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AMERICAN AND OTHER NATIONAL VARIATIONS ON THE  
THEME OF INTERNATIONAL COMMERCIAL ARBITRATION

*Thomas E. Carbonneau\**

I. INTRODUCTION: THE NEEDS AND REALITIES OF INTERNATIONAL  
ADJUDICATION

Despite attempts at harmonization through treaty relations and State participation in multilateral organizations, the international arena is a composite of unsettled and unsettling structures. The volatility of global politics and discordant national perceptions of legitimate lawful conduct constitute a precarious, usually unsuitable, basis for an international rule of law. Domestic concepts of legality rarely serve as adequate instruments for molding the character of international relations.<sup>1</sup> The irreducible principle of national sovereignty

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<sup>1</sup> For example, efforts to articulate an agreed-upon definition of terrorism for extradition purposes have been confounded by disparate ideologies and other barriers that impede the elaboration of uniform standards. See *TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY* (R. Lillich ed. 1982), reviewed in 19 *TEX. INT'L L.J.* 250 (1984); J. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS* (1982); *Symposium On International Terrorism*, 8 *WHITTIER L. REV.* 681 (1986); W. WAUGH, *INTERNATIONAL TERRORISM: HOW NATIONS RESPOND TO TERRORISTS* (1982). See also Baker, *The Western European Legal Response to Terrorism*, 13 *BROOKLYN J. INT'L L.* 1 (1987).

See Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 *U.S.T.* 1641, *T.I.A.S.* No. 7192, 860 *U.N.T.S.* 105, reprinted in 10 *I.L.M.* 133 (1971); Montreal Convention for the Suppression of Unlawful

makes the world community resistant to the adoption of universal juridical standards<sup>2</sup> and consecrates the fragmentation of national

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Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, *reprinted in* 10 I.L.M. 1151 (1971); United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Dec. 14, 1973, G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30), at 146, U.N. Doc. A/9030 (1974), *reprinted in* 68 AM. J. INT'L L. 383 (1974); European Convention on the Suppression of Terrorism, *opened for signature*, Jan. 27, 1977, Europ. T.S. No. 90, *reprinted in* 15 I.L.M. 1272 (1976).

These conventions attempt to deal with the problem of excluding terroristic acts from the purview of the political offense exception by listing specific offenses as extraditable crimes not subject to any exception. For a discussion of these conventions and problems posed by extradition and terrorist acts in the international community, see INTERNATIONAL TERRORISM AND POLITICAL CRIMES (M.C. Bassiouni ed. 1973); INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni ed. 1986); M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974); M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE (2d ed. 1987).

<sup>2</sup> The problems that attend international judicial assistance and cooperation illustrate the lack of cohesion and uniformity. For a discussion of this topic, see generally, Kitchen, *A Bibliography of Transnational Litigation in Socialist Countries: Discovery, Evidence, and Enforcement of Foreign Judgments*, 21 TEX. INT'L L.J. 383 (1986); Gaw, *Bibliography: International Judicial Assistance*, 18 INT'L LAW. 555 (1984); Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986); O'Kane, *Obtaining Evidence Abroad*, 17 VAND. J. TRANSNAT'L L. 69 (1984); McKay, *Compelling Discovery and Disclosure in Transnational Litigation: A Selected Bibliography*, 16 N.Y.U. J. INT'L L. & POL. 1217 (1984); Note, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. §1782, for Use in a Foreign or International Tribunal*, 5 B.C. INT'L & COMP. L. REV. 175 (1982); Note, *Reexamining the American Response to Judicial Assistance Among Nations: Suggestions for Improvement*, 7 ASILS INT'L L.J. 41 (1983); Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW. 575 (1982); Ristau, *Overview of International Judicial Assistance*, 18 INT'L LAW. 525 (1984); Smith, *Letters Rogatory - Compelling the Evidence of Witnesses in Canada*, 31 FED'N INS. COUNS. Q. 333 (1981); Sutherland, *The Use of the Letter of Request (or Letter Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad*, 31 INT'L & COMP. L.Q. 784 (1982); Von Mehren, *Discovery of Documentary and Other Evidence in a Foreign Country*, 77 AM. J. INT'L L. 896 (1983).

See also Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. For a comprehensive treatment of the Hague Evidence Convention, see Note, *Hague Evidence Convention: A Practical Guide to the Convention, United States Case Law, Convention-Sponsored Review Commissions (1978 and 1985), and Responses of Other Signatory Nations: With Digest of Cases and Bibliography*, 16 GA. J. INT'L & COMP. L. 73 (1986).

The goal of the Hague Evidence Convention is to achieve transnational uniformity in the critical areas of litigation, but disruptive political and juridical factors—although they can be balanced in some circumstances—are ever-present and remain

self-interest as the ultimate source of legality among nation-states.

The clash of sovereign interests amidst precarious political alignments, economic interdependencies, and geographical configurations creates special dispute resolution needs. Temporizing imprecision, diplomatic latitude, and the indeterminacy of equivocal dialogue are better suited than adjudication or its analogues to deal with confrontations among the Titans. Finality, as practiced in the domestic setting, is not the exclusive, or even the primary, objective of international dispute resolution. Legal adjudication is only one of the many avenues by which to approach international conflict resolution. Its principal role, in fact, is to act as an instrument of persuasion rather than coercion. Unlike a domestic judicial tribunal, the World Court<sup>3</sup> is but a symbol of what binding legal adjudication might yield in the determination of state-to-state conflicts. By its composition, jurisdictional mandate, and authorizing foundation, the Court and its pronouncements are merely part of a complex, essentially diplomatic calculus for resolving disputes. The legality of expropriations,<sup>4</sup>

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difficult to reconcile:

The Hague Evidence Convention was designed to permit cooperation among legal systems that in many situations reflect fundamentally different views about the role of courts in achieving justice and applying law. A principal goal was to ease the burden on litigants in common-law countries in procuring evidence located abroad. The Convention sought to establish a system for transnational evidence-gathering which was acceptable to the states parties and which would harmonize conflicting views about sovereignty and jurisdiction reflected in differing systems of civil procedure used by the members. The problems which the Convention addresses often flow from fundamentally different assumptions about the role of courts in the legal systems of many of its signatories.

Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 Vand. J. Transnat'l L. 239, 242 (1986) (footnote omitted).

<sup>3</sup> STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, done at San Francisco, June 26, 1945, entered into force for the United States, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993, 3 BEVANS 1153 reprinted in 1976 Y.B. U.N. 1052.

<sup>4</sup> See generally B. WESTON, R. FALK, & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 674-86 (1980). For a discussion of expropriations in state-to-state relations and the role of the national courts, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine held to prevent challenge of Cuban expropriation decree), rev'g 307 F.2d 845 (2d Cir. 1962). See also H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 691-728 (2d ed. 1976); Delson, *The Act of State Doctrine—Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82 (1972); Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1 (1961); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Lowenfeld, *Act of State and Department of State: First National City Bank v. Banco Nacional*

boundaries and fisheries claims,<sup>5</sup> acts of alleged political reprisal,<sup>6</sup> and the use of self-help devices<sup>7</sup> cannot be separated from the political interests of sovereign nations.

International conflicts also arise in more mixed circumstances, involving both governmental and private interests. In addition to the diplomatic espousal of claims by governments, the activity of global, stateless enterprises<sup>8</sup> can give rise to controversies between the host and other countries, the private enterprise, and citizens of various nations. The Bhopal<sup>9</sup> disaster is a telling illustration of the complexity of the dispute resolution problems that can arise in a public-private transnational setting. The alleged commission in India of an industrial toxic tort by a company with a worldwide corporate organization complicated the most elemental issues of adjudication.<sup>10</sup> From a dis-

*de Cuba*, 66 AM. J. INT'L L. 795 (1972). See generally Note, *International Arbitration and the Inapplicability of the Act of State Doctrine*, 14 N.Y.U. J. INT'L L. & POL. 65 (1981).

<sup>5</sup> See generally M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1987); Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STAN. L. REV. 1135 (1977); Nelson, *The Emerging New Law of the Sea*, 42 MOD. L. REV. 42 (1979).

<sup>6</sup> See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3. See also Recent Development, *International Adjudication: Embassy Seizure—United States v. Iran*, 1980 I.C.J. 3, 21 HARV. INT'L L.J. 748 (1980).

<sup>7</sup> For example, in the Entebbe raid, Israel arguably resorted to self-help in order to recover its nationals. For a discussion of the Entebbe raid, see Y. BEN-PORAT, E. HABER & Z. SCHIFF, *ENTEBBE RESCUE* (1977); F. BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 77-121 (1985); Y. RABIN, *THE RABIN MEMOIRS* 282-89 (1979).

<sup>8</sup> See generally EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT: MULTINATIONAL CODES AND CORPORATE CONDUCT (S. Rubin & G. Hufbauer eds. 1984); Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983 (1952); Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961). See also OECD Declaration on International Investment and Multinational Enterprises, 75 DEP'T STATE BULL. 83 (1976); A. SAFARIAN, *GOVERNMENTS AND MULTINATIONALS: POLICIES IN THE DEVELOPED COUNTRIES* (1983); Note, *Multinational Business Enterprises In Lesser Developed Countries: The Role of the United States Legal System*, 2 FLA. INT'L L.J. 69 (1986).

<sup>9</sup> See *The Bhopal Tragedy: Social and Legal Issues*, 20 TEX. INT'L L.J. 267 (1985).

<sup>10</sup> The incident gave rise to a question (among others) of jurisdiction to adjudicate: given its United States corporate headquarters, could Union Carbide be sued before a New York court for the calamities that took place in India? See, e.g., Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321 (1985). See also Maynard, *A Code of Conduct for Transnational Corporations*, 4 THE COMPANY LAW. 103

pute resolution perspective, Bhopal teaches that transnational cor-

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(1983); Note, *United States-Based Multinational Corporations Should be Tried in the United States for their Extraterritorial Toxic Torts*, 19 VAND. J. TRANSNAT'L L. 651 (1986); Tzouganatos, *Private International Law as a Means to Control the Multinational Enterprise*, 19 VAND. J. TRANSNAT'L L. 477 (1986).

The doctrine of *forum non conveniens* held sway. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India* in Dec. 1984, 634 F. Supp. 842, No. 21-38 (S.D.N.Y. 1986), *modified on other grounds*, 809 F.2d 195 (2d Cir. 1987):

This Court is firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability. Further, the Indian courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims.

The presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India.

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The administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case.

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Plaintiffs, including the Union of India, have argued that the courts of India are not up to the task of conducting the Bhopal litigation. They assert that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people.

The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.

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Therefore, the consolidated case is dismissed on the grounds of *forum non*

porate activity harbors the potential for confounding the usual scope

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*conveniens* . . . .

*Id.* at 866-67.

Subsequent judicial rulings in India demonstrated the adaptability of the Indian legal system to the complex proportions of this type of litigation. See *M.C. Mehta v. Union of India*, 1987 A.I.R. (S.C.) 1086.

Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognize the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in *Rylands v. Fletcher* as is developed in England recognizes certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprises must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

*Id.* at 1088.

While this ruling accommodates the tort aspects of the litigation, the prospect of unlimited liability could dissuade other foreign companies from investing in India. This likely consequence has led some Indian lawyers to speculate privately that subsequent foreign investors will be exempted from such liability at the outset of the transaction through negotiations with the government. In terms of law-making, the Bhopal litigation and its doctrine are then akin to a "one-off" contract—good only for this particular and highly publicized event.

of national political agendas and the regulatory capability of national legal processes. These hybrid public and private disputes can be as resistant to the civilizing influence of traditional juridical solutions and as paralyzing to world community interests as state-to-state political conflicts.

By its very nature, private international commercial activity also engenders disputes of a transnational character. These disputes are usually of a contractual variety and can involve both private parties and states that engage in transnational business ventures. International contracting arrangements present considerable risks. In particular, once contractual relations are disrupted by dispute, commercial activity in the world marketplace becomes vulnerable to the variegated rulings of national courts—to the absence of a specifically transnational, cohesive legal regulatory structure.<sup>11</sup>

An effective dispute resolution framework, however, is vital to the viability of these transactions. Where international politics demands the recourse to a panoply of non-judicial remedies in the event of conflict, international commercial ventures require a stable dispute resolution framework, capable of achieving finality and founded upon adjudicatory neutrality, expertise, and confidentiality. Given their domestic orientation, national courts often lack the expertise to decide international contract disputes knowledgeably. National court determinations are usually not fashioned to respond to the unique contours and dynamics of international business dealings. Domestic judges typically are preoccupied with legalistic choice-of-law and jurisdictional matters. Little, if any, consideration is ever given to whether

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<sup>11</sup> See generally D. WILSON, *INTERNATIONAL BUSINESS TRANSACTIONS* (2d ed. 1984); *Transnational Litigation*, 18 INT'L LAW. 522 (1984); von Mehren, *Transnational Litigation In American Courts: An Overview of Problems and Issues*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984* 1 (J. Moss ed. 1985).

The character of the parties and the nature of the transactions are themselves a source of difficulty. The differences between the parties, including those of nationality, language, and culture, can breed distrust and misunderstanding. Communicating the essential details of a business transaction through the veil of intermediaries can be both difficult and dangerous. The participation of lawyers from a plurality of legal backgrounds adds another level of complexity to negotiations and to the drafting of documents. International contracts are themselves special legal creations, requiring provisions that respond to the unique risks that attend transnational deals (e.g., controlling language, currency stabilization, gap-filling, and force majeure clauses). See generally G. DELAUME, *TRANSNATIONAL CONTRACTS, APPLICABLE LAW AND SETTLEMENT OF DISPUTES (A STUDY IN CONFLICT AVOIDANCE)* (multi-volume series).



the would-be governing law provides a suitable decisional basis for resolving private transnational conflicts.

Domestic fora, perhaps sensing that they lack the requisite systemic or jurisdictional authority, ordinarily make little or no attempt to discover a rule of law that corresponds to the nature of the dispute submitted for resolution. Whatever uniformity exists is often achieved in a decentralized, ad hoc, and indirect fashion. Simply stated, in a given jurisdiction, national legal provisions serve provisionally in the particular litigation as international rules of law. This sometimes leads to situations in which domestic laws gain an extraterritorial reach. While these laws may have considerable domestic currency, some jurisdictional and procedural concepts—for example, long-arm jurisdiction, due process of law, and discovery—do not necessarily have universal recognition or, even if they are recognized by most legal systems, may be interpreted or applied differently in various countries. Moreover, courts can be partial, even unwittingly, to the interests of their nationals; in any event, they are likely to share their nationals' perception of commercial practice and of the nature of contractual breach. Finally, the public and confrontational character of court proceedings can do considerable, perhaps irreparable, damage to the parties' commercial status and relationships.

Given the magnitude of the uncertainty with domestic judicial solutions, international merchants have looked to alternative means for settling their disputes—to mechanisms and processes based upon the self-empowering principle of party autonomy in contract. Rather than leave the selection of an appropriate forum and governing law to national court interpretation, commercial parties have provided for either or both in their agreement. The use of choice-of-forum-and-law clauses,<sup>12</sup> however, has a number of drawbacks. It assumes that the contracting parties will be aware or be made aware of, and want to address, these prospective problems and will be able to reach agreement on suitable contract language. It also assumes that national courts will give effect to such contractual provisions without modifying, reinterpreting, or objecting to them. Also, perhaps most importantly, these conflict-avoidance clauses can mitigate or resolve only some of the problems that accompany national court adjudication of transnational commercial disputes. They do not make courts any

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<sup>12</sup> See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See also Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 8 INT'L LAW. 83 (1974).

more sensitive to the particularities of these transactions or give them any better basis to act as international commercial tribunals. Inexpert, possibly biased domestic judicial fora, acting in public proceedings, could continue to dominate the available remedial process.<sup>13</sup>

Arbitral adjudication fulfills many of the dispute resolution needs of international merchants. It represents their use of the party autonomy principle to create an adjudicatory process that yields binding results which reflect the realities of commercial practice. Although arbitration is usually touted for its economical and expeditious character, its primary contribution to the adjudication of transnational commercial disputes resides in its provision of neutrality, privacy, and expertise in the rendition of rulings. In the context of the pragmatic dictates of commerce, international commercial arbitration symbolizes the full use of a self-empowering ethic in dispute resolution.

This article assesses the exemplary dispute resolution value and law-making capability of the international commercial arbitration process. By way of illustrative contrast, the discussion focuses initially upon state efforts under the Warsaw Convention to create a viable transnational regulatory framework dealing with the liability of air carriers for damages resulting from air transportation. The problems that attend the text and implementation of the Warsaw Convention stand in marked contrast to the development of a universal consensus surrounding the 1958 New York Arbitration Convention. The reception of the New York Convention and of arbitration generally in the statutory and decisional law of various national jurisdictions acts as

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<sup>13</sup> In light of these continuing difficulties, parties to international contracts could forego entirely the recourse to national judicial adjudication and rely upon self-help techniques or third-party agencies to resolve their contract disputes. Either at the contracting stage or when a dispute arises, they could agree to negotiate their differences and arrive at a mutually acceptable consensus as to what should be done. Agreeing that negotiated settlement is the sole remedy, however, may lock the parties into a scheme of dispute resolution that is ultimately unwanted or unwarranted. A binding provision for the exclusive remedy of negotiation could, by its time and cost, imperil the viability of the transaction. In the midst of conflict, unless the parties' representatives are particularly skilled, such a provision may not result in an acceptable resolution. Moreover, the circumstances of a dispute may make the process of negotiation of only limited value, addressing minor conflicts or acting as a precursor to litigation that determines which aspects of the dispute are intractable. Failing a negotiated accommodation of differences, the parties could provide for recourse to non-adjudicatory, but third-party-assisted alternatives, like conciliation or mediation. While such processes may be useful in resolving some differences, more substantial conflicts often require a process akin to judicial determinations, providing for adjudicated and binding results.

a foundation for elaborating a viable legal regime of truly transnational proportions. Under this regime, the concept of private international law ceases to function merely as a means of selecting a governing domestic law and becomes a purveyor of organic substantive rules. The activity of the United States Supreme Court in matters of transnational litigation lent credence to the establishment of such a regime. However, the Court's recent opinion in *Shearson/American Express Inc. v. McMahon* appears not only to damage the integrity of the domestic law on arbitration, but also to undermine the segregation of domestic and international policy on arbitration—previously, a critical feature of U.S. decisional law on transnational arbitration. The Court's adoption of a dangerously unrestricted concept of arbitration in domestic matters and the use of precedent from international cases to sustain that view undercuts the transnational import of prior rulings on international arbitration.

## II. THE WARSAW CONVENTION

The history of the Warsaw Convention<sup>14</sup> illustrates the potential ineffectiveness of transnational law-making by convention. The Warsaw

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<sup>14</sup> The Convention for the Unification of Certain Rules Relating to International Carriage by Air [hereinafter Warsaw Convention] resulted from international conferences held in Paris in 1925 and Warsaw in 1929 and the work of the interim Comité International Technique d'Experts Juridiques Aériens (CITEJA). The CITEJA resulted from the 1925 Paris Conference. The Warsaw Convention was signed on October 12, 1929 and is contained in 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934). Spain, Brazil, Yugoslavia, and Rumania were the first countries to ratify the Convention; France, Poland, and Latvia later ratified it on November 15, 1932. Great Britain and Italy ratified it the next day. The Warsaw Convention became effective on February 13, 1933. By the end of 1933, there were 12 high contracting parties, including most European states. Today, the Convention has more than one hundred signatories.

There are a number of secondary sources on the Convention. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) [hereinafter Lowenfeld & Mendelsohn] contains a most comprehensive discussion and analysis of the history of the Warsaw Convention from the 1929 Warsaw Conference until the Montreal Agreement of 1966. For a detailed account of the Convention's provisions and the various amendments of it (especially the 1955 Hague amendments), see R. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER* (1981) [hereinafter MANKIEWICZ]. See also 1 & 2 L. KREINDLER, *AVIATION ACCIDENT LAW* (1986).

On the Convention's conditions for liability, see, e.g., Comment, *Saks: A Clarification of the Warsaw Convention Passenger Liability Standards*, 16 U. MIAMI INTER-AM. L. REV. 539 (1985); Johnson & Minch, *The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System*, 52 J. AIR L. & COM.

Convention, signed in 1929 and ratified by the United States in 1934,

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93 (1986); Martin, *Intentional or Reckless Misconduct: From London to Bangkok and Back Again*, 8 ANN. AIR & SPACE L. 145 (1983); Note, *Up In The Air Without a Ticket: Interpretation and Revision of the Warsaw Convention*, 6 FORDHAM INT'L L.J. 332 (1983); Price, *Article 25? The Warsaw Convention Meaning of 'Recklessly'*, 8 AIR L. 171 (1983); Reukema, *Article 17 of the Warsaw Convention: An Accident is Required for Recovery*, 10 ANN. AIR & SPACE L. 191 (1985); Stanculescu, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lesion Corporelle*, 8 HASTINGS INT'L & COMP. L. REV. 339 (1985).

On the constitutional aspects of the Convention, see, e.g., Comment, *Warsaw Convention Liability Limitations: Constitutional Issues*, 6 NW. J. INT'L L. & BUS. 896 (1984); Monts, *Due Process, Equal Protection and the Right to Travel: Can Article 22 of The Warsaw Convention Stand Up To These Constitutional Foes?*, 49 J. AIR L. & COM. 907 (1984); Rowe, *After Bali: Can the Warsaw Convention Be Proven a Taking Under The Fifth Amendment?*, 49 J. AIR L. & COM. 947 (1984).

On the limits of liability and the use of the gold standard under the Convention, see, e.g., Achampong, *U.S. Courts and the Warsaw Convention: TWA v. Franklin Mint*, 20 J. WORLD TRADE L. 329 (1986); Albert, *Limitations on Air Carrier Liability: an Inadvertent Return to Common Law Principles*, 48 J. AIR L. & COM. 111 (1982); Barlow, *Article 22 of the Warsaw Convention: In a State of Limbo*, 8 AIR L. 2 (1983); Corrigan, *Air Cargo-Liability Limitations of the Warsaw Convention for Loss of Cargo are (Unenforceable) Enforceable in the United States of America*, 9 AIR L. 184 (1984); Note, *Aviation: Liability Limitations for Wrongful Death or Personal Injury - a Contemporary Analysis of the Warsaw System*, 10 BROOKLYN J. INT'L L. 381 (1984); Danziger, *Trans World Airlines, Inc. v. Franklin Mint: The Judiciary's Problematic Role in Treaty Interpretation*, 17 N.Y.U. J. INT'L L. & POL. 323 (1985); Fisher, *The Gold Issue: The Supreme Court Upholds the Limitations on Liability Established by the Warsaw Convention*, 28 TRIAL LAW. GUIDE 471 (1984); Kean, *Warsaw Convention: Limitation of Liability*, J. BUS. L. 77 (1984); Kreindler, *Franklin Mint*, 191 N.Y.L. J. 1 (1984); Larsen, *New Work in UNCITRAL on Stable, Inflation Proof Liability Limits*, 48 J. AIR L. & COM. 665 (1983); Leigh, *Treaties - Warsaw Convention - Conversion of Liability Limitations From Gold Standards to Dollars*, 77 AM. J. INT'L L. 320 (1983); Lyall, *Warsaw Relieved: Gold Reinstated—but . . . Application of Warsaw Convention to Air Transport to and From the United States*, 30 J. L. SOC. SCOTLAND 102(3) (1985); McGilchrist, *Carriage by Air - Limitation of Liability Under the Warsaw Convention - further developments in the U.S.*, LLOYDS MAR. & COM. L.Q. 308 (1983); Recent Development, 7 FORDHAM INT'L L.J. 592 (1984); Note, *Torts - Liability Limitations Under the Warsaw Convention - The Cargo Liability Limits of the Warsaw Convention Are Fully Enforceable At The Rate Of \$9.07 Per Pound*, 50 J. AIR L. & COM. 155 (1984); Recent Development, 11 SYRACUSE J. INT'L L. & COM. 651 (1984); Reukema, *No New Deal on Liability for International Flights*, 18 INT'L LAW. 983 (1984); Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653 (1980); Young, *Court Upholds Warsaw Convention Limits on Liability*, 70 A.B.A. J. 109 (1984).

On the various amendments to the Warsaw Convention, see, e.g., Cohen, *Montreal Protocol: the most recent attempt to modify the Warsaw Convention*, 8 AIR

represents a multi-state attempt to establish an international rule of law to regulate the liability of air carriers for the corporeal and material damages that result from the risks of air travel and transportation.<sup>15</sup> As the international air industry was becoming a reality in the mid-1920's, government attention focused upon the need to protect the nascent enterprise from the prospect of unlimited tort liability. The apprehension was that a single aircraft disaster or a series of such disasters could completely paralyze the industry's commercial viability, depriving all nations of the benefits of the new technology.<sup>16</sup>

The Convention's objective was to create a uniform regime of predictable legal rules—specifically, to limit prospective liability by establishing ceilings on the amount of recoverable damages.<sup>17</sup> In particular, the Convention's liability scheme applies “to all international carriage of persons, luggage, or goods performed by aircraft

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L. 146 (1983); Dubac & Doctor, *Legislative Developments Affecting the Aviation Industry 1981-82*, 48 J. AIR L. & COM. 263 (1983); Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. AIR L. & COM. 273 (1976); Kreindler, *Montreal Protocols: Moment of Truth*, 188 N.Y.L.J., at 1, col. 1 (Aug. 20, 1982); Kreindler, *Montreal Protocols Ready for Vote*, 189 N.Y.L.J., at 1, col. 1 (March 7, 1983); Leich, *The Montreal Protocol to the Warsaw Convention on International Carriage By Air*, 76 AM. J. INT'L L. 412 (1982); Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972).

<sup>15</sup> See Lowenfeld & Mendelsohn, *supra* note 14, at 502. See also Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANN. AIR & SPACE L. 151, 153 (1983) (describing in detail the movement of the United States toward ratification). Briefly, after the State Department conveyed its approval to the President, the Treaty was submitted to the Senate, which rendered its advice and consent by voice vote on June 15, 1934. The United States deposited an instrument of adherence on July 31, 1934, and the ratification was proclaimed 90 days later by the President. It is significant—in view of the later dissatisfaction and controversies—that the Senate consented to the treaty without debate, and that the executive branch took no part in the treaty's negotiation and drafting. The United States only sent an observer to the Warsaw Conference.

<sup>16</sup> This point was emphasized at the Warsaw Conference and is referred to in a number of works. See, e.g., Lowenfeld & Mendelsohn, *supra* note 14, at 499. See generally R. HORNER & D. LEGREZ, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW WARSAW MINUTES 1929 (1975) [hereinafter WARSAW MINUTES].

<sup>17</sup> This objective, often expressed at the Warsaw Conference, is noted by Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, *supra* note 14, at 658, and by the Second Circuit Court of Appeals in *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982) (*rev'd on other grounds*). See also WARSAW MINUTES, *supra* note 16.

for hire.”<sup>18</sup> The Convention adopts a two-pronged approach to the imposition of legal liability, reflecting an attempt to strike a somewhat precarious balance between protecting the air industry (the Convention’s foremost objective) and recognizing the consumer interest of passengers.

First, the Convention provides for a presumptive, ostensibly non-absolute, form of legal liability against air carriers.<sup>19</sup> A presumption of liability arises against the carrier when a passenger suffers bodily injury or death “if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”<sup>20</sup> The presumption of carrier liability appears to sound in negligence; however, it places a higher than reasonable duty of care upon the air carriers, a standard of conduct that is akin to the utmost care to which domestic common carriers are held in common-law jurisdictions.<sup>21</sup> Air carriers can avail

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<sup>18</sup> Warsaw Convention, art. 1(1). For determining the scope of the Convention, the term “international carriage” in article 1(1) is defined in article 1(2) as, any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there would be a break in the transportation or a transshipment, are situated within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that power is not a party to this Convention.

