PRIVATIZING COMMERCIAL JUSTICE:
THE INEVITABILITY OF DEFAULT ARBITRATION

Fabio Núñez del Prado*

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* Yale LL.M. International associate at the international arbitration practice of Clifford Chance. Professor of the Universidad Carlos III de Madrid (LL.M. and Law School), and the Pontificia Universidad Católica del Perú.

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INTRODUCTION

Throughout the last centuries, we have been guided primarily by a statist model of dispute resolution. Indeed, law and justice have been virtually the exclusive competence of the state. Thus, we have lived for a long time under the paradigm that justice was born with the state and will die with the state. Since the beginning, it has been undeniable that a power as important as the resolution of disputes must be a competence of the state. It is hard to imagine the world in any other way. Consequently, every time a legal system is designed, it is taken for granted that the

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1. Youssef has affirmed that:

   [[the birth of the principle of the juge naturel was concomitant with the rise of concepts of sovereignty and the nation-state. International jurisdiction is centered on the default jurisdiction of state justice, as judicial emanation of the state, and the exceptionalism of all other fora. Jurisdictional theory thus inevitably perceives private adjudication as an exception to judicial jurisdiction, and places consent as the core of arbitration theory as the "gate" to arbitration. Arbitration is an opt-in forum that has to be chosen by agreeing to arbitrate, hence, consent's exceptionalism. In contemporary arbitration theory, this exclusionary effect of the juge naturel is attached exclusively to consent, making the arbitration agreement the sole basis of arbitral jurisdiction, or the sole instrument able to propel a dispute outside the gravitational field of state justice. Therefore, the essentialism of consent finds its theoretical basis in arbitration's exceptionalism in international jurisdictional theory. Only its emanation—national courts being the juge naturel—usually appear on the surface of reasoning as the raison d'être for the necessity of consent.

state should be considered the default provider for commercial justice.\footnote{In this regard, Professor Castillo Freyre has stated that “it is usually taken for granted, as if it were an absolute truth whose validity is beyond dispute, that justice, or rather, that the power to administer justice emanates from the people. However, this is just a theory that, with more than two hundred years old, aims to justify popular sovereignty.” Mario Castillo Freyre & Ricardo Vásquez Kunze, \textit{Arbitraje. El juicio privado: la verdadera reforma de la justicia}, in \textit{BIBLIOTECA DE ARBITRAJE}, Vol. I, 121 (2007).}

Since justice is a sensitive and important issue, some statisticians argue that it should not be provided by the market, because money and commerce have a necessarily corrupting effect. However, our daily bread is also very important, perhaps even more important than justice. Today we trust the market as the best system to produce it. Sometimes we believe that the utilization of market mechanisms has a corrupting effect when, in fact, it makes processes more transparent and efficient.\footnote{Alfredo Bullard González, \textit{Comprando justicia: ¿Genera el mercado de arbitraje reglas jurídicas predecibles?}, 53 \textit{THEMIS L.J.} 89 (2007).}

The belief in the superiority of public justice over private justice is based on the romanticizing of the state, a conceptual error pointed by James Buchanan, winner of a Nobel Prize in Economics. As a case in point, one could look at Peruvian state justice, which is one of the least romantic things imaginable. The hypocritical representation of state justice as a bandaged Greek goddess, with a scale in one hand and a sword in the other, acting selflessly to treat the parties equally, is one of the most misguided metaphors that exists.\footnote{Id. at 89.}

There has been stiff resistance to the dispute resolution function being placed in the hands of the market. It is true that arbitration has gained ground during the last decades, but it has always been seen as a residual mechanism in comparison with state justice. The state has always had a sort of monopoly on dispute resolution.\footnote{In this respect, Ortolani has stated that: \textit{[i]n a stateless legal order, the organization of justice does not necessarily stem from a solidified idea of authority; in this context the activities of prescription, adjudication and enforcement mostly arise out of a spontaneous, horizontal initiative of individuals, rather than resonating with centuries of historical development of a certain state. In some cases, the detachment of the private legal order from the state could even be determined by a rejection of authority altogether.}} Nevertheless, if we ask the statisticians why this should be the case, they will most likely answer: because it is obvious. However, this circular reasoning can condemn us to intellectual immobility.

Until recently, the scale of the administrative costs\footnote{Referring to the concept of “administrative costs” used by Robert Cooter & Thomas Ulen, \textit{LAW AND ECONOMICS} 1 (Harper Collins Publishers, 1969).} generated by state administered justice has gone unnoticed. In my view, these costs are generated because all types of justice are inserted in the same bag. The simple fact that not all subject matters can be submitted to arbitration reveals that it is a mistake to put all types of
justice in the same bag. By pure logic, it is not possible to equate commercial and criminal justice since they have an antithetical nature. Nevertheless, for most people, it is undeniable that justice as a whole, at least as a general rule, must be imparted by the state.7

This Article will challenge this belief in the Peruvian legal system. It will demonstrate that, at least in Peru, the state should no longer be the default provider of commercial justice.8 As suggested by Gilles Cuniberti, “it was the rise of the Nation-State which ultimately led to the nationalization of commercial law and the extension of the jurisdiction of public courts.”9 In my view, the concept of Nation-State has also resulted in a “confiscation” of commercial justice, undermining the natural dispute resolution mechanism for contractual disputes: arbitration.10

The article proceeds as follows: Part I will introduce the thesis of the paper. In Part II, I will elaborate a diagnosis of the Peruvian justice system. Part III will discuss three arguments and explain one economic phenomenon that demonstrates that arbitration should be the default jurisdiction. In Part IV, I will explain the five economic catastrophes that have occurred because commercial justice has been treated in Peru as a public good, and I will provide one economic solution. In Part V, I will respond to the critics of the default arbitration proposal. Part VI explains why arbitration should be the default jurisdiction. The last Section concludes and briefly gives some final reflections.

I. BRIEF DESCRIPTION OF THE PROBLEM: DIAGNOSIS OF THE PERUVIAN JUSTICE SYSTEM

So far, the Peruvian society has not yet grasped that conflicts arise faster than the their solutions. We have, therefore, more conflicts than solutions. As suggested by Giovanni Priori, “the Peruvian judiciary is a repository of social conflicts rather than

7. Caplan and Stringham have posed the question: [M]ust the state handle the adjudication of disputes? Researchers of different perspectives, from heterodox scholars of law who advocate legal pluralism to libertarian economists who advocate the privatization of law, have increasingly questioned the idea that the state is, or should be, the only source of law. Both groups point out that government law has problems and that non-state alternatives exist.

8. In the words of Rothbard:
we have not stressed a crucial fact about government: that its compulsory monopoly over the weapons of coercion has led it, over the centuries, to infinitely more butcheries and infinitely greater tyranny and oppression than any decentralized, private agencies could possibly have done. If we look at the black record of mass murder, exploitation, and tyranny levied on society by governments over the ages, we need not be loath to abandon the Leviathan State and . . . try freedom.


10. In this regard, Professor Loquin has stated that the advent of the concept of nation-state resulted in a form of “confiscation” or “nationalization” of the production of legal rules, particularly in the area of commercial law, depriving the law of commerce of its inherent universal and transnational nature.
a source of solutions. The Peruvian judicial system is experiencing a crisis. Few studies have analyzed the reality of this judicial system in depth. The few studies that exist are, to say the least, alarming. Let us consider some of the most revealing data:

- The caseload in the Peruvian judiciary has surpassed 3 million case files (exactly 3,046,292 files);
- A trial extends to an average of five years, though others may last a decade or more, with some exceeding forty years;
- There are 2,912 judges in Peru. Of this total, 40 are Justices, 552 are superior judges, 1,523 are specialized judges and 797 are judges of peace;
- Each year about 200,000 files add to the procedural overload of the judiciary. Therefore, every five years, one million new files are added to the already heavy procedural burden;
- At the beginning of 2015, the caseload inherited from previous years amounted to 1,865,381 unresolved files;
- Justice Enrique Mendoza, former president of the Peruvian Supreme Court, has stated that the notification of a complaint (the first step of a trial) may last four months;
- Each judge handles several thousand files, a task that is physically impossible to complete in a timely and effective manner;
- In 2014, the Superior Court of Lima had accumulated 347,000 files; however, they estimated that they will only be able to solve only 134,000 that year.

The numbers speak for themselves. The situation is regrettable. In the Peruvian reality, prompt justice and urgent protection are illusory. From the data outlined above, we can conclude that the number of judicial lawsuits that are initiated every year exceed the capacity of the Peruvian judiciary. This simple observation is precisely what causes the ominous procedural overload, which leads the judiciary to move slowly. This leads to chaotic consequences: eternal lawsuits and justice of very poor quality, owing to the limited time that judges can devote to each case.
In 2004, an important attempt was made to reform the Peruvian justice system through the enactment of Law No. 28083, by which the Special Commission for the Integral Reform of the Administration of Justice (CERIAJUS) was created. The purpose of this initiative was to develop a global and concerted proposal for the reform of the Peruvian justice system.

CERIAJUS was an important effort. The fatal drawback, nevertheless, was that its proposals were focused on the functional problems of the Peruvian justice system. For instance, many of the most relevant proposals focused on increasing the supply of justice services through the expansion of competences, the creation of courts, the appointment of new judges, as well as the creation of new specialties. Nevertheless, CERIAJUS did not attack the core problem by realizing that there were some types of justice that needed to be privatized.

It is my view that we need a frontal attack to the core of the problem. Undoubtedly, the premises on which the Peruvian justice system was founded must be rethought. As an editorial in the newspaper *El Comercio* pointed out in 2014, “the situation is clear: a reform of the judiciary cannot consist only in certain cosmetic changes. We have to think outside the box and come up with radical solutions.”

This Article attempts to knock down the paradigm on which the public character of justice was built in order to demonstrate that the state should no longer be the default provider for resolving commercial disputes in the Peruvian legal system. However, this Article will go beyond questioning the public nature of justice. Throughout this Article I will demonstrate on its face that in commercial disputes, arbitration must be the default jurisdiction.

II. THREE ECONOMIC REASONS AND ONE ECONOMIC PHENOMENON THAT DEMONSTRATE THAT ARBITRATION SHOULD BE THE DEFAULT JURISDICTION

There is no better way to privatize the commercial justice system than to establish arbitration as the default jurisdiction. For this reason, in the following

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19. In the Plan of Study of the Integral Reform Plan of Justice Administration elaborated by the CERIAJUS, it was pointed out that “in the first case, it can be mentioned the extension of competences of the anti-corruption jurisdiction, the creation of 90 jurisdictional units throughout the country (84 courts and 6 rooms), the appointment of judges to overcome the serious problem of provisionality and substitution that still remains, the creation of new specialties such as commercial.” Congress of Peru, Comisión de Estudio del Plan de Reforma Integral de Administración de Justicia elaborado por la CERIAJUS (Mar. 5, 2019, 11:14 PM), http://www4.congreso.gob.pe/comisiones/2004/beriajus/plan.htm.

20. For centuries it has been unquestionable that justice has a public character. This paradigm, however, has been built on a fragile foundation. The monopoly of state contractual justice is little more than a myth of history.


22. In this respect, Cuniberti has stated that: [t]he first is that arbitration is an unusual mode of dispute resolution. The usual mode of dispute resolution is litigation. The typical way of presenting the operation of the legal system is that the law is made by a parliament (and, in common law
Section, I will provide reasons that can be used interchangeably to explain why commercial justice should be privatized or why arbitration should be the default jurisdiction.

A. First Reason: 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. In this regard, Professors Ian Ayres and Robert Gertner have stated that:

CUNIBERTI, supra note 9, at 12.

23. In this regard, Ayres and Gertner have stated that “[t]he legal rules of contracts and corporations can be divided into two distinct classes. 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.” 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.” Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

In this sense, Posner has argued 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.” RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 372 (Little, Brown and Company, 1986). Additionally, Ben-Shahar has stated 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.


