of appeal and no media coverage. Depending on the specific nature of the coverage dispute, these objections may actually benefit a cyber policyholder. Cyber coverage disputes could involve an exchange of sensitive or confidential information.[43] There could be discovery about the cyber-defenses employed by the policyholder, including weaknesses in its systems.[44] There could be discovery about due diligence in choosing what systems to implement.[45] Also, the policyholder may not want to have media coverage about the extent of its available insurance when it is in the midst of dealing with defending a class action arising out of a breach.[46] Nor would the policyholder want a public court ruling that its defenses are inadequate, or misrepresented, or not properly thought through, so the lack of a written ruling and the circumscribed appellate opportunities might be welcome.[47] Depending on the type of coverage defense asserted, discovery relevant to that issue could lead to the exchange of damaging information about internal processes and procedures and cyber-defenses, adequacy of funding for cyber-defense, quality of decision-making processes and existence of other vulnerabilities in systems that the policyholder would not want documented in public court filings.[48] Although this could potentially be addressed in court filings under seal, that is still more risky than a truly confidential arbitration process.[49] Many hacks also lead to lengthy class action litigation. The class would be following any public insurance dispute with interest and looking for the opportunity to get at any information exchanged in the insurance dispute that was not part of the discovery in the class action.[50] Sometimes, there are regulatory proceedings as well. Regulators also closely follow insurance coverage action.[51]

Also, arbitration provides the policyholder with the opportunity to make some very creative arguments that would not go over as well in court as they might to a sophisticated panel. Such considerations would need to be weighed against the loss of leverage that happens in arbitration because the insurer no longer faces portfolio risk. If the arbitration is optional and the policyholder gets to choose, these objections may be considered and evaluated before arbitration is invoked.

The second policyholder objection is concerned with the pool of potential arbitrators. In the cyber security context, London and Bermuda arbitrations, with their pool of highly technical arbitrators

with some distance from the U.S. litigation environment, may be a plus. It is possible arbitrators may be more sympathetic to the nature of cyber risks and the challenges policyholders face in securing appropriate coverage and dealing comprehensively with the risks both from a cyber and a risk management perspective compared to judges and juries. The policyholder may want a level of expertise with both policy language and technical cyber issues in its decision makers.[52] Cyber policies have not really hardened into standard forms yet, so there is little benefit to looking to court precedents for rules of decision.[53] And it seems that those cases that do get litigated usually lead to the policy form changing yet again, which limits the precedential value of those cases that do get decided.[54]

Also, when policy language is not yet standardized, it may help to have decision makers who read policies frequently and can compare how the language in cyber policies matches up to policies that have endured more testing and modified to adjust for lessons learned.

Similarly, judges and juries may have lower tolerance for flaws in cyber security approaches, even when just considering insurance coverage, but cyber experts may have a much better sense of the feasibility of preventing the kind of thing that happened from happening again based on technology as it existed at the time.[55] In addition, it is possible to negotiate into the arbitration clause what any panel would look like.[56] So, for example, it may be possible to insist on at least one arbitrator with corporate board experience who has been in a position to deal with cyber-related exposures and understand the trade-offs that are being made.[57]

The third and fourth objections do not change much in a cyber context. If the arbitration clause eliminates or reduces the policyholder's ability to obtain attorney's fees and/or bad faith damages in the event it prevails, this is a reduction of leverage for the policyholder.[58] The only question here is whether keeping this leverage is worth the downside risks that go along with litigation, including loss of confidentiality, potential media exposure and possibly less sympathetic decision makers. Also, in a negotiable marketplace, there may be ways to deal with these issues. Perhaps insurers would consider including both attorney's fees and bad faith damages to procedural protections, adequate evidentiary standards and perhaps caps on punitive damages.[59] And, of course, choice of law provisions can be negotiated and need not always be New York or other forums supportive of insurance companies.

The fifth objection also presents no unique cyber considerations. The cost of arbitration plays out differently than litigation. If the arbitration is set up and conducted appropriately, the costs of arbitrators, while expensive, will be more than offset by the reduced spend on litigation.[60] Even if the arbitration is more expensive, the policyholder may be paying for a kind of expertise that ensures it will receive a fairer hearing and potentially a more sympathetic ear than it might get in court.[61]

The sixth objection also presents no unique cyber circumstances. But given the flexibility in the marketplace, it would seem wise to discuss the possibility of all carriers in a tower signing on to an arbitration clause that provides for consolidation of arbitrations, at least as to common issues.