Transportation under an international postal convention is excluded by article 2 from the Warsaw system.

G. MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT* (1977) [hereinafter MILLER] notes that under article 1(1) the terms of the parties’ contract are crucial. MANKIEWICZ, *supra* note 14, at 28, discusses the different countries’ various interpretations of the term “high contracting party” in article 1(1). Transportation by several successive air carriers may be covered by the Convention if it is deemed to be “one undivided operation” under article 1(3). See MILLER, *supra* note 18, at 20-23.

<sup>19</sup> Articles 17 to 19 delineate the conditions for carrier liability under the Convention. They are discussed in detail by MANKIEWICZ, *supra* note 14, at pt. IV; MILLER, *supra* note 18, at chs. III, VI, VII, VIII, IX & XI.

<sup>20</sup> Warsaw Convention, article 17. For a discussion of the courts’ interpretation of “accident” (an important requirement in article 17), see, e.g., Comment, *Saks: A Clarification of the Warsaw Convention Passenger Liability Standards*, *supra* note 14, at 547; Reukema, *Article 17 of the Warsaw Convention: An Accident Is Required For Recovery*, *supra* note 14, at 191. Generally, “accident” is defined in *Warsaw v. Trans World Airlines* 442 F.Supp. 400, 412 (E.D. Pa. 1977), as, “an untoward event out of the ordinary triggered by some external event, in contrast to an occurrence which may come about under conditions of normal operation because of inherent weakness or disability.”

<sup>21</sup> See MANKIEWICZ, *supra* note 14, at 92. For a discussion of carrier liability at common law, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 180-81 (4th ed.

themselves of three defenses: They can rebut the presumption of liability by establishing that (1) "all necessary measures" were taken to avoid the damage; or (2) in the circumstances, such measures were impossible to undertake; or (3) the passenger was contributorily negligent.<sup>22</sup> The provision for carrier exculpation through victim fault supports the view that, despite its strict liability formulation, the form of liability contemplated by the Convention is based upon negligence.

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1971). Generally, at common law, the carrier is under a high standard of care but is not an insurer. Although liability is based on negligence, the doctrine of *res ipsa loquitur* can lessen the plaintiff's burden of proof. With regard to property damages, the carrier is subject to a high duty of care, and is generally considered an insurer (with certain exceptions). On the "conclusive presumption of negligence" which arises at common law once the plaintiff has established a *prima facie* case for damaged goods, see Albert, *Limitations on Air Carrier Liability: An Inadvertent Return to Common Law Principles*, *supra* note 14, at 129. For a comparison of that presumption to *res ipsa loquitur*, see Note, *Aviation: Liability Limitations For Wrongful Death or Personal Injury - A Contemporary Analysis Of The Warsaw System*, BROOKLYN J. INT'L L. 381, at 395.

For a discussion of the minimal advantage of the Warsaw Convention over the common-law system, see Davison & Solomon, *Air Carrier Liability Under Deregulation*, 49 J. AIR L. & COM. 31, 49-51 (1983).

<sup>22</sup> For discussion of the rebuttal provisions (articles 20 and 21), see MANKIEWICZ, *supra* note 14, at 99-109. Under article 20(1),

The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

The defense is available only after the cause of the accident or damage has been established. For a discussion of the drafting history and the American courts' initial construction of article 20(1), see MILLER, *supra* note 18, at 66, 161-62. There is a trend toward requiring only that reasonable measures have been taken.

Article 20(2) establishes a defense, with regard to the "carriage of goods and luggage"; it provides that the carrier is exonerated,

. . . if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

The courts seem to be more stringent with regard to injury to the person than to goods and baggage. See Davison & Solomon, *Air Carrier Liability Under Deregulation*, *supra* note 21, at 42.

Article 21 contains the contributory negligence provision. Under it, the carrier can be totally or partially exonerated by establishing that the injured victim caused or contributed to its injury. *Lex fori* determines the extent of the carrier's exoneration under article 21. The defense is not available if the carrier failed to observe required traffic document provisions contained in articles 3 (in relation to the passenger ticket), 4 (to the baggage check) and 8 (to the airway bill). The carrier's failure to observe such requirements makes it subject to unlimited liability in articles 3(2), 4(4), or 9. Accord MANKIEWICZ, *supra* note 14, at 79-80.

Second, the Convention contains limitation of liability provisions.<sup>23</sup> These provisions are the means by which the Convention achieves its protective objective in regard to carriers, and balances the weighing of the liability scheme. In the event of death or injury to a passenger, the carrier can be held liable only for a maximum amount of 125,000 francs (approximately \$8,300)—provided, of course, that the event takes place under the conditions specified in the Convention and defenses are unavailing.<sup>24</sup> Similar liability provisions apply to damage done to physical property (checked baggage, carry-on baggage, and cargo) transported by air carriers.<sup>25</sup> The Convention sets maximum carrier liability for checked baggage and cargo at 250 francs per kilogram, and for carry-on articles at a global figure of 5,000 francs. These limitation-of-liability provisions are inapplicable to the circumstances of a maloccurrence when the carrier fails to give proper notice of the Convention's applicability to the transportation in question, or when the carrier causes damage through willful misconduct.<sup>26</sup>

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<sup>23</sup> Warsaw Convention, art. 22. Any provision fixing a limit lower than that stipulated in article 22 is declared null and void by article 23. The limits in article 22 are stated in gold francs with a value corresponding to that of the 1929 French franc. For a discussion of the conversion problems, see, e.g., MANKIEWICZ, *supra* note 14, at 113-14.

<sup>24</sup> Warsaw Convention, art. 22(1). Article 22(1) permits the carrier and passenger to agree by special contract to a higher limit of liability. See MANKIEWICZ, *supra* note 14, at 110-11.

<sup>25</sup> Warsaw Convention, art. 22(2) & (3). This limit may be exceeded if, the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.

In such circumstances, the limit becomes the declared sum unless the carrier proves that sum exceeds "the actual value to the consignor at delivery". For discussion of the provisions pertaining to the transportation of cargo and registered baggage, see MANKIEWICZ, *supra* note 14, at 111-13. The limit for carry-on articles is contained in article 22(3).

<sup>26</sup> Articles 3(2), 4(4), 9, and 25 state the conditions for unlimited liability, and are discussed by MANKIEWICZ, *supra* note 14, at 67-87, 122-3; MILLER, *supra* note 18, at chs. V & XI. Under article 3(2), unlimited liability applies "if the carrier accepts a passenger without a passenger ticket having been delivered." MANKIEWICZ, *supra* note 14, at 72. Regarding baggage, liability becomes unlimited "if the carrier accepts luggage without a luggage ticket having been delivered" or if the baggage check lacks the required particulars contained in article 4(3)(d), (f), and (h), namely,

(d) the number of the passenger ticket;

(f) the number and weight of the packages;

(h) [a] statement that the carriage is subjected to the rules relating to liability established by this Convention.

Article 9 provides for unlimited liability, "[i]f the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not



In terms of transnational law-making, the Convention's methodological aim is of particular interest. In addressing the issues of legal doctrine likely to arise in a soon-to-be complex area of international activity, the Convention endeavored to elaborate synthetic legal answers to questions of transnational liability within a cohesive, unitary, and comprehensive regulatory framework. In this sense, the Convention's methodological scope was universal in character. While maintaining a basic respect for the distinctiveness of national legal systems, it attempted to overcome the potential diversity of legal regimes by creating a viable transnational framework for dealing with an activity essential to the organization of the world community. The Convention's attempt to establish a uniform juridical approach to the question of air carrier liability, however, eventually proved to be an ill-fated venture. Rather than act as a juridical instrument responding to an emerging, or codifying an already existing, international consensus, the Warsaw Convention attempted to generate such a consensus.

The Convention's focused practical design—to protect air carriers from potentially unlimited tort liability—rapidly became anachronistic, eventually conflicting directly with the development of tort and consumer protection law in most developed countries.<sup>27</sup> The provision for carrier protection at the expense of the consumer interest and in opposition to domestic liability regimes generated significant opposition and provoked both express and implied refusals to comply.<sup>28</sup>

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contain all the particulars set out in article 8(a) to (i) inclusive and (q).” See MANKIEWICZ, *supra* note 14, at 79. Under article 25, liability is unlimited if the damage is caused by the willful misconduct (or default that the court hearing the case considers equivalent to willful misconduct) of the carrier or his agent. When interpreting this provision, courts are generally reluctant to find willful misconduct when air navigation rules are violated. The ambiguous drafting history of article 25 has, however, caused problems of interpretation.

<sup>27</sup> See, e.g., De Vivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71, 139 (1983); Fisher, *The Gold Issue: The Supreme Court Upholds the Limitation on Liability Established by the Warsaw Convention*, *supra* note 14, at 479; Note, *Up In The Air Without A Ticket: Interpretation and Revision Of The Warsaw Convention*, *supra* note 14, at 342.

Fisher, *supra* note 14, at 481, emphasizes the inadequacy of the compensation available under the Convention. This feature of the Convention is generally contrary to the American tort law concern for compensation. The international credibility of the United States commitment to the Convention is therefore maintained at a high cost.

<sup>28</sup> Lowenfeld & Mendelsohn, *supra* note 14, discuss the hostility shown by the United States shortly after it ratified the Convention. The hostility came to a head when the United States deposited its notice of denunciation in 1966. Briefly, the ultimate threat

The attempt to elaborate a framework for private law adjudication among countries, in effect, fell short of the desired uniformity.

A number of technical problems of interpretation, ordinarily associated with legislation, also hindered the implementation of the Convention. First, the Convention's scope of application is difficult to ascertain. The text of the Convention is ambiguous as to what is meant by "international carriage"; its general language has made the concept subject to a number of varying definitions by national courts.<sup>29</sup> Second, it is not entirely clear what conditions must be satisfied in order to trigger the Convention's liability regime. For example, national courts have yet to provide a uniform definition for the physical operations envisaged by the phrase "operations of embarking or disembarking".<sup>30</sup> Moreover, questions exist concerning the exact

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of withdrawal was prevented by the 1966 Montreal Agreement (*see infra* note 39 and accompanying text). The hostility toward the Convention's liability system continues in the United States and other countries. Express refusals to comply with the Convention are seen in the lack of uniform ratification of the amendments. *See infra* note 39 and accompanying text. Implied refusals to comply are evidenced by court decisions circumventing the liability limits through the courts' determinations of whether notice was adequate or whether willful misconduct exists.

<sup>29</sup> The determination of scope is crucial to the Convention's aim of creating a uniform regime of predictable legal rules. The greater the scope left to national law in determining liability, the less opportunity there is for achieving transnational uniformity. Generally, when establishing the Convention's scope, problems have been encountered with the terms "international transportation" in article 1(1), and "the operations of embarking or disembarking" in article 17.

In regard to the term "international carriage", the discussion in *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982) is relevant. There, the court focused on whether the passenger (*Stratis*) "had reason to know his overall flight was international." 682 F.2d at 412. *Stratis* was a discharged Greek seaman being repatriated as required by Greek and United States immigration law on a Delta flight from Baton Rouge to New Orleans, Louisiana, on an Eastern flight from New Orleans to New York, and on an Olympic Airway's flight from New York to Athens. He had only a domestic ticket for his Delta and Eastern flights. The Eastern plane crashed on approach to New York, and *Stratis* was injured. Olympic Airway's New York city office had prepared pre-paid ticket advice—including notice of the Convention's application for the international segment of *Stratis*' journey. This information had been communicated by telephone to the Olympic Airway counter at the JFK international airport. The ticket made for *Stratis*' international travel at that airport, however, had not been issued or validly stamped. Nevertheless, the court of appeals (682 F.2d at 412) focused on whether *Stratis* "had reason to know his overall flight was international", and concluded, . . . a passenger such as *Stratis* must be presumed to know that his flight is international in nature and that the Convention limitations apply. *Id.*

*See Note, Up In The Air Without a Ticket, supra* note 14, at 352 (stating that this holding opens the door for a searching and complex judicial inquiry).

<sup>30</sup> The concept is discussed by MANKIEWICZ, *supra* note 14, at 149-54. *Day v. Trans*

meaning of the centrally important concept of adequate notice and delivery.<sup>31</sup> The concept refers to the air carriers' obligation to notify passengers of the Convention's applicability and its limitation of liability provisions. According to the theory of the Convention, delivery of adequate notice allows the passengers to make informed choices as to assumption of risk—to take out personal insurance against the possibility of greater loss or injury.<sup>32</sup> How is adequacy to be defined in both typical and uncharacteristic circumstances? What type of print will be deemed sufficient? Finally, debate exists as to what is intended by the presumption of negligence as a rule of liability and as to how that presumption might be rebutted in reference to specific circumstances.<sup>33</sup>

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World Airlines, 528 F.2d 31 (2d Cir. 1975), advances a test that has been followed and sometimes modified in subsequent cases. See, e.g., *Evangelinos v. TWA*, 550 F.2d 152 (3d Cir. 1977). *Evangelinos* has been subsequently distinguished. The *Day* test focuses on the accident's location, the activity in which the injured person was engaged, and the defendant airline's control of the injured person at the location of, and while engaged in the activity occurring at the time of, the accident. The *Day* court, however, noted the Warsaw delegates' concern for a flexible approach.

The Warsaw delegates' differing views on the meaning of this term are stated in *WARSAW MINUTES*, *supra* note 16. The divergence has led to differing judicial interpretations. For instance, French courts in the past considered article 17 to encompass "only operations which exposed the passenger to the risk of the air." *MANKIEWICZ*, *supra* note 14, at 149. *Mankiewicz* cites French cases holding that accidents on the apron before embarkation and after disembarkation are covered. *Id.* Generally, American and other courts have held that operations begin with the check-in, and cease once the passenger has ushered or collected his registered luggage. Today, hijacking and sabotage further complicate matters.

<sup>31</sup> For a specification of what constitutes adequate notice and delivery for passenger tickets, see article 3; for baggage checks, see article 4; and for airway bills, see article 8. *MILLER*, *supra* note 18, at 92-93, discerns a shift from formal compliance to considering how the carrier complied. A central case on the requirements of adequate notice and delivery is *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd* 390 U.S. 455 (1968). *Lisi* held that the delivery requirement of article 3 is meant to provide the passenger with sufficient notice to afford him a reasonable opportunity to protect himself against the Convention's limitation of liability. 370 F.2d at 512. For cases following *Lisi*, see *Albert*, *Limitations on Air Carrier Liability*, *supra* note 14, at 143 n.224. *MANKIEWICZ*, *supra* note 14, at 73, points out that the courts following *Lisi* "differ on the criteria of legibility, or otherwise, of the 'statements' in question." *Lisi* has been subsequently distinguished in the Second Circuit. For criticism of the *Lisi* rule, see *MANKIEWICZ*, *supra* note 14, at 75-76. *MILLER*, *supra* note 18, at 98, observes that what constitutes adequate notice and delivery varies according to whether one is dealing with the passenger or his cargo or baggage. Limitations of liability as to cargo are generally considered part of a commercial bargain not inequitably requiring restrictions, unlike liability limitations on passenger injury.

<sup>32</sup> See, e.g., *Lisi v. Alitalia*, *supra* note 31, at 52.

<sup>33</sup> See *MANKIEWICZ*, *supra* note 14, at 92; *MILLER*, *supra* note 18, at 64-69.

In addition to the usual problems of construction, the Warsaw Convention is beset by difficulties that arise specifically from its transnational character. The official text of the Convention is in French; the Convention's basic structure, its wording and concepts, are all embedded in an unmistakably civilian legal approach.<sup>34</sup> Confining the Convention to one legal tradition and language raises the problem of appropriately translating the technical language of the Convention, along with the civil-law tonality of its substance, for use by domestic courts in common-law jurisdictions. The difficulty of finding a suitable linguistic transposition of the French text of the Convention exacerbates the difficulty of achieving a uniform national court interpretation of the Convention's provisions.<sup>35</sup> For example, some national (primarily civil-law) courts hold that the basis for liability under the Convention is a contractual one, while courts in other jurisdictions (primarily common-law countries) maintain that the liability contemplated by the Convention is essentially one that sounds in tort.<sup>36</sup> This type of fundamental disagreement imperils the Convention's status as an instrument providing for a comprehensive system of governing law.

The regulatory effectiveness of the Warsaw Convention is also undermined by the continued efforts of some governments—most notably the United States—to modify its content, especially its limitation of liability provisions.<sup>37</sup> The most critical obstacle to the Convention's effective implementation is, in fact, national government and court dissatisfaction with the ceilings on liability. Indeed, there appears to be a mounting consensus, centering upon discontent with maximum recovery amounts, that the Convention is no longer necessary or useful. The airline industry, it is argued, has matured

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<sup>34</sup> On the civil law influence in the Convention, see MILLER, *supra* note 18, at 344-45.

<sup>35</sup> Problems of translation occur both in countries where the Convention is self-executing (as in Belgium, France, and the United States), and countries which require enactment of a statute or subordinate legislation to implement the Convention (as in the United Kingdom, the Netherlands, and Switzerland). See MANKIEWICZ, *supra* note 14, at 17-20. Generally, the problems encountered result from the influence of each country's judicial process, the ambiguity of the legislative history, the tendency of common-law judges to rely on the common-law approach and, more generally, of judges to rely upon municipal law as a point of reference, and on the different classifications of legal issues in the various systems. MILLER, *supra* note 18, at 339-49.

<sup>36</sup> See, e.g., McGilchrist, *Does the Warsaw Convention Govern Non-Contractual Liability?*, LLOYD'S MAR. & COM. L.Q. 685 (1983).

<sup>37</sup> See *infra* note 39 and accompanying text.

considerably since 1929. The evolution of the law of tort has taken a direction that is at odds with the Convention's policy imperative. Finally, the insurance industry is now sufficiently developed to enable it to provide coverage for air carriers at affordable rates.<sup>38</sup>

Attempts have been made to modify the Convention and adapt it to evolving juridical attitudes: since 1929, international meetings in the Hague, Guadalajara, Guatemala, and Montreal have given rise to amending documents.<sup>39</sup> The vicissitudes of international politics,

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<sup>38</sup> See *supra* note 27 and accompanying text for a discussion of discontent with the maximum recovery amounts.

<sup>39</sup> *Hague Protocol* [Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1955, 478 U.N.T.S. 371]: For commentary on the Hague Protocol, see MANKIEWICZ, *Hague Protocol to Amend the Warsaw Convention*, 5 AM. J. COMP. L. 78 (1956). By the summer of 1963, thirty states had deposited instruments of ratification. MANKIEWICZ, *supra* note 14, at 231-34. For the amendments made by the Hague Protocol to the Convention, see *id.*, at 199-229. These include a doubling of the liability limits, modification of the notice requirement for tickets and baggage, a revised article 25 containing a factual description to be proved for willful misconduct and unlimited liability, and provision for legal fees. Problems, however, have been encountered with the Hague Protocol—in particular with its inadequate liability limits (even with the lawyers' fees provision). See MILLER, *supra* note 18, at 183. Moreover, the United States did not ratify the Protocol, but only signed it on June 28, 1956.

*Guadalajara Convention* [The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, 1961]: [ICAO Doc. 8181] was signed at Guadalajara on September 18, 1961, and came into force on May 1, 1964. See N. MATTE, *TREATISE ON AIR-AERONAUTICAL LAW* 444-54, Appendix XII (1981). See also MANKIEWICZ, *supra* note 14, at 6-7. The Guadalajara Convention does not affect or modify liability limits, but has importance for jurisdiction and conflict of laws problems. It is mainly concerned with how the original and amended Convention apply to both the contracting and actual carrier.

On November 15, 1965, the United States deposited its note of denunciation of the Warsaw Convention. A working group was established to prepare for the February Montreal Conference. As the time for denunciation grew nearer, various proposals were made to pacify the United States. Finally, the Montreal Agreement was adopted and denunciation avoided. See L. KREINDLER, *AVIATION ACCIDENT LAW*, *supra* note 14, at § 12. The Montreal Agreement became effective on May 16, 1966; it applies to carriers going to, from, or via the United States. The Agreement increases the personal injury and death liability limits to \$75,000 (including legal fees) and to \$58,000 (excluding legal fees). It also provides for more detailed notice requirements and the creation of absolute liability. The improvements made by the Montreal Agreement are only of limited value and effectiveness. See *id.*

*The Guatemala City Protocol* [Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1971, ICAO Doc. 8932 (1971)]: The Guatemala Protocol essentially creates strict liability with an unbreakable limit: 1,500,000 gold francs (approximately \$100,000) for "the aggregate of" personal injury and death claims "however founded"; 62,500 gold francs

however, have prevented any of these texts from gaining universal ratification. As a result, the current regime for the transnational regulation of air carrier liability is in a state of chaos, with the United States government and courts acting as the principal sources of dissent.

### III. THE NEW YORK ARBITRATION CONVENTION

The history and current status of the Warsaw Convention contrast markedly with the genesis, evolution, and contemporary stature of the 1958 New York Arbitration Convention.<sup>40</sup> The latter reflects a much more successful experiment in transnational law-making; it

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(approximately \$4,150) for each passenger's delay; 15,000 gold francs (approximately \$1,000) for destruction, loss, delay, or damage to registered baggage. Strict liability, however, is not adopted for carriage of goods. For a comprehensive discussion of the Guatemala City Protocol of 1971, see Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, *supra* note 14.

*The Montreal Protocols* [ICAO Doc. 9145 (1975) (Protocol No. 1), ICAO Doc. 9146 (1975) (Protocol No. 2), ICAO Doc. 9147 (1975) (Protocol No. 3), ICAO Doc. 9148 (1975) (Protocol No. 4)]: For a comprehensive discussion of the Montreal Protocols, see Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, *supra* note 14.

<sup>40</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, *codified in* 9 U.S.C. §§ 201-08 (1970). For a comprehensive discussion of the Convention and of the various documents pertaining to it, see A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981), *reviewed in* 37 *ARB. J.* 61 [1982]; 18 *TEX. INT'L L.J.* 243 [1983]; 24 *VA. J. INT'L L.* 527 [1984]. *See also*, Aksen, *Application of the New York Convention by United States Courts*, 4 *Y.B. COM. ARB.* 341 (1979); Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 *AM. J. COMP. L.* 283 (1959); Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 *GA. J. INT'L & COMP. L.* 471 (1975); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 *YALE L.J.* 1049 (1961); Sanders, *Consolidated Commentary on Court Decisions on the New York Convention 1958*, 4 *Y.B. COM. ARB.* 341 (1979) and 6 *Y.B. COM. ARB.* 202 (1981); Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 *INT'L LAW.* 320 (1969). For a comprehensive bibliography, see A. VAN DEN BERG, *supra* at 440-50. *See generally* G. GAJA, *NEW YORK CONVENTION* (multi-volume series).

For a general discussion of international commercial arbitration, see Sanders, *Trends in the Field of International Commercial Arbitration*, 145 *REC. DES COURS* (Hague Academy Lectures) 205 (1975); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42 (1982). Accord Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 *BUS. LAW.* 1035 (1980); Rhodes & Sloan, *The Pitfalls of International Commercial Arbitration*, 17 *VAND. J. TRANSNAT'L L.* 19 (1984).

symbolizes a productive attempt to achieve a viable transnational rule of law through the unification of private law.

Like the Warsaw Convention, the New York Arbitration Convention was intended to act as a universal charter;<sup>41</sup> its provisions were meant to articulate a workable, agreed-upon juridical framework for regulating national legal conduct in an area of international activity. Unlike the Warsaw Convention, however, the New York Arbitration Convention embodied the tenets of an already existing and still emerging international consensus. While the New York Convention undoubtedly contributed to expanding the recognition of the utility of international commercial arbitration, the force of its essential authority is based upon its codification of a previously established international attitude toward arbitration. Also, rather than attempt to regulate all aspects of the process, the New York Convention focused directly upon two vital elements of arbitral procedure (the validity of arbitration agreements and the enforcement of arbitral awards),<sup>42</sup> leaving a more comprehensive regulatory scheme to be implied from its express principles.

It is clear from the face of the New York Convention that its express objective is to unify national law in regard to the enforcement

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<sup>41</sup> See A. VAN DEN BERG, *supra* note 40, at 1-10.

<sup>42</sup> These two elements are the most critical factors in establishing the institutional autonomy of arbitral adjudication. The history of arbitration law in various countries illustrates that the former judicial hostility to arbitration was expressed primarily in the form of challenges to the validity of arbitration agreements. See Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39-56 (1984) [hereinafter *Arbitral Adjudication*].

In England, for example, the courts deemed arbitration agreements to be against public policy because they ousted the courts' jurisdiction and the guarantees of judicial justice. As a result, a party, anticipating an unfavorable award, could revoke its initial consent to arbitrate—claiming that the arbitration agreement was against public policy. American courts integrated the basic English judicial attitude into their case law, holding that an arbitration agreement was unenforceable through specific performance and could be revoked by either party before an award was rendered. Nineteenth century French decisional law concurred with these results; the French courts held the arbitral clause (the agreement to arbitrate future disputes) invalid under French domestic law. See *id.* at 39-40, n.12.

The history of the English supervision of the merits of arbitral awards illustrates how the autonomy of the arbitral process could be effectively challenged on another ground. See *id.* at 40. When the initial reference to arbitration could not be defeated, the results of the process could be strictly reviewed by courts. An adjudicatory process unable to provide binding determinations had little basis upon which to found its legitimacy.

of foreign arbitral awards and, more impliedly, to establish a transnational rule of law that favors the recourse to arbitral adjudication.<sup>43</sup> For example, article II(1) provides that the Contracting States shall recognize an agreement to submit disputes to arbitration. The purpose of this article is to eradicate systemic hostility to arbitration—hostility stemming from the view that arbitration amounts to a usurpation of judicial authority to adjudicate disputes. Consequently, by adhering to the Convention, Contracting States agree to recognize the arbitral process as a legitimate means of resolving disputes.<sup>44</sup> Under paragraph 3 of article II, a request to compel arbitration can be defeated only by establishing that the arbitration agreement was null and void, inoperative, or incapable of being performed.<sup>45</sup> Decisional interpretations of the Convention demonstrate that these defenses were meant to function as ordinary contract defenses to the enforcement of an agreement.<sup>46</sup> Arbitration agreements, therefore, are valid contractual arrangements and do not, per se, violate principles of public policy. They symbolize party recourse to contractual prerogatives—a recourse that can be defeated only by a deficiency in contractual intent, capacity, or language. Accordingly, courts in the Contracting States are under a legal imperative to enforce arbitration agreements, provided they meet the usual requirements of contractual validity.

The text of the Convention proposes a unified transnational rule of law not only in regard to the validity of arbitration agreements, but also concerning the enforcement of foreign arbitral awards.<sup>47</sup> The institutional autonomy and systemic viability of any non-judicial adjudicatory process are dependent upon both the legal system's recognition of the validity of agreements to enter into such processes and its willingness to give binding effect to the determinations of such parallel adjudicatory processes. The seven grounds in article V under which national courts may review arbitral awards for purposes of recognition and enforcement can be grouped into two broad categories. First, the procedural grounds for a denial of recognition and enforcement refer to essential contractual and procedural due process requirements. The parties must have had the contractual capacity to enter into an arbitration agreement; they must have been afforded

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<sup>43</sup> See A. VAN DEN BERG, *supra* note 40, at 28-43, reviewed in 24 VA. J. INT'L L. 527, 530-32 (1984).

<sup>44</sup> See A. VAN DEN BERG, *supra* note 40, at 121-232.

