Honorable
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Contemporary US Commercial Arbitration Meets Ancient Chinese Curse:

May you Live in Exciting Times.[1]

These are indeed exciting and somewhat worrisome times in US commercial arbitration. To understand why this is so, we need to turn the clock back a little to see how we got to where we are. In the interests of time, I will simplify the history a bit.

Since Congress enacted the Federal Arbitration Act ("FAA") in 1925, the percentage of business-to-business disputes resolved through arbitration rather than litigation has been steadily rising. However, in the 1970's and 80's, there was a dramatic increase in the number, complexity and dollar value of these arbitrations. More of the biggest corporate battles were being fought out before arbitrators rather than judges. The causes for this development were many including, a growing backlog of cases in state and federal courts, an explosion in discovery costs, some frighteningly large jury verdicts for compensatory and punitive damages, and growing stables of respected, experienced arbitrators at JAMS, AAA, and other providers. The shift from litigation to arbitration became so great that a few years ago a federal judge I know said to me "I have no doubt that you have a more interesting civil docket than I do."

Generally pleased with this shift of commercial disputes to arbitration, many companies started including in their adhesion contracts with employees, consumers, bank borrowers, utility customers, cell phone users, etc. etc. small print clauses that said the parties agreed to give up their rights to go to court and would instead arbitrate all their disputes. Plaintiff trial lawyers attacked these clauses, contending that forcing the little guy to give up his constitutionally protected right of jury trial was unconscionable, against public policy and unenforceable. The courts agreed if the clauses were patently unfair, for example, by providing that only the company would choose the arbitrator, or that the hearing would take place at the company's home office rather than where the employee/consumer lived or worked, or that there would be no discovery, or that the hefty arbitration fess would be split 50-50, or that the relief available in arbitration would be less extensive than a court could have decreed. However, so long as the process prescribed by these mandatory arbitration clauses was fair and even-handed, the court generally upheld them.

Emboldened by this victory, US companies began arguing that mandatory arbitration could only be conducted on an individual, not a class, basis, either because the company- written clause expressly said so or because a clause which was silent about class arbitration should be presumed to preclude it. Here again, the courts largely rejected the trial lawyers' attacks. Reasoning that a class action is a markedly different process than resolution of an individual claim, the courts held that it was not unconscionable for these mandatory clauses to expressly prohibit class arbitration and that, where the clause was silent, it should be construed to bar class arbitration unless it was very clear that the parties intended to permit it.

Facing the possible disappearance of all class proceedings in employment and consumer cases, with their potential for huge fee awards and tremendous settlement leverage, and having been repeatedly rebuffed in court, the trial lawyers turned their attention, vast resources, and numerous political IOU's toward Congress and mounted a major effort to have mandatory arbitration clauses outlawed legislatively. Here, their outcries fell on fertile ground.

Over the last several years many bills have been introduced banning such clauses in particular industries. More significantly, the so-called Fairness in Arbitration Act, introduced a few years ago, would ban all pre-dispute arbitration clauses in consumer and employment cases; only arbitration clauses freely entered into after the dispute arose would be enforceable.

Many of us in the commercial arbitration world were sympathetic to the notion that consumers and employees ought to have some protection from adhesion contracts that forced them to arbitrate rather than litigate. And because, as a practical matter, consumers and employees with small claims have little chance of finding lawyers to sue for them, and studies suggested that these little guys, on average, were doing as well or better in arbitration than they had in litigation, many thought the best solution was for Congress to require that all mandatory ar-

bitration clauses meet the minimum due process standards that had been voluntarily adopted by JAMS and AAA.

Even an outright ban on pre-dispute arbitration clauses might have been OK had it been limited to adhesion contracts. However, the Fairness in Arbitration Act was so broadly written that it would have precluded pre-dispute arbitration clauses in most commercial contracts as well. For this reason, the AAA, Chamber of Congress, and others lobbied Congress to exclude commercial arbitration from the reach of the Act, and its scope was indeed scaled back somewhat in subsequent versions of the bill. Because Congress has been effectively deadlocked since 2010 due to divided control of the House and Senate, the Arbitration Fairness Act has not yet passed. However, it remains pending, with over 100 sponsors, and whether it will pass, and what effect it might have on commercial arbitration, is far from clear.

Meanwhile, back in the commercial arbitration arena, there were other troubling developments. With many very big cases being decided by arbitration, leaving many well-heeled losers in their wake, creative entrepreneurial lawyers soon realized that there were big bucks to be had from those losers if they could find ways to overturn those awards. Thus was born a new legal cottage industry- the Award Terminators. These diabolical demons of destruction have thus far concentrated their efforts chiefly on three avenues of attack.

