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KCON XI ESSAY INTRODUCTION

COMPULSORY ARBITRATION AND ADHESION CONTRACTS IN THE AGE OF DONALD TRUMP

PETER LINZER*

*Remarks of Peter Linzer on Receiving the
Lifetime Achievement Award from the
11th International Contracts Conference (K-CON XI)
(Revised after Election Day, 2016)*

When Colin Marks told me I was going to get the award I told him I wanted to make a speech that I hoped would sum up forty years of contracts teaching, but I never got around to writing it. So, I will content myself with a short talk about something that has been troubling me for years—the role of one-sided power in contracts, specifically in mass consumer contract—and comment even more briefly about three essays in this issue of the *St. Mary's Law Journal* authored by a talented panel that I had the pleasure to moderate.

Before doing either, however, I want to tell you how much affection I have for this annual conference with the somewhat pretentious name of the International Contracts Conference, but which we all just call the K-CON. It got its start about 2003 when Frank Snyder was surfing the Internet and nearly fell off his board at the news that the City of Gloucester, in England, was renovating an old mill as part of an urban renewal project.¹ Frank

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1. Peter Linzer, *Hadley v. Baxendale and the Seamless Web of Law*, 11 TEX. WESLEYAN L. REV. 225, 225 (2005).

quickly realized the mill in question was the one whose broken crankshaft led to the contracts warhorse, *Hadley v. Baxendale*,² dealing with the foreseeability of consequential damages.³ He also realized the following summer would be *Hadley's* 150th anniversary. "Let's put on a show!" cried Frank, and decided to organize a contracts conference in Gloucester, in or near the mill from *Hadley*.⁴ It was a great success,⁵ and we⁶ have been holding them almost every year since. The first K-CON was the only one held outside the United States so far, but we have increasingly had participants from all over the world, and who knows, maybe we will hold one in Mexico if President Trump's wall is not too high to scale.

When I was told of the award, the great Édith Piaf recording of *La Vie En Rose* kept going through my mind. It is about life with a happy rose coloring, and it seemed to fit my being given the award at the K-CON.⁷ What I like about the K-CONs is that they are comprised of a bunch of contracts professors who just like the subject and like each other. At the annual meeting of the Association of American Law Schools (AALS), people look at your badge to see if you are at a prestigious enough school for them to be seen talking to you, while here we just hang out and listen to each other talk about contracts. Some of the participants are from tonier schools than others, and many are young, with just enough greybeards like me to leaven the discussions. We listen to each other and learn from each other. That is why I've rarely missed a K-CON, and why receiving this award from my peers and friends means so much to me.

In teaching and writing about contracts I have become increasingly concerned with disparate power and an ethos that assumes the fiction that everyone has the same degree of sophistication and attention to detail, so that if you cannot afford as good a lawyer as the other side, or did not read the thirty page End User License Agreement linked next to the "I Agree" box on your computer screen, that is your problem.⁸ In the last few years

2. *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145 (Ex. Ch. 1854).

3. *Id.* at 145.

4. *City Event Marks Historic Law Case*, GLOUCESTER CITIZEN, May 25, 2004, at 22.

5. I helped Frank to find speakers and was offered a free trip for my (very modest) troubles, but was already behind on writing the Revised *Corbin on Contracts* Volume Six, and stayed home. I did not get the book done for five more years, so obviously I should have taken the trip to England. Oh well, *n'importe*. Spilled milk and all that.

6. I say "we," but I have little knowledge of who sets things up, though I have taken part in some of the planning. The K-CONs do not have, as far as I know, any corporate structure or officers; it is just a bunch of folks continuing them from year to year. With great success, let me add.

7. ÉDITH PIAF, *La Vie En Rose*, in CHANSONS PARISIENNES (Columbia Records 1949).

8. I discussed some aspects of this in Peter Linzer, *Contract as Evil*, 66 HASTINGS L.J. 971 (2015), at the wonderful symposium that Hastings Law School gave to honor Chuck Knapp's fifty years of

many of us have written on the serious substantive issue of adhesion contracts that force consumers into compulsory arbitration and simultaneously prevent them from banding together to bring class actions against companies who are accused of ripping off millions of individuals in amounts too small to justify even going to small claims court.

This has largely been due to a Supreme Court that has read the Federal Arbitration Act (FAA) in ways that were not intended when it was enacted and that were unimaginable to Congress in 1925. To my mind, the FAA is a judge-made, not Congress-made, law. The Congress that passed it in 1925 was dealing with business-to-business disputes and what was then viewed as a progressive alternative to full-fledged trials. It understood the federal commerce power narrowly—the New Deal expansion beginning in *NLRB v. Jones & Laughlin Steel Corp.*⁹ would not take place for twelve more years. And it understood diversity of citizenship litigation to be governed, as it had been for more than eighty years, by the “federal common law” of *Swift v. Tyson*.¹⁰ It would be thirteen years before *Erie Railroad Co. v. Tompkins*¹¹ would overrule *Swift* and make state law govern diversity cases.¹² Thus, the Congress that passed the FAA did so in a legal world that has not been in existence since before most of us were born. Nonetheless, the Supreme Court has expanded the FAA without much regard for what Congress meant. The initial cases giving the FAA a strong role were decided by liberal justices trying to protect a progressive procedural device,¹³ but in recent years it has been expanded to cover diversity cases and consumer and franchisee cases,¹⁴ and to prevent states from protecting consumers by restricting compulsory arbitration in adhesion contracts.¹⁵ While there was some hope of convincing the Supreme Court that it had taken a wrong approach, the more promising route appeared to me to be through

teaching law.

9. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

10. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

11. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

12. *Id.* at 78.