IV. WHAT THE MARKETPLACE MAY BEAR

Given the potential that cyber policyholders may want an arbitration option and the likelihood that they will not want arbitration in all instances and certainly would not want it to be mandatory, what are some of the possibilities?

Many carriers already offer a limited optional arbitration clause that requires both parties' consent to move forward.[62] Most of these clauses have a general reference to some existing set of arbitration rules, whether AAA, JAMS or others. This is helpful but may cause either side to try to game the incident and closely evaluate risks and rewards of either approach.[63] If one side clearly wants an arbitration, the other may go the other way, sensing that some advantage will be lost if it agrees.[64]

But arbitration clauses may involve a situation where a modular approach is preferable. By modular, we simply mean a clause with different elements that can be chosen and combined in different ways. There are lots of potential choices.[65] In terms of triggering arbitration, you can require both parties' consent, or you can have one way

mandatory—this would give the policyholder the right to invoke and proceed with arbitration, and the insurer would have no right to object. In either case, the insurer gains from secrecy and confidentiality, and avoids appeal and media; this may be sufficient for insurers to sign on to this approach. But depending on what other provisions are in the arbitration clause, the insurer may have additional reasons for liking this approach. Other choices in this modular approach could be a variety of choice of law options (including New York, the law of the policyholder's principal place of business and other states with some nexus to insured operations); varieties of fee shifting and potential damage options, including bad faith subject to caps; different arbitrator requirements in terms of background and perhaps even fully neutral panels (as suggested under ARIAS neutral rules); and different rule and discovery options.[66]

V. CONCLUSION

The cyber market is broad and deep with lots of insurers, and pricing is relatively low compared to the risks.[67] Competition is intense.[68] Policyholders can and are negotiating policy language.[69] Arbitration clauses should be a part of this discussion. Once you take away arbitration as an imposed concept and policyholders have the opportunity to view it as an option that may inure to its benefit, the dialogue will be much different. Given the importance of cyber security to most businesses, the ongoing media coverage, published opinions and jury verdicts may not be what the C-suite wants. Even smaller companies may be harmed by continuing publicity around cyber attacks.[70] Consider this: You've been hacked. Regulators are coming your way. A class action may be filed at any moment. You are in internal crisis mode utilizing the services of a breach coach, and your teams are in high alert. Then you get a reservation of rights letter or a partial disclaimer from your insurance company, and your counsel tells you that you might also face a declaratory judgment action in federal court. If you don't have an arbitration clause, would you want to try negotiating one now?

Better to have that option in place before a crisis happens.

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ENDNOTES

1. The cost involved in compelling a recalcitrant party to arbitrate has the potential to significantly increase the overall cost of the proceeding. *See* Nat'l Union Fire Ins. Co. of Pittsburgh v. Beelman Truck Co., No. 17-CV-2946, 2017 U.S. Dist. LEXIS 111136 (S.D.N.Y. July 17, 2017) (appointing an umpire; the first trip to court involved arbitrability).

2. Joshua Gold, ANDERSON KILL P.C., *Insurance Policy Arbitration Clauses: Perils and Considerations for Policyholders,* CORPORATE COUNSEL (Dec. 2007), https://www.andersonkill.com/webpdfext/CorporateCounsel-December2007.pdf; Peter A. Halprin, ANDERSON KILL P.C., *Arbitration in Insurance Coverage Disputes: Pluses and Minuses,* POLICYHOLDER ADVISOR (2014), https://www.andersonkill.com/webpdfext/publications/PHA/PDF/Arbitration-in-Insurance-Coverage-Disputes-Pluses-and-Minuses.pdf.

3. Rich Lewis, REED SMITH, *A Quick and Dirty Guide to London Insurance Arbitrations,* POLICYHOLDER PERSPECTIVE, (June 4, 2009), https://www.policyholderperspective.com/2009/06/articles/insurance-coverage/a-quick-and-dirty-guide-to-london-insurance-arbitrations/; Leon Kellner & Vivek Chopra, PERKINS COIE LLP, *Bermuda Form Arbitration: A Policyholder Perspective,* GETTING THE DEAL THROUGH (July 2, 2014), https://gettingthedealthrough.com/area/16/article/28741/insurance-reinsurance-bermuda-form-arbitration-policyholder-perspective; Joshua Gold & Peter A. Halprin, ANDERSON KILL P.C., *Cyber Insurance Disputes: Will Arbitration Clauses be a Battleground?,* POLICYHOLDER ADVISOR, (2016), https://www.andersonkill.com/Custom/PublicationPDF/PublicationID_1362_Cyber-Insurance-Disputes-Will-Arbitration-Clauses-be-a-Battleground.pdf.