First were attempts to have arbitration clauses declare that, in addition to the four narrow grounds for vacatur provided by the FAA –namely, fraud or corruption, evident partiality of the arbitrators, failure to receive material evidence or to postpone a hearing on good cause shown, or arbitrators exceeding their powers – federal courts could also vacate awards for factual or legal errors of the arbitrator. At least in the US, the hallmark of commercial arbitration had always been finality, the notion that parties, having chosen their decision-makers, have to abide by their decisions and could not engage in the broad appellate review available in court. The expansion of FAA review to include errors of fact or law would have eviscerated such Finality. In the case of *Hall Street Associates v. Mattel*, the US Supreme Court held that the FAA's grounds for vacatur could not be expanded by private agreement, thus blocking this avenue of attack in federal courts, although not in state courts, which were free to adopt a different interpretation of their own state arbitration laws.

The second avenue of attack pursued by the Award Terminators was trying to expand the historic doctrine of manifest disregard of law. For many decades some courts had held that the FAA vacatur grounds of arbitrators "exceeding their powers" included cases in which the arbitrator said, in effect, "I know that the law requires X result in this case but I am going to disregard the law and decree what I happen to think is the proper outcome." Seizing on this doctrine, the Terminators argued that, when an arbitrator made a clear error of law in her award, she had effectively disregarded the law and should be subject to vacatur for such an error. Again, in the *Hall Street* case, the Supreme Court seemed to say that manifest disregard of the law was not a ground for vacatur under the FAA, though, again, state courts might interpret their own state arbitration statues differently. However, because the Supreme Court's language was not as precise as it might have been, lower federal courts have been uncertain whether the doctrine retains any vitality and the Circuit Courts of Appeal are now split on that question, a conflict the Supreme Court will have to resolve soon.

The third avenue of attack utilized by the Terminators has been to claim that the arbitrator made insufficient disclosures at the outset or during the course of the arbitration. When the alleged failure of disclosure involved some prior contact with a party, lawyer, law firm, or witness, the courts have generally rejected the challenge on grounds that the information not disclosed could not have led a reasonable person to question the arbitrator's neutrality. However, there have been some highly publicized cases[2] in which courts have vacated awards, and named and excoriated the arbitrator, for failure to disclose a connection that was simply too close for the court to stomach.

And recently, some awards have been challenged on grounds that the arbitrator failed to disclose something about his or her "life experiences" which might raise a question about impartiality. For example, in an arbitration in which a woman complained that her employment had been terminated in retaliation for having reported sexual harassment by her supervisor, the arbitrator was challenged for failure to reveal that years earlier, while a sitting judge, he had been disciplined for sexual harassment. In another arbitration, involving the equitable distribution of considerable property in connection with a highly contentious divorce, the arbitrator failed to reveal that he too had been through a highly contentious divorce and a bitter fight about division of property. While the incidence of vacatur for failures of disclosure is still relatively low, it is growing, reminding us of the wise advice "Disclose, Disclose, Disclose." It rarely gets you bumped from a case, but withholding something can get you publicly humiliated if some judge later thinks it ought to have been disclosed.

Finally, I turn to what is perhaps the most worrisome development in US commercial arbitration. I mentioned earlier that, initially, US companies reported being very happy with the commercial arbitration process. However, over the past decade, there has been a mounting chorus of complaints that commercial arbitration has become just as slow and costly as litigation. That is certainly possible since, as big commercial cases migrated from litigation to arbitration, so did the big case litigators who generally wanted to conduct the arbitrations in the same way, and bill the same amounts, as when the cases were in litigation. What is surprising here is the response to this phenomenon announced by many smart in-house counsel, i.e., "arbitrations are now costing my company just as much, and taking just as long, as litigations, so we have decided to litigate rather than arbitrate our cases." Say what? If the average cost and cycle time for commercial arbitrations and commercial litigations are indeed the same, something that has not been empirically demonstrated to date,

then, cost and delay cannot serve as a rational basis for choosing one process over the other. Instead, a rational client would presumably choose arbitration for cases that demanded its particular benefits, e.g., the right to pick the decision makers, the rules, the procedures, the time and location of the hearing, and whether or not the decision will include a statement of reasons; privacy; and finality, and would choose litigation for cases that demanded its particular benefits- a public decision, a legal precedent, a right of appeal, and judicial contempt power to enforce subpoena, injunctions, decrees of specific performance, etc.