13. See, in particular, Justice Abe Fortas’s opinion for the Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, where Fortas deferred questions on fraud in the inducement to arbitration unless the alleged fraud concerned the arbitration clause itself. *Prima Paint Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

14. See *Southland Corp. v. Keating*, 465 U.S. 1, 10–16 (1984) (holding the California Franchise Investment Law could not invalidate arbitration clauses in franchise contracts without violating the FAA and the Supremacy Clause).

15. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40, 352 (2011) (reaffirming the FAA’s power of preemption and abrogating a California state law protecting consumers against arbitration in unconscionable contracts, including contracts of adhesion).

administrative law, particularly through the actions of the Consumer Financial Protection Bureau (CFPB), the product of the labors of former contracts professor Senator Elizabeth Warren.¹⁶ A court was likely to approach the problem from a classical contract bias, focusing more on the duty to read than the fairness of the transaction, and was likely to continue to feel bound by what it perceived, wrongly to my mind, as the intention of Congress to erect a strong wall around all kinds of arbitrations, not just those negotiated by sophisticated businesses dealing with each other. But it was Congress that gave the CFPB the authority to study compulsory pre-dispute consumer arbitration, to report on it to Congress, and, if justified by its study, to regulate or even ban these arbitrations.¹⁷ After making exhaustive studies, the Bureau has proposed a ban on the use of arbitration clauses to prevent consumer class actions,¹⁸ and Professor Jean Sternlight carefully shows why she strongly supports the proposal.¹⁹ I fully agree with her, but the downside of regulation by an administrative agency is that a change in administrations can, as it is likely to do here, produce an abandonment of an earlier administrative ruling. Whether the CFPB can get its regulation into law before January 20, 2017 is beyond my knowledge. If it cannot, the proposed regulation will probably be crippled by President Trump. That is the problem with reform by administrative agencies—what one administration giveth, the next can take away, and that may well happen here. Professor Ramona Lampley apparently would prefer this result because she sees small arbitrations as valuable to consumers, and urges that they should be given a chance.²⁰ But compulsory pre-dispute consumer arbitration has been around for decades, and the CFPB showed that it has hardly ever been used; companies typically settled consumer claims or allowed them to be brought in small claims court.²¹ They used the clauses almost exclusively as a firewall against consumer class actions.²² Professor

16. Eric J. Mogilnicki & Melissa S. Malpass, *The First Year of the Consumer Financial Protection Bureau: An Overview*, 68 BUS. LAW. 557, 557 (2013).

17. Dodd-Frank Wall Street Reform & Consumer Protection Act, 12 U.S.C. § 5518 (2012 & Supp. 2015).

18. Arbitration Agreements, 81 Fed. Reg. 32,830, 32,830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) [hereinafter Arbitration Agreements].

19. Jean R. Sternlight, *Hurray for the Consumer Financial Protection Bureau: Consumer Arbitration as a Poster Child for Regulation*, 48 ST. MARY'S L.J. 343 (2016)

20. Ramona L. Lampley, *The CFPB Anti-Arbitration Proposal: Let's Just Give Arbitration a Chance.*, 48 ST. MARY'S L.J. 313 (2016).

21. See Arbitration Agreements, *supra* note 18, at 32,845 (finding that 32.2% of cases sent to arbitration were decided on the merits while 57.4% settled, either formally or informally).

22. See *id.* at 32,830 (“[P]re-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis.”).

Lampley's attempt to show that it was more convenient and cheaper for a consumer to go to arbitration than to sue in small claims court was not very convincing, at least not to me. Concededly, I am not unbiased on this issue. The other finance industry challenge to the CFPB's proposal to ban the use of arbitration clauses as defenses to consumer class actions was in the form of "it's my football and I'll take it home if you don't let me score a touchdown." The industry said it would give up consumer arbitrations altogether if it could not use them against consumer class actions.²³ Professor Richard Frankel had the rather easy task of showing how empty this threat was, and he did the job very well.²⁴ Consumers do not want arbitration and finance companies do not use it except in class actions. If there was a demand for consumer arbitration, consumers would ask for it, and some finance companies would offer it for its competitive public relations value. There have been so few plain vanilla small amount consumer arbitrations over the past years that the industry's threat is laughable. Eight months after K-CON XI came the 2016 Election, making the future of the CFPB and Supreme Court rethinking look pretty dim right now. It is not going to be easy avoiding the view of contract as every man for himself—we are all equals in contract, even if I have the power and expertise and you do not. I think that even if the political climate has changed it is imperative we keep discussing the role of money and power in consumer affairs and other contracts between large businesses and small people. This is the time to talk about power and contract and to talk about doing something about it. I doubt whether we will ever reach "La Vie En Rose." But we could move closer to it and protect the vulnerable from the worst sides of contract. That will require organizing and harnessing public opinion between now and the 2018 and 2020 elections. It might just succeed. It would be a great blessing if we can accomplish at least some of it.

23. See Yuka Hayashi & Christina Rexrode, *Proposed Rule Would Allow Consumer to Sue Banks, Credit-Card Companies*, WALL STREET J. (May 5, 2016, 1:40 PM), <http://www.wsj.com/articles/cfpb-unveils-proposed-rule-to-let-consumers-sue-banks-credit-card-companies-1462420862> (stating the U.S. Chamber of Commerce warned that the proposed rule would cause companies to stop using arbitration clauses altogether).

24. Richard Frankel, *"What We Lose in Sales, We Make Up in Volume:" The Faulty Logic of the Financial Services Industry's Response to the Consumer Financial Protection Bureau's Proposed Rule Prohibiting Class Action Bans in Arbitration Clauses*, 48 ST. MARY'S L.J. 283 (2016).