<sup>45</sup> See *id.* at 154-60.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* at 246-382.



proper notice of the proceeding; the arbitrators must not have exceeded the jurisdictional authority conferred upon them by the agreement; the composition and appointment of arbitrators must have been in conformity with the provisions of the agreement; and the award must have been binding in the jurisdiction in which it was rendered.<sup>48</sup>

Second, national courts can deny recognition and enforcement to a foreign arbitral award upon the basis of two broad public policy-oriented grounds.<sup>49</sup> The dispute which the award settles must have been arbitrable under the law of the requested jurisdiction; moreover, recognition and enforcement of the award must not be contrary to the requested jurisdiction's public policy. To some extent, the inarbitrability and public policy defenses to the recognition and enforcement of foreign arbitral awards overlap. As a general rule, disputes relating to the status and capacity of persons are not submissible to arbitration but rather fall exclusively within the ambit of the state's jurisdictional competence. Accordingly, an award relating to an inarbitrable subject matter would also be, if recognized and enforced, contrary to the public policy of the requested jurisdiction.

As with any other legislative document, the broad general language of these fundamental and other provisions of the New York Convention could be subject to forms of judicial construction in specific cases that undermine the Convention's underlying intent. As noted previously,<sup>50</sup> in the case of the Warsaw Convention, some American courts have rigorously interpreted the adequate notice requirement to defeat the application of the Convention's limitation of liability provisions. Similarly, national courts could have given a stringent interpretation to the New York Convention's article II requirement that arbitration agreements be in writing, thereby undoing agreements reached through less formal, albeit commonplace, practices. Courts could also have given wide effect to the article II contractual defenses to the validity of arbitration agreements, finding a plethora of circumstances for invalidating agreements. Moreover, as to the grounds for denying recognition and enforcement in article V, national courts could have given a highly legalistic content to the due process requirement or advanced an uncompromising view of their jurisdiction's public policy.

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<sup>48</sup> See *id.* at 275-358.

<sup>49</sup> See *id.* at 359-82.

<sup>50</sup> See *supra* notes 30-32 and accompanying text.

Actual decisional law outcomes<sup>51</sup> in signatory states reveal, however, that the vast majority of national courts interpret the Convention exclusively by reference to its underlying intent. The contrast with the various national domestic cases relating to the Warsaw Convention is marked, and evidences that the New York Convention has successfully developed a transnational juridical framework relating to arbitration—a framework characterized by the reference to emerging international commercial realities and the dynamic interplay between the content of an international instrument and the interpretive and enforcement powers of national courts.<sup>52</sup> The Convention's truly international stature and law-making capacity are built upon two factors: its passive and largely symbolic function of codifying an existing and emerging international consensus on arbitration, and its endorsement by national legal processes which seek to affirm and integrate the Convention's content and underlying intent, and thereby entrench the transnational recognition of and support for arbitration. The transnational law-making impact of the Convention is reflected, to varying degrees, in the domestic arbitration law of a number of jurisdictions.

#### IV. THE FRENCH LAW OF ARBITRATION

Compared with other countries, France was especially quick to ratify the New York Convention. The longstanding French domestic court support for international commercial arbitration<sup>53</sup> probably con-

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<sup>51</sup> See generally Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979); Sanders, *Consolidated Commentary on Court Decisions on the New York Convention 1958*, *supra* note 40; van den Berg, *Court Decisions On The New York Convention 1958*, 11 Y.B. COM. ARB. 399 (1986).

<sup>52</sup> But see A. VAN DEN BERG, *supra* note 40, at 28-43. *Accord* 24 VA. J. INT'L L. 527, 530-32 (1984).

<sup>53</sup> The basic reference on French arbitration law is J. ROBERT, *L'ARBITRAGE DROIT INTERNE DROIT INTERNATIONAL PRIVÉ* (5TH ED. 1983) (transposed into English as J. ROBERT & T. CARBONNEAU, *THE FRENCH LAW OF ARBITRATION* [1983]). See also M. BOISSESON, *LE DROIT FRANÇAIS DE L'ARBITRAGE* (1983); J.L. DELVOLVÉ, *ARBITRATION IN FRANCE. FRENCH LAW OF NATIONAL AND INTERNATIONAL ARBITRATION* (1982); B. MOREAU & T. BERNARD, *DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE* (1985); 2 H. SMIT & V. PECHOTA, *THE WORLD ARBITRATION REPORTER* 1641 (1986) [hereinafter H. SMIT & V. PECHOTA]; Déraïns, *National Reports: France*, 6 Y.B. COM. ARB. 1 (1981) and 7 Y.B. COM. ARB. 35 (1982); Seppala, *French Domestic Arbitration Law*, 16 INT'L LAW. 749 (1982).

The following section of the text relies heavily upon several of my previous studies on French arbitration law, in particular on *Arbitral Adjudication*, *supra* note 42.

tributed significantly to the alacrity of the French espousal of the Convention. At the time of the French ratification<sup>54</sup> in 1959, the French law of arbitration, while progressing toward consolidation, was in need of revision.<sup>55</sup> In particular, French law was characterized by outmoded provisions on domestic arbitration and an absence of any statutory regulation pertaining to international arbitration, although a body of judicial opinions attempted to remedy statutory deficiencies and uphold the validity of arbitral dispute resolution.

Until 1980, the French law of arbitration consisted of articles 1005 through 1026 and article 1028 of the Code of Civil Procedure (originally promulgated in 1806 and subsequently modified in 1975) and article 631 of the Code of Commerce. The Law of December 31, 1925 had modified article 631, legalizing the arbitral clause in certain specified commercial cases.<sup>56</sup> Since arbitration agreements were especially common in commercial cases, the amended content of article 631 eliminated much of the domestic judicial hostility toward arbitration. Given their early enactment, the provisions in the Code of Civil Procedure were ill-suited to the regulatory needs of modern arbitration practice. They contained gaps and referred to antiquated procedures that, in most cases, were supplemented or remedied by judicially-created rules.<sup>57</sup> Moreover, the domestic legislation did not directly regulate international commercial arbitration. Despite the judicial adaptation of these provisions in domestic arbitration litigation, their application by analogy to international arbitration cases could have impaired severely the viability of the international process. Rather than use domestic law as a servile foundation for articulating legal rules pertaining to international matters, the French courts undertook to identify the special needs of international commercial arbitration and fashion an accommodating decisional law.<sup>58</sup>

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For a discussion of the French domestic court support for international commercial arbitration, see Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1 (1980) [hereinafter *French Court Doctrine*].

<sup>54</sup> For a list of contracting states see 11 Y.B. COM. ARB. 395 (1986).

<sup>55</sup> See Carbonneau, *The Reform Of The French Procedural Law On Arbitration: An Analytical Commentary On The Decree of May 14, 1980*, 4 HASTINGS INT'L & COMP. L. REV. 273, 275-76 (1981) [hereinafter *French Procedural Reform*].

<sup>56</sup> In particular, disputes regarding the obligations and dealings among business persons, merchants, and bankers. C. COM. art. 631 (Daloz 1979-80). See Law of Dec. 31, 1925 [1926] SIREY LOIS ANNOT. 57-58 (Fr.). See also P. HERZOG, CIVIL PROCEDURE IN FRANCE 513, n.169 (1967).

<sup>57</sup> See *Arbitral Adjudication*, *supra* note 42, at 53-54.

<sup>58</sup> See *French Court Doctrine*, *supra* note 53, at 6-16.

For example, rather than merely transpose into international litigation the domestic provision prohibiting the French State from engaging in arbitration,<sup>59</sup> the courts held that the French State was bound by arbitration agreements included in private international contracts to which the State or its instrumentalities were parties.<sup>60</sup> Moreover, the courts confined considerably the reach of domestic public policy imperatives in matters of international commercial arbitration. In a number of significant rulings, the courts concluded that, for purposes of international adjudication, French public policy required only that arbitral proceedings guarantee the parties a fair opportunity to be heard and to present their case.<sup>61</sup> Additionally, unlike domestic awards, international or foreign arbitral awards did not have to be accompanied by a reasoned opinion to be enforceable.<sup>62</sup> The courts further held that arbitral awards, unlike court judgments, were subject only to a limited form of review for purposes of recognition and enforcement and that a valid arbitration agreement constituted a waiver of the French rules of exorbitant jurisdiction.<sup>63</sup> These court opinions and others like them demonstrated that the French courts had a keen perception of the systemic needs of international commercial arbitration, did not neglect opportunities to foster its growth, and afforded it a privileged status in the French legal order.

Some years following its ratification of the New York Arbitration Convention, France enacted twin legislative provisions regulating both

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<sup>59</sup> C. CIV. art. 2060 (Fr.). See Level, *Compromis d'Arbitrage*, in [1972] JURIS-CLASSEUR CIV. II arts. 2059-2061, at 4. See also *French Court Doctrine*, supra note 53, at 29, 6-7. The recently-enacted law No. 86-972 of August 19, 1986, however, created a specific exception to article 2060, allowing the State and its entities to enter into arbitration agreements in contracts with foreign companies. See *New French Law Authorizes Arbitration For Government Entities*, 2 INT'L ARB. REP. 7 (Jan. 1987). See also Boisseson, *Intérogations Et Doutes Sur Une Evolution Législative: L'Article 9 De La Loi Du 19 aout 1986*, [1987] REV. ARB. 3.

<sup>60</sup> See Judgment of Apr. 10, 1957, Cours d'appel Ire, Paris, 85 J. DR. INT'L-CLUNET 1002 (1958); Judgment of May 2, 1966, Cass. civ. Ire, Fr., [1966] D.S. Jur. 575; Judgment of May 5, 1959, Cours d'appel Ire, Aix-en-Provence, 87 J. DR. INT'L-CLUNET 1077 (1960). See also Batiffol, *Arbitration Clauses Concluded Between French Government-Owned Enterprises and Foreign Private Parties*, 7 COLUM. J. TRANSNAT'L L. 32 (1968); *French Court Doctrine*, supra note 53, at 29-30.

<sup>61</sup> See Judgment of May 18, 1971, Cass. civ. Ire, Fr., 99 J. DR. INT'L-CLUNET 62 (1972); Judgment of June 14, 1960, Cass. civ. Ire, Fr., 49 REV. CRIT. DR. INT'L PR. 393 (1960); Judgment of June 30, 1976, Cass. civ. Ire, Fr., [1977] REV. ARB. 135. See also *French Court Doctrine*, supra note 53, at 36-40.

<sup>62</sup> See *French Court Doctrine*, supra note 53, at 37-38.

<sup>63</sup> See *id.* at 20-23.

the domestic and international arbitral processes. This legislation reflects a formal statutory consolidation of the French law of arbitration. The Decree of May 14, 1980 repealed the antiquated provisions of the Code of Civil Procedure and replaced them with some 50 new articles.<sup>64</sup> The 1980 Decree restructured the body of applicable law into a more coherent and intelligible whole. Its content responds to a number of critical questions that were left unanswered by the former legislation, most notably, whether arbitral tribunals could themselves rule upon jurisdictional challenges and how great a role court supervision should play in arbitral proceedings. The Decree also implicitly confers a new legal status upon the arbitral clause and reorganizes the recourse that can be had against arbitral awards.

As a general rule, the new legislative text remedied many of the uncertainties that attended the application or interpretation of the previous legislation. It gave clarity of direction to the regulation of arbitration, and official systemic autonomy to the arbitral process. It aligned the arbitral proceeding with court actions—for example, giving arbitral awards *res judicata* effect once rendered. The principal originality of the Decree lies in the relationship that it established between the arbitral and judicial processes. Under the new French law, the courts are perceived as a complement to the arbitral process, providing the public force of law to a private contractual process where such intervention is necessary to the successful implementation of the process. The Decree's basic intent is unmistakable: it is designed to promote arbitration as a viable alternative dispute resolution process.

The legislation on domestic arbitration was followed by the Decree of May 12, 1981, dealing with matters of international arbitration.<sup>65</sup>

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<sup>64</sup> Decree No. 80-354 of May 14, 1980, [1980] J.O. 1238, reprinted in [1980] D.S.L. 207. See Delvolvé, *La réforme du droit de l'arbitrage: l'intervention du juge*, [1980] REV. ARB. 607; Loussouarn, *La réforme du droit de l'arbitrage: les voies de recours*, [1980] REV. ARB. 671; Robert, *La législation nouvelle sur l'arbitrage*, [1980] D.S. Chronique No. 25, at 189. See also *French Procedural Reform*, supra note 55 (the following commentary refers in the main to this previous analysis).

<sup>65</sup> Decree No. 81-500 of May 12, 1981, [1981] J.O. 1398, reprinted in [1981] D.S.L. 222. See Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 116 [Sixth Sokol Colloquium] (T. Carbonneau ed. & contrib. 1984); Craig, Park & Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 13 LAW & POL'Y INT'L BUS. 727 (1981); Delaume, *International Arbitration under French Law: The Decree of May 12, 1981*, 37 ARB. J. 38 (1982); Goldman, *La*

The 1981 Decree represents the first French legislative enactment on international arbitration. The content of the Decree is in full accord with the express provisions and underlying intent of the 1958 New York Arbitration Convention; in fact, it is perhaps the most forceful national statement upholding the Convention's transnational law-making objective. For example, in article 1492, the 1981 Decree espouses a comprehensive definition of the concept of international arbitration, providing that an international arbitration is one that "implicates the interests of international commerce".<sup>66</sup> The absence of a choice-of-law reference to a nationality factor in establishing the definition, combined with the exclusive reference to the economic substance and impact of the transaction, impliedly recognizes a sphere of lawful transnational activity that is not anchored in the domestic statutory or decisional law base of any national legal system.<sup>67</sup>

Furthering this "anational" design, the 1981 Decree contemplates imposing only essential national law restraints upon the arbitral process and gives predominant importance to the principle of party autonomy. For instance, parties to an international arbitration agreement may choose whatever procedural and substantive law they wish to govern the arbitral proceeding. While the arbitral tribunal must render its ruling in accordance with the rules of law, the parties can modify the content of the rules they have designated as applicable. Tracking the realities of international practice, the Decree further provides that the tribunal must take commercial usages into account in its ruling. Finally, the parties can authorize the arbitral tribunal to rule *ex aequo et bono*, outside the boundaries of legal rules when a sense of equity so dictates.<sup>68</sup> Thus, in the vital area of designating a law to govern the merits and the procedure, the Decree, as it does in its other

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*Nouvelle Règlementation Française De L'Arbitrage International*, in THE ART OF ARBITRATION 153 (J. Schultsz & A. van den Berg eds. 1982); for further sources, see Audit, *supra* at 116-17 n.3. See also *Arbitral Adjudication*, *supra* note 42, at 77-79 (the following commentary refers in the main to this previous analysis).

<sup>66</sup> Decree No. 81-500 of May 12, 1981, *supra* note 65, at art. 1492: "An international arbitration is one which implicates the interests of international commerce." *Id.* Other European civil law jurisdictions, following the French example, have recently enacted very modern and advanced statutes on arbitration, in particular dealing with international commercial arbitration. See Budin, *La nouvelle loi suisse sur l'arbitrage international*, [1988] REV. ARB. 51 (1988); Schultsz, *Les nouvelles dispositions de la législation néerlandaise en matière d'arbitrage*, [1988] REV. ARB. 209 (1988). See also Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1989).

<sup>67</sup> See *Arbitral Adjudication*, *supra* note 42, at 78-79.

<sup>68</sup> See *id.* at 78.

provisions, maintains the contractual principle of party autonomy essentially unfettered.

The courts can intervene in the proceeding exclusively to assist the process, and judicial assistance can be provided only in fairly limited circumstances. For example, "when the arbitration takes place in France" or is governed by French procedural law, the district court in Paris can appoint arbitrators upon a party's request, "unless the agreement provides to the contrary. The Decree does not contemplate any other form of judicial assistance." If the agreement fails to provide for applicable procedural or substantive law, for instance, "the arbitral tribunal has the authority to make the determination." Generally, "the provision for limited judicial assistance attests to the French legislation's intent to give full recognition to the special characteristics of international commercial arbitration and provide regulations for a process that is 'anational' " in character.<sup>69</sup>

The Decree then sets forth a set of rules pertaining to the recognition and enforcement of foreign and international arbitral awards. These rules apply independently of the provisions of the New York Arbitration Convention, either when a party designates them as applicable or when the award falls outside the scope of the Convention. The rules are basically identical to their counterparts in the Convention, except that they are even less restrictive in nature. Recognition or enforcement may be denied only for technical violations of the arbitral tribunal's jurisdictional mandate and infringements of basic due process rights.<sup>70</sup>

The reception of the New York Arbitration Convention in the French legal order and the French legal system's evolving response to matters of domestic and international arbitration reveal that French law not only supports but also fosters the transnational rule of law that is embodied in the Convention. In addition, the French experience illustrates the basic procedure by which the international legal order can elaborate workable legal rules with authoritative content. The law-making authority of such rules arises initially because they codify and develop an existing (perhaps tacit) consensus among a majority of nations. Progressively, they acquire more formal legitimating sources (integration in an international convention, in national statutory and decisional laws, and in the *modus vivendi* of the affected communities). This multiple domestic adhesion is necessary to establish the

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<sup>69</sup> See *id.* at 78-79.

<sup>70</sup> See *id.* at 79.

international scope of the legal rule. Once such domestic recognition is achieved and consolidated, the internationally-recognized rule—using the support gained from national legal processes—develops a dynamism of its own and begins to operate in an independent fashion, transcending the jurisdictional perimeters of national legal processes and acquiring a truly transnational regulatory character. Having established this foundation, they eventually superceded the bounds of municipal law by their continued presence and development, and acquire an autonomous transnational stature.

Not all countries, however, embraced the rule of the New York Convention as quickly and as unqualifiedly as did France. Although the Convention can boast of an overwhelming number of adherents, its acceptance and impact were more gradual in other jurisdictions. The reluctance was in evidence even among nations that, in theory, should have been drawn to the essentially Western and Northern underpinnings of the international commercial arbitration process.

#### V. THE ENGLISH LAW

Even in its contemporary form, the English position on arbitration remains a less enthusiastic endorsement than its French counterpart. The United Kingdom acceded to the New York Convention in 1975.<sup>71</sup> In all likelihood, the belated accession reflected considerable doubts about the Convention's purpose and principle.

The development of the English law of arbitration<sup>72</sup> has been impeded by the longstanding English tradition of supervising arbitral awards through judicial review of the merits and, generally, the persistence of judicial and legislative distrust of arbitration.<sup>73</sup> While the ostensible purpose of the Arbitration Act of 1950 was to institute

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<sup>71</sup> The legislation implementing the Convention in England is The Arbitration Act of 1975, 1975, ch. 8, reprinted in 4 G. GAJA, *THE NEW YORK CONVENTION* 15.1 (1978-1980) and A. WALTON & M. VITORIA, *RUSSELL ON THE LAW OF ARBITRATION* 494-503 (20th ed. 1982).

<sup>72</sup> For general sources on the English law of arbitration, see E. LEE, *ENCYCLOPEDIA OF ARBITRATION LAW* (1984); M. MUSTILL & S. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* (1982); A. WALTON & M. VITORIA, *supra* note 71; Hunter, *Arbitration Procedure in England: Past, Present and Future*, 1 *ARB. INT'L* 82 (1985); Jones, *History of Commercial Arbitration in England and the United States*, in *INTERNATIONAL TRADE ARBITRATION* 127 (M. Domke ed. 1958); Steyn, *National Reports: England*, 8 *Y.B. COM. ARB.* 3 (1983); Steyn, *National Reports: England*, 1 *INT'L HANDBOOK ON COM. ARB. England-1* (1984); 2A H. SMIT & V. PECHOTA, *supra* note 53, at 2701-62.

<sup>73</sup> See *Arbitral Adjudication*, *supra* note 42, at 40-42.



a more liberal view of arbitration, recognizing it as a legitimate alternative adjudicatory procedure, the Act nonetheless provided for fairly extensive judicial intervention both in the arbitral proceeding and in regard to the award.<sup>74</sup> The Act adopted the "stated case" procedure, the principal mechanism for effecting judicial review of the legal content of arbitral awards.<sup>75</sup> The statutory procedure for review included both a "consultative case", applying to requests for judicial guidance on legal questions made during the arbitral proceeding, and "alternative final awards", applying to the arbitrator's statement of legal questions at the end of the proceeding.<sup>76</sup>

In effect, despite its stated intent, the Arbitration Act of 1950 embodied a continuing systemic distrust of arbitral adjudication, relegating it essentially to a fact-finding function in the process of adjudication. While an arbitral tribunal could effectively rule pursuant to a binding agreement, it was required to apply legal rules in much the same way a court of competent jurisdiction would have done. The English concept of adjudicatory public policy seemed to require determinations based upon "correct" legal reasoning and results. Questions of law were to be referred to the High Court to guarantee basic substantive uniformity between court rulings and arbitral awards. Because the award, upon review, was tantamount to a judicial determination, the parties' initial intent to refer the dispute to arbitration was, in effect, defeated. The parties' contractual stipulation providing for arbitration allowed them to gain only procedural flexibility in a perhaps less costly and more expeditious proceeding. Therefore, prior to 1979, the stated case procedure, which the parties could not waive by contract, provided for mandatory judicial review and appeal of arbitral proceedings on questions of law at either party's request and, thus, negated some of the primary benefits of arbitration.

The Arbitration Act of 1979 redefined judicial supervision of arbitral proceedings and awards in England and Wales.<sup>77</sup> The 1979 Act

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<sup>74</sup> Arbitration Act, 1950, 14 Geo. 6, ch. 27.

<sup>75</sup> See *Arbitral Adjudication*, *supra* note 42, at 42-44.

<sup>76</sup> See Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87, 92 (1980) [hereinafter Park, *Judicial Supervision*].

<sup>77</sup> Arbitration Act, 1979, ch. 42, reprinted in 5 Y.B. COM. ARB. 239-47 (1980). The secondary references on the 1979 Arbitration Act include: Abromson, *The English Arbitration Act of 1979: A Symbiotic Relationship between the Courts and Arbitration Tribunals*, 5 SUFFOLK TRANSNAT'L L.J. 7 (1980); Berggren, *Judicial Implementation of the United Kingdom Arbitration Act, 1979: Pioneer Shipping v.*

generally lessened the courts' supervisory authority. It repealed an entire section of the 1950 Act and, subject to certain exceptions and qualifications, abolished the common law jurisdiction of the High Court to set aside an award for a manifest error of fact or law. More significantly, the 1979 Act abolished the stated case procedure, replacing it with "a more limited right of appeal to the High Court."<sup>78</sup> With respect to international arbitration, the Act authorized exclusion agreements in non-domestic arbitrations, allowing the parties to limit judicial intervention by eliminating some of the High Court's supervisory powers. Under the Act, parties to an international or, more precisely, a non-domestic contract, have the right to eliminate judicial review of future disputes by inserting a stipulation into the principal contract precluding the courts from hearing appeals, requiring reasoned awards, or providing interlocutory clarification of questions of law. The exclusion agreement is applicable only to non-domestic arbitrations and is void in so-called "special category" contracts (involving shipping, insurance, and commodity contracts) that are governed by English law. Finally, exclusion agreements cannot be used to eliminate "the benefits of English *lex loci arbitri*", namely, the judicial assistance of the arbitral proceeding.<sup>79</sup>

Chronologically, the liberalization of the English law on arbitration follows relatively closely the English adherence to the New York

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*B.T.P. Tioxide ("The Nema")*, 24 HARV. INT'L L.J. 103 (1983); Donaldson, *Commercial Arbitration 1979 and After*, 11 INT'L BUS. LAW. 189 (1983); Lord Hacking, *The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979*, 14 INT'L LAW. 95 (1980); Lord Hacking, *Where We Are Now: Trends and Developments since the Arbitration Act [1979]*, 2 J. INT'L ARB. 7 (1985); Jarvin, *London as a Place for International Arbitration: Some Observations in Light of the Arbitration Act 1979 and the Bank Mellat v. Helleniki Techniki case*, 1 J. INT'L ARB. 59 (1984); Kerr, *The Arbitration Act 1979*, 43 MOD. L. REV. 45 (1980); Park, *Judicial Supervision*, *supra* note 76; Park, *The Influence of National Legal Systems on International Commercial Arbitration: Recent Developments in English Arbitration Law*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION*, *supra* note 65, at 80; Samuel, *The 1979 Arbitration Act Judicial Review of Arbitration Awards on the Merits in England*, 2 J. INT'L ARB. 53 (1985); Schmitthoff, *The United Kingdom Arbitration Act of 1979*, 5 Y.B. COM. ARB. 231 (1980); Shenton & Toland, *London as a Venue for International Arbitration: The Arbitration Act, 1979*, 12 L. & POL'Y INT'L BUS. 643 (1980); Smerdresman, *The Arbitration Act, 1979*, 11 J. MAR. L. & COM. 319 (1980); Thomas, *An Appraisal of the Arbitration Act 1979*, [1981] LLOYD'S MAR. & COM. L.Q. 199.

<sup>78</sup> See Park & Paulsson, *The Binding Force of International Arbitral Awards*, 23 VA. J. INT'L L. 253, 272-73 (1983). See also Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 40-41 (1983).

<sup>79</sup> See *Arbitral Adjudication*, *supra* note 42, at 44-45, 62-64.

Arbitration Convention. While the 1979 Act represents an attenuation of judicial supervision, its content is not free of ambiguity or lingering skepticism. The Act contains a rather narrow and formalistic definition of international arbitration, referring to such arbitrations as "non-domestic" arbitrations. Rather than define the concept of international arbitration (as does the French legislation) by reference to the economic content and impact of the transaction, this standard takes into account only the parties' nationalities and places of residence. While it is quite conceivable that parties residing in England or of English nationality could enter into a contract that has all the trappings of an international economic transaction, the 1979 Act denies to such parties the benefit of entering into a prearbitration exclusion agreement.

Moreover, the invalidity of exclusion agreements in "special category" contracts, despite the evident international character of many of these transactions even under the English definition, is a source of serious concern. Presumably, these types of transactions constitute a major part of the international business that goes through England. Even when English law governs these agreements, one wonders why, given their international commercial character, they should be singled out for possible substantive judicial supervision. Surely the objective of achieving uniform interpretation of English law is relevant only in the setting of domestic adjudication. Once English legal rules are applied outside the boundaries of the English legal system, they cease to have their special relevance to the domestic English legal order and assume an entirely different status. This provision for judicial review diminishes severely the achievements of the other, more liberal sections of the 1979 Act.

Unlike their French analogue, English legal developments pertaining to arbitration lend only qualified support to the transnational rule of law embodied in the provisions of the New York Arbitration Convention. The view that arbitral proceedings and rulings should conform to judicial standards still lingers in the domestic English statutory framework and taints the legitimacy of the arbitral process. "It is a view that continues to express fundamental distrust of the arbitral process, refuses to recognize its coming-of-age, and ultimately can rob international commerce of an effective and necessary dispute resolution mechanism."<sup>80</sup>

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<sup>80</sup> *Id.* at 64.

Although a balance needs to be struck between the judicial and arbitral processes and their competing needs and interests, primary recognition should be given to the international consensus that surrounds the private dispute resolution process. As the provisions of the New York Arbitration Convention illustrate, court supervision should be limited to the fundamental concerns of procedural fairness: the need to thwart the abusive exercise of arbitral authority and to protect the rights of third parties in the private proceeding between the contracting parties. While the provisions of the 1979 Act attempt to inaugurate a new age of arbitration in England, the success of that effort ultimately depends upon how the English courts implement and interpret the underlying conditions and restrictions of the new legislation, and also what meaning they ascribe to the status and content of the New York Convention.