4. Gold, *supra* note 2; Edmund M. Kneisel & Richard English Dolder, *Arbitration Clauses in Insurance Policies: A Primer for the Construction Professional,* in 2004 CONSTRUCTION LAW UPDATE 223 (Neal J. Sweeney, ed., 2004), *available at* http://kilpatricktownsend.com/~/media/Files/articles/2012/CH-5_CLUP_2004.ashx.

5. Gold, *supra* note 2; John G. Nevius & Peter A. Halprin, ANDERSON KILL P.C., *Arbitration of Insurance Coverage Disputes: A*

Policyholder's Definitive Survival Guide, MONDAQ (Dec. 21, 2010), http://www.mondaq.com/unitedstates/x/118608/Insurance/Arbitration+of+Insurance+Coverage+Disputes+A+Policyholders+Definitive+Survival+Guide.

6. Carrie E. Cope & Ian Reynolds, *"Breaking Bad" in Cyberspace: A Challenge for the Insurance Industry,* 7296 EMERGING ISSUES (LexisNexis, 2015).

7. Mark Chudleigh & Neil Thomson, I*nsurance Arbitrations: Confidentiality Versus Consistency,* INS. L. BLOG: LEXOLOGY (Aug. 30, 2016), https://www.lexology.com/library/detail.aspx?g=3a23ae16-bd30-4e6c-874f-7335f03f032b.

8. Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 518 (3d Cir. 2013). However, appeals from arbitration rulings seem to be increasing, although not with much success, other than impinging on confidentiality.

9. Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration,* 2008 J. DISP. RESOL. 349 (2008).

10. *See* Gold, *supra* note 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Strine*, 733 F.3d at 518. See also Drennen v. Certain Underwriters at Lloyd's of London, 563 B.R. 756 (Bnkr. S.D.N.Y. 2016) (discussing insurance coverage dispute).

15. Stephen J. Choi et al., *The Influence of Arbitrator Background and Representation on Arbitration Outcomes,* 9 VA. L. & BUS. REV. 43 (2014) (discussing correlation of outcome with the background of the arbitrators in securities arbitration). *See also* Gold, *supra* note 2; Halperin, *supra* note 2; Strine, 733 F.3d at 518.

16. *See, e.g.,* ARIAS U.S., RULES FOR THE RESOLUTION OF U.S. INSURANCE AND REINSURANCE DISPUTES, R. 6.2 (2014), http://www.arias-us.org/wp-content/uploads/2016/09/ARIASU.S.-Rules.pdf ("The arbitrators and umpire shall be persons who are current or former officers or executives of an insurer or reinsurer and shall be ARIAS-certified as of the date of their appointment."). *See, e.g.,* Nat'l Union Fire Ins. Co. of Pittsburgh v. Beelman Truck Co., No. 17-CV-2946, 2017 U.S. Dist. LEXIS 111136 (S.D.N.Y. July 17, 2017) (on limiting clauses).

17. *Beelman Truck Co.,* 2017 U.S. Dist. LEXIS 111136, at *3.

18. These proceedings are referred to as "Tripartite Panels." The third arbitrator is intended to act as a neutral "umpire," whereas the other two unilaterally appointed arbitrators generally act on behalf of the party that appointed them. Stephen C. Rogers, *Can Tripartite Arbitration Panels Reach Fair Results?,* 19 A.B.A. SEC. SOLO, SMALL FIRM & GEN. PRAC. DIV. 6 (2002), https://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/rogers.html.

19. MITCHELL L. LATHROP, INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS (1990).

20. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) (disclosure is the key to avoiding the appearance of bias).