Likewise, Baird and Jackson have stated 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.” Douglas Baird & Thomas Jackson, *Fraudulent Conveyance Law and its Proper Domain*, 38 VANDERBILT L. REV. 829, 835-836 (1985).

Finally, Whincop and Keynes have stated that “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.” 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).
As 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.24

It would appear that the state should choose a default rule reflecting the majority preference. This being the criterion for determining the proper default rule, it is essential to ask ourselves which dispute settlement mechanism is most desired by the Peruvian business community for commercial matters. Only by knowing for certain the preferred dispute mechanism can we determine the optimal default jurisdiction.25

In Peru, arbitration is perceived as the most suitable and the dominant method for the settlement of commercial disputes. As Alfredo Bullard explains, “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.”26

It should not come as a surprise that Peru is one of the countries with the most arbitrations per capita in the world.27 It is curious, to say the least, that arbitration is often considered an alternative mechanism of dispute resolution. In Peru, arbitration has become the natural mechanism for resolving commercial disputes. It is the rule, and, by definition, the rule cannot be an alternative. The natural order of things has been reversed. In commercial matters, arbitration is the rule, and courts the exception. “Why must parties opt in for a solution which appears as the most natural one in the community?”28

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.29

Similarly, Professor Karim Youssef has stated that:

25. In this regard, Whincop and Keynes have stated that “a default rule is supplied by the state to complete an agreement that the parties leave incomplete. Although 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. A default rule is distinguishable from a mandatory or an immutable rule. 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. Default rules can reduce the costs of contracting, whereas immutable rules increase those costs, if preferences for legal rules are not homogeneous.” Whincop & Keynes, supra note 23, at 515.
26. Bullard Gonzalez, supra note 3, at 86.
27. Fernando Cantuarias Salaverry, Arbitraje Comercial y De Inversiones 3 (Fondo Editorial de la UPC, 2007).
29. Cuniberti, supra note 9, at 6.
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 in turning, in fact, arbitral justice into the default forum of international commerce. The structure of international jurisdiction theory based on the exceptionalism of private settlement is being informally altered; and today, arbitration can be said to “prevail by default.”

The rationality behind the economic theory of default rules is precisely to respond to market demand. Then, if it is clear that arbitration is the preferred dispute mechanism, it should be recognized as the default jurisdiction. This suggests that recognizing arbitration as the default jurisdiction would be the confirmation of a phenomenon that has been stealthily strengthening for decades.

B. Second Reason: The Transaction Costs In The Market Of Contractual Dispute Resolution Are Low

In commercial matters, transaction costs are low. The parties can, without major inconvenience, arrive at an efficient solution that meets their needs and expectations. For this reason, in commercial matters, it is more convenient for the parties to negotiate and agree to terms under clear property rules.

30. Youssef, supra note 1, at 39. In the same sense, Professor Born explains that: “one can take this analysis a step further. 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.” Gary Born, BITS, BATS and Buts: Reflections on International Dispute Resolution 13 Young Arb. Rev. 10 (2014).

31. In this regard, Professor Graves has suggested that:

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 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.


32. One of the great challenges that we face today is determining when the allocation of resources is best determined by the market through isolated and uncoordinated decisions, and when it should be determined by means of a centralized decision-making plan. In the Coase Theorem, we find the answer to this dilemma. This theorem helps us to understand, to a large extent, the limits of the state intervention. The first formulation of the Coase Theorem states: “If the transaction costs are equal to zero, it does not matter what legal solution is adopted, since the parties involved will arrive at the most efficient solution through transactions in the market.” Alfredo Bullard González, Ronald Coase y el Sistema Jurídico. Sobre el Nobel de Economía de 1991, 28 Apuntes, Revista de Ciencias Sociales del Centro de Investigación de la Universidad del Pacífico 103, 105 (1991).

In this regard, when transaction costs are not significant, regulation by the state is unnecessary. Economic agents spontaneously achieve efficient solutions. The first formulation of the Coase Theorem is particularly
On the other hand, in criminal law, it makes sense for the state to be responsible for designing the criminal procedure and determine which judges would be in charge of resolving the criminal cases. This is because the transaction costs of the criminal dispute settlement market are prohibitive. It is unrealistic to assume that the criminal and the prosecutor will agree on how the criminal procedure should be designed and jointly appoint the adjudicator of the dispute.

Consequently, since transaction costs in commercial justice are low, the state should never have been responsible for designing the procedures or appointing judges to resolve commercial disputes. The recognition of arbitration as the default jurisdiction, therefore, is nothing more than an application of the first formulation of the Coase theorem.

C. Third Reason: Contractual Justice Constitute A Private Good

Economic theory suggests that the notion of private property only applies to scarce goods. The reason is simple: the definition of property rights encourages the efficient use of goods. If property rights are not clearly defined, inevitably everyone will want to appropriate the same goods and, to the extent that there is no property right to respect, the solutions would be violent. In a state in which the rule of law prevails, private property is indispensable.

On the other hand, when the good is not scarce, its abundance does not warrant the establishment of property rights. Again, the reason is simple: when the good abounds, its efficient use is not necessary. For example, there is no need to establish property rights over the air we breathe every day. With respect to scarce goods, the establishment of property rights promotes social peace. Without private property, society would be chaotic.

Admittedly, the background presented above is explained from an economic perspective in a very straightforward way. In effect, in order to determine whether a good is public or private, two elements must be analyzed: (i) rival consumption and (ii) the existence of exclusion costs. “Rivalry” in the first element implies that an act of consumption excludes another. This requirement is inextricably linked to the concept of scarcity mentioned above. As for the second element, exclusion costs must be low to determine that a good is private.

The difference between public and private goods is of enormous importance useful, because it allows us to conclude that in cases in which transaction costs are low, the market solution can lead us to the best alternative. Id. at 108.

33. If property rights are not clearly defined, inevitably everyone will want to appropriate the same goods and, to the extent that there is no property right to respect, the solutions would be violent. In a state in which the rule of law prevails, private property is indispensable.

34. The state cannot provide the goods and services that it desires. The dividing line that demarcates what the state should do and what the private sector should do is determined by the economy. According to economic theory, there are public and private goods. The former must be provided by the states, while the latter by the private sector. The difference between public and private goods, however, is not capricious. It has an economic rationality that supports it. In its most classic conception, economy is the social science that seeks to allocate efficiently the scarce resources in society. This explains why one of the most basic concepts of economics is scarcity. In order to ensure that the goods are used efficiently, it is indispensable to differentiate public and private goods. This distinction is essential because only the goods that have a private nature are susceptible to becoming private property.

35. The abundant goods have no rival consumption because they can be consumed by many people at the same time. Think of the air or the ocean waters. Property rights are not assigned to them because their abundance does not justify it.

36. Let’s see an example: the fish in the ocean have rival consumption because the fishing that a person performs deprives other persons of fishing the same fish. However, the costs that would have to be incurred in order to establish property rights over the fish in the ocean are absolutely prohibitive.
because there is consensus that the market should provide private goods, with the state providing public goods. Confusion regarding the nature of a good can have disastrous consequences in society. As we will see, granting the state the competence to provide a private good can have tragic consequences when it leads to overexploitation.  

It has rarely been questioned that a competence as important as the resolution of disputes must be the responsibility of the state. While the foundations of this view are uncertain, it seems to have been internalized to such a degree that it is assumed that the most important services must be provided by the state, while the least important by the market. From an economic point of view, the importance of a service is of very little relevance to determining whether it should be provided by the state or the market.

Regarding the resolution of disputes, all types of justice have been equated for centuries. Several Constitutions express that the jurisdictional power emanates from the state. It is not distinguished, however, if the disputes are contractual, administrative, or criminal. Their resolution is, as a general rule, a power that falls on the state.

It is not possible to assimilate contractual and criminal justice, because they are qualitatively antithetical. The resolution of criminal disputes is of public interest, while the resolution of commercial disputes is of private interest. The prosecution of crimes is in the interest of the whole society, while the process of eviction, for example, only concerns the parties involved in the arbitration.

In the resolution of commercial disputes, justice is predominantly a private good. In effect, when two parties choose their arbitrators, they are seeking an arbitral award that resolves their dispute. Due to the principle of privity of contract, the ruling is consumed exclusively by the parties of the contract. Contractual justice, therefore, has rival consumption, and exclusion costs are non-existent. The parties do not have to incur costs to exclude other people from the consumption of their arbitral award. The very nature of the dispute reveals that the costs are equal to zero.

The two elements that define property rights—exclusion costs and rival

37. Unlike private goods, public goods are characterized because they produce effects on persons that have not participated in the transaction, i.e., those that produce effects on third parties or externalities that are not susceptible to internalization. In a nutshell, the nature of these goods does not allow the exclusion of others.

38. As explained by Professor Correa:

[Traditionally, justice has been conceived as a public good, that is, as a good that once produced, benefits a broad group of consumers, whether or not they have paid for it. According to this point of view, justice would constitute a good in which the incorporation of an additional consumer has no cost. Under this conception of justice, the market is not, of course, the ideal mechanism for its provision. . . . This vision of justice as a public good allows us to understand in a coherent way the predominant model associated with the administration of justice: a public service designed to provide this service, in charge of officials paid by the State, financed from general income and without apparent barriers to access, such as, for example, a price system.]


39. Let’s see an example: the fish in the ocean have rival consumption because the fishing that a person performs deprives other persons of fishing the same fish. However, the costs that would have to be incurred in order to establish property rights over the fish in the ocean are absolutely prohibitive.

40. Thus, if a judge renders a judgment declaring that Juan owns a house, there is no reason why a third party should be benefited or harmed by that decision. Similarly, if a judge issues a ruling in which it determines that Gabriel must compensate Rodrigo US $50,000.00, there is no way for a third party to benefit from said compensation. Contractual controversies are characterized, then, by the rivalry in the consumption and non-existing exclusion costs.
consumption—demonstrate that commercial justice is predominantly a private good on its face. Consequently, the market should be the default provider of commercial justice. As Bullard explains, “if we have a contract, we have a private problem. And if it is a private problem, we must have a private solution.”

D. An Economic Phenomenon: Arbitration Should Be Recognized as The Default Jurisdiction In Application Of The Government’s Failure Theory

1. State justice constitutes a Government failure and the market has reacted through arbitration

Market failures are usually defined as situations in which the market fails to achieve efficiency because the individual behavior of each person trying to maximize their own benefits is opposed to the best social outcome. Asymmetry of information, monopolies, externalities, and public goods are identified as market failures. When one of these situations arises, economists usually advocate in favor of state intervention to remedy the failure. It is taken for granted that the government will always function in its idealized version. Nevertheless, as Guillermo Cabieses explains, attempting to justify state intervention in a market failure may end up being like trying

41. In this regard, Correa has stated that:
the available empirical evidence seems to show that it is a technically correct vision. An examination of civil and commercial justice - of the composition of the litigation and its behavior - shows that, in these areas, justice is not a public good. It is not true, of course, that the incorporation of a new consumer (a new litigant) lacks costs or that there is no rivalry to access the justice system or that it is possible to exclude an optimum cost to a new consumer. None of these traits -own, as is known, of a public good- are presented by civil and commercial justice. By contrast, this type of justice constitutes a private good, whose benefits -although not all of its costs- are internalized predominantly in the litigants. By providing that kind of justice as if it were a public good, a socially damaging result is produced: if the litigants do not pay the total costs associated with that good, their welfare rate associated with the litigation is increased. The subjects will tend, then, to litigate more, even beyond what would be efficient from the point of view of social welfare. Although the costs associated with the litigation are greater than the benefit obtained with it, the subjects will tend to sue anyway. There is, in technical terms, a divergence between the social and private costs of the litigation. However, justice or, each judicial action generates significant externalities or positive effects on society as a whole, which are not internalized by each claimant. A justice system and the information contained in judicial practice, reduces transaction costs and discourages the commission of illegal activities by assigning costs and probable costs. A system of justice that works, produces, then, indiscriminate benefits that extend beyond the litigants. This is the public dimension of justice. In the presence of these benefits, the private optimum in the provision of good justice differs from the social optimum: in a situation like that there is a part of the benefit of litigating that does not fall on the litigant. The State must, then, finance this proportion of the benefits charged to general income to favor the achievement of a social optimum. In other words, it is only possible to achieve an optimum in the provision of this good when the State compensates the individuals who access the system the amount of externalities that, on the community, they are generating with their action.