Recent cases indicate that, as a result of the 1979 Act, the English decisional law has shifted from its former insistence on legal certainty to an emphasis upon promoting the finality of arbitral awards.<sup>81</sup> The prior attitude of allowing judicial review in virtually every case has been eliminated. In comparative terms, however, there is still a fairly large degree of judicial supervision in England. The purpose of the 1979 Act was not to create full arbitral autonomy, but rather to redress the imbalance between the institutional independence of arbitration and the would-be benefits derived from the legally accurate application of English commercial law.

## VI. THE REVISED CANADIAN LAW

Due in part to its juridical affinity with England, the position of the Canadian legal system on arbitration was, until recently, characterized by substantial misgivings about the legitimacy and utility of arbitration as an adjudicatory mechanism.<sup>82</sup> Canada's ratification

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<sup>81</sup> See *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* (The "Antaios") (No. 2), [1984] 2 Lloyd's Rep. 235; *B.T.P. Tioxide Ltd. v. Pioneer Shipping Ltd. and Armada Marine S.A.* (The "Nema"), [1981] 2 Lloyd's Rep. 239 (H.L.). See also Berggren, *supra* note 77; Thomas, *The Antaios: The Nema Guidelines Reconsidered*, [1985] J. Bus. L. 200.

<sup>82</sup> For a discussion of the prior status of the Canadian law on arbitration, see R. McLAREN & E. PALMER, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* (1982); Claxton, *Commercial Arbitration under Canadian Law*, 21 CAN. B. REV. 171 (1943); Guibault, *Les lois québécoises de conciliation et d'arbitrage*, 11 La Revue Du Barreau [REV. BAR.] 221 (1951); Kos-Rabcewicz-Zubowski, *Commercial Arbitration in Canada*, 1 Y.B. COM. ARB. 16 (1977); Nadelmann, *Enforcement of Foreign*

in 1986 of the New York Arbitration Convention,<sup>83</sup> accompanied by the national and provincial adoption of the new UNCITRAL model law on arbitration,<sup>84</sup> however, constituted a radical departure from that longstanding skepticism. These events indicate that the Canadian attitude toward arbitration is now substantially distanced from the historical and, to some extent, even from the contemporary English influence. Canada's willingness to participate in the overriding world consensus on arbitration appears to be unconditional.

Canada's previous reserved, almost apathetic, posture on arbitration arose from systemic, constitutional, and other factors. In terms of geo-political organization,<sup>85</sup> Canada is—like the United States—a federal system; it became a confederated union with the adoption of the British North American Act of 1867. Canada is comprised of thirteen jurisdictions: two territories, ten provinces, and the federal government. With the exception of Quebec which is a civil-law jurisdiction, the provinces and territories adhere to the principles of common-law juridical organization and procedures.<sup>86</sup>

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*Judgments in Canada*, 38 CAN. B. REV. 68 (1960); Pérrault, *Clause compromissoire et arbitrage*, 5 La Revue du Barreau [REV. BAR.] 74 (1945); 2 H. SMIT & V. PECHOTA, *supra* note 53, at 1143-1234; Verge, *De la souveraineté décisionnelle de l'arbitre*, 19 MCGILL L.J. 543 (1973).

<sup>83</sup> See An Act to Implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Bill C 107); Law on the United Nations Convention Concerning Foreign Arbitral Awards (Can. Stat. 1986, C. 21) (received Royal assent on June 17, 1986). In accordance with the federal government accession, all of Canada's provinces and territories enacted legislation implementing the Convention. See, e.g., Foreign Arbitral Awards Act, Bill 67, 1985 British Columbia, 33d Parl., 34 Eliz. II, B.C. Stat. 1986, c.14; An Act to Implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Bill 98, 1986 Ontario, 1st Sess. 33d Ont. Stat., 35 Eliz. II; An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to Adopt the Model Law on International Commercial Arbitration, Bill 83, 1986 Nova Scotia, 2d Sess., 54th G.A.N.S., 35 Eliz. II, enacted N.S. Stat. 1986, c.12; An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, Bill 91, 1986 Quebec, 1st Sess. 3d Leg., enacted Qué. Stat. 1986, c.73. See also Alberta, Alta. Stat. 1986, c.1-66; Manitoba, Man. Acts. 1986, c.32; New Brunswick, N.B. Acts. 1986, c.1-12.2; Prince Edward Island, P.E.I. Acts. 1986, c.14; Newfoundland, Nfld. Stat. 1986, c.45; Northwest Territories, N.W.T. Ord. 1986(1), c.6. Saskatchewan and the Yukon Territory, which have adopted legislation to give effect to the New York Convention, are in the process of considering legislation to give effect to the UNCITRAL Model Law.

<sup>84</sup> See An Act Relating to Commercial Arbitration, Bill C-108, 1986, 1st Sess., 33d Parl. 33-34-35 Eliz. II, enacted Can. Stat., 1986, c.22.

<sup>85</sup> See generally *Canada*, in U.S. STATE DEPT., COUNTRIES OF THE WORLD 131 (1974).

<sup>86</sup> See *id.*

Prior to the 1986 ratification of the New York Convention, there was no federal Canadian law of arbitration; each province and territory had its own arbitration act.<sup>87</sup> In the nine common-law provinces and two territories, the statutory law on arbitration was based upon the English concept of arbitration, dating back to the English Arbitration Act of 1899. This provincial legislation was relatively uniform and its salient provisions basically fostered the autonomy of arbitral adjudication—*e.g.*, the provincial statutes recognized the validity, irrevocability, and enforceability of arbitration agreements and their divesting impact upon judicial jurisdiction, they provided for judicial assistance of the arbitral proceeding, and they generally allowed for the enforceability of arbitral awards. The provincial statutes on arbitration, however, also incorporated the English practice of the stated case (also known as the special case) procedure.<sup>88</sup> As noted earlier,<sup>89</sup> by requiring arbitrators to refer questions of law to the courts, this procedure substantially undermined the incentive to have

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<sup>87</sup> See 2 H. SMIT & V. PECHOTA, *supra* note 53, at 1143, 1221. The provincial legislation was quite uniform. Typically, the parties could agree to submit either an existing or future dispute to arbitration. Such an agreement would have essentially the same effect as if the recourse to arbitration had been ordered by a court. See ONT. REV. STAT. ch. 25, § 4 (1970); ALTA. REV. STAT. ch. A-43, § 2 (1980); MAN. REV. STAT. ch. A-120, § 5 (1970); B.C. REV. STAT. ch. 18, § 3 (1979); N.B. REV. STAT. ch. A-10, § 5 (1973); Nfld. REV. STAT. ch. 187, § 178 (1970); N.W.T. REV. ORD. ch. A-4, § 5 (1980); N.S. REV. STAT. ch. 12, § 2 (1967); P.E.I. REV. STAT. ch. 12, § 4 (1974); SASK. STAT. ch. A-24, § 3 (1981).

Furthermore, the court could assist in the implementation of the arbitration proceedings by staying court proceedings, nominating an arbitrator, or supervising the incapacity of an arbitrator. See ALTA. REV. STAT. ch. A-43, §§ 3, 5, 11 (1980); B.C. REV. STAT. ch. 18, §§ 5, 6, 13 (1979); MAN. REV. STAT. ch. A-120, § 7 (1970); N.B. REV. STAT. ch. A-10, §§ 5, 7 (1973); Nfld. REV. STAT. ch. 187, §§ 179, 181 (1970); N.W.T. REV. ORD. ch. A-4, §§ 11, 12, 13 (1980); N.S. REV. STAT. ch. 12, §§ 3, 6, 18 (1967); ONT. REV. STAT. ch. 25, §§ 7, 12 (1980); P.E.I. REV. STAT. ch. A-14, §§ 6, 7 (1974); SASK. STAT. ch. A-25, §§ 5, 6, 10 (1981).

The enforcement of an award was obligatory; by leave of the court, an award could be enforced in the same manner as a judgment or order to the same effect. See Alberta § 12; British Columbia § 15; Manitoba § 24; New Brunswick § 18; Newfoundland § 187; Northwest Territories § 26; Nova Scotia § 3; Ontario § 13; Prince Edward Island § 13; Saskatchewan § 11. However, in four provinces, an appeal of the award was envisaged. See Manitoba § 32(1); Ontario § 16; Prince Edward Island § 21; Saskatchewan § 14.

<sup>88</sup> See J. Brierley, *International Trade Arbitration: The Canadian Viewpoint*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 826 (R. St. John MacDonald, G. Morris, & D. Johnston eds. 1974) [hereinafter Brierley, *The Canadian Viewpoint*].

<sup>89</sup> See *supra* notes 74-76 and accompanying text.

recourse to arbitration, reducing arbitration to a form of adjudicatory fact-finding.

Despite basic regulatory agreement among the common-law provinces, the Quebec law on arbitration,<sup>90</sup> relying upon the French Code of Civil Procedure as a model, deviated in some significant respects from the statutes in the other provinces. For example, under Quebec law, the agreement to arbitrate future disputes (the arbitral clause) was still of questionable legal validity, notwithstanding modern legislative reforms pertaining to arbitration. As a consequence, parties to an arbitral clause could be required to execute a submission once a dispute arose. Also, in conformity with French (pre-decree) provisions on arbitration, the Quebec Code of Civil Procedure authorized arbitrators to rule as *amiables compositeurs*—a form of equitable jurisdictional authority that allows arbitrators to disregard the rules of law in reaching a determination. With this French influence on the Quebec provisions on arbitration, they could not logically contain a procedure comparable to the special case proceeding that applied in the common-law provinces. Unlike English practice, the civil law concept of adjudicatory imperatives and arbitration did not require arbitral tribunals to reach outcomes that necessarily were legally correct. In somewhat contradictory fashion, however, the Quebec code did mandate that arbitrators, regardless of whether they ruled in equity or law, issue reasons with their awards. A feature of the French domestic law on arbitration, the requirement of reasoned awards had no equivalent in the provincial common-law legislation.<sup>91</sup>

Accordingly, not only did the Quebec law on arbitration differ from its counterpart in other provinces, but it was not entirely consistent in articulating a basic position on arbitration. While questioning the validity of the arbitral clause and mandating reasoned awards cast doubt upon the legitimacy of the process, the recognition of a flexible jurisdictional authority for arbitrators sounding in equity gave arbitration systemic autonomy. Finally, Quebec law (although it did not permit a review on the merits) was generally unclear about the role of judicial scrutiny in the enforcement of awards, did not distinguish effectively between foreign (or international) and domestic awards, and required judicial homologation of awards for purposes of enforcement.<sup>92</sup>

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<sup>90</sup> See C. PR. CIV. arts. 940-51, ch. 80 (1965), *as amended* ch. 63 (1970).

<sup>91</sup> See QUE. REV. STAT. ch. 25 § 948 (1977).

<sup>92</sup> See QUE. REV. STAT. ch. 25 § 950, 951 (1977).

The provinces' general reliance upon rather antiquated statutory models from parent legal systems and the classical dichotomy between common-law and civil-law legal regulation (as it related to arbitration) made the adoption of a uniform national Canadian law on arbitration, basically required by the adoption of the New York Convention,<sup>93</sup> difficult. These difficulties were accompanied—and perhaps partly generated—by apathetic responses to arbitration from both government and business sectors.<sup>94</sup> The lack of interest gave little reason to expect that the basic Canadian juridical concept of arbitration would be revised and provincial differences reconciled.

Beginning with the Geneva Convention and Protocol,<sup>95</sup> Canada failed to participate in four major multilateral conventions on arbitration.<sup>96</sup> Moreover, domestic experimentation with arbitration had resulted in failure.<sup>97</sup> For example, the Canadian-American Commercial Arbitration Commission [CACAC] was created in 1943 to lay the groundwork for Canadian-American business arbitration. Efforts under the CACAC to establish a form of institutional arbitration were unavailing. Moreover, the design of creating an arbitration program between the Vancouver Board of Trade and the Japanese Commercial Arbitration Association was never realized. These failed experiences, the business community's lack of interest in and demand for arbitration, and the seeming indifference of the federal government were supplemented by the legal community's skepticism about whether there was any need to deviate from traditional adjudicatory mechanisms and procedures, whether arbitrators could effectively dispense adjudicatory functions, and, ultimately, whether courts would enforce arbitral awards.<sup>98</sup>

The cardinal difficulty confronting the elaboration of a uniform Canadian national law on arbitration, however, resided in a much larger systemic consideration that reinforced these other barriers. In

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<sup>93</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 40, at art. II. See also VAN DEN BERG, *supra* note 40, at 123-25.

<sup>94</sup> See Castel, *Canada and International Arbitration*, 36 *ARB. J.* 5, 6-10 (1981).

<sup>95</sup> See BRIERLEY, *The Canadian Viewpoint*, *supra* note 88, at 834-35.

<sup>96</sup> These conventions are: The Geneva Protocol on Arbitration Clauses of 1923; The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927; the 1958 New York Arbitration Convention; and The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965.

<sup>97</sup> See BRIERLEY, *The Canadian Viewpoint*, *supra* note 88, at 831-32. See also, MORRIS, *The Problem of Uniform Arbitration Legislation in Canada*, 13 *ARB. J.* 103 (1958).

<sup>98</sup> See BRIERLEY, *The Canadian Viewpoint*, *supra* note 88, at 833-34.



systemic terms, the absence of a Canadian law on arbitration was attributable to the dictates of Canadian federalism that made provincial agreement to a uniform law constitutionally indispensable yet difficult of practical achievement.<sup>99</sup> The Canadian Constitution allocates power between the federal parliament and the provincial legislatures. As in the United States, this doctrine of separation of powers is fundamental to the Canadian concept of constitutional federalism:

The vital core of a federal constitution is the division of legislative powers between the central authority and the component states or provinces. This division represents the compromise between the forces which make a union and those which inhibit the formation of a closer union. It marks the limits of what can be done by common agreement and the extent to which the separate states must be permitted to differ and work out their own destinies.<sup>100</sup>

The Constitution gives the federal parliament power over the regulation of trade and commerce, transportation and communication, banking, currency, and customs; the provincial legislatures have authority over other areas, like property and civil rights in the province, the administration of justice, and procedure.<sup>101</sup> According to this enumeration and insofar as arbitration relates to interprovincial and international commercial and trading activities, arbitration could be deemed to be within the powers delegated to the federal parliament. Unlike their American analogues, however, Canadian courts generally have restricted the scope of the federal parliament's authority over interprovincial commerce by defining the latter term narrowly.<sup>102</sup> As a result, the accepted view in Canada is that the constitutional allocation of powers implies that the regulation of arbitration is a matter of contract and procedure, and therefore comes within the legislative competence of the provinces.<sup>103</sup> Arguments to the contrary are likely to be unavailing:

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<sup>99</sup> See P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 439-40 (2d ed. 1985). See also BRIERLEY, *The Canadian Viewpoint*, *supra* note 88, at 834-35.

<sup>100</sup> B. LASKINS, *CANADIAN CONSTITUTIONAL LAW* 3 (1951).

<sup>101</sup> See P. HOGG, *supra* note 99, at 29-30.

<sup>102</sup> See SMITH, *THE COMMERCE POWER IN CANADA AND THE UNITED STATES* (1963).

<sup>103</sup> See P. HOGG, *supra* note 99, at 440 (citing *Citizens' Ins. Co. v. Parson's*, 7 App. Cas. 96 [1881]). "Since the *Parsons Case*, it has been accepted that, in general, intraprovincial power, under 'property and civil rights in the province' (S 93 (13)) and the federal trade and commerce power is confined to (1) interprovincial or international trade and commerce, and (2) 'general' trade and commerce." See *id.*

The case for constitutional validity of a federal arbitration law under the trade and commerce rubric could therefore only rest on the proposition that the subject matter of arbitration transcends the bounds of provincial competence; that, in other words, the arbitration contract and award, and their enforcement, as adjuncts to trade and commerce both interprovincial and international, constitute regulation of trade and commerce rather than an invasion of an exclusive provincial field. To rest the argument on this ground is to affirm that the subject of commercial arbitration goes beyond the subjects of contract and/or procedure and touches upon commerce, such that federal authority can be seen to begin. This is a mode of reasoning that is unlikely to be followed. . . .<sup>104</sup>

Moreover, although the federal government has treaty-making power, it would lack essential constitutional authority over the subject matter of an international treaty on arbitration:

While the federal government is the sovereign authority constitutionally empowered to participate in the creation of a treaty with another state, and the only Canadian authority able to assume international obligations thereunder, it does not thereupon acquire the constitutional competence to execute that obligation if its subject matter is a provincial matter. . . . The only obligation that the Canadian federal authorities can assume and effectively discharge under a multilateral or bilateral convention on arbitration is, therefore, that of bringing to the attention of the appropriate provincial authorities that which is within their own competence with a view to the several provinces implementing the real substance thereof.<sup>105</sup>

Lacking constitutional authority, the federal government's only recourse—other than excluding Canada by default from participation in international commercial arbitration and impairing Canadian interests in international trade—was to undertake efforts to persuade the provincial legislatures of the need for and benefits of Canadian recognition of the New York Arbitration Convention. After the English accession in 1975, Canada was the only major Western country not to have ratified the Convention, which by then had nearly fifty adherents.<sup>106</sup> Without a knowledge of the Canadian federalism issue and its implications, it was difficult to understand why Canada, for all these years, had failed to undertake action that would have been

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<sup>104</sup> BRIERLEY, *The Canadian Viewpoint*, *supra* note 88, at 830.

<sup>105</sup> *Id.* at 835.

<sup>106</sup> See VAN DEN BERG, *supra* note 40, at 410 (Annex B).

in its best national self-interest. The English Arbitration Act of 1979, despite its guarded acceptance of arbitration, may have had some impact in coalescing forces at the various levels of Canadian government. Recent United States statutory and decisional law developments may also have had some bearing on the change of attitude.<sup>107</sup> Given the views of provincial autonomy in Canada and the intensity of political debate, achieving a consensus among all provinces may have been particularly arduous and painstaking, requiring years and the appropriate circumstances to initiate and complete. Or, more simply, the level of transnational acceptance of and developments in arbitration law may have been, finally, too overwhelming to disregard any longer. In any event, one or a combination of these factors dictated a sudden and dramatic reversal of the Canadian law on domestic and international arbitration.

On May 12, 1986, the Canadian government acceded to the New York Arbitration Convention, and, subsequently, all the Canadian provinces and territories enacted legislation implementing the Convention.<sup>108</sup> What is even more remarkable and attests to the dramatic character of the reversal is that, along with the ratification of the Convention, both the federal government and the provinces (with the exception of Saskatchewan) adopted the UNCITRAL model law on arbitration, making it, in effect, the Canadian national law on arbitration.<sup>109</sup> The model law's provisions are designed to provide a comprehensive regulatory framework for arbitration, one that reflects a liberal and supportive attitude toward arbitration and that fosters the uniform interpretation of the New York Convention.<sup>110</sup> The model

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<sup>107</sup> See notes 114-264 *infra* and accompanying text. See also Holtzman, *L'Arbitrage et les Tribunaux: Des Associés Dans un Système de Justice Internationale*, [1978] REV. ARB. 253; Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 255 (1983); Ribicoff, *Alternatives to Litigation: Their Application to International Business Disputes*, 38 ARB. J. 3, 5 (1983).

<sup>108</sup> See *supra* text accompanying notes 82-84.

<sup>109</sup> See I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* (1986). See also Böckstiegel, *The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL Rules*, 1 J. INT'L ARB. 223 (1984); Herrmann, *The UNCITRAL Model Law-Its Background, Salient Features and Purposes*, 1 ARB. INT'L 6 (1985); Hunter, *International Commercial Arbitrations: The UNCITRAL Model Law*, 12 INT'L BUS. LAW. 189 (1984); McNerney & Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. INT'L & COMP. L. REV. 47 (1986).

<sup>110</sup> See Herrmann, *UNCITRAL's Work Towards a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 537, 546-47 (1984).

law seeks to give arbitrating parties "maximum freedom to conduct the arbitration in accordance with their stated expectation. . . ." <sup>111</sup> According to a distinguished commentator, "[f]or countries without any settled and explicit law of arbitration, the adoption of the model without adaptation should provide a valuable legislative 'package' which will convert them into suitable venues for international arbitrations." <sup>112</sup> Nearly thirty years after the New York Convention was first opened for signature, Canada not only had ratified the Convention, but also transformed itself, nearly overnight, into a receptive forum for arbitration.

A number of commentators <sup>113</sup> have already singled out those national characteristics that recommend Canada as a venue for arbitration. For instance, Canada's geographic proximity to the United States might enable it to act as a forum for arbitrations between United States business interests and those from other nations. Canada is also mid-way between the East and the West. The ethnic diversity of its minority population and its distinctive life-style, it is argued, could make Canada a neutral forum for accommodating arbitrating parties from opposing social, economic, and political backgrounds. Also, Canada is not unfamiliar with international trade and commerce. Canada ranks among the top ten manufacturing countries of the world and is also a world leader in the volume of foreign trade. Finally, movement is under way to establish arbitration centers in British Columbia and Quebec, and there is some talk about a possible third Canadian arbitration center. <sup>114</sup>

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<sup>111</sup> Lucio, *The UNCITRAL Model Law on International Commercial Arbitration*, 17 U. MIAMI INTER-AM. L. REV. 313, 322 (1986).

<sup>112</sup> Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L.Q. 1, 16 (1985).

<sup>113</sup> See Alvarez, *La nouvelle législation canadienne sur l'arbitrage commercial international*, [1986] REV. ARB. 529 (1986); Chaisson, *Canada: No Man's Land No More*, 3 J. INT'L ARB. 67 (1986); Mendes, *Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration*, 3 J. INT'L ARB. 71 (1986). See also Brierley, *Une loi nouvelle pour le Québec en matière d'arbitrage*, 47 REV. BAR. 259 (1987) (English language version in 13 CAN. BUS. L.J. 58 [1987-88]). Chiasson & Lalonde, *Recent Canadian Legislation On Arbitration*, 2 ARB. INT'L 370 (1986); Comment, *Canadian-American Perspectives on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 CAN.-AM. L.J. 219 (1986).

<sup>114</sup> See PRICE WATERHOUSE, *DOING BUSINESS IN CANADA* 7 (1983); *Canada*, in U.S. STATE DEPT., *supra* note 85, at 136. See also Telephone interviews with Professors John Brierley (McGill University) and Leon Trakman (University of Dalhousie), (May 5, 1987). See generally *A Colloquy Alternative Dispute Resolution In International Trade And Business*, 40 ME. L. REV. 225-59 (1988).

It is true that Canada's political, economic, and cultural distinctiveness may allow it to become a major arbitration forum, especially in regard to the Pacific Rim and developing countries. The more permanent domestic consequences of the Canadian ratification, however, remain difficult to gauge. Federal and provincial courts have yet to interpret the new statutory law;<sup>115</sup> experience in other countries demonstrates that the judicial response to enabling legislation on arbitration is always of critical importance in evaluating that legislation's long-term effectiveness. The general disposition of the legal profession, still undetermined, will also be of significant importance. There does appear to be a revitalization of the business community's interest in arbitration; that interest may be rather fragile and short-lived, however, and could be directed exclusively to matters of international commercial arbitration where lucrative possibilities exist. The export of arbitration services (to remedy trade imbalances and invigorate sluggish national economies) has become an exceedingly competitive international business, in which a number of countries have a clear head-start.

The vital significance of the Canadian ratification lies elsewhere than in conjecture about the practical ramifications of its adoption of a developed statutory framework for arbitration. Canada's accession to the New York Convention not only represents a departure from dependence upon European arbitral models, but it is also an important indication of the continuing strength and development of the transnational consensus on arbitration as an extra-judicial means of resolving disputes. Given Canada's cultural and political diversity—its affinity to both developing and developed countries—its ratification of the New York Convention is a forceful symbol of the truly comprehensive appeal of the Convention in the divisive pluralism of the international community. The gradual reconsideration by Latin American countries of their attitude toward arbitration,<sup>116</sup> the in-

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<sup>115</sup> According to Professor Brierley, *Navigation Sonamar v. Algoma Steamships* is the first reported decision under the new Canadian arbitration regime and "is a promising indication of favourable judicial attitudes". See Brierley, *Canadian Acceptance of International Commercial Arbitration*, 40 ME. L. REV. 287, 302 n.39 (1988).

<sup>116</sup> For a discussion and analysis of the traditional Latin American attitude toward arbitration, see Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L ARB. 293 (1984). See also Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 397 (1986); Samtleben, *Arbitration in*

creased participation of African countries in ICC arbitration,<sup>117</sup> the ratification of the New York Convention by the People's Republic of China<sup>118</sup> in 1987, conjoined with the Canadian action on arbitration, indicate that the provisions of the New York Convention are approaching the ideal of universal adherence and have genuine law-making authority.

The further consolidation of the New York Arbitration Convention in national laws indicates that the recourse to arbitral adjudication is firmly entrenched in the emerging transnational commercial process. In fact, the recognition of arbitration as a legitimate adjudicatory process is a *de facto* condition precedent to effective national participation in international trade. Moreover, this recognition, along with the development of advanced national arbitration laws, could have an impact upon purely internal concerns. The growing familiarity with and acceptance of arbitration as a viable and vital adjudicatory process might make national legal systems generally more receptive to the consideration and adoption of alternative dispute resolution mechanisms. The experience with international commercial arbitration could become a foundation upon which to begin the domestic transformation of adjudicatory values and processes: devising a variety of remedial frameworks that respond to the diversity and the actual needs of disputes.

The American law of arbitration reveals precisely this sort of interface between domestic processes and the international experience. Also, the internal systemic aspects of the Canadian experience have

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*Brazil*, 18 U. MIAMI INTER-AM. L. REV. 1 (1986). For a discussion of the Inter-American Arbitration Convention, see Current Development, *The Inter-American Convention On International Commercial Arbitration*, 75 AM. J. INT'L L. 982 (1981); Note, *International Commercial Arbitration: Domestic Recognition and Enforcement of the Inter-American Convention on International Commercial Arbitration*, 10 SYRACUSE J. INT'L L. & COM. 169 (1983); 5 PACE L. REV. 607 (1985); 196 N.Y.L.J., at 1, col. 1 (Nov. 18, 1986).

<sup>117</sup> See W. CRAIG, W. PARK, & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 5 (1984); Paulsson, *Arbitration Under the Rules of the International Chamber of Commerce*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION, *supra* note 65, at 235, 255-60.

<sup>118</sup> See *China Becomes A Signatory To The New York Convention*, 2 INT'L ARB. REP. 158 (Mar. 1987); Shaoshan, *A Brief Account of the New York Convention of 1958*, CHINA PATS. & TRADEMARKS Q. 9 (Apr. 1987). See also DaQuan, *Fully Utilize (sic) The Methods of Mediation in Handling Foreign Economic and Trade Disputes*, CHINA PATS. & TRADEMARKS Q. 33 (Oct. 1986); Gushu, *Settling Industrial Property Disputes Through Non-Judicial Procedures*, CHINA PATS. & TRADEMARKS Q. 24 (Jan. 1986); Yougan, *Arbitration Cases Handled By The Foreign Economic and Trade Arbitration Commission, CCPIT*, CHINA PATS. & TRADEMARKS Q. 101 (Jan. 1987).

particular relevance to the United States law. While the specific character of the federalism problem differs, Canada's struggle with federalism questions associated with arbitration is germane to the most recent United States Supreme Court decisions on arbitration. In those cases, the Court—relying upon an expansive interpretation of interstate commerce under the Commerce Clause, invoking the Supremacy Clause, and emphasizing the congressional intent underlying the Federal Arbitration Act—appears to be engaged in a process of federalizing the American law of arbitration. Given the disruptive systemic consequences, a legislative approach, reflecting the Canadian experience, might be a more feasible way to achieve the same ends.