21. ARIAS U.S, *supra* note 16; *Beelman Truck Co.,* 2017 U.S. Dist. LEXIS 111136, at *4.

22. Gold, *supra* note 2; Halperin, *supra* note 2.

23. Gold, *supra* note 2; Halperin, *supra* note 2.

24. Gold, *supra* note 2; Halperin, *supra* note 2.

25. Gold, *supra* note 2; Halperin, *supra* note 2.

26. Gold, *supra* note 2; Halperin, *supra* note 2.

27. Gold, *supra* note 2; Nevius, *supra* note 5.

28. Newport Assocs. Dev. Co. v. Travelers Indem. Co., 162 F.3d 789 (3d Cir. 1998).

29. Gold, *supra* note 2; Nevius, *supra* note 5.

30. Bradford v. Rockwell Semiconductor Sys., 238 F.3d 549, 556 (4th Cir. 2001).

31. R. Brian Tipton, *Allocating the Costs of Arbitrating Statutory Claims Under the Federal Arbitration Act: An Unresolved Issue,* 26 AM. J. TRIAL ADVOC. 325, 361 (2002).

32. Walter Olson & David Bernstein, *Loser-Pays: Where Next?,* 55 MD. L. REV. 1161 (1996).

33. *See* N.Y. ST. UNIFIED CT. SYS., *Filing Fees,* NYCTS.GOV, https://www.nycourts.gov/forms/filingfees.shtml).

34. Dixon v. Comm'r, 91 T.C.M. (CCH) 1086 (2006).

35. *See generally* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327 (2013).

36. Insurance towers are created by combining multiple different insurers with different policies, setting up base insurers and upper "excess policy" insurers. This protects the company against bankruptcy of any individual insurer. Some Direct and Officer liability insurance companies are so specialized that they offer only excess, upper floor insurance. *See* Richard Squire, *How Collective Settlements Camouflage the Costs of Shareholder Lawsuits,* 62 DUKE L.J. 1 (2012).

37. *See State Laws Regulating Arbitration in Insurance Contracts,* PUB. CITIZEN (May 24, 2017), https://www.citizen.org/article/state-laws-regulating-arbitration-insurance-contracts-0.

38. Federal Arbitration Act, 9 U.S.C. § 1–16 (1925). *See, e.g.,* N.Y. C.P.L.R. § 7501 (1963) ("A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and enter judgment on an award.").

39. Dep't of Transp. v. James River Ins. Co., 292 P.3d 118 (2013). *But see,* United Nations Convention on the Recognition & Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 38 (entered into force June 7, 1959) (enforcing the clause due to the international nature of the contract, regardless of state statutes).

40. *See, e.g.,* New Hotel Monteleone, LLC v. Certain Underwriters at Lloyd's of London, No. 2:16-CV-00061 (E.D. La. Aug. 17, 2016) (subscribing to Ascent Policy No. ASC14C000944); Columbia Gas. Co. v. Cottage Health Sys., No. CV-15-03432, 2015 U.S. Dist. LEXIS 93456 (C.D. Cal. July 17, 2015).

41. If mandatory arbitration is always preceded by a challenge as to its enforceability, the combined cost of both proceedings may well warrant a foregoing of mandatory arbitration. Therefore, the prima facie enforceability of arbitration agreements is of paramount importance, and can be secured significantly easier if both parties negotiate and agree to mandatory arbitration.

42. *See* Gold, *supra* note 2.

43. *See* Music Grp. Macao Commer. Offshore, Ltd. v. Foote, No. 14-CV-03078, 2015 U.S. Dist. LEXIS 81415 (N.D. Cal. 2015) (regarding disclosure of extensive documentation).

44. *See In re* Anthem Data Breach Litig., 162 F. Supp. 3d 953 (N.D. Cal. 2016) (alleging insufficient security measures).

45. *See In re* Heartland Payment Sys., Customer Data Sec. Breach Litig., 834 F. Supp. 2d 566 (S.D. Tex. 2011).

46. Lili Dai et al., *The Governance Effect of the Media's News Dissemination Role: Evidence from Insider Trading,* 53 J. ACCT. RES. 331 (2015).

47. The effect of a public court ruling against a defendant exceeds purely legal considerations. By giving plaintiffs multiple chances to obtain such a ruling, the public court system has significant disadvantages for defendants vis-`a-vis the circumscribed appellate opportunities available to arbitration. *See* Matt Levine, *There Will Always Be Stock-Drop Lawsuits,* BLOOMBERG (June 23, 2014), https://www.bloomberg.com/view/articles/2014-06-23/there-will-always-be-stock-droplawsuits.