Correa, supra note 38, at 30-31.


to extinguish fire with gasoline.\textsuperscript{44}

Professor Harold Demsetz has explained that when state intervention is demanded in one of these cases, the fallacy of nirvana is presented.\textsuperscript{45} In other words, one errs in comparing the existing alternative (the market) with an ideal one (what one imagines would happen under the best possible circumstances if the government intervened) and not a real one (what would really happen if the government intervened). It is a mistake to think that the government does not fail and to not be aware that the remedy can be worse than the disease.\textsuperscript{46}

In the face of a market failure, one must seriously consider whether state intervention will generate an even worse government failure. Just because a potential problem exists does not mean that the government has the capability to solve it.\textsuperscript{47} Government intervention could lead to greater deviations in the efficient use of resources compared to the results obtained by the market.

The idea that the state should be the one in charge of resolving commercial disputes as a default jurisdiction may be a manifestation of the Nirvana fallacy. As

\begin{flushleft}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} The fallacy of Nirvana refers to the tendency to assume that there is a perfect solution to a particular problem. The textual quote of Professor Demsetz is the following: "The view that now pervades much public policy economics is the corresponding option in the relations between an ideal norm and an existing "imperfect" institutional arrangement." This \textit{nirvana} approach differs considerably from the comparative approach in which the relevant choice is among other mechanisms of real institutional approaches." Harold Demsetz, \textit{Information and Efficiency: Another Viewpoint}, 12 J. L & ECON. (2019). As explained by Caplan and Stringham:

\begin{quote}
[T]hinking of a dilemma and then assuming that government has the capability to solve it is what Harold Demsetz called the Nirvana approach to public policy. A libertarian world might not eliminate 100 percent of all problems, but there are many reasons to believe that it could eliminate more problems than giving the government a monopoly over the use of force could. If men are not angels, as many government advocates are quick to point out, then why would we expect a government composed of actual men to be an improvement?
\end{quote}

\textit{Caplan & Stringham, supra} note 7, at 527.

\textsuperscript{46} As explained by Professor Cabieses, "The concept of market failure is opposed to another that can be much more serious, the failure of the government, which occurs when the regulation that is created to remedy a market failure leads to a situation in which society moves further away from efficiency." Cabieses, \textit{supra} note 43. Similarly, Benson has stated that:

the arguments for public provision of law and its enforcement are largely `market failure' arguments, which imply that the private sector will not efficiently produce law and order. The implicit assumption underlying such justifications for public production is that when the market fails, the government can do better. But even if the market failure arguments are correct, it does not necessarily follow that government production of law and order is justified.

\textit{BENSON, supra} note 17, at 286. In the same sense, Tullock explains that:

\begin{quote}
in every case, the problem that we face when deciding whether some activity shall be market or governmental is . . . the maximization of the [net] benefit. Clearly, neither method is perfect, and clearly, we are choosing between two techniques that will produce less than if we lived in a perfect world.
\end{quote}

\textit{GORDON TULLOCK, PRIVATE WANTS, PUBLIC MEANS: AN ECONOMIC ANALYSIS OF THE DESIRABLE SCOPE OF GOVERNMENT} 127-128 (Basic Books, 1970). In the same vein, Benson has stated that:

it does not follow that the public sector does a better job. Neither system is likely to be perfect. The question is: Which creates the most significant imperfections? This discussion implies that private sector failures have been substantially exaggerated by government law advocates while significant government failure arguments have been overlooked.

\textit{BENSON, supra} note 17, at 286.

\textsuperscript{47} Caplan & Stringham, \textit{supra} note 7, at 528.
Caplan and Stringham explain:

Private dispute resolution is not flawless, but it works surprisingly well. Scholars are usually too quick to dismiss private courts on the grounds of market failure, without first considering the magnitude of the market failure, or whether the government could realistically do any better.\textsuperscript{48}

To the extent that courts are inefficient, a process of spontaneous vindication has arisen during the last decades in which the market has returned and is now demanding a terrain that belongs to it—the resolution of commercial disputes. It is undeniable that arbitration has spontaneously gained force during the last years leaving a clear message: whether perfect or not, the market can fulfill more effectively the task of resolving commercial disputes.

This is the phenomenon that usually occurs when the State’s actions are justified in an alleged market failure. It is often overlooked that it is much more problematic for the state to be the default provider of justice. Under this situation, however, the market does not remain idle.\textsuperscript{49} Quite the opposite. It reacts with forcefulness in order to demonstrate that it is in much better conditions than the state to resolve commercial disputes.

Over the years people have noticed the inefficiencies of the judiciary and have realized that arbitration is a much better alternative. In fact, today, parties in Peru include an arbitration agreement virtually in all commercial contracts. It is uncommon to find a relevant contract that does not include an arbitration clause.

If arbitration is the dispute resolution mechanism best served for resolving commercial disputes, we must, once and for all, recognize arbitration as the default jurisdiction. Our obstinacy has no sustenance. At least this would be more consistent with our reality in which almost all commercial disputes are resolved through arbitration.

2. Empirical evidence that demonstrates that state justice is a government failure: the successful story of mandatory arbitration in Peru

The Law of Acquisitions of the Peruvian State, Legislative Decree 1017 (Law of Acquisitions), 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.\textsuperscript{50} Peru is the only

\textsuperscript{48} Id. at 523.

\textsuperscript{49} In this regard, Castillo Freyre stated:

Is arbitration a reactionary way of administering justice? Of course, it is. Because everything that does not work - and the centralization of the jurisdictional function of the State has been stuck for a long time in the swamp of its own dogmas, incapable of solving the problems that the man presents and his circumstances raise - gives rise to a reaction. And the reaction is positive when the congestion of causes in the courts and the resulting inefficiency, the complexities of modern commercial life that often require advanced economic or technological knowledge to understand the core of a controversy, have led to a disappointment of the theory of the hegemony of the Judicial Power.

Freyre & Vásquez Kunze, supra note 2, at 32.

\textsuperscript{50} Article 45 paragraph 1) of Legislative Decree No. 1341, Legislative Decree that modifies Law No. 30225, establishes that “disputes that arise between the parties regarding the execution,
country in the world in which this measure has been adopted. Many arguments have been drawn against this law: That the implementation of a mandatory arbitration system is unconstitutional; that it contravenes the contractual nature of arbitration; or that justice is too important to leave in the hands of the market. However, there is no argument more powerful than the empirical one.

So far, the story of mandatory arbitration in Peru has been a story of success. It is definitely a better formula than one in which the state itself, through the judiciary, resolves controversies to which it is a party. When the state resolves its own disputes, impartiality is conspicuous by its absence. The Peruvian experience not only shows that consent is not inherent to arbitration, but even confirms that Peru state justice has suffered from the phenomenon of government failure. It has gone from a reality in which the Judicial Power had the absolute 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.

Although the implementation of mandatory arbitration broke the contractual nature of arbitration, it is undoubtable that the arbitrations initiated by virtue of the Law of Acquisitions, should still be considered arbitrations. At the beginning, there were voices that denounced the unconstitutionality of mandatory arbitration, arguing that arbitration was contractual in nature. Years later, nevertheless, mandatory arbitration in Peru has demonstrated to be a great success.

Although at the beginning there were many criticisms, things have gone very well and this measure has been very useful to decongest the judicial branch. Recognizing arbitration as the default jurisdiction, then, would be nothing more than the confirmation of a phenomenon that has been stealthily configured for decades: Arbitration is already the natural mechanism for resolving commercial disputes.

III. THE FIVE ECONOMIC CATASTROPHES THAT HAVE OCCURRED DUE TO THE FACT THAT COMMERCIAL JUSTICE HAVE BEEN TREATED IN PERU AS A COMMON GOOD AND ONE ECONOMIC SOLUTION.

Since Peru’s commercial justice has been treated as a public good (and not a private good), five catastrophic economic consequences have been produced: (1) litigants do not internalize the services they consume nor the Coasian social costs they create in the system; (2) free-riding has been incentivized; (3) courts are imbued in a tragedy of the commons; (4) the burden of judges has generated justice defying-delays, standing in line, and rationing of justice; and (5) the agency problem and public choice have been accentuated.

Each of the following sections demonstrate that all the economic catastrophes

51. Correa has stated that “in this direction are found, in the case of arbitration, measures tending to . . . 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.” Correa, supra note 38, at 32-33.

52. 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. This phenomenon, 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.
that have caused the treatment of commercial justice as a public good are correlated. To the extent that litigants do not internalize the services they consume, nor the social costs they generate in the system, over-litigation has been incentivized. This generates the problem of free-riding. Because if a litigant has a case and it thinks it has small chances of winning, it does not have incentives to initiate an arbitration because it knows that it will have to internalize the costs. Nevertheless, since in a lawsuit you only have to pay insignificant fees, you have all the incentives to initiate a trial. This economic logic has produced perverse incentives that have determined that courts end up being imbued in a tragedy of the commons. This economic reality has caused justice-defying delays, standing in line, and rationing of justice. Since the parties do not pay their judges, they are not incentivized to do their job well. There is an agency problem between the parties to the dispute and the judge, which has generated the public choice problem.

A. First Economic Catastrophe: Litigants Do Not Internalize The Costs Of The Services They Consume, Nor The Social Costs That They Generate In The System

In the Peruvian legal system, the principle of free justice prevails. Thus, when litigants initiate lawsuits before Peruvian courts, they do not have to make any payment. They need only pay a few insignificant fees that do not represent the cost of the service that they are consuming. In effect, the token fee paid by a litigant to submit evidence or to appeal falls short of the cost of services provided by state justice. Courts, then, provide subsidized services.

Professor Brendan Maher’s idea developed in his paper Civil Judicial Subsidy—in which he suggests the existence of a “court insurance” in the U.S. legal system—is fully applicable to the Peruvian legal system. Indeed, to the dismay of some and approval of others, Peru also offers an atypical social insurance: “court insurance.” Legal patients do not need to pay for the court’s time (i.e., the cost of courtroom personnel or the cost of operating and maintaining the courthouse). The only requirements are modest fees.

In this context, a precise question arises: Why, for example, should Peruvian taxpayers subsidize a lawsuit between Banco de Crédito and Microsoft, or between Belcorp and Nestlé? As explained by Rex Lee, surely others are more in need of public welfare benefits. Yet, in each of those suits the public paid the bill for thousands of hours of court time—at several hundred dollars per hour—to determine which of these corporate giants owed the other money.

In this regard, Maher has stated that:

Justice is blind, not free. Litigation is expensive. Yet while significant scholarly attention has been devoted to the private cost of litigation, largely unaddressed is the cost of the civil court system itself—or who should bear it. Judges and court staff do not work for free, and courthouses do not build and maintain themselves; those

53. In this regard, Article VIII of the preliminary title of the Civil Procedure Act states: “access to the justice service is free, without prejudice to the payment of costs, costs and fines established in this Code and administrative provisions of the Judiciary.”
costs are almost entirely borne by the taxpayer as a pure judicial subsidy. This article asks: is that right? Or is there a more desirable way to apportion court usage costs between the state and litigants?56

Though it is taken for granted that access to the Peruvian court system must be free of charge due to the importance of justice, court fees are necessary. As Milton Friedman said, “there’s no such thing as a free lunch.”57

When litigants bring suits before the Peruvian courts, they generate externalities that the state (and, indirectly, taxpayers) internalize. Litigants not only ignore the cost to taxpayers of extra trials, but also the cost of justice delayed or denied to everyone waiting behind them.58 By doing this, litigants fail to internalize the cost of the service they consume, and also fail to internalize the social costs they are creating in society, because the filing of a lawsuit affects the duration of other pending lawsuits. Through the initiation of their lawsuits, litigants are congesting the judiciary. This creates a social cost.