### VII. THE AMERICAN LAW OF ARBITRATION

In terms of its historical and contemporary development, the American law of arbitration<sup>119</sup> stands in an intermediary position between its French and English counterparts. It also bears some, albeit different, affinity with its Canadian analogue. In keeping with the patterns developed in the French and English systems, a sense of commercial realism and legislative lobbying efforts brought about landmark legislation that eventually undermined the judicial hostility toward arbitration, undoing the perception that it amounted to a contractual usurpation of judicial jurisdictional authority.<sup>120</sup> While

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<sup>119</sup> General references on the American law of arbitration are: F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* (1948); G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* (1984); Coulson, *Commercial Arbitration in the United States*, 51 *ARB.* 367 (1985); Hoellering, *Arbitration in the United States*, 76 *AM. SOC. INT'L L. PROC.* 175 (1982); Holtzmann, *National Report: United States*, 2 *Y.B. COM. ARB.* 116 (1977), 9 *Y.B. COM. ARB.* 60 (1984). See also Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial And Substantive Status in Transnational Commerce*, 19 *TEX. INT'L L.J.* 33, 45-53, 65-77 (1984) (this previous study provides some of the background for the present discussion).

<sup>120</sup> In an 1814 case, *Tobey v. County of Bristol*, 23 *F.Cas.* 1313 (C.C. Mass. 1845) (No. 14,065), Mr. Justice Story characterized the American judicial perception of arbitral adjudication in rather contradictory, albeit negative, terms:

Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel

the attitude of the American legal system initially paralleled the English reluctance to embrace arbitration wholeheartedly, contemporary American statutory and decisional law on arbitration are in keeping with the unequivocal French acceptance of arbitral adjudication.

Enacted in 1925, the Federal Arbitration Act<sup>121</sup> [FAA] is the landmark legislation which put an end to the era in which United States courts were willing to entertain suits brought in violation of arbitration agreements. According to the celebrated language of Article 2 of the FAA, arbitration agreements are "valid, irrevocable, and enforceable".<sup>122</sup> The intention of the federal legislation manifestly was to

a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

*Id.* at 1320-21. See also Note, *Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75, 83 n.30 (1982).

<sup>121</sup> Ch. 213, §§ 1-15, 43 Stat. 883-86, (current version at 9 U.S.C. §§ 1-14 (1982)). Present arbitration legislation retains the vast majority of the original language.

During the congressional debate on the Act in 1924, a proponent of the legislation explained its underlying purpose and rationale in the following terms:

This bill is one prepared in answer to a great demand for the correction of what seems to be an anachronism in our law, inherited from English jurisprudence. Originally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England. This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts - an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to do. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.

65 CONG. REC. 1931 (1924) (Rep. Graham-Pa.).

See Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. REV. 238 (1930-31); Note, *Contracts—Effect of the United States Arbitration Act*, 25 GEO. L.J. 443 (1936-37); Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law And Its Application*, 11 A.B.A. J. 153 (1925).

<sup>122</sup> United States Arbitration Act, ch. 213, § 2, 43 Stat. 883-86 (current version at 9 U.S.C. § 2 [1982]). See generally Heely, *Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223 (1982); Overby, *Arbitration of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986).



promote arbitration as a viable alternative to the judicial resolution of disputes. In its current form, the FAA retains substantially all of its original language. In the federal decisional law spearheaded by the United States Supreme Court, the FAA continues to act as the legislative foundation for the judicial elaboration of a federal policy strongly favoring the recourse to arbitral adjudication.

As with most modern statutes on arbitration,<sup>123</sup> the FAA recognizes the contractual principle of party autonomy and freedom, the elements that give arbitration its fundamentally consensual nature. The federal statutory framework couples the party autonomy principle with arbitral flexibility. Within the restrictions posed by basic public policy requirements regarding adjudicatory justice, the parties to an arbitration agreement can fashion the procedural rules to be applied in the arbitral proceeding. Moreover, judicial jurisdictional authority is meant to assist the implementation and functioning of the arbitral process. Courts are the vehicles for compelling arbitration or appointing arbitrators when a contracting party refuses to comply with the provisions of a valid agreement to arbitrate. The courts are under a statutory obligation to respect and give effect to an arbitration agreement's jurisdictional consequences. A valid arbitration agreement demands staying court proceedings regarding a dispute validly submitted to arbitration. Finally, the FAA provides for limited judicial supervision of awards. The grounds for setting aside an award center upon basic concerns of procedural due process.<sup>124</sup>

Prior to 1970, the United States, paralleling the English posture, was not a party to any international agreement on arbitration. In 1970, subject to the double reservation that the Convention would be applied on the basis of reciprocity and only to disputes arising out of contractual or other relationships considered commercial under United States law, the United States ratified the 1958 New York Arbitration Convention. The ratification of the Convention led to the enactment of the 1970 Arbitration Act, establishing a set of new provisions for dealing with litigation arising under the Convention.<sup>125</sup>

The provisions of the New York Convention apply in cases in which an arbitration agreement or award arises out of a dispute in which one or both parties are foreign nationals.<sup>126</sup> When both parties

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<sup>123</sup> See Carbonneau, *supra* note 119, at 46, 50, 54.

<sup>124</sup> See *id.* at 45-46.

<sup>125</sup> See *id.* at 66; 9 U.S.C. §§ 201-208 (1976).

<sup>126</sup> 9 U.S.C. § 202 (1976).

are United States nationals, the Convention governs only those instances in which the "relationship involves property located abroad, envisages performance or enforcement, or has some other rational relation with one or more foreign states."<sup>127</sup> Like the English Arbitration Act of 1979, the American legislation defines international arbitration by reference to the formalistic requirement of party nationality. The governing definition in cases in which no party to the transaction is a foreign national, however, reflects a far more realistic standard than the English concept of "non-domestic" contracts. Like the French and other recent civilian legislation, it focuses upon the actual economic impact of the parties' commercial relationship to determine whether the award is international and thereby subject to the provisions of the Convention.

As in other jurisdictions, judicial implementation is critical to the status of the Convention in the American legal system. Following the rulings of the United States Supreme Court, the federal courts have exhibited a favorable disposition toward arbitration in general and toward international commercial arbitration in particular. A perusal of recent federal court cases, in fact, reveals that federal court decisions systematically uphold the continued viability and autonomy of the arbitral process.<sup>128</sup> The gravamen of the opinions centers upon

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<sup>127</sup> *Id.*

<sup>128</sup> See *Atkins v. Louisville & Nashville R.R. Co.*, 819 F.2d 644, 649 (6th Cir. 1987); *Bauhinia Corp. v. China Nat'l Mach. & Equip. Import & Export Corp.*, 819 F.2d 247, 248 (9th Cir. 1987); *In re Diaz Contracting, Inc.*, 817 F.2d 1047, 1054 (3d Cir. 1987); *Hoffman v. Missouri Pac. R.R.*, 806 F.2d 800, 801 (8th Cir. 1986); *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 293 (1st Cir. 1986); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986); *Felkner v. Dean Witter Reynolds, Inc.*, 800 F.2d 1466, 1470 (9th Cir. 1986); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520, 523 (9th Cir. 1986); *John F. Harkins Co. v. Waldinger Corp.*, 796 F.2d 657, 664 (3d Cir. 1986); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 719 n.21 (D.C. Cir. 1986); *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1162 (5th Cir. 1986); *Explo, Inc. v. Southern Natural Gas Co.*, 788 F.2d 1096, 1098 (5th Cir. 1986); *Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home & Allied Serv. Union*, 788 F.2d 894, 897-98 (2d Cir. 1986); *Taylor v. Nelson*, 788 F.2d 220, 223 (4th Cir. 1986); *Valentin v. United States Postal Serv.*, 787 F.2d 748, 750 (1st Cir. 1986); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985); *International Union of Elevator Constructors v. National Elevator Indus.*, 772 F.2d 10, 13 (2d Cir. 1985); *Local 703, Int'l Bhd. of Teamsters v. Kennicott Bros.*, 771 F.2d 300, 302 (7th Cir. 1985); *Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775, 777 (3d Cir. 1984); *City of Meridian v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983); *Liskey v. Oppenheimer & Co.*, 717 F.2d 314, 319 (6th Cir. 1983); *Kroog v. Mait*, 712 F.2d 1148, 1151 (7th Cir. 1983); *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55, 57 (3d Cir. 1983);

furthering "the strong federal policy supporting arbitration",<sup>129</sup> a phrase wrought and consecrated by the United States Supreme Court in its decisional law regarding the FAA and the Convention.

The Court's opinions on arbitration can be roughly divided into three major groupings: first, earlier rulings that deal with the domestic law implications of arbitration, specifically the FAA's impact upon federalism concerns; second, more recent domestic rulings that demonstrate a reinforcement of the Court's favorable position toward arbitration and of its willingness to curtail federalism considerations to advance the process; and third, rulings that deal exclusively with matters of international commercial arbitration. In these last rulings, the Court defines the inter-relationship between national juridical requirements and the international process. The content of these decisions not only portends the creation of a general substantive American law on transnational commerce and arbitration, but also demonstrates the possible influence of such a law upon domestic commerce and arbitration matters. The Court's most recent ruling on arbitration, however, threatens to place this decisional law in a state of profound disequilibrium.

#### A. *Arbitration And Federalism*

The Federal Arbitration Act was enacted during the era of *Swift v. Tyson*.<sup>130</sup> The import of *Swift* was that federal courts hearing state

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Ryder Truck Lines, Inc. v. Teamsters Freight Local Union No. 480, 705 F.2d 851, 856 n.7 (6th Cir. 1983); Federated Metals Corp. v. United Steelworkers of Am., 648 F.2d 856, 859 (3d Cir. 1981); Midwest Window Systems v. Amcor Indus., Inc., 630 F.2d 535, 536 (7th Cir. 1980); Chauffeurs, Teamsters and Helpers Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716, 716-17 (8th Cir. 1980); Hall v. Prudential-Bache Sec., Inc., No. CV 86-5520-ER (C.D. Cal. Apr. 30, 1987); Compania Chilena De Navegacion Interoceanica, S.A. v. Norton, Lilly & Co., 652 F. Supp. 1512, 1514 (S.D.N.Y. 1987); General Motors Overseas Distribution Corp. v. Kuwait Maritime Corp., No. 84 Civ. 5346 (S.D.N.Y. Oct. 31, 1986) (available on LEXIS, Genfed library, Dist. file); Management Recruiters of Albany, Inc. v. Management Recruiters Int'l, Inc., 643 F. Supp. 750, 752 (N.D.N.Y. 1986); Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 639 F. Supp. 1391, 1397 (S.D.N.Y. 1986); Dow Chem. Pac. Ltd. v. Rascator Maritime S.A., 640 F. Supp. 882, 884 (S.D.N.Y. 1986); Lis Upholstery Decorators, Inc. v. Amalgamated Indus. Union Local 768, No. 85 Civ. 0062, 106 Lab. Cas. (CCH) Para. 12,306 (S.D.N.Y. Feb. 14, 1986) (available on LEXIS, Genfed library, Dist. file); Lewmar Creations, Inc. v. Pretty Tops, Inc., No. 85 Civ. 3943 (S.D.N.Y. Feb. 7, 1986) (available on LEXIS, Genfed library, Dist. file); T.W. Oil, Inc. v. Burmah Oil Tankers Ltd., No. 84 Civ. 7249 (S.D.N.Y. Jan. 15, 1986) (available on LEXIS, Genfed library, Dist. file); Sacks v. Dean Witter Reynolds, Inc., 627 F. Supp. 377, 378, 381 (C.D. Cal. 1985).

<sup>129</sup> See sources cited *supra* note 128.

<sup>130</sup> 41 U.S. 1 (16 Pet.) (1842).

law cases on a diversity basis were bound by state court opinions only when the cases before them involved the construction of state constitutions or statutes. Where the latter provisions were not involved, the federal courts were free to devise their own rules of decision independently of state court rulings.<sup>131</sup> *Erie R.R. v. Tompkins*<sup>132</sup> overruled *Swift v. Tyson*, providing that “there is no general federal common law,”<sup>133</sup> and that “Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or general, whether they be commercial law or a part of the law of torts.”<sup>134</sup> In effect, *Erie* reversed the prior doctrine, requiring federal courts, in cases of diversity jurisdiction, to apply state law except when the controversy was governed by the U.S. Constitution or an Act of Congress.<sup>135</sup> Viewing the enactment of the FAA from the perspective of *Erie*, the question became whether the federal law on arbitration—providing

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<sup>131</sup> *Id.* at 18-19. In 1924, Congress apparently believed that, by making arbitration agreements enforceable in federal courts, the Federal Arbitration Act merely settled a “question of procedure” and did not create “substantive law”. See *Incorporation of State Law Under The FAA*, 78 MICH. L. REV. 1391, 1398 (1980) (citing H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 1924). Accordingly, if the FAA were merely a procedural rule applying to cases in the federal court system, even the later *Erie* prohibition would not bar its application. Although the underpinnings of the decision are far from being absolutely clear, *Erie* is generally interpreted as prohibiting only those federal rules of decision that affect stated-created substantive rights. See Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1316 (1985) (citing *Erie v. Tompkins*, 304 U.S. 64, at 78-79). Cases since *Erie*, however, have held that the FAA creates substantive federal law; the United States Supreme Court has nonetheless upheld its application in diversity cases. See generally Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61 (1985); Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts: Erie v. Tompkins*, 39 CORNELL L. Q. 74 (1953).

<sup>132</sup> 304 U.S. 64 (1938). *Erie* was a diversity suit brought by a citizen of Pennsylvania for damages he sustained allegedly as a result of the activities of a New York railroad. The law of Pennsylvania favored the railroad, providing that the railroad had no duty in regard to people walking along the right of way unless its negligence was willful or wanton. The federal court in New York applied federal common law and found for the plaintiff. The United States Supreme Court reversed, holding that the Swift doctrine was unconstitutional because it allowed federal courts to make law where the federal government had no constitutional authority to do so. See generally Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Note, *Erie, Bernhard, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L. J. 846 (1959).

<sup>133</sup> *Erie*, 304 U.S. at 78.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

for the enforceability of arbitration agreements—was merely a set of procedural regulations or legislation that created substantive rights and was therefore binding upon the federal courts in all cases. More specifically, in a diversity of citizenship case involving purely state interests, could the provisions of the FAA dislodge the application of a less favorable or perhaps contrary (but otherwise controlling) state statute or decisional law? Under *Erie*, the displacement of applicable state law on arbitration could be seen as a preemptive application of general federal common law. Although clearly protective of federalism principles, such an interpretation could have fragmented any national consensus on arbitration and undermined the FAA's clear mandate to make arbitration an autonomous and viable alternative adjudicatory process. In this setting, another view of the federalism issue, generated by the judicial implementation of the FAA in diversity cases, could be advanced. Since *Erie* mandates the application of state law in all diversity cases but those in which the U.S. Constitution or federal legislation is controlling, the courts could deem that the FAA was applicable as a federal enactment, holding—in effect—that the FAA represents more than the enactment of merely procedural regulations and that it actually creates substantive rights. According to a distinguished scholar in the area, “to be consistent with *Erie*, a court creating federal common law need only ground its authority to do so on some federal enactment other than the diversity grant.”<sup>136</sup>

In this regard, the decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*<sup>137</sup> has landmark significance. Decided in 1967, *Prima Paint*

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<sup>136</sup> Field, *The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 888 (1986). For other writings on the domestic federalism question, see, e.g., Symposium, *Federalism: Allocating Responsibility Between The Federal And State Courts*, 19 GA. L. REV. 789 (1985); La Pierre, *Political Accountability In The National Political Process - The Alternative To Judicial Review Of Federalism Issues*, 80 NW. U. L. REV. 577 (1985-86); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L. J. 678 (1975-76); Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663 (1980); Segreti, *The Federal Preemption Question - A Federal Question? An Analysis Of Federal Jurisdiction Over Supremacy Clause Issues*, 33 CLEV. ST. L. REV. 653 (1984-85).

<sup>137</sup> 388 U.S. 395 (1967). *Prima Paint* was preceded by *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), which involved an action for breach of an employment contract brought before the federal district court on diversity of citizenship. The district court denied respondent's motion to compel arbitration, ruling that—under *Erie*—the arbitration clause in the contract was governed by Vermont law which provided that agreements to arbitrate were revocable by either party prior

establishes the separability doctrine as part of the developing decisional law on arbitration.<sup>138</sup> The separability doctrine holds that an arbitration clause is unaffected by the nullity of the main contract. For example, when the main contract is alleged to be invalid for reasons of fraud, that allegation does not affect the validity of the arbitration clause unless the fraud was also directed at that clause. The agreement to arbitrate has a separate juridical existence from the main contract.<sup>139</sup> Recourse can still be had to the arbitral process to decide those disputes that flow from the invalidity of the main contract. “[A]rbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded, and . . . where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract was induced by fraud.”<sup>140</sup>

The significance of *Prima Paint* also resides in the Court’s view of the FAA’s systemic stature. In *Prima Paint*, the Court underscored the primary intent and ultimate objective of the federal legislation, and expressed its judicial resolve to give full effect to both these aspects of the act in relevant litigation.<sup>141</sup> The Court further stated that the question in *Prima Paint* “was not whether Congress may

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to the rendering of an award. On appeal, the United States Supreme Court upheld the district court ruling, holding that the FAA was inapplicable because the transaction did not involve maritime or commercial matters. Although the *Bernhardt* Court held that the FAA was substantive and not procedural for *Erie* purposes, it avoided addressing the question of whether the FAA controlled in cases that came before the federal courts exclusively on a diversity basis. See Hirshman, *supra* note 131, at 1320.

<sup>138</sup> Prima contended that Flood and Conklin had fraudulently represented that it was solvent and therefore able to perform its contractual obligations. The contract between the parties contained a broad arbitration clause. The district court granted Flood and Conklin’s motion to compel arbitration, holding that the claim of fraud in the inducement was properly a question for the arbitrators, not the court. The Second Circuit Court of Appeals dismissed Prima Paint’s appeal, ruling that the FAA created “national substantive law and governs even in the face of a contrary state rule.” The court of appeals cited *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted* 362 U.S. 909, *cert. dismissed* 364 U.S. 801 (1960) (holding that claims of fraudulent misrepresentation could be submitted to arbitration despite the requirements of New York state law; the FAA creates a body of substantive federal law that encompasses all the legal issues surrounding the arbitration clause; the FAA does not require any reference to state rules of decision).

<sup>139</sup> On the separability doctrine, see *Prima Paint*, 388 U.S. at 402. See also G. WILNER, *supra* note 119, at § 8:01.

<sup>140</sup> *Prima Paint*, 388 U.S. at 402.

<sup>141</sup> *Id.* at 404.

fashion federal substantive rules to govern questions arising in simple diversity cases, . . . but whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has the power to legislate.”<sup>142</sup> In other words, in the Court’s view, *Prima Paint* did not involve the issue of federalism and states’ rights, but, rather, whether Congress could provide substantive directives to the federal courts in areas in which Congress had specific legislative powers. The Court, in effect, answered the federalism question while appearing to disregard it: Congress could create federal law where it had legislative authority to act. Therefore, in diversity cases in which questions arose concerning the validity of the recourse to arbitration, the federal courts were under an obligation to apply the relevant federal legislation in the area. The only limitation upon the application of federal law in this area appeared to be that the contracts in question containing arbitration clauses must affect interstate commerce. The concept of interstate commerce, however, could be construed very broadly.

In *Prima Paint*, the Court also articulated what was to become a fundamental tenet of its evolving decisional law on arbitration: that the FAA’s purpose to provide for the enforceability of arbitration agreements was manifest, and that objective—buttressed by the reference to contractual freedom—must be given effect whenever possible. In the Court’s own language, “in so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure when selected by the parties to a contract, be speedy and not subject to

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<sup>142</sup> *Id.* at 405. In his dissent, Justice Black argued that the majority went beyond the specific intent of the Act: to make arbitration agreements enforceable in federal courts if they were valid and legally recognized under state law:

The court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means. Even if Congress intended to create substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.

*Id.* at 422.

Justice Black also contended that the effect of the separability doctrine was not to place arbitration agreements on an equal footing with other contracts—the avowed purpose of the FAA, but to afford them a privileged status beyond the ordinary legal impact of contract provisions. *Prima Paint*’s promise to arbitrate disputes, according to Black, was inseparable from its other contractual promises. *Id.* at 424.

delay and obstruction in the courts.”<sup>143</sup> Challenges to the validity of arbitration agreements on the basis of state law provisions, therefore, were seen essentially as a dilatory tactic, meant to defeat the effect of the arbitration agreement and the manifest purpose of the federal legislation. Despite some weaknesses in the Court’s reasoning,<sup>144</sup> it was now clear that the Court had espoused a strong and unequivocal position in regard to arbitration—a position that was not only supportive, but also protective of the institution of arbitral adjudication. This position continues to color, influence, and dictate the results in subsequent litigation on arbitration. Recent cases interpreting the FAA, in fact, have been decided in a similar and even stronger vein.

### B. *The New Trilogy*

Described by analogy to landmark labor arbitration cases as “the new arbitration trilogy,”<sup>145</sup> a series of recent cases reveals the strength of the policy that underlies the Court’s construction of the FAA. The rulings in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*,<sup>146</sup> *Southland Corp. v. Keating*,<sup>147</sup> and *Dean Witter Reynolds v. Byrd*<sup>148</sup> make clear that the Court perceives a fundamental congressional objective underlying the FAA that it will uphold despite allegations that state law is controlling and requires a different result. These cases further demonstrate that the FAA embodies a federal rule of law of truly national dimension.

*Moses Cone* involved circumstances relating to a contractual dispute between a hospital and a building contractor.<sup>149</sup> The hospital, located in North Carolina, entered into a contract with an Alabama construction company to build additions to its main building. The contract provided that disputes would be decided by the architect and, if the dispute were not decided within a specified time, it would then be submitted to binding arbitration. When a dispute arose and went unsettled beyond the specified time, the hospital filed an action against the construction company and the architect in a North Carolina state court. In its petition, the hospital sought a declaratory judgment that there was no right to arbitrate. The defendant construction company

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<sup>143</sup> *Id.* at 404.

<sup>144</sup> See Justice Black’s dissent, *id.* at 424-25.

<sup>145</sup> See Hirshman, *supra* note 131.

<sup>146</sup> 460 U.S. 1 (1983).

<sup>147</sup> 465 U.S. 1 (1984).

<sup>148</sup> 470 U.S. 213 (1985).

<sup>149</sup> *Moses Cone*, 460 U.S. at 4-5.



then filed an action in federal district court on the basis of diversity of citizenship, seeking an order to compel arbitration under the provisions of the FAA.<sup>150</sup>

Upon motion of the hospital, the federal district court stayed the federal court action pending resolution of the suit in state court. The federal court reasoned that the two suits involved identical issues: namely, the arbitrability of the claim under consideration.<sup>151</sup> On appeal, the federal appellate court reversed the ruling and issued instructions to compel arbitration.<sup>152</sup> The United States Supreme Court affirmed the appellate decision, grounding much of its reasoning in a categorical statement of doctrine upholding the FAA.<sup>153</sup>

Considering the possibility of fragmented proceedings in the resolution of this controversy, the court held that "the federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement."<sup>154</sup> Moreover, the Court was concerned that the delay ordered by the trial court might defeat the underlying purpose of the federal legislation: "stay would have frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements."<sup>155</sup> The intent of the legislation was to move the parties to an arbitration agreement out of court and into arbitration as quickly and as easily as possible.<sup>156</sup> Finally, the Court gave extensive reach to the federal legislation on arbitration. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body

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<sup>150</sup> *Id.* at 7.

<sup>151</sup> *Id.* at 10.

<sup>152</sup> See *Mercury Construction Corp. v. Moses H. Cone Memorial Hosp.*, 656 F.2d 933 (4th Cir. 1981).

<sup>153</sup> *Moses Cone*, 460 U.S. at 13-29.

<sup>154</sup> *Id.* at 20. The first question presented to the Court was whether the district court had properly stayed the federal action pending resolution of the parallel state claim. *Id.* at 4, 13. In addressing this question, the Court relied on *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), holding that—once federal jurisdiction is properly invoked—deference to parallel state court litigation is proper only in exceptional circumstances. See *id.* at 813. The factors to be considered in determining whether exceptional circumstances exist are: (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; and (3) the order in which jurisdiction was obtained by the concurrent fora. See *Moses Cone*, 460 U.S. at 15. Applying these factors to the facts in *Moses Cone*, the Court found no showing of exceptional circumstances to justify the district court's stay. *Id.* at 19.

<sup>155</sup> *Id.* at 22-23.

<sup>156</sup> *Id.*

of substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act."<sup>157</sup> In effect, the court's ruling made the provisions of the FAA applicable in state courts provided some sort of jurisdictional basis existed for applying federal law.

The *Keating* case was decided similarly, minimizing state statutory law on arbitration and upholding the underlying policy of the federal law. In *Keating*,<sup>158</sup> the issue centered upon the constitutionality of a section of the California Franchise Investment Law which had been interpreted to require exclusive judicial consideration of claims brought under the statute.<sup>159</sup> Keating's claim, brought on behalf of Seven-Eleven franchisees against Southland Corporation, the Seven-Eleven franchiser, alleged, among other things, that Southland had breached its fiduciary duty and violated the disclosure requirements of the California Franchise Investment Law.<sup>160</sup> Pursuant to a contract provision, Southland moved to compel arbitration of all claims, except those based on the Franchise Investment Law. After a trial court determination holding the non-waiver provisions of the Franchise Investment Law valid,<sup>161</sup> the California court of appeals held that, if the Franchise Investment Law rendered arbitration agreements unenforceable, it conflicted with the provisions of the FAA and was, therefore, invalid under the Supremacy Clause of the U.S. Constitution.<sup>162</sup> The California Supreme Court interpreted the investment law provision to require exclusive judicial consideration of claims brought under the statute; it held that claims asserted under the investment law were inarbitrable, and it further concluded that the California statute did not contravene the federal legislation on arbitration.<sup>163</sup>

The United States Supreme Court determined that the federal legislation created a duty not only upon the federal courts, but also upon the state courts to apply the federal policy on arbitration embodied in the FAA. "In enacting section 2 of the federal act,

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<sup>157</sup> *Id.* at 24.

<sup>158</sup> 465 U.S. 1 (1984).

<sup>159</sup> California Franchise Investment Law (CFIL), CAL. CORP. CODE § 31512 (West 1977). See *Keating v. Superior Court*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), modified 465 U.S. 1.

<sup>160</sup> *Keating*, 465 U.S. at 4.

<sup>161</sup> *Keating v. Superior Court*, 31 Cal.3d 584, 599, 645 P.2d 1192, 1200, 183 Cal. Rptr. 360, 368 (1982).

<sup>162</sup> *Keating v. Superior Court*, 167 Cal. Rptr. 481, 493-94 (1980).

<sup>163</sup> *Keating v. Superior Court*, 31 Cal. Rptr. 584, 604, 645 P.2d 1192, 1203-04 (1982).

Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>164</sup> Agreeing with the essential reasoning of the California appellate court opinion, the Court further held that, “in creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that §31512 of the California franchise investment law violated the supremacy clause.”<sup>165</sup>

In undermining the state regulatory authority in the area of arbitration, the Court was especially concerned that state statutory policies could impair “the basic purpose of the federal statute.”<sup>166</sup> In effect, by inserting restrictions on dispute resolution alternatives in other statutory frameworks, “states could wholly eviscerate the congressional intent to place arbitration agreements ‘upon the same footing as other contracts.’”<sup>167</sup> “We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.”<sup>168</sup> The uniform application of the FAA would prevent forum shopping and oblige state courts in jurisdictions with inhospitable arbitration statutes to disregard their own law and apply the federal law.