Nevertheless, whether rational or not, the growing list of companies who said they were abandoning commercial arbitration due to its costs and delays spurred action from many of us who believe that such arbitration is often a very favorable process for resolving commercial disputes, and also one in which we make our living. In 2009, as President of the College of Commercial Arbitrators, I convened in Washington, DC a day long National Summit on Commercial Arbitration. Present were distinguished representatives of the four major constituencies involved in such arbitration, namely, in-house counsel, outside counsel, arbitration providers and arbitrators. There was broad consensus that all four constituencies bore some responsibility for increased arbitration costs and delays and that all four had a role to play in reducing those excesses. I was particularly pleased to hear many in-house attorneys from major companies publicly state that, to a large extent, they had allowed this problem to develop. One such attorney said "We are primarily to blame for this problem. In these big arbitrations, we have given the keys to the litigators, who naturally conduct the arbitrations just like litigations."

Following the Summit, former CPR President Thomas Stipanowich, AAA arbitrator Deborah Rothman, and I took the transcript of the Summit, and other suggestions submitted by various stakeholders, and wrote what was entitled "The College of Commercial Arbitrators' Protocols for Expeditious, Cost-effective Arbitration." After analyzing the various causes of the problem, this document prescribed for each constituency a dozen or so steps they each could take to dramatically reduce cost and delay in commercial arbitration. The steps proposed were hardly radical; rather we sought to pull together in one place worthwhile ideas that had been circulating in various forums for several years. Time precludes us from discussing all these steps, but to give you a flavor of the document, let me mention a few. For Business Users and In-House Counsel, the Protocols recommend that companies include in their arbitration clauses limits on discovery and motions, that they select outside counsel for arbitration (not litigation) expertise and select arbitrators who are proven case managers, that they set limits on the time and money they are prepared to devote to the arbitration, and that in-house counsel stay actively involved throughout the arbitration to monitor compliance with those limits. Outside Counsel are urged to recognize and exploit the differences between arbitration and litigation, to cooperate with opposing counsel on scheduling and procedural matters, to limit discovery to what is truly needed, to keep arbitrators informed about case progress, and to enlist their help promptly when needed. Arbitration Providers should offer users a wide range of arbitration models and rules (including fast track arbitration with no discovery or motions), should insist that their panelists have training in managing cases efficiently, and should collect and make available to users information on how well particular arbitrators perform that function. Finally the Protocols recommend that Arbitrators obtain training in managing commercial arbitration, that they insist on cooperation and professionalism between counsel, that they actively shape and manage the arbitration from start to finish and schedule consecutive hearings days whenever possible, and that they be readily available to counsel when needed to resolve procedural problems and keep the arbitration on track.

If I were asked "what is the single most important recommendation in the Protocols," I would say that it is for companies to include in their arbitration clauses an absolute deadline by which the arbitration must be concluded. British civil servant and wit Cyril Northcote Parkinson taught us 50 years ago, in Parkinson's Law, that "work expands to fill the amount of time available for its completion." I might add that this is particularly true where the workers, counsel and arbitrators, are paid on an hourly basis. The fastest trial court in the US federal system is the Eastern District of Virginia which sets virtually all cases, no matter how complex, for trial about six months after the complaint is filed and hardly ever grants continuances. When counsel are given a strict and tight deadline like that, they find ways to eliminate the peripheral discovery and issues and get promptly to the core of the dispute. At our Summit, the Deputy General Counsel of Bechtel, who supervised some of the most complex arbitrations in the world, said she has never seen a commercial case that could not have been fairly and properly arbitrated within one year. Thus, I would love to see all companies recite in their arbitration clauses a requirement that all cases involving, say, $10 million or less be concluded within six months from service of the arbitration demand and all other cases within twelve months and that the arbitrators are empowered to so schedule and manage the case as to assure compliance with those deadlines.

So the big question now is whether these kinds of measures will be adopted and will save the day. Can the commercial arbitration ship be righted at this point and returned to its prior status as the preferred forum for complex commercial dispute or is it going to sink under the weight of its own excesses? I am not sure of the answer to that question. Over the past year, many commercial arbitrators have told me that they have recently experienced significant decreases in their caseloads. Such a falloff might be attributable, at least in part, to faltering Economy and to the increasing number of cases that settle in mediation before they can proceed to either arbitration or litigation.