B. Second Economic Catastrophe: Perverse Incentives And The Free-Riding Problem

When litigants do not internalize the costs they generate, their welfare rate associated with the litigation is increased. Persons tend to litigate more (even beyond what would be efficient from the point of view of social welfare). Thus, although the costs associated with the litigation are greater than the benefit that is obtained with it, litigants always have incentives to sue. Consequently, there will be a divergence between the social and private costs of the litigation.59

In other words, to the extent that litigants do not assume the real costs that initiating a trial implies, they have perverse incentives to litigate more than they should. The absence of internalization determines that, since litigants do not bear their costs, they frequently bring lawsuits with little or no case, which increases the burden of the judiciary.

As explained by Richard Neely:

In the universe of all the routine cases that go to court, most of the time one party will be flat wrong, and he or she will know that from the beginning . . . . The egalitarian bias that demands free access to court services is predicated on the assumption, however, that both

56. Caplan & Stringham, supra note 7, at 529.
57. MILTON FRIEDMAN, THERE’S NO SUCH THING AS A FREE LUNCH (Open Court Publishing Company).
58. Caplan and Stringham continued stating:
[S]ince a longer delay gives both sides a greater opportunity to outspend each other, delay usually favors the richer litigant. Delay also deadens the deterrent effect of damages: future damages, like other future income streams, will be discounted by the interest rate. All these issues would not be problems if court services were not essentially free.
Caplan & Stringham, supra note 7, at 512. Similarly, Neely has affirmed that “often the attractive products that the court delivers free are delay itself or a forum that provides the stronger litigant with an opportunity to wear out or outgun the opposition.” NEELY, WHY COURTS DON’T WORK? 165 (MCGRAW-HILL BOOK COMPANY, 1983)
litigants in all lawsuits have a good-faith dispute. Empirically this is an entirely unfounded assumption.\textsuperscript{60}

The filing of a frivolous claim, for instance, generates a series of costs that are externalized to society. In effect, due to the congestion of the Peruvian judiciary, every time a person brings a lawsuit, it contributes to the judiciary’s overload, which in turn generates further external social costs. It is therefore reasonable to conclude that civil justice is subsidized by the state.\textsuperscript{61}

The second problem (which is a natural consequence of the lack of internalization of costs) is the free-riding problem.\textsuperscript{62} As Correa explains:

“If, as this point of view claims, justice constitutes, in effect, a public good [. . .]: individuals would expect others to pay, in order to achieve, in that way, a benefit without bearing any of the costs associated (such behavior is what is usually called free-riding). If justice were a public good, its production associated with a market system would be socially harmful: there would be less justice than socially necessary.”\textsuperscript{63}

A few years ago, the Peruvian judicial branch reported that 84 percent of its budget came from the national budget, while only 15.1 percent of its financing was assumed by the users.\textsuperscript{64} This becomes alarming when we realize who the main consumers of the judiciary are. Unbelievably, the consumers par excellence are the banks. Through claims for the collection of money, the lawsuits initiated by banks represent approximately 25 percent of the lawsuits existing in the judiciary.

In the words of Neely:

The courts are used unequally by different taxpayers. There are groups in society that use the civil courts all the time and groups that never use them. The government, large corporations, local landlords, and retail businesses all use the courts extensively; lawyers call them “specialized” users. Most of the taxpayers who pay for the courts, however, are at best only occasional users of this terribly expensive machinery. Ordinary taxpayers or their representatives understand that bigger and better models of expensive court machinery will not eliminate the problems of delay that confront the occasional user. Specialized users will consume more additional court services, while the delays for the occasional user will remain the same.\textsuperscript{65}

Unbelievably, banks are responsible for the increasing congestion of courts.

\textsuperscript{60} Neely, supra note 58, at 166.

\textsuperscript{61} Cuniberti, supra note 9, at 185.

\textsuperscript{62} In economic theory, a person acts as a free-rider when he does not internalize the cost of producing a good from which he has benefited. The free-riding problem occurs when a person seeks to enjoy a good, but expects that someone else produces it and, therefore, someone else bears the corresponding expenses.

\textsuperscript{63} Correa, supra note 38, at 30.

\textsuperscript{64} Enrique Pasquel Rodríguez & Andrés Bayly Letts, ¿Quién dijo que en Salem hubo brujas? La privatización del servicio de justicia: rompiendo el muro de la justicia estatal, 46 THEMIS L. REV. 316 (2003).

\textsuperscript{65} Neely, supra note 58, at 164.
The problem is that they pay a minimal percentage of the real cost of litigation. It does not exist the slightest equivalence between what the bank pays and what it consumes. In short, the ones who least need to benefit from the free justice system—the banks—are the ones who most benefit from it.  

Peña has described a similar experience in Chile:

[T]he primary sources show that more than 75% of litigation in the last twenty years is equivalent to causes linked to the credit system, which means, given the free access to the system, that the excluded subsidize the litigation of companies related to credit, or what is the same, that public spending on justice is distributed, although not deliberately, in discriminatory terms. This character of justice administration systems allows those who access the system to externalize an important part of their litigation costs to all potential litigants.

National taxes end up subsidizing banks. Since banks pay an irrelevant fee for the services they consume, they are authentic free-riders. This generates a regressive effect in which the litigants (many of them, poor) subsidize the banks. It is an upside-down world.

As explained by Lee:

There is, however, a difference between the two, and the difference illustrates the most serious problem associated with public goods: overuse by free-riders [. . .]. It is part of our American tradition that we treat our courts as public goods. They are publicly funded, and made available “for free” to whom-ever wants to use them. From the standpoint of the free-rider problem, courts are more like the public pasture than the lighthouse. Their services are consumable. Use by one has an effect on others’ use. And since everyone does not use the courts in direct proportion to the taxes he or she pays, public financing makes it not only possible but inevitable that some will pay for what others use.

This reality represents a tragic demonstration of the implications derived from the allocation of common property rights over all types of justice.

C. Third Economic Catastrophe: Over-Litigation And The Tragedy Of The
Commons

The third problem (the consequence of the free-riding problem) is the tragedy of the commons.

When the State arrogates the competence of providing private goods, the consequences can be dramatic. According to economic theory, when a private good receives the treatment of a public good, the natural consequence is its overexploitation. This phenomenon is economically known as the tragedy of the commons.70

To the extent that in Peru commercial justice is being treated as a common good (and not as a predominantly private good), the Peruvian courts are suffering from a tragedy of the commons. The problem is that under the premise that justice is a public good, by recognizing the gratuity of the justice system as a principle, the benefit is being considered but not the cost.71

When filing a lawsuit, litigants do not consider the scarcity of the resources they are using, which leads to them overexploiting the judiciary. Litigants tend to initiate lawsuits at high rates because the common property system of the Peruvian judicial branch is not consistent with the scarcity of resources and litigants do not bear the costs.72 If their lawsuits contribute to overloading the judiciary, and this indirectly affects other people who urgently need protection of the state, then it is not their concern.

Consequently, the belief that state justice should be the default jurisdiction leads to case overloads of the Peruvian courts.73 To the extent that there is no

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70. Pasquel & Bayly, supra note 64, at 316. (“The tragedy of the commons occurs when a group of people, acting in their own benefit, overexploit a finite good. The curious thing about this situation is that none of them benefits from the overexploited of the good. However, since the good does not belong to anyone specifically, nobody cares. The good, therefore, belongs to everyone and no one at the same time. Assigning public property rights over private goods has chaotic consequences.”).

71. In this respect, Cuniberti affirmed that:

[the first benefit of charging court user fees should be an increase in the resources of the State. Such resources could be used either to increase the resources of the civil justice system, or to fund some other State activity. Remarkably, however, this is not the benefit that scholars advocating a user fee for commercial contract cases put forward. Indeed, these scholars predict that such a fee would result in a decrease of the suits handled by courts. They explain that courts are overused because the subsidy encourages some parties to initiate proceedings in cases where the costs of adjudication should have incentivized them not to do so. They thus hope that the user fee would deter parties from initiating these suits, and that the result would be a lower number of cases. The gain for the State and the civil justice system would therefore not be that a high number of parties would pay the fee and that it would generate additional resources. The gain would be that the State might handle a lower number of cases with the same resources, and that the court system could allocate more resources to other cases, and reduce delays in adjudication, with all the benefits associated.]

CUNIBERTI, supra note 9, at 190. (citations omitted).


73. In this regard, Maher stated,

[I]f we assume all players are risk neutral (which they are not) and that there are no externalities associated with court use (which there are), subsidization results in 'court overuse' because players will not be bearing the full cost of suit. Put simply, if players litigate when expected gains exceed expected costs, artificially reducing costs with a subsidy will result in some amount of socially undesirable litigation that causes a net decrease in total overall welfare—that is, some amount of 'court overuse' False “The current legal system—with the premiums and indemnity fully subsidized by the state, and with no “experience rating;” adjustment in any case—is highly likely
distinction between commercial justice and other types of justice, all types of justice are equated, and courts end up resolving disputes that could be easily resolved through arbitration. There comes a point in which the judiciary is so overloaded that it can no longer respond quickly and effectively.74

The most serious problem is that until today, the costs generated by state justice have not been fully understood. It has not been noticed that under this paradigm all individuals can use the judiciary as a common good and no one assumes the real costs of its use. A system proposed like this, as expected, incentivizes the increase of the lawsuits unceasingly. As the newspaper El Comercio reported in 2015, each judge handles several thousand files, which is simply inhumane75 The consequence of the tragedy of the commons is the collapse of the justice system.76

This overexploitation of the judicial branch is imputable to the state justice paradigm. The problem is that all types of justice are handled by the state, when many (such as commercial justice) belong to the market instead.

D. Fourth Economic Catastrophe: Justice-Defying Delays, Standing In Line, And Rationing Of Justice

The tragedy of the commons that courts suffer determines whether judges will have less time for each of their cases. This leads to delays and decreased quality in the judge’s work.

As explained by Neely, “All work is custom produced, but our strong egalitarian tradition precludes any arrangements for self-financing. Because the courts are available free of charge, they are overused, and the result is justice-defying delays.”77

If judges have more than a thousand cases pending, it is difficult to do their job well, or in a timely manner. Consequently, trials are lengthened and the quality of court’s services significantly deteriorates. A system like this encourages laziness, inefficiency and mediocrity.

There is more at stake than just money. As explained by Lee, first, there is a relationship between the quality of justice and the promptness with which it can be delivered. Judicial relief years after the event is seldom adequate.78 The parties’ circumstances have changed; sometimes the parties themselves are not the same; and the linkage between the judgment and its intended effects usually weakens. This also threatens citizens’ trust in our judicial system. Finally, this threatens the quality of a judge’s work product.

Additionally, the statist model in the Peruvian justice system forbids any explicit price system to ration court services. Nonetheless, since demand for free court resources results in the overconsumption of judicial resources.

Maher, supra note 54, at 1530.

74. As mentioned earlier, there is alarming data that reveals the critical situation of the Peruvian Judicial Branch: (i) the procedural burden has exceeded three million cases; (ii) every year about 200,000 files increase the procedural caseload of the Judiciary, which means that every five years a new million files are added to the already heavy procedural burden; and (iii) at the beginning of 2015, the load inherited from previous years amounted to 1,865,381 unsolved cases. GUTIERREZ, supra note 12, at 1.