The *Byrd* opinion is the final segment of the decisional law triptych. It reveals that the Court’s position on the federal arbitration legislation is not simply grounded in a concern for dispute resolution efficiency. Rather, the court’s reasoning is anchored in a perception of a fundamental congressional intent underlying the FAA.

*Byrd* involved a dispute between a customer and the Dean Witter Reynolds securities brokerage firm.<sup>169</sup> *Byrd* filed a complaint against Dean Witter Reynolds in a U.S. District Court, claiming jurisdiction based on the existence of a federal question as well as diversity of citizenship, and alleging violations of the U.S. Securities Exchange Act of 1934 and of various state law provisions relating to securities regulation.<sup>170</sup> The broker-dealer contract, however, contained an ar-

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<sup>164</sup> *Keating*, 465 U.S. at 10.

<sup>165</sup> *Id.* at 16.

<sup>166</sup> *Id.* at 21.

<sup>167</sup> *Id.* at 17 n.11.

<sup>168</sup> *Id.*

<sup>169</sup> 105 S. Ct. 1238 (1985).

<sup>170</sup> *Id.* at 1239.

bitration agreement. Based upon that agreement, Dean Witter filed a motion to sever the pendant state claims and compel arbitration, staying arbitration pending the resolution of the federal court action. Both at the federal trial<sup>171</sup> and appellate<sup>172</sup> levels, the motion to sever the pendant state claims and compel arbitration was denied because of the “intertwining” doctrine,<sup>173</sup> barring the arbitration of state law claims that are factually inseparable from claims under the federal securities act. According to the appellate court reasoning, the intertwining doctrine maintained the federal courts’ “exclusive jurisdiction over the federal securities claim,”<sup>174</sup> by preventing the earlier arbitral determination of the state claim to bind the federal proceeding through collateral estoppel. Also, “by declining to compel arbitration, the courts avoid bifurcated proceedings and perhaps redundant efforts to litigate the same factual question twice.”<sup>175</sup>

Despite the persuasiveness of this reasoning, the United States Supreme Court reversed the decision, holding that the arbitration of the pendant state claims should be compelled.<sup>176</sup> In a unanimous opinion, the court stated that “the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”<sup>177</sup> The Court was explicit in emphasizing the underlying congressional intent apparent in the federal legislation on arbitration, namely, “that the purpose behind its [the act’s] passage was to ensure judicial enforcement of privately made agreements to arbitrate . . . We therefore reject the suggestion that the overriding goal of the FAA was to provoke the expeditious resolution of claims.”<sup>178</sup>

These decisions leave little doubt that the Court’s recent decisional law has effectively federalized the American law of arbitration. In contradistinction with the Canadian experience, the national law on arbitration in the United States was not achieved by the concurrent

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (726 F.2d 552 (1984)).

<sup>173</sup> *Id.* at 1240.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1241.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1242. For a parallel development in another area of law where the Court’s decision arguably results in the federalization of the law of contractual forum-selection clauses, see *Steward Organization, Inc. v. RICOH Corp.*, 108 S.Ct. 2239 (1988).

enactment of legislation at the federal and state levels of government. Rather, over a period of years, the chief federal judicial organ progressively elaborated the full systemic implications of an earlier federal enactment. Using a triple constitutional reference—a broad view of interstate commerce under the Commerce Clause, a reference to the Supremacy Clause, and invoking the congressional authority to enact the FAA and the underlying intent of the legislation—the Court concluded that state statutory provisions and court rulings must not contravene the FAA's basic provisions. Moreover, given the circumstances in *Keating*, it seems that this position applies to cases that involve either interstate or even more localized forms of commerce.

Not unexpectedly, these recent decisions generated a volume of scholarly criticism,<sup>179</sup> decrying the rather evident infringement of state legislative authority over local commercial matters. The Canadian legislative approach certainly evinces greater respect for essential systemic relationships in the federal process. Canada, however, did not have an existing federal enactment. Moreover, the United States Supreme Court's action could be seen as a legitimate judicial extension of the enabling legislation's original intent over time and changing circumstances. No movement is under way to have the decisional law overridden by congressional action. While the Canadian approach can be seen as a perhaps less brutal exercise of power, both national experiences attest to the perceived need in each system to have a uniform national position on arbitration that is neither encumbered nor weakened by internal dissenting variations.

In summary, domestic litigation demonstrates that the Court has adopted a position supportive of the arbitral process' institutional autonomy and systemic viability. The Court's decisional law emphasizes the judicial duty to recognize the validity of arbitration agree-

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<sup>179</sup> See Comment, *Dean Witter Reynolds, Inc. v. Byrd: The Unraveling of the Intertwining Doctrine*, 62 DEN. U. L. REV. 789 (1985); Hirshman, *supra* note 131; Note, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable In Federal And State Courts And Supercedes Contrary State Statutes*, 54 MISS. L.J. 561 (1984); Note, *Investor-Broker Arbitration Agreements: Dean Witter Reynolds, Inc. v. Byrd*, 20 U.S.F.L. REV. 101 (1985); Note, *Preemption of State Law Under The Federal Arbitration Act*, 15 U. BALT. L. REV. 128 (1985); Note, *Mixed Arbitrable and Nonarbitrable Claims in Securities Litigation: Dean Witter Reynolds, Inc. v. Byrd*, 34 CATH. U. L. REV. 525 (1985); Recent Development, *The Federal Arbitration Act: A Threat to Injunctive Relief*, 21 WIL-LAMETTE L. REV. 674 (1985). See generally McDermott, *Significant Developments In The United States Law Governing International Commercial Arbitration*, 1 CONN. J. INT'L L. 111 (1985-86).

ments and their jurisdictional consequences. It appears clear that the Court wants to give full effect to the federal legislation's underlying purpose of eliminating judicial hostility toward arbitration. It is also clear that the Court—while its interpretations are logical and grounded in a plausible jurisdictional base—is supplying additional content to the federal legislation and embellishing its original policy imperative. A more qualified form of support, however, could undermine the institutional autonomy and viability of arbitral adjudication. In order to have a cohesive and coherent national policy regarding arbitration, it may well be necessary to minimize state legislative authority in local commercial matters and to compel compliance by both state and federal courts with the FAA's express language.

### C. *International Arbitration Cases*

The Court's forceful stance on arbitration also acts as the leitmotif of its decisional law on international commercial arbitration. Here, as well, the Court appears to give preeminence to the policy directive it perceives underlying the governing federal legislation (in this instance, the legislation being the 1970 Arbitration Act<sup>180</sup> which codifies the provisions of the 1958 New York Arbitration Convention). Succinctly stated, the federalization of the American domestic law on arbitration is accompanied by a similar (and related) federalization of the American law on international commercial arbitration and, more generally, on international business transactions.

*Scherk v. Alberto-Culver Co.*,<sup>181</sup> the leading case on international commercial arbitration, involved allegations that Alberto-Culver, the American purchaser of foreign trademarks, had been deceived by the fraudulent misrepresentations of *Scherk*, the German seller, and that Scherk's conduct violated the provisions of the Securities Exchange Act of 1934. Several months after the initial sale, which was negotiated over a period of time in various countries, Alberto-Culver purportedly discovered that the trademarks it had purchased from Scherk were substantially encumbered. The purchase contract contained express warranties that title to the trademarks was unencumbered; the agreement also contained an arbitration clause, providing for the arbitral resolution of disputes arising under the contract.<sup>182</sup> The question

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<sup>180</sup> See *supra* note 125 and accompanying text.

<sup>181</sup> 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974). See *Arbitral Adjudication*, *supra* note 119, at 68-74.

<sup>182</sup> 417 U.S. at 508.

presented in litigation before the federal courts was whether the substance of the 1934 Securities Act rendered the dispute inarbitrable, thereby nullifying the contractual provision for recourse to arbitration.

Previously, in litigation involving purely domestic interests, the Court had held that disputes allegedly involving violations of the Securities Act of 1933 were inarbitrable. In *Wilko v. Swan*,<sup>183</sup> an investor lodged an action against a securities brokerage firm, claiming that the firm had violated section 12(2) of the 1933 Act. The brokerage contract contained a dispute resolution clause providing for the submission of disputes arising under the contract to arbitration.<sup>184</sup> Notwithstanding its view that the FAA embodied a strong congressional policy supporting arbitration, the Court deemed the arbitration agreement in *Wilko* to be unenforceable. The Court reasoned that the provision for arbitration countermanded the express policy of the 1933 Act prohibiting investors from waiving certain statutorily-established rights, namely, the rights to bring suit in any federal or state court, to select a forum from a wide choice of venue, to take advantage of the nationwide service of process provision, and to dispense with the amount in controversy requirement.<sup>185</sup> Moreover, section 12(2) of the Act expressly gives investors a cause of action to redress claims of misrepresentation against a seller of securities, requiring the defendant to prove its lack of scienter.<sup>186</sup>

Therefore, despite a valid arbitration agreement, securities claims arising under the 1933 Act could not be submitted to arbitration. The Act's non-waiver of rights provisions, in effect, manifested a congressional intent to create an exception to the FAA's validation of arbitration agreements. The policy imperative underlying the 1933 Act exceptionally overrode its analogue in the FAA.

Despite the *Wilko* doctrine which the lower federal courts found to be controlling in *Scherk*,<sup>187</sup> the Court nonetheless ordered the parties in *Scherk* to proceed with ICC arbitration as provided in the contract. In the Court's assessment, the critical factor that served to distinguish the cases was the "truly international"<sup>188</sup> character of the contract in *Scherk*: "[T]he respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement

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<sup>183</sup> 346 U.S. 427 (1953).

<sup>184</sup> *Id.* at 429.

<sup>185</sup> *Id.* at 432-35.

<sup>186</sup> *Id.* at 428 n.1.

<sup>187</sup> 417 U.S. at 512.

<sup>188</sup> *Id.* at 515.

involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement."<sup>189</sup> Tracking the basic content of section 202 of the 1970 Arbitration Act, the Court defined the concept of a "truly international agreement" by reference to the constituent elements of the transaction: elements—like the parties' nationalities, where they conducted their principal business activities, the companies' place of incorporation, and the use of different national fora to assemble the deal—which reflected the transnational character of the venture.<sup>190</sup> The Court, however, gave principal import to the transaction's economic content and impact: "Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets."<sup>191</sup>

The Court's reference to the economic impact of the transaction aligned the American law on international commercial arbitration with the "anational" tenor of the French Decree on international arbitration, avoiding the mechanical formalism of the British statute. Rather than half-heartedly concede the existence of the international process and subordinate its operation whenever possible to national legal strictures, the expansive reasoning in *Scherk* indicated that the Court perceived the United States ratification of the New York Arbitration Convention as part of a congressional pronouncement on matters of international trade—a legislative policy that favored the development of private international commerce. Impliedly, the New York Convention and the 1970 Arbitration Act represented the United States' adherence to a global consensus on international trade. In the Court's assessment, the implementation of that policy justified and required the judicial elaboration of rules minimizing national legal obstacles to the performance of obligations under international contracts.

Although the 1933 Securities Act (controlling in *Wilko*) and the 1934 Securities Act (at issue in *Scherk*) arguably contained similar non-waiver provisions,<sup>192</sup> the juridical effect of inarbitrability provisions in domestic statutes was substantially reduced, essentially elim-

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See *Arbitral Adjudication*, *supra* note 119, at 69.



inated, in cases involving international contracts. The dislodging of the contractual recourse to arbitration by the mandatory congressional provision for judicial remedies was ineffective in the *Scherk* setting because “[s]uch a[n] [international] contract involves considerations and policies significantly different from those found controlling in *Wilko*. . . .”<sup>193</sup> “The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to . . . [*Scherk*].”<sup>194</sup> The “considerations and policies,” sufficient to undermine the application of otherwise mandatory domestic law, focused upon the needs and integrity of international commerce and the participation of United States business interests in the world marketplace:

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if *Scherk* had anticipated that *Alberto-Culver* would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining *Alberto-Culver* from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man’s-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.<sup>195</sup>

In summary, arbitration—because of its adjudicatory neutrality, expertise, and privacy—had become the foremost remedial means by which to resolve disputes arising from international contracts. By

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<sup>193</sup> 417 U.S. at 515.

<sup>194</sup> *Id.* at 517.

<sup>195</sup> *Id.* at 516-17.

ratifying the New York Convention, the universal charter of international arbitration, Congress had expressly endorsed the emerging international stature of arbitration and implicitly recognized that the world marketplace did business on transnational and not national terms. Accordingly, in its decisional law, the Court felt obligated to make the congressional endorsement a juridical reality. The *Scherk-Wilko* nexus required the Court to balance, segregate, and prioritize divergent policy dictates: (1) the domestic interest in having claims of fraudulent misrepresentation in securities matters resolved by courts; (2) the FAA's mandate to enforce arbitration agreements; (3) the objective of furthering the interest of the world community and of the United States in international trade; and (4) the need to avoid compromising domestic legal imperatives, like the requirements of securities legislation, in international litigation without some fundamental justification.

In domestic matters, *Wilko* achieved a balanced form of prioritization by resolving the conflict between the first and second policy dictates in the form of an exception to the FAA that did not infringe upon the core interests of the arbitration legislation. *Scherk*, however, evidences an overriding prioritization of the policy interest favoring international commerce, placing that objective squarely above the other policy considerations. *Scherk* manifests the Court's intent to eliminate any opportunity for parochial judicial construction or extraterritorial judicial extension of domestic laws in the context of international cases involving arbitration. In effect, the Court recognizes a sphere of international activity that, while subject to national jurisdiction, must be regulated in keeping with its essentially autonomous transnational character. *Scherk* thereby allows the Court to lay the foundation for the elaboration of a substantive American law on private international commerce.<sup>196</sup>

The display of internationalism in *Scherk* stands in sharp contrast with a previous and well-established federal decisional law upholding the extraterritorial extension of United States antitrust laws.<sup>197</sup> Ini-

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<sup>196</sup> For a discussion of the concept of private international law in its traditional sense and new acceptance, see *infra* note 226 and accompanying text.

<sup>197</sup> See generally J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (2d ed. 1981); W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (3d ed. 1982); Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1975); Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213 (1982); Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963);

tially, the Court—with its decision in *American Banana Co. v. United Fruit Co.*<sup>198</sup>—adopted the rule of strict territoriality, holding that the regulatory reach of the Sherman Antitrust Act was confined to anti-competitive commercial practices taking place within the United States. In a series of subsequent cases<sup>199</sup> that culminated in the *United States v. Aluminum Company of America*<sup>200</sup> decision (*Alcoa*), the effect of a more aggressive executive branch antitrust enforcement policy was manifest. The rule of legislative territoriality was replaced by a more expansive construction of the Sherman Act's jurisdictional scope. That interpretation allowed the federal courts to assert jurisdiction in antitrust cases in which would-be violations took place abroad, provided that the conduct in question bore a substantial connection with United States trade. In *Alcoa*, the controlling doctrine was reformulated in terms of "intended effects":<sup>201</sup> commercial activity pursued anywhere in the world by nationals of whatever country, which the courts could interpret as exhibiting an intent to place

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Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257 (1980); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981); Note, 'Forum Non Conveniens' and the Extraterritorial Application of United States Antitrust Law, 94 YALE L.J. 1693 (1985); Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 INT'L LAW. 313 (1982); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

On extraterritoriality generally, see EXTRATERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO (C. Olmstead ed. 1984); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982); Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1984); Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7 (1984).

<sup>198</sup> 213 U.S. 347 (1909).

<sup>199</sup> See Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce Variations on 'American Banana' Since 1909*, 15 B.C. IND. & COM. L. REV. 343 (1973). See also Thomsen v. Cayser, 243 U.S. 66 (1917); *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

<sup>200</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>201</sup> *Id.* at 442. See Ellis, *Comment to Miller, Extraterritorial Effects of Trade Regulations*, 111 U. PA. L. REV. 1129 (1963); Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521 (1974); Zwarenstejn, *The Foreign Reach of the American Antitrust Laws*, 3 AM. BUS. L.J. 163 (1965). See also *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir.), *cert. denied* 409 U.S. 950 (1972); *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957).

restraints upon American trade, was within the scope of United States antitrust jurisdiction.

More contemporary circuit court decisions in *Timberlane Lumber Co. v. Bank of America*<sup>202</sup> and *Mannington Mills v. Congoleum Corp.*<sup>203</sup> have tempered the parochial bias of the *Alcoa* rule and its neglect of considerations of international comity. While neither opinion repudiates the statutory basis for asserting jurisdiction, the holding in each case modifies the legal standard for triggering the application of antitrust legislation. In effect, both courts abandoned the *Alcoa* "intended effects" test and replaced it with a more moderate balance-of-interests approach and a jurisdictional rule of reason.<sup>204</sup> According to these courts, the effects test was incomplete; in its provision for the assertion of jurisdiction, it inadequately accounted for the interests of other nations and for the actual relationship between the defendants and the United States. Under the jurisdictional rule of reason, assuming that "some" actual or intended effect could be established, the supposedly anti-competitive practices must be of sufficient magnitude to justify—in light of considerations of international comity—an assertion of domestic United States jurisdiction.<sup>205</sup> The United States' interest in enforcement must outweigh the interests of the implicated foreign country. "When foreign nations are involved, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."<sup>206</sup>

Regardless of its current character, the decisional law on the extraterritorial application of U.S. antitrust laws has, in effect, been reversed by the Court's ruling in *Mitsubishi Motors v. Soler Chrysler-Plymouth*.<sup>207</sup> The long-awaited sequel to *Scherk*, *Mitsubishi* repre-

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<sup>202</sup> 549 F.2d 597 (9th Cir. 1976).

<sup>203</sup> 595 F.2d 1287 (3d Cir. 1979).

<sup>204</sup> *Timberlane*, 549 F.2d at 612-13; *Mannington Mills*, 595 F.2d at 1297-98.

<sup>205</sup> *Timberlane*, 549 F.2d at 614; *Mannington Mills*, 595 F.2d at 1297-98.

<sup>206</sup> *Mannington Mills*, 595 F.2d at 1296.

<sup>207</sup> 105 S.Ct. 3346 (1985). For commentary on the case, see Campbell & Vollmer, *International Arbitration*, 7 Nat'l L.J., Aug. 19, 1985, at 24; Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L L. 265 (1986) [hereinafter *Quixotic Internationalism*]; Comment, *International Arbitration—Commerce—Arbitrability of Antitrust Claims Arising From International Commerce Disputes Recognized Under Federal Arbitration Act—Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 17 SETON HALL L. REV. 448 (1987); Lipner, *International Antitrust Laws: To Arbitrate or Not to Arbitrate*, 19 GEO. WASH. J. INT'L L. & ECON. 395 (1985); Note, *International*

sented an opportunity for the Court to refine the implications of the international contract concept and place some restrictions on the wide policy directive articulated in *Scherk*. Since *Mitsubishi* involved the question whether antitrust claims were arbitrable when they arose in the setting of an international contract, some commentators<sup>208</sup> anticipated that the case might represent an opportunity for the Court to establish essential boundaries between national priorities and the self-regulatory needs of international commerce. Like the public policy exception, the inarbitrability defense<sup>209</sup> is a well-recognized juridical limitation on arbitration, preventing it from infringing upon core systemic interests. The application of that defense in *Mitsubishi*, it

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*Arbitration And The Comity of Error: Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 19 CONN. L. REV. 435 (1987); Recent Development, *Arbitration: Arbitrability of Antitrust Claims in International Tribunals, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), 27 HARV. INT'L L.J. (1986); Robert, *Une date dans l'extension de l'arbitrage international: L'arret Mitsubishi c/ Soler*, [1986] REV. ARB. 173. See also Branson & Wallace, *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39, 50, 54, 57-64 (1986). See also Symposium, *The Future Of Private International Arbitration: Beyond Mitsubishi Motors v. Soler Chrysler-Plymouth*, 12 BROOKLYN J. INT'L L. 579 (1986).

For related articles that refer to *Mitsubishi*, see, e.g., Allison, *Arbitration Agreements And Antitrust Claims: The Need For Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219 (1986); Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987); Comment, *Arbitrating Civil RICO And Implied Causes of Action Arising under Section 10(b) Of The Securities Exchange Act of 1934*, 36 CATH. U. L. REV. 455 (1987); Fletcher, *Privatizing Securities Disputes Through The Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393 (1987); Note, *Arbitrability Of Claims Arising Under The Securities Exchange Act of 1934*, 1986 DUKE L.J. 548 (1986); Note, *Arbitrability of Implied Rights of Action Under Section 10(b) Of The Securities Exchange Act*, 61 N.Y.U. L. REV. 506 (1986).

<sup>208</sup> See *Quixotic Internationalism*, *supra* note 206, at 274-77. For commentary on the lower court determination of the case (723 F.2d 155 (1st Cir. 1983)), see Comment, *Mitsubishi: The Erosion of the New York Convention and International Arbitration*, 1984 WIS. INT'L L.J. 151; Recent Development, *Arbitration: Public Policy Exception To Arbitration of Antitrust Issues*, 25 HARV. INT'L L.J. 427 (1984); Recent Decision, *Arbitration: Transnational Antitrust Claims Are Nonarbitrable Under the Federal Arbitration Act and Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 17 VAND. J. TRANSNAT'L L. 741 (1984).

<sup>209</sup> For a discussion of the separability doctrine, see G. WILNER, *supra* note 119, §§ 8:01-:02; A. VAN DEN BERG, *supra* note 40 at 145-46, 156, 200, 372 (1983). See also Bedell, Harrison & Grant, *Arbitrability: Current Developments In The Interpretation And Enforceability Of Arbitration Agreements*, 13 J. CONTEMP. L. 1 (1987); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981) (regarding the related public policy defense).

was argued, would not have lessened the viability of the arbitral process.

Rather than restrict the *Scherk* doctrine, the *Mitsubishi* opinion reinforced and amplified it. Holding that antitrust claims arising from international contracts are arbitrable,<sup>210</sup> the Court avoided placing meaningful yet moderate national restraints on international arbitral adjudication. In effect, the Court impliedly affirmed the view that Western national economies have effectively been internationalized by world participation in international trade and that private transnational commerce functions by reference to its own, self-generated rules. *Mitsubishi* thus echoed and expanded the gravamen in *Scherk*: international trade is vital to the national interest, and the United States cannot expect the world to do business on primarily American terms.<sup>211</sup>

#### *D. A Perspective on the Federalization of American Arbitration Law*

The federalization of the American law of arbitration, both domestic and international, reflects too great a level of judicial innovation, and evidences too strong a doctrinal conviction, for the companion development of these two areas to be explained as mere happenstance. Ostensibly with tacit congressional approval, the Court is adapting the FAA and the provisions of the 1970 Arbitration Act to contemporary domestic and international commercial and adjudicatory realities. The Court attributes a privileged status to the congressional objective of validating arbitration agreements and legitimating arbitral adjudication in the hierarchy of protected values. Nor can the motivation that underlies such unequivocal support for a system of private, non-judicial justice—beginning with *Prima Paint*, amplifying itself through the new trilogy and gaining forceful expression in the *Scherk-Mitsubishi* internationalist doctrine—be adequately explained, as the *Byrd* Court opines,<sup>212</sup> merely by a mechanical judicial allegiance to a congressional dictate. The Court's rulings on arbitration embody concordant perceptions of the social role and necessity of commerce and of the limited dispute resolution utility of legal adjudication.

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<sup>210</sup> *Mitsubishi*, 105 S. Ct. at 3355.

<sup>211</sup> See *Quixotic Internationalism*, *supra* note 206, at 280-81.

<sup>212</sup> *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238, 1242-43 (1985).

The decisional law on arbitration has survived the inevitable variations in the Court's political configuration. It has been espoused by liberal and conservative justices alike.<sup>213</sup> In the international cases, exceptional dissenting positions were taken by members of the Court as different as Justice Douglas (in *Scherk*)<sup>214</sup> and Justice Stevens (in *Mitsubishi*).<sup>215</sup> The steadfastness of the majority commitment to the FAA's policy directive reveals, in effect, an institutionalization of a federal policy on commerce, namely, that domestic commercial activity is national in scope. The integrated national character of commerce should not be undercut by public law questions relating to systemic organization and political authority. Because of its private and self-regulatory character, commerce can escape public law constraints. To immix constitutional debates and the intricacy of legality into commerce would paralyze the ability of merchants to function effectively and thereby imperil the national economy. Political values and the accompanying adjudicatory requirements have little relevance in the ideology of the marketplace.

With the Burger Court, the policy implied from the FAA's provisions merged with the concern about the litigation crisis and the accessibility of justice. The prevalent view, advocated by the Chief Justice, was that the severe burden placed upon the courts by the volume of claims and protracted proceedings threatened to undermine the administration of justice.<sup>216</sup> The success of arbitration in labor and commercial matters<sup>217</sup> became the grounds upon which to advocate

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<sup>213</sup> Former Chief Justice Burger's departure, for example, has not modified the Court's position on arbitration. See *McMahon v. Shearson/American Express, Inc.*, 107 S. Ct. 2332 (1987); *Perry v. Thomas*, 107 S. Ct. 2520 (1987).

<sup>214</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 529 (Douglas, J., dissenting). See *Quixotic Internationalism*, *supra* note 206, at 288-90.

<sup>215</sup> *Mitsubishi v. Soler*, 105 S.Ct. at 3361 (Stevens, J., dissenting). See *Quixotic Internationalism*, *supra* note 206, at 288-90.

<sup>216</sup> See Address by Chief Justice Warren Burger, ABA Midyear Meeting (Jan. 24, 1982), reprinted in 68 A.B.A. J. 274 (1982); *Chief Justice Burger's State of The Judiciary Address*, 109 N.J.L.J., at 1, col. 4 (Feb. 4, 1982); *Time To Review Our Reliance On Adversary System: Chief Justice Faults Lawyers For Frivolous Suits, Discovery Abuse* (Address by Chief Justice Warren Burger at A.B.A. Midyear Meeting, Las Vegas, Feb. 1984), L.A. Daily J., at 4, col. 3 (Feb. 15, 1984).

<sup>217</sup> See generally (on commercial arbitration) 1-5 J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* (1979); G. WILNER, *supra*, note 119; de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961). On labor arbitration, see J. CORREGE, V. HUGHES, & M. STONE (eds.), *THE FUTURE OF LABOR ARBITRATION IN AMERICA* (1976); F. ELKOURI & E.

recourse to alternative means of dispute resolution in a variety of other areas. While *Byrd* indicates that dispute resolution efficiency was not the principal motivation for the federal decisional law on arbitration, it is difficult to imagine that this concern did not inform and bolster the Court's perception that arbitration was a legitimate exercise in commercial self-regulation through self-determined adjudication.

Relatedly, the Court's unwavering support for commercial arbitration also challenged consecrated legal adjudicatory values. Its safeguarding of a privately-initiated and controlled system of justice suggested that juridical adjudicatory methods were to be reassessed and adversarial convictions reconsidered. For example, the extensive protections available to the individual against state action in regard to fundamental political rights should not necessarily predominate in the adjudication of private law claims. Here, considerations of costs and expediency—also part of the ethic of fairness—should be weighed. The procedural flexibility, expertise, and possible efficiency proffered by arbitration responded to many of the elements of the dilemma generated by a dispute resolution framework saturated with lawyerly concerns and juridical procedures. Accordingly, the Court's institutionalization of a national policy on commerce was grouped with a growing awareness of the need to devise workable alternatives to judicial adjudication. In private law matters, the latter objective, it seemed, could be achieved by the promotion of self-determination in dispute resolution and the recourse to a non-judicial and non-adversarial adjudicatory ethic.