48. Public documentation of these issues increases the likelihood that affected companies will be the subject of related litigation. See Christopher P. Skroupa, *Shareholders Sue Companies for Lying About Cyber Security,* FORBES (Oct. 27, 2016), https://www.forbes.com/sites/christopherskroupa/2016/10/27/exposing-litigation-the-hidden-risks-of-cyber-breach/#66a16baf31a1.

49. Lisa R. Hasday, *Think Before You Seal*, A.B.A. SEC. LITIG. (Dec. 27, 2011), https://apps.americanbar.org/litigation/litigationnews/top_stories/122111-sealed-case-files.html.

50. *In re* Heartland Payment Sys., 851 F. Supp. 2d 1040 (S.D. Tex. 2012) (involving disclosure of data security breach followed directly by class action comprising over one-hundred million plaintiffs).

51. Paul M. Schwartz & Edward J. Janger, *Notification of Data Security Breaches,* 105 MICH. L. REV. 913 (2007).

52. *Id.*

53. Jennifer Gordon, *Like a Bad Neighbor, Hackers are There: The Need for Data Security Legislation and Cyber Insurance in Light of Increasing FTC Enforcement Actions,* 11 BROOK. J. CORP. FIN. & COM. L. 183, 184 (2016) ("Interpretations of cyber insurance policies are still in their infancy.").

54. Michael A. Tomasulo & Scott N. Godes, *The Cybersecurity Playbook: Helping Clients Evaluate Their Cyber Risks, in* UNDERSTANDING DEVELOPMENTS IN CYBERSPACE LAW: LEADING LAWYERS ON ANALYZING RECENT TRENDS, CASE LAWS, AND LEGAL STRATEGIES AFFECTING THE INTERNET LANDSCAPE 157 (2012).

55. Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging The Use of Arbitration Through Evidence Rules Reform,* 64 FORDHAM L. REV. 247 (1995) ("Judges and jury members who lack technical expertise often are overwhelmed and confused by such material and lack the background to resolve the conflicting assertions.").

56. BERTHOLD H. HOENIGER, COMMERCIAL ARBITRATION HANDBOOK 1–11 (rev. ed. 1991) ("Since arbitration is a creature of contract, the possibilities for custom tailoring are almost endless.").

57. AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, 15 (2016).

58. Gold, *supra*, note 2.

59. Panoche Energy Center, LLC v. Pacific Gas & Electric Co., 1 Cal. App. 5th 68 (Cal. App. 1st Dist. July 1, 2016). "Arbitration is foremost a creature of contract. Arbitration's consensual nature allows the parties to structure their arbitration agreement as they see fit." *Id.* at 93 *quoting* Bunker Hill Park Ltd. v. U.S. Bank Nat'l Assn., 231 Cal. App. 4th 1315, 1326 (Cal. App. 2d Dist. Nov. 26, 2014). *See also* Baker v. Sadick, 162 Cal. App. 3d 618 (1984) (allowing arbitration to consider issues of punitive damages).

60. According to statistics furnished by the American Bar Association, arbitration takes, on average, sixteen months less than civil cases in district courts. Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes,* 2012 A.B.A., SEC. DISPUTE RESOL. 3 (2012), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

61. Studies show that a majority of respondents believe arbitration is superior to litigation. Furthermore, arbitrators may work full time and have a significantly lower caseload than traditional judges, allowing them to devote unlimited time to a single case. DOUGLAS SHONTZ ET AL., RAND CORP., INST. FOR CIV. JUST., BUSINESS TO BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL (2011), http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf.

62. *See, e.g.,* CYBEREDGE®, CYBER LIABILITY INSURANCE, AIG.

63. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication,* BERKELEY J. EMP. & LAB. L., March 2003, at 1.

64. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements,* 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

65. Because arbitration agreements are created by contracts founded on mutual assent, the parties have wide latitude to decide the structure, form, and substance of arbitration processes. With sufficient negotiations, both parties can obtain terms that protect their core interests, without acting to the detriment of the other party.

66. 66 HOENIGER, *supra* note 56. ("[S]ince arbitration is a creature of contract, the possibilities for custom tailoring are almost endless.").

67. Richard S. Betterley, *Cyber/Privacy Insurance Market Survey,* BETTERLEY REPORT (2016), http://betterley.com (on file with author).

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