75. Editorial staff, supra note 16.


77. NEELY, supra note 58, at 164.

78. Lee, supra note 55, at 269.
services exceeds supply, disputing parties queue up to receive the subsidy. Consequently, rationing occurs, and it is accomplished by standing in line. Unfortunately, the people who have the most urgent need to litigate need to wait, because the statist model prohibits the sale of one’s place in line to someone with a more pressing need for court services.79

In other words, since the services of courts are undervalued, demand increases and lawsuits are queued, and analyzed in the order they arrive, despite the fact that some are more urgent than others.

In this regard, Caplan and Stringham suggest that:

First, the courts underprice their services, leading to excess demand and non-price rationing (usually, waiting in line). But selling one’s place in line is illegal, so the most urgent cases must wait as long as trivial ones, leading to protracted legal conflict and higher legal costs. This is particularly severe for dispute resolution because the litigants can struggle with one another ferociously while they wait to go before the judge. If courts charged user fees, people with insignificant disputes would be more likely to drop them or to try a cheaper resolution method. Yet the courts provide subsidized services, often complete with juries. The whole process is expensive, but litigants only need to consider their lawyers’ fees. They ignore both the cost to taxpayers of extra trials as well as the cost of justice delayed or denied to everyone waiting behind them.80

What is worse, many trivial claims are often placed ahead of others that truly require protection. A system of common property in courts determines that an endless queue is created in which litigants have to wait regardless of the urgency of their claim.

As explained by Neely:

Since a place in line cannot be sold or exchanged, all litigants must pay essentially the same price for use—a price that bears no relationship to the urgency of individual needs or the importance to the public of certain issues like highway or power public plant construction. The currency in which the price of access to courts is paid is what economists call a “deadweight loss,” currency that is of no value to anyone else.81

Judge Learned Hand contended that the chief judicial commandment should be “thou shalt not ration justice.”82 But justice is always rationed. It must be because it involves limited supplies of scarce resources. “Due to courts’ congestion, justice is

79. Caplan & Stringham, supra note 7, at 512.
80. Caplan and Stringham continued stating:
[S]ince a longer delay gives both sides a greater opportunity to outspend each other, delay usually favors the richer litigant. Delay also deadens the deterrent effect of damages: future damages, like other future income streams, will be discounted by the interest rate. All these issues would not be problems if court services were not essentially free.
Id. at 512. Likewise, Neely has affirmed that “[o]ften the attractive products that the court delivers free are delay itself or a forum that provides the stronger litigant with an opportunity to wear out or outgun the opposition.” NEELY, supra note 58, at 165.
81. NEELY, supra note 58, at 164-65.
82. BENDON, supra note 17, at 235.
rationed by waiting.83 Thus, courts have no choice but to contravene Hand’s mandate against the rationing of justice. 84

E. Fifth Economic Catastrophe: Agency Problem, Public Choice and Inefficiency

The fifth catastrophe can be summarized in the following three points: (1) courts suffer from the public choice tragedy because they are typically appointed for life; (2) to the extent that judges are not paid by the parties, incentives for mediocrity are generated; and (3) judges usually do not know what is efficient, while arbitrators, far from being omniscient, know better.85

Public courts lack incentives to be efficient for several reasons. First, judges suffer from the problem of public choice. As explained by Caplan & Stringham:

In courts, no residual claimant with an interest in cutting costs and increasing consumer satisfaction exists. In profit-making firms, the owners have an incentive to keep costs low and make them fall over time. But the incentives of the employees in government versus private firms are different. Judges are typically either elected or appointed for life. Elections are a bad way to monitor work effort since informing oneself about each judge’s attributes is a pure public good. Society at large benefits from the intelligent selection of judges, but individual diligent voters bear the costs. Life appointments take away even the meager incentive effects of voting. If we want the public courts to function well, we must rely on judges to monitor themselves. This may work sometimes, but the incentive structure of private labor markets is more sensible. While they have imperfections, private labor markets leave employment decisions to a concerned manager or entrepreneur, not the public at large. These managers reward their employees if they work well and fire them if they don’t. Surely these spurs work effort better than elections or life appointments.86

Second, since judges are not paid by the parties, they have no incentives to do their job well. There is an agency problem between the judge and the parties to the dispute. Parties have no way of supervising judges. In a competitive dispute resolution system, it is essential that users evaluate judges.

Finally, as Hayek suggests, private markets allow people to utilize knowledge more effectively than the state.87 In markets, explicit prices measure costs and benefits.88 By contrast, as explained by Posner, “public bodies must estimate social costs and benefits by (at best) using surveys or (at worst) guessing.”89

In conclusion, as Caplan & Stringham suggest, courts lack incentives to

83. Caplan & Stringham, supra note 7, at 512.
84. PERSON, supra note 17, at 32.
85. Caplan & Stringham, supra note 7, at 519.
86. Id. at 519.
89. Caplan & Stringham, supra note 7, at 519-520.
embrace customer orientation and pricing mechanisms, plus they face the public choice problem. In contrast, when arbitrators are appointed, they must provide efficient services to customers and avoid the waste of resources. Competition between arbitrators also allows for specialization and the provision of services focused on the consumer rather than a centrally planned, one-size-fits-all system.90

F. One Economic Solution: The Creation Of A Private Property Regime And The Introduction Of A Price System By Recognizing Arbitration As The Default Jurisdiction

Economic theory suggests that in order to avoid the economic catastrophes that the Peruvian judiciary is suffering, a regime of private property must be created.91 Since owners in such a regime would internalize the effects of the overexploitation of the good, they will have all the incentives to make an efficient use of it. When internalization occurs, people consider the effects they generate with their actions, which encourages them to be more diligent in the use of goods.92 The internalization allows us to avoid the tragedy of the commons and the free-riding problem.93

The scarcity of state justice’s resources warrants the creation of a property regime in which every litigant must assume the costs of the service he consumes.94 It seems urgent to alleviate the burden of commercial justice by outsourcing a range of disputes to the private sector. Through the privatization of commercial justice, the five economic catastrophes that we have described can be mitigated. Additionally, through this measure, a price system will be introduced in litigation with rates fixed by the market. As explained by Lee, “the beauty of the free enterprise system is that it allocates society’s goods fairly because it allocates to those who are willing to pay for them. Subsidies distort that process, and thereby deprive society of the benefits of the

90. Id. at 503.
91. When externalities create a significant social cost, the causers must internalize them. As Demsetz explains, the main function of property is the internalization of the beneficial and harmful effects derived from the use of goods. Consequently, property rights must appear when the internalization of externalities produces benefits that are greater than the cost of internalization, and we are precisely in that case. See generally Demsetz, supra note 45, at 1.
92. Bullard, supra note 72, at 152.
93. In that sense, Correa has indicated that:
   [I]t is necessary, then, to make significant changes to the way civil justice is provided today if we want to approach an optimum in this matter. Policies should encourage private actors to provide and produce justice. Even in the event that cultural or political reasons prevent a detachment of the public role in this matter, maintaining its state production through the courts, it is pertinent to advise that the State should provide this good in its entirety, but rather charge the litigants who will cover the amount of the service provided minus the proportional amount of the externalities generated. Only by putting a price on the justice inefficient litigation will be avoided and the system will be saved from its collapse. This, of course, is in no way opposed to the establishment of direct subsidies in favor of the people who lack the necessary resources to provide this good. In this way, the regressive nature of justice can be ended. Correa, supra note 38, at 37.
94. In the words of Lee, “the question that I am going to discuss with you deserves to be considered carefully, but skeptically. It should be considered carefully because it affects two of society’s most important problems: (1) the allocation of scarce public resources, and (2) an overburdened court system [. . .]. The question is this: Should the cost of running our nation’s courts be borne by those who use them, or by the taxpayers? Alternatively stated, should the public continue to pay for what is used by only a few of its members? Fortunately, the issue is not a single, indivisible whole. For some kinds of litigation, the only reason for not changing from public financing to user financing is that the public has been paying the bills for centuries.” Lee, supra note 55, at 272.
free market system.\textsuperscript{95} Arbitration is par excellence the mechanism for resolving disputes through which a property regime is created, since each party internalizes the costs that the resolution of the dispute implies.\textsuperscript{96} In this regard, Cantuarias claims that “arbitration is an effective mechanism to internalize the costs of justice.” Similarly, Professor Mac Lean has expressed that “the real economic advantage of arbitration for society is that it transfers the economic cost of litigation from the taxpayer to the user of the service.”\textsuperscript{97}

The best way to privatize contractual justice is by making arbitration the default jurisdiction.\textsuperscript{98} Through this measure, a property regime on contractual justice would be introduced in which each litigant would internalize the costs derived from the resolution of his disputes.

As explained by Peña:

The use of alternative mechanisms such as arbitration allows litigants to internalize the costs of litigation [...]. Faced with this characteristic of justice administration systems, it is necessary to institute mechanisms that allow each litigant to internalize a good part of its litigation costs. In this way not only a price structure is introduced into the litigation – allowing the person who values less the litigated good and provoking a net social gain – to abandon the dispute, but the regressive effects caused by this phenomenon are corrected. Although the coastal system can operate here as a corrective system, arbitration is also useful. Arbitration, as is obvious, more than a contract, technically speaking, is a privatization of justice that internalizes, in the participants of the conflict, the costs of litigation that otherwise will be diffused, with serious regressive effects, over all potential litigants.\textsuperscript{99} [emphasis added]

Likewise, if arbitration were the default jurisdiction, justice would be better served by fewer delays, and less rationing of justice. In the words of Cerney, “cases sent to arbitration are on a shorter timeline. Instead of being placed at the end of docket, they are submitted to readily available arbiters.”\textsuperscript{100}

\textsuperscript{95} Id. at 269-271.

\textsuperscript{96} In this respect, Drahozal has affirmed that “[u]nlike court litigation, which is subsidized by the government, the parties to arbitration proceedings must pay all the forum costs – that is, the arbitrator’s fees and any administrative costs. Ordinarily, forum costs in arbitration increase as the amount of the claim increases, unlike filing fees in court, which are a flat, low amount. Moreover, arbitration rules typically require the claimant to pay administrative costs and make a deposit of arbitrator’s fees when the claim is filed.” Christopher Drahozal, Arbitration Costs and Contingent Fee Contracts, 59 VAND. L. REV. 729, 734 (2006).

\textsuperscript{97} Robert Mac Lean, ¿Es visible y práctico privatizar la justicia?, 30 IUS ET VERITAS L. REV. 210, 215 (2005).

\textsuperscript{98} In this respect, Hay has affirmed that “although litigation in the court system obviously is not free to the parties, the public still bears a substantial amount of the costs of adjudication. Foremost among these costs 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.” 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).

\textsuperscript{99} Peña, supra note 67, at 126.

\textsuperscript{100} John Cerney, Default Arbitration Provisions: One Step to Making “Great Trade Deals”,
As suggested by Ware, a court’s resources are allocated according to parties’ willingness to wait. By contrast, under a default arbitration system, resources would be allocated according to willingness to pay. This will allow an authentic market to function and free competition to prevail. If parties had to pay more to use the court system, fewer would use it, and thus this measure would reduce the burden of the judiciary.

There are three additional externalities to mention. First, it is much more difficult for political power to influence a privatized dispute resolution system. The judiciary is much easier to capture. A default arbitration system would be more independent, less corrupt, and would give citizens greater certainty.

Second, by establishing arbitration as the default jurisdiction, citizens could more easily compare it with the efficiency of state justice. And, as was mentioned in an editorial of El Comercio, a horse runs faster when another is put next to it.

Third, by privatizing commercial dispute resolution, the judiciary can commit more resources to criminal or administrative controversies.

As explained by Cuniberti:

As far as the proposed model is concerned, two series of costs can be identified. 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.

Similarly, Edwards explains that, “by diverting private disputes to arbitration, federal and state courts may be able to expend more time and energy resolving difficult public law problems.”

If we consider that it is usually the symptoms that allow us to discover diseases, we realize that the simple facts of the courts being infested with a common tragedy and the free-rider problem suggest that a private good is being treated as a public one. If the market would be the default provider of commercial justice, none of these problems would have occurred.