The values espoused and promoted by the Court in domestic adjudication were already at work in transnational commerce. There, the different nationalities of contracting parties, the need for adjudicatory neutrality, expertise, and privacy, and the commercial necessity of maintaining viable business relationships despite disputes made the recourse to arbitration or other alternatives a virtual necessity. Rather than articulate a restrained acceptance of the process, the Court gave international arbitration an unqualified endorsement. A central feature of that endorsement was the minimization of do-

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ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985); O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* (2d ed. 1983); M. HILL & A. SINICROPI, *REMEDIES IN ARBITRATION* (1981); S. KAGEL, *ANATOMY OF A LABOR ARBITRATION* (1st ed. 1978); C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* (3d ed. 1972); A. ZACK & R. BLOCH, *LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION* (1983).



mestic imperatives in transnational commercial cases. Again, the Court relied on its pragmatic concern for the viability of commerce and its sense that traditional forms of legal regulation and juridical procedures were counterproductive in this setting. The internationalization of commerce meant that the U.S. national interest could only be served by participating in international trade on globally-accepted terms. The extraterritorial extension of domestic laws, be they antitrust regulations or jurisdictional concepts, could only hinder American commercial interests. Moreover, the history of commercial self-regulation<sup>218</sup> supported the exemption of international commerce from national legal restrictions. Given the transnational support for arbitration, international arbitrators could legitimately deal with claims brought pursuant to legislation of United States or of other countries which arose in the context of international commercial contracts.<sup>219</sup>

In keeping with the domestic experience, the principle of self-determination in international dispute resolution dislodged the application of systemic concerns in order to establish a cohesive national policy on commerce and to generate a body of law relating to a parallel and autonomous adjudicatory framework. While arguably ill-conceived,<sup>220</sup> the internationalist tenor of the rulings in *Scherk* and *Mitsubishi* give additional juridical support to the concept of an autonomous and "anational" international commercial arbitration process, a process that is distancing itself from any reference to municipal legal authority and operates free of all national legal provisions but those that specifically regulate private international law matters.<sup>221</sup> This stance coincides with recent developments concerning other facets of international commerce (specifically, in the jurisdictional area) where the Court has consistently refused to transpose purely domestic legal standards (U.S. long-arm jurisdiction concepts) into transnational litigation.<sup>222</sup>

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<sup>218</sup> See Carbonneau & Firestone, *Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication*, 1 EMORY J. INT'L DISPUTE RESOLUTION 51, 57-63 (1986) [hereinafter *Transnational Law-Making*].

<sup>219</sup> See Lowenfeld, *The Mitsubishi Case: Another View*, 2 ARB. INT'L 178 (1986). See also Smit, *Mitsubishi: It Is Not What It Seems To Be*, 4 J. INT'L ARB. 7 (1987).

<sup>220</sup> See *Quixotic Internationalism*, *supra* note 206, at 296-98.

<sup>221</sup> See *infra* note 225 and accompanying text.

<sup>222</sup> See *Asahi Metal Indus. v. Super. Ct. of Cal.*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S.Ct. 1026 (1987). On this question, see generally Hay, *Judicial Jurisdiction Over Foreign-Country Corporate Defendants - Comments on Recent Case Law*, 63 OR. L. REV. 431 (1984).

The Court's sensitivity to issues of transnational commerce and its general activism in that area lays the groundwork for the progressive development of a substantive American law of private international law. Replacing the reliance on choice-of-law principles and national legal provisions, such a law would be comprised of substantive rules that account for the sui generis features and needs of international commercial cases.<sup>223</sup>

The Court's internationalism, presumably inspired and authorized by the 1970 Arbitration Act, raises a number of concerns. The determination that antitrust claims are arbitrable in an international contract setting leaves little room for the functioning of the inarbitrability defense (and the related public policy exception) contained in the New York Arbitration Convention.<sup>224</sup> With some reluctance, and in the hope that a more measured balancing of interests might eventually be instituted, one could accept this development as a necessary part of the Court's implied accession to the concept of "anational" arbitration—although other aspects of the *Mitsubishi* opinion seem to undermine that concept.<sup>225</sup> Additional criticism centers upon the concept of "anational" arbitration itself. There is a lively academic debate regarding whether the international arbitration process is truly separable from national legal processes.<sup>226</sup> The con-

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<sup>223</sup> See *infra* note 225 and accompanying text. For an assessment of the status of such a law, see Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 279-83 (1988).

<sup>224</sup> See *supra* note 208 and accompanying text.

<sup>225</sup> See *Quixotic Internationalism*, *supra* note 206, at 283-88.

<sup>226</sup> The phrase "private international law" (favored by English and continental writers) is often used interchangeably with the phrase "conflicts of law" (favored by American writers). See M. WOLFF, *PRIVATE INTERNATIONAL LAW* 10 (2d ed. 1950). Both phrases have been subject to criticism for their imprecision, but still survive, each in its own right. A majority view holds that private international law or conflicts of law is part of municipal law. Distinct bodies of conflicts rules exist in various countries, and these rules may be as different from one another as other national legal provisions. These rules draw their authority from municipal sources; the resulting law is, therefore, municipal in character. A universalist trend—which views private international law as an evolving body of transnational commercial law—opposes the classical perspective. See E. LANGEN, *TRANSNATIONAL COMMERCIAL LAW* 8-33 (1973); Schmitthoff, *International Business Law, A New Law Merchant*, in 2 *CURRENT LAW AND SOCIAL PROBLEMS* 129 (1961). The universalists argue that transnational law will gradually overcome the fragmentation of municipal legal systems. Although it has its source in municipal law, private international law—in the universalist perspective—is properly international in character. In order to devise a properly transnational law, municipal authorities need to engage in a comparative law synthesis that responds to the transnational character of international commercial dealings. See C. SCHMIT-

trovercy is anchored in a positive law thesis that argues for the need

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THOFF, *COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE* 21 (1977).

According to the classical view, the primary function of private international law or conflicts of law is to designate an appropriate municipal law to govern the provisions of an international contract. Differing interpretations of the effect of party choice exist in the various municipal systems. Some national laws hold that, even when the parties have designated an applicable law, the municipal jurisdiction must still invoke its choice of law rules to determine whether the agreement itself is valid. Unlimited party autonomy in this regard would allow private individuals to perform an essentially legal function. The more pervasive view is that express party choice controls; absent party selection, the proper law of the contract is the law of the country with which the contract has the closest connection. This view assumes that a transaction which touches upon the legal order of several countries will be more closely connected to one of them. The attempt to identify a contract's "center of gravity" proceeds from the territorial doctrine of localization. See *Rex v. Int'l Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500; *Bonython v. Commonwealth of Australia*, [1951] A.C. 201; *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.*, 1983 v. 3 WLR 241 (1983). See also DICEY AND MORRIS ON THE CONFLICT OF LAWS (J. Morris ed. 10th ed. 1980); P. NORTH, *CHESHIRE'S PRIVATE INTERNATIONAL LAW* (10th ed. 1979).

The American view parallels its English analogue described above, although it places less emphasis upon the role of party autonomy. See Craver, *The Two "Local Law" Theories*, in *CHOICE OF LAW: SELECTED ESSAYS (1933-1983)*, 45-55 (1985). For the most part, Anglo-American practice is firmly rooted in considerations of territoriality. See R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (3d ed. 1986); R. LEFLAR, *AMERICAN CONFLICTS OF LAWS* (4th ed. 1986).

The universalist view argues that private international law has been transformed from a choice of law system to a set of substantive rules that regulate transnational dealings and activities. The transformations in the global community and the economic interdependence of states have rendered the concept of territoriality obsolete. Moreover, private international law—in its substantive sense—only gains its origins in national legal systems; it is a regime of legal governance that transcends the parochial boundaries of municipality. It regulates "delocalized" international contracts and evidences the emergence of a new "lex mercatoria." See Kegel, *The Crisis of Conflicts of Laws*, 112 REC. DES COURS 91 (1964-II). Although proponents of the universalist view of private international law have advanced different justifications for this "anational" law, they are all searching for an appropriate calculus by which to explain the complexity of factors that have transformed international legal and economic relationships. See W. FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964). On the role of state contracts in this evolution, see Hyde, *Economic Development Agreements*, 105 REC. DES COURS 267 (1962-I); Lalive, *Contracts Between A State Or A State Agency And A Foreign Company - Theory and Practice: Choice of Law in a New Arbitration Case*, 13 INT'L & COMP. L.Q. 987 (1964); Schmitthoff, *The Unification or Harmonisation of Law By Means of Standard Contracts and General Conditions*, 17 INT'L & COMP. L.Q. 551 (1968).

The universalist school further argues that neither municipal law nor international law provides a sufficient juridical basis for transnational economic relationships (particularly those between states and foreign corporations). Subjecting transnational commercial parties to domestic legal requirements and the territorial authority of municipal systems is both inappropriate and undesirable. A new legal order needs

to ground legal regulation and processes in an authorizing national sovereign source. Envisioning what might or ought to be, it is argued,

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*to be fashioned that takes new realities into account. According to Lord McNair, "[t]he complexity of the modern world . . . compels the abandonment of any . . . facile dichotomy of law into national law and public international law."* McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957). See also Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS (STUDIES IN TRANSNATIONAL ECONOMIC LAW) 19 (N. Horn & C. Schmitthoff eds. 1982). "This is the area in which a transnational law of international trade has developed and can be further evolved. This law is essentially founded on a parallelism of action in the various national legal systems, in an area in which . . . the sovereign national state is not essentially interested." *Id.* at 21.

These views have been subjected to considerable criticism, primarily because the effects of contracts are transposed from the established and well-defined realm of municipal law to allegedly vague general principles of law or other, equally indefinite, systems whose substantive norms are inarticulate and whose sources are uncertain. See Mann, *The Proper Law of Contract Concluded by International Persons*, 35 BRIT. Y.B. INT'L L. 35 (1959) ("Lord McNair . . . somewhat surprisingly considers the general principles as affording, in certain cases, 'the choice of a legal system', and, indeed, describes them as a 'system of law'. Yet it is hardly open to doubt that, unless they are equiparated to public international law, the general principles are not a legal system at all." *Id.* at 45); Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572 (1960); Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967) ("Although, where international aspects of some kind arise, it is not uncommon and, on the whole, harmless to speak, somewhat colloquially, of the international arbitration, the phrase is a misnomer. In the legal sense no international commercial arbitration exists . . . [E]very arbitration is a national arbitration, that is to say, subject to a specific system of national law. . . . Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law." *Id.* at 159-60); Mann, *England Rejects "Delocalised" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193 (1984); Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983) ("The paradox of a legal obligation independent of a legal order suggests Athena springing full-blown from the head of Zeus: a binding commitment, free from any municipal law, just appears." *Id.* at 26); Suratgar, *Considerations Affecting Choice of Law Clauses In Contracts Between Governments And Foreign Nations*, 2 INDIAN J. INT'L L. 273 (1962) ("The major criticism of this [Lord McNair's] suggestion is that no such legal system exists and that it could have no connection with any definable society, and would not amount in positivist terms to a legal system at all." *Id.* at 311.).

But see Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983) ("What this critique misses is that the delocalized award is not thought to be independent of any legal order. Rather, the point is that the delocalized award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin." *Id.* at 56. See also Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981). See generally Smit, *A-National Arbitration*, 63 TUL. L. REV. (1989) (forthcoming).

cannot be mistaken for what is and must be.<sup>227</sup> Mirroring the English attitude on international arbitration, proponents of this view hold that the effort of international merchants to create their own adjudicatory system cannot be effective without the initial and continuing approval of national legal systems.<sup>228</sup> The responsibility and authority for creating legitimate legal norms lie exclusively within the province of municipal sovereignty.

The experience with the twin American federalization of arbitration law belies this interpretation of the development of international commercial arbitration. The municipal endorsement of arbitration—domestic or international—manifests a systemic willingness to accept

<sup>227</sup> See *Transnational Law-Making*, *supra* note 217, at 53 n.10:

Municipal law can influence the arbitral process in a number of ways. First, the procedural rules of the forum may determine the manner in which the adjudication will be conducted. Second, substantive municipal law may govern the resolution of the dispute. Third, the validity of the award under various national laws may be relevant to the award's enforceability. Unless the losing party acquiesces to the award, the prevailing party will lodge an enforcement action before a national court. Finally, questions arise concerning the relationship between the arbitral tribunal and the laws of the arbitral forum: whether and to what extent forum law can or should influence the course of arbitration solely because the tribunal is presiding in the forum.

The English view of the degree to which national laws and policy can or should influence the international arbitral process is marked by a strong disdain for arbitral anationalism. English judges and commentators refer disparagingly to a system of "floating" arbitration or arbitration "unbound." The traditional English view is that a system of procedural or substantive law for the resolution of disputes can exist only by virtue of sovereign authority. All adjudications conducted in England must be subject to a certain extent to the English judicial system and procedural rules. . . .

Mann's refusal to recognize international commercial arbitration as a form of adjudication independent of municipal law and national sovereigns reflects a strict Austinian view of the law. Essentially, Mann argues that there can be no party autonomy, hence no institutional autonomy, if autonomy is defined as independence from the strictures of national law . . . .

This attack upon the existing process is objectionable in a number of respects. On the one hand, the refusal to recognize the evident realities of international commercial activity and the necessity of having a dispute resolution process that transcends parochial national concerns reveal the sterility of the analysis. It begrudges the creative contributions of the dynamic interplay between the law and economic forces merely because they undo prior realities. On the other hand, the strident character of the analysis clouds the real problem: how to strike a workable balance between the transnational arbitral process and the integrity of vital national policy interests . . . .

<sup>228</sup> See *supra* note 225 and accompanying text (references to Mann).

arbitration as a parallel adjudicatory process. It further evidences a similar willingness to allow that mechanism to develop as a process and to formulate its own rules and *modus vivendi*. The viability of arbitration as an adjudicatory mechanism, in fact, depends upon its independence from judicial supervision as to both the arbitral proceeding and the award. Initial systemic espousal, therefore, implies an acceptance both of arbitration's legitimacy and of its independent evolution (including the laxity of procedure, party and arbitrator discretion, and flexible [even equitable] substantive rulings). Only fundamental abuses, amounting to a clear denial of procedural justice, warrant judicial correction.

The real issue of the law of international arbitration lies not in whether the phenomenon of "anational" arbitration can be given an adequate theoretical foundation nor in the United States Supreme Court's participation in advancing that concept of the process. The cohesion of international relations has always suffered from the continued and absolute assertion of sovereign municipal authority; arbitration seems to have made significant inroads into minimizing the negative operation of that principle—reducing the fluxity of available remedies and helping to make the necessity of international commerce a reality. What is of significant moment are the indirect domestic consequences of the *Mitsubishi* ruling. The segregation of domestic and international policy imperatives resulting from the elaboration of a substantive private international law appears to be operative only at the level of insulating international adjudication from domestic law provisions. The rulings in the international cases, however, have exhibited a tendency to seep back into the domestic legal order. The *Mitsubishi* doctrine, for example, has generated considerable confusion and division among lower federal courts as to whether purely domestic issues, formerly deemed unquestionably to be matters of public policy, are submissible to arbitration. In the aftermath of *Mitsubishi*, courts—ruling in both domestic and international cases—held that civil violations of RICO are submissible to arbitration, reasoning that the RICO legislation was no more significant in terms of the public interest than the Sherman Antitrust Act.<sup>229</sup> At least one court has held that antitrust disputes arising from domestic contracts are arbitrable.<sup>230</sup> Moreover, the *Scherk-Mitsubishi* doctrine has encouraged a significant minority of lower federal courts to question

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<sup>229</sup> See *Quixotic Internationalism*, *supra* note 206, at 290-96.

<sup>230</sup> See *id.* at 293 n.112.

whether domestic securities fraud claims arising under either the 1933 or 1934 Securities Act are arbitrable.<sup>231</sup>

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<sup>231</sup> See *id.* at 291 n.97. Since the *Wilko* decision barring arbitration in disputes involving the 1933 Securities Act, federal courts had generally extended the *Wilko* holding to claims arising under the 1934 Securities Act. These courts reasoned that, given the similarity between the non-waiver provisions of the acts (15 U.S.C. § 77 (n) and 15 U.S.C. § 78cc (a)), the preclusion of pre-dispute arbitration agreements should apply in both types of claims. The differences between the acts did not override their basic similarities in this regard. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977); *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976); *AFP Imaging Corp. v. Ross*, 780 F.2d 202 (2d Cir. 1985); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir. 1976); *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982).

The *Byrd* and *Mitsubishi* decisions cast serious doubt on whether the Court would follow the lead of the lower federal courts in this matter. See Comment, *Section 10(b) And Rule 10b-5 Federal Securities Law Claims: The Need For The Uniform Disposition Of The Arbitration Issue*, 24 SAN DIEGO L. REV. 199 (1987); Comment, *The Case For Domestic Arbitration Of Federal Securities Claims: Is The Wilko Doctrine Still Valid?*, 16 S.W. UNIV. L. REV. 619 (1986); Note, *The Preclusive Effect Of Arbitral Determinations In Subsequent Federal Securities Litigation*, 55 FORDHAM L. REV. 655 (1987). Since *Byrd* and *Mitsubishi*, in fact, circuit courts have split on the question of whether 1934 Act claims are subject to arbitration. Those courts which had precedent on the issue maintained the correctness of their previous decisions, *i.e.*, nonarbitrability. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted* 107 S.Ct. 60 (1986) [held that arbitration agreements with respect to securities claims arising under the 1934 Act were unenforceable; the court did, however, state that common law fraud claims were arbitrable]. *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986); *Girard v. Drexel Burnham Lambert, Inc.*, 805 F.2d 607 (5th Cir. 1986). In contradistinction, the two circuit courts that were not constrained by precedent had determined that 1934 Act claims were arbitrable. *Phillips v. Merrill Lynch, Pierce, Fenner & Smith*, 795 F.2d 1393 (8th Cir. 1986); *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291 (1st Cir. 1986).

In keeping with the tenor of its established decisional law on arbitration, the Court recently held that 1934 Securities Act claims could be submitted to arbitration. See *McMahon v. Shearson/American Express, Inc.*, 107 S.Ct. 2332 (1987). See also *infra* text accompanying notes 234-263; Branson, *The U.S. Supreme Court Casts a Vote of Confidence for Arbitration: Shearson/American Express, Inc. v. McMahon*, 2 INT'L ARB. REP. 355 (June 1987). As to the arbitrability of 1933 Securities Act claims, see *infra* text accompanying note 266.

Expressly following the line of Supreme Court decisions from *Zapata* to *Scherk* and ending with *Mitsubishi*, a federal court ruling in an international case recently held that bankruptcy proceedings do not prevent the arbitration of a dispute between the bankrupt company and one of its suppliers. *Société Nationale Algerienne v. Dstrigas Corp.*, 80 Bankr. 606 (D. Mass. 1987). In overturning an earlier opinion by the Bankruptcy Court, the court reasoned that,

In weighing the strong public policy favoring international arbitration with

Obviously, the Court should clarify the domestic implications of its decisional law on international commercial arbitration. It seems that little benefit can be gained by reducing the scope of the inarbitrability defense in domestic law matters. The domestic process places significant public law value on matters of economic regulation and anti-racketeering legislation; arguably, conflicts arising from such public law provisions should be resolved by tribunals invested with the public trust and adjudicatory authority. Although the Court attacked this rationale in *Mitsubishi*,<sup>232</sup> commercial arbitrators should have little credibility in addressing these regulatory issues, and such disputes have a much wider significance in the domestic order than ordinary contractual commercial controversies.<sup>233</sup>

There is, however, an inexorable logic to the "emphatic federal policy" favoring arbitration<sup>234</sup> that has already brought the afore-

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any countervailing potential harm to bankruptcy policy upon the present facts, this Court finds the scales weighted in favor of arbitration. As discussed earlier, no major bankruptcy issues will be implicated in valuing contract damages and the international arbitration panel requires no special expertise to accomplish their task. While international arbitration will require a temporary and limited incursion into the Bankruptcy Court's exclusive jurisdictional bailiwick, no bankruptcy policies will suffer adverse impact. Conversely, the very image of the United States in the international business community stands to be tarnished. It is important and necessary for the United States to hold its domiciliaries to their bargains and not allow them to escape their commercial obligations by ducking into statutory safe harbors. Rather, our country should take special pains to project those qualities of honesty and fairness which are essential parts of the traditional American character and be perceived as a fair and equal player in the global marketplace, particularly in our commercial relations with the underdeveloped world. Any additional time and expense required by the international arbitration process—which is only speculative at this point—will be overshadowed in importance by the virtues of having the parties abide by their commitments.

*Id.* at 613-14 (footnotes omitted).

See 2 INT'L ARB. REP. 226, 269 (Apr. 1987); Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595 (1983). See also *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987) (holding, *inter alia*, that "as a matter of law . . . RICO claims arising in an international context are arbitrable . . ."). See 2 INT'L ARB. REP. 229, 241 (Apr. 1987).

Finally, the influence of the domestic and international decisional law on arbitration is clearly in evidence in *Bhatia v. Johnston*, 818 F.2d 418 (5th Cir. 1987).

<sup>232</sup> *Mitsubishi*, 105 S. Ct. at 3356-58.

<sup>233</sup> See *Quixotic Internationalism*, *supra* note 206, at 275.

<sup>234</sup> *Mitsubishi*, 105 S. Ct. at 3356-57. The strength of the federal policy favoring arbitration has made its influence felt upon the controversial question of whether arbitrators can award punitive damages. State courts are generally divided on the



mentioned lower federal courts to render what were formerly un-

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question—some see the arbitral mandate, once conferred, as basically unlimited, while others believe that all arbitral powers should be expressly conferred by the terms of reference that accompany the submission to arbitration. Yet a third group of courts finds that the award of punitive damages by arbitrators is inappropriate in all cases. These courts view punitive damages as a special and extraordinary remedy linked to the law's exclusive hold on public policy matters.

*Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793 (1976), is the controlling case in New York state. There, the court of appeals held that arbitrators could not award punitive damages even if the parties had authorized them to do so in their agreement because punitive damages are meant to punish parties and deter negative social conduct, not compensate disappointed contractants. Fearing an unwarranted intrusion upon public functions and state authority, the court held that,

Punitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention.

Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated. 353 N.E.2d at 794.

The position of the federal courts on the question of the arbitral award of punitive damages is in striking contrast to the reasoning in *Garrity* and aligns itself with the general tenor and logic of the second trilogy and *Mitsubishi*. In *Willoughby Roofing Co. & Supply v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984), the court found that the arbitrators had the authority to award punitive damages pursuant to a broad arbitral clause (allowing the arbitrators to entertain "all claims, disputes, and other matters in question arising out of, or relating to, this agreement . . . or the breach thereof") and wide-ranging institutional rules ("The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties"). *Id.* at 355, 357. The court held, "[o]nly in the presence of 'clear and express exclusions' could it be said that the arbitrators lacked authority under the contract to consider the plaintiff's claims for punitive damages." *Id.* at 358. The holding reflects the view that the federal policy favoring arbitration (and its institutional and juridical autonomy) requires allowing arbitrators to fashion the remedies they deem appropriate in the particular case. *See also Willis v. Shearson/American Express, Inc.*, 569 F.Supp. 821 (M.D. N.C. 1983) ("This court agrees that there is no public policy bar which prevents arbitrators from considering claims for punitive damages."); *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *cert. denied* 315 N.C. 590, 341 S.E.2d 29 (1986) (state court agrees that claims for punitive damages are arbitrable); *Grissom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d 709 (1984) [upholding arbitrability of punitive damages where arbitration agreement expressly conferred authority on arbitrators to consider exemplary damages; further, such awards did not violate public policy in contractual disputes]; *Baker v. Sadick*, 162 Cal App.3d 618, 208 Cal. Rptr. 676 (Cal S. Ct. 1984) (upholding validity of punitive damage awards in medical malpractice arbitration); *Belko v. AVX Corp.*, 57 U.S.L.W. 2197 (Ca. App. 1988). *See generally* Berg, *Punitive Damages: Are They Properly Awarded in Arbitration?*, 1 INT'L ARB. REP. 248 (1986); *The Arbitrator's Power to Award Punitive Damages in International Contract Actions*, 19 N.Y.U. J. INT'L L. & POL. 203 (1986); Note, *The Award of Punitive Damages as a Public Policy Question—Garrity v. Lyle Stuart, Inc.*, 43 BROOKLYN L. REV. 546 (1976); Note, *Punitive Damages in Arbitration: The Search for a Workable Rule*, 63 CORNELL L. REV. 272 (1978); Shell, *The Power to*

thinkable rulings. The compromise of federalism interests in the trilogy decisional law was itself a rather dramatic development, indicating that even fundamental considerations of political organization may fall in the face of the overriding policy of upholding arbitration agreements. The absolute character of that policy may well impel the Court to eliminate any juridical constraints upon the arbitral process in domestic law matters but for the FAA grounds for the enforcement of awards. The final result will be a fully uniform (and federalized) American arbitration law with totally concordant domestic and international branches—a law that, on the one hand, promotes the contractual recourse to arbitration as the primary mechanism for commercial dispute resolution and, on the other hand, advances a philosophy of adjudication that emphasizes, at least in regard to certain classes of disputes, the principle of autonomy and self-determination.

In many respects, despite some gaps, problems in implementation, and systemic conflicts, the contemporary development of arbitration law in the United States indicates not only the breadth and success of possible experimentation with alternatives, but also the limited scope and design of the legal approach to dispute resolution. Remedies, it seems, must comport with the nature of the disputes they are meant to resolve; their acceptance and viability are the measure

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*Punish: Authority of Arbitrators to Award Multiple Damages and Attorneys' Fees*, 72 MASS. L. REV. 26 (1987); Stipanowicti, *Punitive Damages and Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953 (1986).

There is a division of authority on this question in labor arbitration. See *Safeway Stores, Inc. v. Int'l Assoc. of Machinists & Aerospace Workers*, 534 F.Supp. 638 (D. Md. 1982) (disallowing punitive damages); *Baltimore Regional Joint Bd. v. Webster Clothes, Inc.*, 596 F.2d 95 (4th Cir. 1979) (holding that arbitrator's award of punitive damages exceeded authority granted by collective bargaining agreement); *Sweeney v. Morganroth*, 451 F.Supp. 367 (S.D. N.Y. 1978) (upholding an arbitral award for "liquidated" damages, "recognizing the substantial leeway which must be granted an arbitrator in fashioning remedies, especially in labor-related disputes. . . ."); *Local 369, Bakery & Confectionery Workers Int'l Union of America, AFL-CIO v. Cotton Baking Co.*, 514 F.2d 1235 (5th Cir. 1975) (allowing award of punitive damages as being within arbitrator's discretion). See also *Westmoreland Coal Co. v. United Mine Workers of America*, 550 F.Supp. 1044 (W.D. Va. 1982); *Westinghouse Elec. Corp., Aerospace Div. v. Int'l Bhd. of Elec. Workers*, 561 F.2d 521 (4th Cir. 1977); *Int'l Union of Operating Eng'rs v. Mid-Valley, Inc.*, 347 F.Supp. 1104 (S.D. Tex 1972); *School Comm. of New Bedford v. New Bedford Educators Assoc.*, 9 Mass App. Ct. 793, 405 N.E. 2d 162 (1980); *United States Fidelity & Guar. v. DeFluiter*, 456 N.E. 2d 429 (Ind. Ct. App. 1983); *Shaw v. Kuhnel & Assocs., Inc.*, 102 N.M. 607, 698 P.2d 880 (1985). The author is indebted to Ms. Margaret Sullivan for her research assistance in the writing of this footnote.

of their usefulness; and a proper marriage of disputes with remedies serves most, if not all, of the indispensable values—the right to be heard by an impartial panel which renders a relatively expeditious and fair determination.