More disturbing is a 2011 survey by Cornell University of Fortune 1000 companies. In 1997, 85% of those companies

that responded to the survey reported using arbitration in commercial contracts at least once in the prior three years. In 2011, only 60% of the survey respondents so reporting, a drop of nearly 1/3. Reasons given for not using arbitration included, besides high costs, no right of appeal, a concern that arbitrators will not follow the law, and the perception that arbitrators often split the baby (something repeatedly disproved in AAA studies).

On the other hand, there are indications that publications like the Protocols are finding a receptive audience. More than 10,000 copies have been distributed all over the country and Fellows of the College have touted them at more than 100 conferences and professional programs, garnering broadly favorable reactions. Last year the Protocols won awards from both the ABA and CPR and they are now available for download from the websites of all the Summit sponsors, namely, JAMS, AAA, ABA, CPR, and the Chartered Institute of Architects, as well as the College's own website (*www.thecca.net*). Last fall, Thomas Sager, the General Counsel of DuPont, sent a copy of the Protocols to the general counsel of all Fortune 1000 companies along with a letter urging that they implement them at their companies just as he has done at DuPont. Last week, while speaking at an ABA program in Washington, DC, I was told by the Deputy General Counsel of Viacom that his company believes commercial arbitration is definitely worth saving and that his company is implementing the Protocols.

Being an optimist, I am hopeful that we are about to witness the redemption of commercial arbitration rather than its demise. But that will require major efforts by all of us to turn the juggernaught of cost and delay away from its present course toward the shoals of despair and into the bright sunlight of expeditious and economical arbitration proceedings.

I hope you will all join in that effort.

With nearly 40 years as a trial lawyer, judge and neutral, Judge von Kann has experience in virtually every field of civil law and disputes. He literally wrote the book on business arbitration as editor-in-chief of the CCA's Guide to Best Practices in Commercial Arbitration. Judge von Kann has arbitrated and mediated an impressive array of disputes in locations throughout the United States and abroad.

1 REMARKS AT THE APRIL 26, 2012 ANNUAL GENERAL MEETING OF THE TORONTO COMMERCIAL ARBITRATION SOCIETY

2 In the seminal case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the United States Supreme Court held that failure of an arbitrator to disclose a material relationship with one of the parties constitutes "evident partiality" under Federal Arbitration Act § 10(a)(2) requiring vacatur of the arbitration award. In subsequent cases, federal and state courts have tried to determine what kinds of relationships are "material" enough to warrant vacatur of an award. *See, for example, Applied Industrial Materials Corp. v. Ovalur Makine Ticaret Ve Sanayi*, 492 F3d. 132 (2nd Cir. 2007) (award vacated where arbitrator failed to disclose discussions between his company and the parent company of a party and arbitration agreement forbade service "where the arbitrator or the arbitrator's current employer has a direct or indirect interest in the outcome of the arbitration"); *Crow Construction Co. v. Jeffrey M. Brown Associates Inc.*, 264 F. Supp 2d 217 (E.D. Pa. 2003) (award vacated for failure to disclose that one arbitrator had served in another case as a mediator for a party and two arbitrators had previously served as arbitrators for a party); *Dealer Computer Services, Inc. v. Michael Motor Co., Inc.*, No. H-10-2132 (S.D. Tex. Dec. 2010) (award in favor of plaintiff vacated where arbitrator had disclosed that she had previously served on an arbitration panel that considered dispute between plaintiff and another party but did not disclose that the cases involved similar contract provisions and the same plaintiff law firm, and several witnesses, including the damages expert, were the same); *J.D. Edwards World Solutions Co. v. Estes, Inc.*. 91 S.W.3d 836 (Tex. App. 2002) (award vacated where neutral party-appointed arbitrator failed to disclose his and his law firm's relationship with the appointing party; *Amoco C.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837 (Tex. App. 2011) (award vacated where arbitrator failed to disclose that the firm in which he became "of counsel" during the prehearing stage of arbitration represented a corporate affiliate of the prevailing party and where that affiliate and its CEO were involved in the transaction underlying the arbitration); *Benjamin, Weill & Mazer v. Cors*, 189 Cal. App. 4th 126 (2010) (award in favor of plaintiff law firm for unpaid legal bills vacated because arbitrator failed to reveal that his practice focused on representing lawyers in litigation with former clients). A particularly scathing opinion is *Karlseng v. Cooke*, 2011 WL 2536504 (Tex. App. June 2011) in which arbitrator failed to disclose a substantial personal, social and professional relationship with lead counsel for the prevailing party and arbitrator and lead counsel presented themselves at commencement of the arbitration as complete strangers.