By recognizing arbitration as the default jurisdiction, significant public funds are saved. As Bullard points out, “why spend our tax money on private problems?” There is no reason why the state should finance with public resources something that by nature is private. It is a waste, and, as Calabresi points out, in a world where resources are scarce, wasting them is unfair.

IV. RESPONSE TO THE CRITICS OF THE DEFAULT ARBITRATION

72 RORY BRADY ESSAY COMPETITION ARTICLES 51, 56 (2017).
102. Id. at 900.
104. Id.
105. Cuniberti, supra note 28, at 11-12.
107. Bullard, supra note 42.
108. This is a very famous phrase that Professor Calabresi repeats very often in his torts classes.
PROPOSAL

The proposal of recognizing arbitration as the default jurisdiction has not been exempt from criticism. Those who argue that state justice should be the default jurisdiction for the resolution of commercial disputes usually invoke five arguments: (i) A historical argument: state justice has always been the default jurisdiction for the resolution of commercial disputes; (ii) A distributive argument: the poor cannot afford the costs of an arbitration; (iii) A constitutional argument: default arbitration contravenes the principle of the “juge naturel” and denies parties access to the public court system; (iv) A democratic argument: arbitrators lack democratic legitimacy; and (v) An economic argument: the creation of law through case law is a public good, so it makes sense to recognize state justice as the default jurisdiction. We will now refute these five arguments:

A. Historical Argument: State Justice Has Always Been The Default Jurisdiction

This argument is fallacious. Justice and the state were not born together. Against popular belief, justice was not born as a public institution, but as a private one, and was later nationalized by the state. Thus, in the beginning, arbitration was the natural mechanism of dispute resolution. As explained by Stuyt, “arbitration is the oldest method for the peaceful settlement of international dispute.”

In fact, the original forms of justice were customary and were based on private mechanisms as the basis for the resolution of disputes. The first human groups and merchants during the middle ages found in the election by agreement of the arbitrator the best way to solve their problems. As Professor Benson has pointed out, “the foundation of commercial law was developed by the European merchant community and enforced through merchant courts.” Thus, contractual justice was born as private and was then nationalized.

Arbitration, like any social institution, was not an artificial and constructive invention of the state, but of merchants. As explained by Born, “if two merchants had a dispute, they submitted it to the guild.” This person was in charge of appointing

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110. In this regard, Professor Castillo Freyre has stated that “historically, arbitration has a very remote origin and can even be said to be the first way to administer justice.” Mario Castillo Freyre, Orígenes del arbitraje, ESTUDIO CASTILLO FREYRE (Feb. 8, 2019, 10:48 pm), http://www.castillofreyre.com/archivos/pdfs/articulos/origen_del_arbitraje.pdf. In the same sense, Cuniberti has affirmed that “Commercial disputes were not always decided by publicly funded courts. Quite to the contrary, for centuries, States were not involved in the resolution of commercial disputes, which were handled by business communities. An essential reason was that States did not care much for commercial law either. The rules governing business transactions were thus developed by business communities. Commercial law was essentially customary, and it was applied by merchant ‘courts’, which were established by business communities. States recognized the jurisdiction of such merchant courts, and the existence of mercantile customs, but States would not adjudicate directly commercial disputes.” CUNIBERTI, supra note 9, at 188-189.
112. Bullard, supra note 3, at 87.
113. Bullard, supra note 42, at 1.
114. BENSON, supra note 17, at 2.
115. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 30 (Kluwer Law of
merchants to resolve the cases applying the *lex mercatoria*. Thus, merchant courts were developed to resolve commercial disputes involving highly technical issues. Merchant judges were chosen from the merchant community.

At that time, arbitration was not at all like civil procedure. It was informal, flexible, and pragmatic. If one of the merchants refused to comply with the arbitral award, no enforcement action was necessary. The sanction was private and effective: ostracism. Nobody from the guild traded with the defaulter.

As explained by Rothbard:

The answer is that the merchants, in the middle ages and down to 1920, relied solely on ostracism and boycott by the other merchants in the area. In other words, should a merchant refuse to submit to arbitration or ignore a decision, the other merchants would publish this fact in the trade, and would refuse to deal with the recalcitrant merchant, bringing him quickly to heel.

In addition, Benson explains that:

A judgment under customary law is typically enforceable because of an effective threat of total ostracism by the community (e.g., the primitive tribe, the merchant community). Reciprocities between the groups, recognizing the high cost of refusal to accept good judgments, taken those who refuse such a judgment outside their support group and they become outcasts or ‘outlaws.’ The adjudicated solutions tend to be accepted due to fear of this severe boycott sanction.

As a result, it is a gross mistake to believe that the original forms of justice appeared with the state. For centuries, arbitration was the natural mechanism of dispute resolution. In my view, the nationalization of commercial justice constituted an authentic expropriation. Arbitration, as a phenomenon, was developed in a praxeological way by merchants. That is why it has been correctly said that arbitration

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116. Professor Born has stated that “a wide variety of regional and local forms of arbitration were used to resolve commercial and other disputes throughout the Middle Ages in Europe. A recurrent theme of this development was the use of arbitration by merchants in connection with merchant guilds, trade fairs, or other forms of commercial or professional organizations.” *Id.* at 30.

117. BENSON, supra note 17, at 34.

118. Bullard, supra note 3, at 86.

119. Wooldridge mentions one medieval example: “Merchants made their courts work simply by agreeing to abide by the results. The merchant who broke the understanding would not be sent to jail, to be sure, but neither would he long continue to be a merchant, for the compliance exacted by his fellows, and their power over his goods, proved if anything more effective than physical coercion. Take John of Homing, who made his living marketing wholesale quantities of fish. When John sold a lot of herring on the representation that it conformed to a three-barrel sample, but which, his fellow merchants found, was actually mixed with ‘sticklebacks and putrid herring,’ he made good the deficiency on pain of economic ostracism.” WILLIAM C. WOOLDRIDGE, UNCLE SAM THE MONOPOLY MAN 96 (Arlington House, 1970).

120. Bullard, supra note 3, at 86. On the other hand, Benson has explained that “strong incentives for both offenders and victims to submit to adjudication arise as a consequence of social ostracism or boycott sanctions, and legal change occurs through spontaneous evolution of customs and norms.” BENSON, supra note 17, at 36.

121. ROTHBARD, supra note 8, at 278.

122. BENSON, supra note 17, at 15.
is, in fact, the result of a spontaneous order.\footnote{123}

As explained by Youssef:

The shy contractual creature which only 50 years ago was struggling for recognition has emerged as a commercial justice that hosts the great majority of commercial disputes, and stands side-by-side in pacific coexistence with state justice. If the last three centuries were an era of nation-states and state justice, the last decades have inaugurated a historical revival of commercial arbitration at the image of the earlier days of glory of the institution in the trade fairs of middle ages Europe.\footnote{124}

In short, arbitration marks the origin of the administration of justice. Thus, justice has a private, historical origin. Far from constituting a delegation of the state for individuals, arbitration’s rebirth in the mid-nineties was partial privatization.\footnote{125}

As explained by Professor Castillo Freyre:

It is usually taken for granted, as if it were an absolute truth whose validity is beyond dispute, that justice, or rather, that the power to administer justice emanates from the people. However, this is just a theory that, with more than two hundred years old, aims to justify popular sovereignty over any other.\footnote{126}

Since arbitration was the rule at the beginning, we do not want to suggest that it must now also be the case. Such a historicist’s argument has no basis; the circumstances were absolutely different. I am simply trying to question the sacred paradigm making the state and justice inseparable. Private justice existed for centuries (many more centuries than state justice), and things worked very well. As Bullard has pointed out, we are just proposing to return justice to its origin.\footnote{127}

\footnote{123. In the words of Professor De Benito, how is it possible, if there is no central authority, if there is no systematic, universally accepted body of rules, principles, ways of interpreting the law? This is where the Austrian School comes in. For the Austrian School - as Sonsoles said - international arbitration is nothing more than an example of a spontaneous market order. As said by a popular French song that gathers Leoni: how wise is nature, which makes the rivers pass just below the bridges. Just the opposite of how it really is. We have to get used to stop thinking that the right is just the bridge that some engineer has built, because the right is mainly the river, which flows with all the impetus and irregularity of nature. Nobody could ever sit down and start designing international arbitration as we know it today: with the innumerable companies that include in their contracts arbitration clauses, the states themselves that submit themselves to arbitration in hundreds, thousands of bilateral agreements of reciprocal investment protection, all the institutions that administer arbitrations, the offices-lawyers’ offices or small boutiques-that run the cases, those gentlemen with silver temples who yearn for new appointments as arbitrators, the congresses where everyone distributes old and new cards, associations + 40 and -40... No one could, by definition, have the intelligence, knowledge, information necessary to assemble a similar shed from scratch.}


\footnote{124. YOUSSEF, \textit{supra} note 1, at 39.}
\footnote{125. Bullard, \textit{supra} note 109, at 19.}
\footnote{126. Castillo & Vásquez, \textit{supra} note 2, at 121.}
\footnote{127. Bullard, \textit{supra} note 42.}
B. Distributive Argument: The Poor Cannot Afford The Costs Of Arbitration

In the model of default arbitration, I propose, this would be an unpersuasive argument. Arbitration would be the default jurisdiction unless the claimant proves they do not have sufficient economic resources to assume the costs.\textsuperscript{128}

As explained by Lee:

The difference between free access to the courts by the poor and the non-poor may be more than a difference in degree. For a person or company of means, utilization of the courts involves simply an economic decision driven by net-worth-maximizing motives. That is, the decision will be controlled by an assessment whether the litigant’s net-worth will be greater or less if he goes to litigation. For the poor, by contrast, the cost of litigation would constitute an absolute barrier so that the indigent, unlike his or her wealthy neighbor, could not make the same rational judgment whether to litigate [. . .]. For obvious reasons, the case for the public funding of courtroom costs for poor people is stronger than for people of means.\textsuperscript{129}

I propose that if litigants have a commercial dispute, they must internalize the costs in full. There is no reason why litigants should be entitled to externalize these costs in society with strong regressive effects. There does not need to be a state subsidy for parties who can bear the cost of arbitration.\textsuperscript{130} The rule will be for litigants to internalize the costs, and they will have the burden of proving they do not have the financial resources to afford the costs of an arbitration. Therefore, claimants are only entitled to bring a suit before the judiciary when they can irrefutably demonstrate they do not have the financial resources to internalize the costs of their disputes.\textsuperscript{131}

\textsuperscript{128} In this regard, Cuniberti has stated that “there are excellent reasons to subsidize civil justice for certain kinds of cases, for instance those involving poor litigants, and those raising certain issues of particular societal importance. But government officials and scholars have long been puzzled by the scope of the subsidy which, in modern systems, makes access to the public court system free for all cases involving any kind of parties.” \textit{CUNIBERTI, supra} note 9, at 185-87.

\textsuperscript{129} Lee, \textit{supra} note 55, at 272-73.

\textsuperscript{130} In this sense, Ware has asked: Which disputing parties deserve subsidized adjudication and which should have to pay market rates for it? Our society’s failure to confront this important question allows all disputing parties to pursue the subsidy for themselves. The result is that parties who do not deserve the subsidy—parties who should be paying market rates for adjudication—are consuming public resources that would be better spent on parties who do deserve the subsidy. This problem can be reduced by confronting the question of which disputing parties deserve subsidized adjudication and which should have to pay market rates.

\textsuperscript{131} The foundation of our proposal is well explained by Correa:

Civil and commercial justice - which has represented, during the period between 1977 and 1995, on average, one third of the cases that enter our courts in the first instance - does not constitute a public good of those that justifies its full financing by the State charged to general income. It is only pertinent that the State contributes to its financing to the extent that it generates positive externalities on the community, but only in the amount sufficient to compensate for them. All this without prejudice to the State’s desire, no longer for efficiency reasons but distributive, to subsidize the poorest people so that they will be able to access justice services. The full state
Finally, with respect to the costs of the procedure, the English rule must prevail (i.e., the costs follow the event). This is the model that prevails in the Peruvian legal system so it must be preserved. These measures discourage conflicts in Peruvian society because everyone will be perfectly aware that if they initiate unnecessary lawsuits, they will have to internalize the costs.


Another objection to the default arbitration proposal is that it contravenes the principle of the “juge naturel,” and denies parties access to justice in the public court system. In support of this argument, one might rely on constitutional guarantees like due process, article 139 literal 3) of the Peruvian Political Constitution, and the judicial guarantees provided by the Inter-American Convention of Human Rights.

In this sense, Professor Youssef has argued that:

The “waiver of right” argument lies at the heart of the classical inevitability of consent in arbitration. Submitting to arbitration, viewed as a waiver of the constitutional right to one’s own court system, requires express and unequivocal consent. The principle of the juge naturel is beautifully sacralized in a large number of constitutional texts: “Nul ne peut être distraité de son juge naturel . . . .” Mandatory arbitration thus raises concerns of unconstitutionality. Constitutional courts in a number of jurisdictions have relied on natural judge arguments to invalidate mandatory arbitration regimes.

With respect to these objections, I have three comments. First, I do not believe juge naturel is a fundamental principle. In my view, juge naturel is a mechanism designed to protect the true fundamental right of an impartial adjudicator. It is perfectly conceivable to design a dispute resolution system in which the adjudicator is not predetermined by law. Nevertheless, a system in which the adjudicator lacks impartiality is simply intolerable. If it is admitted that the impartiality of the adjudicator is the authentic constitutional principle that must be protected, it is not difficult to conceive a system that dispenses with judges predetermined by law.
Second, the default arbitration proposal does not deny parties access to the public court system. The parties are entitled to access the public court system, if there is a clear agreement. Parties to commercial agreements would be entirely free to opt out of this default arbitration mechanism. The default arbitration proposal maximizes freedom and it does not deprive parties to access the public court system, nor the arbitration system. Arbitration simply recognizes as the default jurisdiction the option preferred by the majority, which is consistent with economic theory.

Furthermore, if businessmen want their disputes resolved neutrally, expertly, efficiently, and enforceable, the default arbitration proposal works as a nudge. If it is accepted that arbitration is the most desired mechanism for resolving commercial disputes, it is logical to influence the conduct and decision making of businessmen in order to assure them the best possible justice.137

Third, arbitration guarantees a much higher-quality justice. It is the default arbitration proposal that provides real access to justice, not illusory access to justice of the sort that one often encounters in many Peruvian courts.”138

D. Political Argument: Arbitrators Lack Democratic Legitimacy

As explained by Cuniberti, the weakness of the legitimacy of arbitrators seems to flow first and foremost from their lack of democratic legitimacy. Arbitrators are private individuals exercising a power which is normally entrusted to state officials acting with publicly accepted authority. Intuitively, this seems wrong. Democratic theory commands that power be only exercised with the consent of the governed. It is thus critical that the holders of any power, whether judicial or not, be appointed either directly or indirectly by the community of people where this power will be exercised.139

Regarding the alleged lack of democratic legitimacy of arbitrators, I have two comments:

First, unlike American judges who are appointed either directly or indirectly by the people, Peruvian judges are not elected, nor are they appointed by elected officials. In fact, they are typically recruited as career judges by way of examination like any other civil servant. Consequently, their legitimacy flows from their legal

137. “Nudge” is a concept which proposes positive reinforcement and indirect suggestions as ways to influence the behavior and decision making of groups or individuals.
139. In this regard, Cuniberti has stated that
Any theory seeking to extend the scope of arbitration beyond those disputes that the parties have actually agreed to resolve by way of arbitration raises the issue of the legitimacy of such mode of dispute resolution. Indeed, the essential reason why arbitration is perceived as a legitimate alternative to judicial litigation is because the parties have agreed to resort to arbitration. On the contrary, and maybe because arbitration has so much been presented as a creature of contract, if they have not so agreed, it seems hard to imagine how this mode of adjudication could be legitimate at all. The first objection which comes to mind against arbitration as a default mode for the resolution of inter-national commercial disputes is the lack of legitimacy of private arbitral tribunals. Intuitively, it seems that the legitimacy of national courts is so strong that any case for resorting to a mode of resolution of disputes regarded as ‘alternative’ in the absence of an actual agreement of the parties to that effect is bound to fail.

CUNIBERTI, supra note 9, at 67-68.
expertise.140 It would therefore be unfair to criticize arbitrators in the Peruvian legal system because they lack democratic legitimacy when judges also do not have such legitimacy.

Second, arbitrators have legitimacy, which derives from the parties’ designation. The appointment of arbitrators is made as a result of an act of freedom, and there is nothing that makes us more responsible than freedom. This explains why, at least in the Peruvian legal system, I believe the legitimacy of arbitrators is much stronger than that of judges.

Consequently, if the democratic legitimacy of judges in the United States derives from their direct or indirect appointment by members of the community, adjudicators directly appointed by the parties enjoy democratic legitimacy. It was Plato who affirmed that “the most sacred court is the one chosen by the parties.”

E. Economic Argument: The Creation of Law Through Case Law Is A Public Good So It Makes Sense To Recognize State Justice As The Default Jurisdiction

The assumption that the sole function of judges and arbitrators is to resolve conflicts is wrong. In fact, judges and arbitrators have two functions: jurisdictional and legislative. They serve a jurisdictional function when they resolve conflicts, but they also have a legislative function when they create law through their judgments.141

In this sense, Posner and Landes have argued that:

The most serious one is that the function of courts is not only to resolve private disputes. Courts do also serve public functions. The most important of them is certainly lawmaking. Courts interpret statutes, and, in their absence, lay down rules.142

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140. CUNIBERTI, supra note 9, at 96.

141. Yet, I have to accept that hidden in many seemingly private disputes are often complex issues of public law. As explained by Edwards, “obviously, many disputes cannot be easily classified as solely private disputes that implicate no constitutional or public law. Many commentators have tried to distinguish “public” and “private” disputes; but, in my view, no one has been fully successful in this effort. The problem is that hidden in many seemingly private disputes are often difficult issues of public law.” Edwards, supra note 106, at 668.

142. Posner and Landes have also stated:

A court system (public or private) produces two types of service. One is dispute resolution—determining whether a rule has been violated. The other is rule formulation—creating rules of law as a by-product of the dispute—settlement process. When a court resolves a dispute, its resolution, especially if embodied in a written opinion, provided information regarding the likely outcome of similar disputes in the future. This is the system of precedent which is so important in the Anglo-American legal system although less so in other legal systems. Richard Posner & William Landes, Adjudication as Private Good, 8 J. OF LEG. STUD. 235, 238 (1979).

Similarly, Silberman has stated:

Some critics, however, have raised a more fundamental challenge to ADR. They have argued that ADR subverts one of the basic purposes of adjudication – the public resolution of disputes and the public articulation of legal norms. For these critics, the resolution of disputes in a public forum, resulting in the making of law, is not just an incidental feature of adjudication, but one of its principal purposes. On this view, delegating the dispute resolution process to a privatize organization always comes at a cost, no matter how efficient or accurate the result. LINDA SILBERMAN ET. AL., CIVIL PROCEDURE, THEORY AND PRACTICE 1190 (2017).
Posner and Landes argue that the creation of law is a public good. They are right. When judges create law, their service is consumed by all of society. Predictability is a public good because it creates a climate of institutional trust that promotes investment, expedites dispute resolution, and reduces transaction costs. These benefits do not have rivalry in their consumption. Based on this, there are distinguished scholars who have argued that arbitration cannot be the default jurisdiction for commercial disputes because the creation of commercial law through case law constitutes a public good and, therefore, state justice must remain the default jurisdiction.143

In the Peruvian legal system, however, the Supreme Court is the only body that has the obligation to create law and predictability. While it is true that courts cannot deviate from the precedents created by the Supreme Court, creating law is not one of their functions. And, even in the hypothetical scenario in which creating laws were one of their functions, the externalities they would create would be more negative than positive because by rendering contradictory rulings every day, they would create uncertainty in the legal system.

As Correa explained:

Civil and commercial justice is now financed by general revenues, in terms of the cost of running the courts, in circumstances that not only do not constitute a public good, but also that the externalities that could eventually be generated are, in fact, very limited.144

The Peruvian legal system is different from the common law systems in which courts continually create law. In fact, the Peruvian legal system is, in my view, characterized by a lack of predictability. As a result, it is nonsense to argue that commercial justice cannot be privatized because Peruvian courts would stop creating law. This is an unpersuasive argument if we take into account that Peruvian courts contradict each other every day.

Further, it is wrong to argue that arbitrators do not create law. In fact, they create law all the time. Many specialists even argue that arbitrators create precedents; their arguments are very strong. Professor Weidemaier, for example, has stated that:

Do arbitrators create precedent? The claim that they do not recurs throughout the arbitration literature. Yet this claim conflicts with a small but growing body of evidence that, in some arbitration systems, arbitrators frequently cite to other arbitrators, claim to rely on past awards, and promote adjudicatory consistency as an

Finally, Cuniberti has stated:

Another public function of adjudication is to make the law accessible to the public. Public access to adjudication enables the public to learn about the law and about procedures. Public trials and published judgments teach the public that there are rules, and that such rules are enforced. This knowledge increases the awareness of the public of their rights, and thus results more often in the vindication of those rights. The actual reach of the legal system is extended. Moreover, as the state is able to clearly show that it uses its power in accordance with procedures and rules, it reinforces the legitimacy of such power.

CUNIBERTI, supra note 9, at 40.

143. This was told to me by several Professors of the Yale Law School like Owen Fiss, Daniel Markovits and Judith Resnik in several meetings.

144. Correa, supra note 38, at 35.
important system goal. Thus, although not every system of arbitration generates precedent, some clearly do.145

In the Peruvian legal system, arbitrators create much more law than judges.146 This is because arbitrators do not create law in the terms in which common law judges do it. Arbitrators are, in fact, the producers par excellence of lex mercatoria. The lex petrolea and lex constructionis, for example, have been created largely through arbitral awards. The arbitrators’ decisions determine whether the risks of a certain economic sector are allocated to one side of the table or the other. This may be why international arbitrators are the natural judges of the lex mercatoria.147

In that sense, Professor De Jesús has argued that:

It follows that arbitral jurisprudence is another crucial source of rules for the transnational petroleum industry. Formerly, the paradigm maintained that international arbitration was confidential but the reality embodied in new trends points towards transparency (particularly in investment treaty cases) and the impact of the communication technologies in this hyper-connected world demonstrates that arbitral awards, even awards that are supposed to remain confidential, are easily accessible in the petroleum society. These arbitral awards or relevant extracts are also published in law reviews of some of the foremost arbitral institutions like the ICC International Arbitration Court Bulletin, the ICSID Review – Foreign Investment Law Journal, as well as the Journal de droit international (Clunet).148

Courts, on the other hand, are not in a good place to create lex mercatoria. They do not have the ability to identify the applicable transnational rule because they do not have that technical or specialized knowledge to do so. This is one explanation as to why there is an absolute distrust of courts in Peru.

Arbitration is not a predictable system. However, in Peru arbitration is much more predictable than what happens in the courts. As Bullard explains, predictability in arbitration is not created from the top by a higher centralized body, but rather from below, by means of the decisions of arbitrants in the market.149 To the extent that arbitrators are paid by the parties, they have an incentive to create predictable rules since doing so ensures them work in the future.150 This explains why arbitrators tend

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146. Consequently, defending the importance of law making in commercial matters, constitutes, at the same time, one more reason to recognize arbitration as “default jurisdiction”.
147. Alfredo de Jesús, La autonomía del arbitraje comercial internacional a la hora de la constitucionalización del arbitraje en América Latina, 3 LIMA ARBITRATION 151, 167 (2008).
149. Bullard, supra note 3, at 79.
150. Cuniberti has stated:
ADR critics further argue that, even if access to arbitral awards was easy, it would not bring much, as arbitrators have neither the willingness, nor the ability to develop precedents. First, arbitrators would have no incentives to develop rules, as they would not be paid to perform this function, but solely to resolve disputes. Second, they would not have the appropriate training anyway. Finally, and in any case, even if they would and could, arbitration is too decentralized to offer the possibility to develop a
to create uniform rules spontaneously.\textsuperscript{151}

As Bullard explains:

Would the arbitrators still have incentives to generate good rules for others that will not pay them? The answer is affirmative. To deny it is to lose perspective that, as usually happens in the market, arbitration is a repeated game, in which the possibility of selling my services tomorrow depends on how I lent my services yesterday. The arbitrators, like any other person who sells something, want to continue selling their services in the future. Therefore, being recognized as the generator of a public asset ensures them work in the future.\textsuperscript{152}

consistent and precise body of rules. The two first arguments are contradicted by the reality of modern international commercial arbitration. It is true that the vast majority of international arbitration regimes do not require that arbitrators have legal training. It is also true that the service that the parties seek is the settlement of their private dispute. However, in practice, most international arbitrators are distinguished jurists. They are either experienced legal practitioners, or law professors. Their legal expertise and prestige is often very high. If one accepts that judges are not superheroes for the sole reason that they went through the appointing process of their country of origin, there is no reason to consider that arbitrators could not have the training and the skills to develop the law if they wanted to. However, would they be willing to do so? Again, the practice of international commercial arbitration is that they most often are, so much so that they are commonly urged not to forget that their main task is not to develop the law and to write legal dissertations, but to settle the dispute appropriately. At first sight, this may seem surprising. Arbitrators do not seem to need to engage into a difficult activity without being paid for it, and parties certainly do not have any reason to pay for an activity which will essentially benefit others, that is future litigants. How can this seemingly inefficient conduct be explained, then? Quite simply, by the need for arbitrators to show their skills. They do not necessarily wish to market themselves aggressively so as to be appointed in future arbitrations, but they certainly have a professional reputation that they wish to maintain, or to enhance. Additionally, it should be underlined that many international arbitrators, especially in the civil law world, are law professors. They thus have an inclination towards legal analysis, and may wish to use the arbitration as just another forum.

CUNIBERTI, \textit{supra} note 9, at 34-35.

\textsuperscript{151} As we have pointed out, in the system we propose, the risk of contradictory awards is eliminated. And if it were true that this risk continues to exist, a competitive system is spontaneously created in which the best awards are those that prevail. The bad ones are automatically discarded from the system. Cuniberti has stated:

In the last decade, the practice of international arbitration has offered evidence that arbitral tribunals can develop precedents. In several specialized fields, arbitral tribunals cite, examine and follow decisions made by prior tribunals. Some of the common features of these specialized arbitrations explain why this has been possible. First, most of the awards made by these tribunals are public. They are typically available on line shortly after being made, and are also published in legal journals. Second, the awards provide a detailed analysis of legal issues. In one particular field, foreign investment law, they commonly reach a hundred pages. Third, the vast majority of the arbitrators sitting in the tribunals are experienced legal academics or practitioners, and sometimes indeed very distinguished jurists. On these three accounts, these arbitral tribunals are not significantly less equipped than courts to make the law and develop precedents. Of course, if these tribunals had been unwilling and unable to develop precedents, they would not have done so. But they have.

Cuniberti, \textit{supra} note 28, at 36-37.

\textsuperscript{152} As explained by Bullard:

The same does not happen with ordinary judges. The number of cases, the volume of work and the level of income of a judge is not related to a repeated game or to the
Analyzing arbitral awards and judgments, shows that arbitrators cite other awards more frequently than courts cite other judgments. When parties prepare writs or memorials in arbitral procedures, most of the parties’ arguments are supported by arbitral awards of previous cases. Parties do not cite arbitral awards without any purpose. They cite them because arbitral tribunals pay attention to what other arbitral tribunals have decided in previous cases.

Professor Kaufmann-Kohler states that “it may be debatable whether arbitrators have a legal obligation to follow precedents –probably not– but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable.”

According to Professor Kaufmann-Kohler, the moral obligation to follow precedents arises out of the fact that rule creation through dispute settlement depends on the need for predictability: more consistency must be the goal, given that the credibility of the entire dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose.

Hence, the economic argument affirming that the creation of commercial law is a public good, rather than suggesting that state justice should be the default jurisdiction for commercial disputes, confirms exactly the opposite: Arbitration must be the default jurisdiction because arbitrators have proven to be the producers par excellence of lex mercatoria.

V. PROPOSAL: ARBITRATION SHOULD BE THE DEFAULT JURISDICTION

A. What Does Arbitration As Default Jurisdiction Imply?

Recognizing arbitration as the default jurisdiction implies removing the contractual nature of arbitration. I do not intend to reverse the rule and propose for arbitration to become an “opt out.” Under my model, the existence of an arbitration agreement is not implicitly presumed when two parties enter into a contract. Quite the contrary, arbitration would be the natural resolution mechanism of commercial disputes, which implies that arbitration loses its contractual foundation and becomes the default mechanism of dispute resolution.

By proposing that arbitration should be the default jurisdiction, I suggest that in the face of a commercial controversy, whether contractual, real estate or torts, a party can sue whomever he wants in an arbitration without having to prove the existence of consent even if respondent is not a party of the contract. Under the

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amount of work. The parties are subject to certain judges by a centralized and planned shift system that assigns work only because it is your turn. What incentive does a judge have in creating good and predictable rules? In principle none. The game will continue to be equally repetitive regardless of whether it solves well or solves badly, and what is worse, will continue to charge the same.

Bullard, supra note 3, at 79-80.


154. Id. at 375-376.

155. Cuniberti has stated that “in the model that I propose, however, arbitration loses its contractual foundation.” Cuniberti, supra note 28, at 6.

156. In this regard, Cuniberti has argued that “the 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.” Id. at 30.
proposed model, access to public courts would be contractual.

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 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.\(^\text{157}\)

By eliminating the contractual nature of arbitration, everything would be much simpler, generating a direct impact on the peaceful settlement of disputes.\(^\text{158}\)

By recognizing arbitration as the default jurisdiction, several positive externalities are created: (i) irresolvable discussions regarding arbitral consent would be overcome; (ii) one would no longer have to invent absolutely convoluted non-signatory theories to create consent; (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.

\section*{B. What Are the Required Modifications To Make Arbitration The Default Jurisdiction?}

The Arbitration Law, Legislative Decree 1071, would need to be amended in order to clearly establish that in case of any commercial controversy, arbitration would be the default jurisdiction.\(^\text{159}\)

We will also propose a constitutional reform because the Constitution seems to suggest that arbitration is an alternative mechanism. Any section of the Constitution that suggests this idea must be eliminated. The Peruvian Arbitration Law must address this issue.

In addition, there must be a residual system for the appointment of arbitrators. To this point, we propose that the Peruvian State conduct a bid to create an arbitral

\begin{itemize}
  \item \(^\text{157}\) Graves, \textit{supra} note 31, at 127.
  \item \(^\text{158}\) Cuniberti has stated:

[\textit{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. For instance, 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 [...] . It happens to be that many of such rules are widely perceived as limits to the efficacy of the arbitral process, and as such as necessary evils. One of the best examples is precisely the rule preventing joiners 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 will actually lead to an improvement of the arbitral process.]

\textit{CUNIBERTI, supra} note 9, at 156.

\item \(^\text{159}\) The articles that would need to be amended are the following: articles 2 subsection 1), 6, 13, 14, 15, 16, 41 and 63 of the Peruvian Arbitration Law.
\end{itemize}
institution with modern arbitration rules. This court of arbitration may have its headquarters in Lima, but it definitely has to be decentralized and have offices in all the provinces. My proposal is that this court of arbitration should be attached to the Ministry of Justice despite not depending on it.

Thus, in the absence of an agreement between the parties, the arbitration would be administered by such an arbitral institution and, by virtue of an express provision of the Peruvian Arbitration Law, it would have the competence to appoint the arbitrators and resolve challenges to arbitrators. If not, the scenario would be chaotic because it would be extremely costly for the parties to constitute the arbitral tribunal. The parties would need to ask a court to appoint the arbitrators, which is precisely what they tried to avoid from the beginning.

C. Benefits Of Recognizing Arbitration As The Default Jurisdiction

The following benefits will be derived directly from recognizing arbitration as the default jurisdiction:

a) All commercial disputes, including torts and property would be settled by arbitration.

b) Courts would be decongested because all commercial disputes would be resolved through arbitration.

c) Courts would no longer be infested with a tragedy of the commons, and the free-riding problem would disappear.

d) Litigants would internalize the costs of their disputes, as well as the social costs they create in society.

e) Public resources would be saved because commercial justice would no longer be subsidized by citizens’ taxes.

f) All the problems derived from the contractual foundation of arbitration would be eliminated, which would create a much more effective and consistent system.

g) There would no longer be a risk of contradictory and unenforceable awards.160

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

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160. In effect, Cuniberti has stated:

[I]f one takes the perspective of the state, however, the issue becomes very different. Arbitration is a private mode of dispute resolution, which is entirely funded by the litigants. As a result, it obviously saves public resources. Arbitral 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.

*Cuniberti*, *supra* note 9, at 25.

He continues 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.” *Id.* 185.
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.\(^{161}\)

The benefits generated by the proposal of arbitration as the default jurisdiction determines that its recognition in the Peruvian Arbitration Law should be implemented sooner rather than later. This is the real justice reform system that urges us. We do not need to create more courts, appoint new judges, expand their competences, or create new specialties. We need proposals that break this paradigm. It is my view that default arbitration is an outside-the-box proposal that would generate the disruptive change that is needed.

**CONCLUSION**

Today we are facing a passionate debate. We are questioning a paradigm that history has treated as dogma. The picture is clear: the questioning of the public nature of justice and the contractual foundation of arbitration will not cease. Over time it will be increasingly obvious that not all types of justice should be the competence of the state.

Once upon a time, arbitration was once perceived as an alternative dispute resolution mechanism. This notion does not stand today. Arbitration is no longer a mechanism of avoiding courts in resolving contract disputes. Rather, it is the natural mechanism for resolving commercial disputes.\(^{162}\)

The only fearsome objection to the default arbitration proposal for domestic disputes is the fear of the unknown. We all know that the nature of arbitration rests on consent. The default arbitration proposal is innovative – it breaks the mold, and we know that disruptive proposals usually produce fear and reticence. But, as emphasized by Gary Born, “we ought not forget that 100 years ago the New York Convention would have been regarded similarly, and that 40 years ago Bilateral Investment Treaties were as well. They too were bold innovations that were, in a sense, ahead of their times. But they proved remarkably successful and are now parts of the orthodox legal environment.”\(^{163}\)

The fact that the default arbitration proposal is new and unorthodox for domestic disputes does not mean that it lacks merit and cannot be achieved. So, following Born’s suggestions, let us put that fearsome objection away and think instead about what might be, what could be, and how to make it happen.\(^{164}\)

The fact that arbitration would stop being treated as an alternative dispute resolution mechanism to become the default jurisdiction is something proper to the future. We are witnessing a decline of the public. And the privatization of justice is simply an example of this phenomenon.\(^{165}\)

Winston Churchill famously observed of democracy that it was “the worst

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\(^{161}\) Graves, *supra* note 31, at 134.

\(^{162}\) *Id.* at 113.


\(^{164}\) *Id.*

\(^{165}\) Castillo Freyre & Vásquez, *supra* note 2, at 263-264.
form of government, except for all those others that have been tried.” I would suggest that default arbitration, with all its imperfections, is the worst system of resolving commercial disputes, except for all others.166