*E. McMahon: A Radical Postscript*

*Shearson/American Express Inc. v. McMahon*,<sup>235</sup> decided in early June 1987 and involving a claim for securities fraud and misrepresentation under the 1934 Securities Exchange Act, is the Court's most recent pronouncement in the area of American domestic arbitration law. The *McMahon* opinion further amplifies the already extensive reach of the "emphatic federal policy" favoring arbitration. It disposes of any residual doubts in domestic law surrounding the arbitrability of Exchange Act and RICO claims. The ruling, however, also alters certain well-settled principles of the developing American law on arbitration. It substantially discredits the precedential value of the *Wilko* decision, and eliminates the utility of the distinction—initially propounded in *Scherk*—between the regulation of domestic and international arbitration.

Both the end achieved and the means employed in the opinion indicate that the Court will go to practically any length to uphold arbitration agreements. *McMahon* makes abundantly clear that the Court is impelled by an unbending objective: fostering the unfettered recourse to arbitration. In effect, the Court's desire to eliminate all vestiges of judicial hostility toward arbitration has given arbitration a privileged position in the cosmology of protected judicial values. Indeed, following *McMahon*, it is not at all implausible that the consideration afforded to arbitration is not so different, in kind or in degree, from the constitutional regard given to political speech, racial equality, or other fundamental values and rights. The uncompromising tenor of the doctrine generates questions about the wisdom of and motivation for the Court's stance.

Prior to *McMahon*, the related but separable rulings in *Wilko* and *Scherk* logically gave rise to the question of whether claims arising under the 1934 Securities Exchange Act were arbitrable in domestic transactions. After *Wilko*, lower federal courts<sup>236</sup>—in cases involving purely domestic contracts—had consistently held that these claims were inarbitrable for reasons of the public policy interest in securities

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<sup>235</sup> 107 S.Ct. 2332 (1987).

<sup>236</sup> See *id.* at 2346 (Blackmun, J., dissenting).

investor protection. The lower courts, it seems, took the core element of the *Scherk* decision seriously, namely, that the internationalization of trade and national economies demanded that international commercial litigation be insulated from domestic juridical strictures (even imperative ones). Therefore, arbitrability, as understood for purposes of international contracting, differed quite substantially from arbitrability as applied to domestic commercial transactions. In short, although American merchants could not engage in international business exclusively on their terms, domestic notions of legality should still govern national commerce and commercial practices.

The *Scherk* reasoning represented a fair, open-minded, and pragmatic accommodation of national and international interests. In the relatively unfamiliar, specialized, and potentially politically contentious area of international trade, the Court provided a neutral form of leadership that allowed it to give proper scope to domestic regulatory policies and safeguard American interests in world trade. This balancing of interests dictated the result in the case. Proffering domestic legal protection to a sophisticated commercial enterprise allegedly defrauded by a foreign national was hardly worth compromising American international business interests. The Court, therefore, gave effect to the duly-consented-to arbitration agreement.

*Mitsubishi*,<sup>237</sup> the later companion opinion, reinforced and consolidated the display of judicial internationalism in *Scherk*. There, the Court held—despite persuasive domestic precedent to the contrary—that antitrust claims arising under an international contract were arbitrable. While the tone of the opinion and segments of the Court's reasoning generated misgivings,<sup>238</sup> the unmistakable implication of the reasoning was that the Court had established a clear line of demarcation between matters international and domestic, that regulatory policies—which pertained to the public interest at a national level and which demanded adjudication through tribunals invested with public authority—did not maintain their public policy status once they were integrated into the transnational context.

Echoing *Scherk*, the Court in *Mitsubishi* reiterated the view that the community of international merchants had established arbitration as the remedial process for the resolution of international contract claims. Interpreting domestic American regulatory provisions to block the recourse to arbitration for certain types of international contract

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<sup>237</sup> See *supra* text accompanying note 206.

<sup>238</sup> See *supra* note 206 and accompanying text.

claims would imperil the viability of international commerce and larger American economic and commercial interests. Despite the equities involved and its clear authority to refuse arbitration under the public policy and inarbitrability provisions of the New York Arbitration Convention, the Court in *Mitsubishi* chose to restrict the reach of imperative domestic public policy requirements and to further its support for what appeared to be an emerging general American policy on private international law.

*McMahon*, however, now demonstrates that *Scherk* and *Mitsubishi* are misunderstood if assessed as isolated international cases defining a special policy on transnational commerce and international arbitration. Following *Scherk* and contemporaneously with *Mitsubishi*, the Court decided the "new trilogy" of domestic arbitration cases—*Moses Cone*, *Keating*, and *Byrd*.<sup>239</sup> These cases gave new impetus and direction to the domestic law of arbitration. The "trilogy" cases established the foundation for a full-fledged national policy on arbitration. As a group, these cases stand for a variety of propositions that minimize, and perhaps eliminate, any federalism constraints on the policy underlying the FAA. According to these opinions, the "emphatic federal policy" favoring arbitration demands a virtual extinguishment of state authority in matters pertaining to arbitration. The FAA is not merely a composite of procedural enactments that apply only to federal courts, but rather the congressional enactment of substantive rules in an area where Congress has constitutional authority to act.<sup>240</sup>

Moreover, the Supremacy Clause mandates that the provisions of the FAA override contrary state legislative enactments;<sup>241</sup> ultimately, the policy and content of the FAA are binding upon both federal and state courts.<sup>242</sup> Even in those matters in which federal courts have exclusive jurisdiction, if related claims are submissible to arbitration, arbitration has to be compelled and federal jurisdiction stayed until the conclusion of the arbitral proceeding.<sup>243</sup> In effect, the intertwining doctrine could not survive the dominance of the FAA's policy and was eliminated in favor of the contractual recourse to arbitration. Even duplicative proceedings and adjudicatory inef-

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<sup>239</sup> See *supra* text accompanying note 145.

<sup>240</sup> See *supra* text accompanying notes 153 & 154 (*Moses Cone*).

<sup>241</sup> See *supra* text accompanying notes 160-68 (*Keating*).

<sup>242</sup> *Id.*

<sup>243</sup> See *supra* text accompanying notes 169-78 (*Byrd*).

iciency did not dissuade the Court in these domestic cases from upholding the congressional intent to legitimate the recourse to arbitration.

*McMahon* reinforces the direction born of the "trilogy"; however, it not only consolidates but also expands the Court's decisional law on domestic and international arbitration. To achieve the objective of declaring that both Exchange Act and RICO claims are arbitrable, the Court engages in an uncharacteristic and disappointing display of narrow, strained, and distortive construction of statutes and prior decisional law. While the Court's aim of eliminating any restrictions on arbitration is transparent, its methodology and doctrine are confusing, unpersuasive, and ultimately unsound. Indeed, it is difficult to understand why the Court is so determined to eradicate any and all juridical restraints upon arbitration. Surely the imposition of some minimal limitations arising out of core public policy concerns would not threaten or undermine the autonomy of arbitral adjudication. For instance, allowing consumers in the securities context to benefit from statutory protections exclusively through judicial fora would not preclude or restrict the recourse to arbitration in a commercial, arms' length setting where the institution of arbitration developed and continues to thrive. The Court's desire to give absolute effect to the FAA's policy of upholding arbitration agreements is both dogged and unnecessary to maintain the integrity of the arbitral process.

The reasoning in *McMahon* suffers from several methodological and conceptual deficiencies. As to the issue of the arbitrability of Exchange Act claims (a question which divided the Court 5-4), the majority opinion begins by incanting the now-consecrated view that a claim based upon statutorily-conferred rights does not disrupt the ordinarily "hospitable" inquiry into the question of arbitrability.<sup>244</sup> To defeat the implied presumption favoring the arbitrability of claims, the statute that is the vehicle for creating the rights must contain, in either its language or its legislative history, a congressional command mandating exclusive recourse to the courts for the vindication of claims. Moreover, the burden is upon the party opposing arbitration to establish the existence of such congressional intent.<sup>245</sup> Having weighted the inquiry in favor of a finding of arbitrability, the

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<sup>244</sup> 107 S.Ct. at 2337.

<sup>245</sup> *Id.*

majority opinion then engages in a series of strained constructions to guarantee the result implied by its initial proposition.

At the outset, the Court advances a painfully technical interpretation of the relevant provisions of the Exchange Act, arguing that the non-waiver language of the Act applies exclusively to the substantive obligations under the legislation.<sup>246</sup> Since the recourse to arbitration merely represents the selection of a different forum and remedial process, such an agreement—the Court would have us believe—has no impact upon the substantive statutory rights in question. The non-waiver provision of the Act, therefore, does not apply to arbitration agreements because that choice of remedy does not affect the substantive guarantees of the Act. In reaching this determination, the Court opines that arbitrators are capable of applying and interpreting the law.<sup>247</sup>

The Court, however, attributes no significance whatever either to the underlying purpose of the Exchange Act (to protect individual investors from overreaching by securities industry professionals) or to the intractable reality that arbitrators are likely to construe the applicable law very differently from judges, especially in light of the fact that the arbitral procedure in these circumstances is established and directed by the securities industry. In effect, the Court chooses to ignore the adhesions character of the contract and the arbitration agreement, neglecting the evident need for consumer protection generated by the facts. The Court exhibits similarly tendentious and distortive reasoning in its attempt to align the result in *McMahon* with the principles of prior decisional law on arbitration.

For example, the majority opinion interprets the *Wilko* decision as barring the selection of a non-judicial forum where arbitration is inadequate to protect the substantive statutory rights at issue.<sup>248</sup> *Scherk* is seen as providing that, where arbitration is deemed (presumably by the courts) sufficient to protect the rights at issue, there is no bar to a waiver of a judicial forum.<sup>249</sup> This construction of precedents extends the doctrine, first articulated in *Scherk* and more forcefully in *Mitsubishi*, that the existence of statutory rights does not preclude the recourse to arbitration unless there is a legislative command that mandates judicial disposition of alleged violations. According to the

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<sup>246</sup> *Id.* at 2338-39.

<sup>247</sup> *Id.* at 2340-41.

<sup>248</sup> *Id.* at 2338.

<sup>249</sup> *Id.* at 2339.

*McMahon* interpretation of *Wilko* and *Scherk*, statutory language providing for the non-waiver of judicial remedies will be effective only when arbitration, the alternative, is deemed to be an inadequate remedial process for adjudicating statutory rights. Expressed more forthrightly, the syllogistic logic<sup>250</sup> yields the following new rule of law: Express statutory language attributing exclusive jurisdiction to the courts will defeat a private agreement to arbitrate only when the courts determine that arbitration is an inadequate remedy to protect the statutory rights in question. The Court's review of the relevant precedent amounts to a reconstruction of the prior law.

In effect, *Wilko* stands for a very different proposition than the one advanced by the Court. According to the express language of *Wilko*,<sup>251</sup> as between two competing congressional policies—upholding arbitration agreements under the FAA and protecting securities investors under the Exchange Act—the *Wilko* Court gave effect to the latter in light of the express statutory language in the 1933 Act providing for exclusive judicial remedies and relief. The *Wilko* Court reasoned that, in such special circumstances, Congress had itself decided to make an exception to its general policy under the FAA. Moreover, *Scherk* is distinguishable from *Wilko* not because there exists a meaningful difference in statutory language or objective between the 1933 and 1934 Acts, but rather because the domestic policy of securities investor protection has little relevance to multinational parties engaged in an international commercial venture. The primary analytical factors that led in *Scherk* to a restriction of the *Wilko* doctrine to domestic circumstances are the presence of an international contract and the Court's willingness to elaborate special rules for litigation resulting from transnational commercial activities.

*McMahon* ignores the special circumstances, express doctrinal content, and segregation of domestic and international considerations in the prior decisional law. The *McMahon* Court has thus created new law from the previously well-settled significance of these decisions. It is not surprising that these reconstructed rules are more suitable to developing an unlimited arbitrability doctrine.

The holding in *Mitsubishi* is similarly recast.<sup>252</sup> A fair reading of the *Mitsubishi* rule would represent it as stating that antitrust claims are arbitrable in the context of international contracts. As in *Scherk*,

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<sup>250</sup> *Id.* at 2349 (Blackmun, J. dissenting).

<sup>251</sup> See *supra* text accompanying note 65.

<sup>252</sup> 107 S.Ct. at 2332.



the triggering element of the opinion was the fact that the dispute and the agreement to arbitrate surfaced in the context of an international commercial transaction. If American parties could frustrate the recourse to arbitration by alleging violations of American antitrust law, the stability of international commerce achieved with predictable dispute resolution through arbitration would be undermined. According to *McMahon*,<sup>253</sup> however, *Mitsubishi* now stands for the proposition that the submission of statutory rights to arbitration does not represent an abandonment or elimination of those rights. Arbitral tribunals, like courts, are able to interpret and apply the governing law. Resorting to the arbitral rather than judicial adjudication of statutory claims merely represents a choice of dispute resolution forum.

This transparent reassessment of *Mitsubishi* is again calculated to support (*après la lettre*) the Court's increasingly expansive arbitration doctrine. It further appears that the objective of establishing a judicial policy on matters of private international law, discernable in the *Scherk* and *Mitsubishi* holdings as originally stated, has been engulfed by and lost in the larger, more doctrinaire and unbending policy on arbitration.

In particular, *McMahon* gives short shrift to *Wilko*. According to the majority opinion,<sup>254</sup> *Wilko*, rather than representing a statement of the importance of the policy of protecting securities investors from broker overreaching, instead symbolizes primarily a general distrust of arbitration and of the ability of arbitral tribunals to achieve viable adjudicatory results. While the Court makes a half-hearted attempt to preserve *Wilko's* precedential value,<sup>255</sup> it effectively discredits its reasoning and ultimate result—stating, for instance, that the *Wilko* view of arbitration does not square with the more contemporary judicial evaluation in *Mitsubishi*, *Byrd*, *Keating*, *Moses Cone*, or *Scherk*.<sup>256</sup> The present view is that arbitral tribunals can handle complex disputes, that procedural flexibility in arbitration does not mean that substantive rights will be compromised or eliminated, and that arbitrators are able to apply the law (with the prospect of judicial review at the enforcement stage standing as a safeguard against arbitrator abuse or incompetence).<sup>257</sup> Moreover, in regard to securities

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<sup>253</sup> *Id.* at 2340.

<sup>254</sup> *Id.* at 2339-41.

<sup>255</sup> *Id.* at 2341.

<sup>256</sup> *Id.* at 2340.

<sup>257</sup> *Id.*

arbitration, the *McMahon* Court finds that the new oversight authority of the SEC provides a guarantee against overreaching and unfairness.<sup>258</sup> Accordingly, the *Scherk* holding (despite its reasoning pertaining to international commerce) is extended to cover both domestic and international claims arising under the Exchange Act and *Wilko* is limited to claims (presumably both domestic and international) arising under the Securities Act.<sup>259</sup>

As to the issue of the arbitrability of RICO claims,<sup>260</sup> the Court in *McMahon* is unanimous in its view that such claims can be submitted to arbitration. While the RICO legislation could readily be seen as involving matters of public policy, there is no express language in the statute or its legislative history to indicate a congressional intent to preclude party selection of alternative, non-judicial remedies. Accordingly, under the revamped reasoning in *Mitsubishi*, the Court gleefully finds itself bound to conclude that RICO claims can be adjudicated through arbitration.<sup>261</sup> The RICO statute does provide for civil claims, and arbitrators are able to take jurisdiction over such disputes. Apparently, arbitral (like judicial) jurisdiction extends to the awarding of treble damages.

It is startling that the disposition of this question generated no controversy among the members of the Court. Given the vehement dissents<sup>262</sup> that accompanied some of the major cases in this line of decisional law, some expression of disagreement could logically have been expected in light of the arguably vital public interests at stake. Perhaps, the Court finds the RICO statute duplicative of other regulatory legislation and burdensome to administer in actual litigation. In any event, the last vestiges of opposition within the Court to an unthwarted arbitration policy appear to have been finally voiced in *Mitsubishi*.<sup>263</sup>

Prior to *McMahon*, Justice Stevens' dissenting opinion in *Mitsubishi* had assumed a critical significance in the development of American arbitration law. Eloquent and persuasive, it made a cogent case for a more measured decisional law grounded in the need for rational restraints. It created the expectation that the Court's unwieldy vision of arbitration might be kept in check by an assessment of the process

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<sup>258</sup> *Id.* at 2341.

<sup>259</sup> *Id.* at 2340-41.

<sup>260</sup> *Id.* at 2343-45.

<sup>261</sup> *Id.* at 2344.

<sup>262</sup> For instance, Justice Douglas in *Scherk* and Justice Stevens in *Mitsubishi*.

<sup>263</sup> See Justice Stevens' dissent in *Mitsubishi*.

that was anchored in an intelligence of its history, reality, and design. Justice Stevens' concurring and dissenting opinion in *McMahon* very substantially disappoints that expectation. Agreeing that RICO claims can be submitted to arbitration, Justice Stevens only takes exception with the majority view that arbitration agreements should be enforced with respect to 1934 Security Act claims: given the "longstanding interpretation" upholding the *Wilko* bar in this area, "any mistake the courts may have made in interpreting the statute is best remedied by the legislative, not the judicial, branch." The brevity in tone and content of the opinion strongly suggests that the Stevens' opposition to the incongruities of the majority's doctrine on arbitration has waned to acquiescence. His opposition to the concept of limitless arbitration now gains expression in the empty formalism of judicial restraint.<sup>264</sup>

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<sup>264</sup> The Court's current stance on arbitration is lodged (so it seems at least) in the general policy objective of improving the administration of justice by promoting the recourse to arbitration. Its intent appears to be to have arbitral adjudication act as a substitute for the judicial process, thereby reducing the volume of cases on federal court dockets. In pursuing this policy objective, the Court has minimized the importance of other, arguably equally-important juridical values—such as federalism concerns and regulatory policy. Moreover, the Court has achieved its aim by responding to the legal questions engendered by the litigation through analytical reasoning that is so single-minded at times as to be transparently ill-conceived and tortuous.

In this setting, Justice Stevens' dissenting opinion in *Mitsubishi* was an enlightening counterpoint to the majority's view of and approach to arbitration. The Stevens dissent was grounded in persuasive legal reasoning and in a realistic sense of the dimensions of the arbitral process. It also countered the majority's policy vision with a set of critical and opposing policy considerations: what are or should be the demands of international trade and business upon national processes? When should national interests be considered vital in this setting and how are they to fare in the elaboration of a policy on international commerce? How can an effective balancing of priorities be achieved?

Stevens' reference to judicial restraint in *McMahon* no longer carries with it an implied understanding of the arbitral process or of its mission in the larger landscape of dispute resolution and public policy. Nor does it convey a persuasive opposing view of the policy underpinnings of the specifically legal questions that are ordinarily raised in the litigation on arbitration. In effect, it sounds a retreat to a refuge of doctrine that is likely to be inconsequential as a dissenting view.

Given the history of his opinions on arbitration, it may have been unrealistic to expect that Justice Stevens would become a voice of reasoned opposition to the Court's arbitration doctrine. Taken as a whole, the opinions contain a number of marked inconsistencies. Moreover, rather than reflect an elaborated concept of the systemic or institutional stature of arbitral adjudication, they reveal an assessment of the alternative process that is subordinated to the traditional legal issues that

The majority opinion in *McMahon* makes evident that the Court wants the recourse to arbitration to go unimpeded in almost all

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dominated the particular litigation.

For example, Justice Stevens, as a judge on the Seventh Circuit Court of Appeals, dissented in *Alberto-Culver Co. v. Scherk*, arguing that the arbitration agreement should be enforced. See 484 F.2d 611 (7th Cir. 1973). According to then-Judge Stevens, although both statutes rendered "void any waiver by a plaintiff of defendant's obligation to comply with the statute," neither the 1933 Act nor the 1934 Act "expressly applies to the plaintiff's waiver of his right to sue in a federal court." *Id.* at 618-19 (Stevens, Cir. Judge, dissenting). *Wilko* was distinguishable from *Scherk* on the ground that *Wilko* involved actions contrary to the purpose of the statute while *Scherk* was merely a disguised contract case. "[I]n a case such as this, . . . I would interpret § 29(a) as meaning no more than it actually says, and respect what I regard as the stronger policy mandated by § 201 of the Federal Arbitration Act . . ." *Id.* at 619.

While the tenor of the opinion appears to announce in an ironic way the type of reasoning that would eventually characterize the majority opinion in *Mitsubishi* and *McMahon*, Judge Stevens' logic was not adopted by the United States Supreme Court, which anchored its agreement with the Stevens conclusion in language relating to international comity and the needs of international commerce. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Justice Stevens later vehemently dissented against such reasoning in *Mitsubishi*, criticizing the majority opinion for subordinating the "national interests in a competitive economy" to "vague notions of international comity." *Mitsubishi*, 105 S.Ct. at 3361, 3369 (Stevens, J., dissenting). According to Stevens, a makeshift "vision of world unity" should not be allowed to "distort the importance of the selection of a prior forum for resolving this dispute." *Id.* at 3374.

Therefore, as a circuit judge, Justice Stevens argued that claims under the 1934 Act should be submitted to arbitration, while in *McMahon*, as a Supreme Court Justice, he dissented on the ground that such claims should not be arbitrable. Moreover, his strong opposition to the arbitrability of antitrust claims expressed in *Mitsubishi* is accompanied in *McMahon* by the silent approval of the submission of RICO claims to arbitration—even though civil RICO claims can be considered roughly equivalent to antitrust claims in terms of their importance to the public interest.

The dichotomy between Stevens' reasoning in *Scherk* and *McMahon* could be explained by reference to a belief in judicial restraint. Since and prior to his circuit court dissent in *Scherk*, the *Wilko* bar to 1934 Act claims has been upheld by a long line of courts. Even if Justice Stevens believes that the application of *Wilko* is mistaken, his conservative view on the exercise of judicial authority may have led him to conclude that the erroneous decisional law should be corrected by legislative, not judicial, action. Judicial restraint would further require that the Justice's misgivings yield to overwhelming case precedent and the Congressional acquiescence to the non-arbitrability of such claims.

The conflict between the determination of the arbitrability of antitrust and RICO claims may be explained by Justice Stevens' long association and intimate acquaintance with antitrust law. Justice Stevens not only practiced antitrust law, but has also extensively taught and is an accomplished scholar in that area. Justice Stevens' affinity to the "Chicago School" of antitrust economics and to its regard for the consumer protection rationale of antitrust policy may have motivated the Justice's

circumstances. The most troubling and elusive component of the opinion is its underlying motivation and the need to have such an absolute and unrestricted policy on arbitrability specifically and on arbitration generally. The "new trilogy" in domestic law could be understood in terms of the need to articulate a policy on arbitration of truly national dimension. If state courts applying state law in commercial cases could undermine the basic purpose of the FAA, the congressional objective of legitimating arbitration might receive only episodic implementation. Moreover, in diversity cases, federal courts obligated to apply state law might also be compelled to undo the gravamen of the FAA. Accordingly, in matters of interstate commerce where Congress has the power to legislate, the goals of the FAA should receive uniform and systematic application by all judicial tribunals.

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view in *Mitsubishi* that "the public interest in free competitive markets" is too close to fundamental values and core regulatory interests to be implemented through private arbitral resolution. The anti-competitive restrictions allegedly imposed by *Mitsubishi* are the very type of actions that the antitrust laws were intended to guard against and prosecute.

According to Justice Stevens, RICO claims raise a very different set of considerations. Few RICO claims actually involve allegations of criminal conduct by mobsters. Civil RICO violations, like those allegedly involved in *McMahon*, are not essential claims in that they do not arise from organized crime's encroachment upon legitimate business. They are not, according to the Stevens thinking, part of the primary concerns of the statutory framework. Moreover, there is no express statutory language evidencing a Congressional intent to render such claims inarbitrable. Finally, there is no body of decisional law supporting the inarbitrability of civil RICO claims. Therefore, while the alleged violations in *Mitsubishi* were exactly the type of misconduct that the antitrust statutes were meant to prevent, the RICO violations alleged in *McMahon* cannot, realistically or analytically, be equated with the social evil that the RICO statute was intended to extinguish.

Taken in the context of the entirety of his opinions on arbitration, the Stevens dissent in *Mitsubishi* does not so much reflect an insightful understanding of the institution of arbitral adjudication as such, but rather a studied concern for the role and integrity of antitrust regulation. As a whole, while the majority view in arbitration litigation focused upon the politics of judicial administration, Justice Stevens was preoccupied with either substantive juridical concerns or policies relating to the exercise of judicial authority. On either side of the equation, the court appears to have only a minimal regard for the integrity of arbitration itself.

For a discussion of Justice Stevens' judicial career and philosophy, see generally R. KAY, R. KHAYAT, J. ZIRKLE, A REFERENCE GUIDE TO THE SUPREME COURT 329 (S. Elliott ed. 1986); 5 L. ORLAND, *John Paul Stevens*, in THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 149 (L. Friedman ed. 1978); *Tribute to Justice John Paul Stevens*, 56 CHI. KENT L. REV. 1 (1980); Riggs, *Justice Stevens and the Law of Antitrust*, 43 U. PITT. L. REV. 649 (1982). The author is indebted to Mr. Craig E. Frosch for his research assistance in the writing of this footnote.

The determinations in *Scherk* and *Mitsubishi* were also sustainable by reference to a comprehensible policy objective. Simply stated, the needs of international commerce and trade are sui generis and differ from their domestic analogue. Because of its provision of neutrality and expertise, arbitration has become the principal dispute resolution mechanism in that area of activity. If it is problematic to have one party to a transnational commercial venture subject to the laws and judicial procedure of a foreign country, it is untenable to have the national law of one of the contracting parties frustrate the agreed-upon recourse to arbitration. Domestic restrictions on arbitrability, therefore, should not be integrated into the context of international transactions because such parochial action would eventually undermine the effectiveness and stability generated by the availability of the arbitral process. While statutory rights available to American parties in the form of securities or antitrust legislation will probably be compromised under this internationalist doctrine, the interest in fostering the development of international commerce by freeing it of local juridical constrictions outweighs the policy of affording nationals—versed in the commercial climate—extraterritorial protection.

*McMahon*, however, escapes the normal reach of policy justifications. The opinion effectively collapses the astute and creative distinction between matters of international arbitration and those pertaining to domestic arbitration. *Scherk* and *Mitsubishi* are no longer to be understood as creating special rules for international commercial litigation, but rather as producing propositions that generally apply to the arbitrability of all disputes. It is one thing to decide that domestic restrictions are unsuitable for application in an international context; it is quite another matter to decide that, because the domestic restriction is inapplicable in transnational matters, it has lost its governing effect in the domestic process as well. The rulings in *Scherk* and *Mitsubishi* were premised on the specialty of international commercial litigation, as exceptions to a usually controlling rule in the domestic legal order. Rather than simply ignore that aspect of the cases, the Court should have recognized the consequences of its reasoning and provided some justification for its ricochet integration of the international exception into the domestic legal order. After all, different legal regimes and policy interests are involved in these separable areas of activity. The unreasoned alignment of the international and domestic cases on arbitration, then, is both unfortunate and confusing. It robs both groups of cases of their specialty and particular policy directives,

and allows the Court to elaborate a policy on arbitration that is abstracted from the meaningful restrictions of varying circumstances.

The only protection that the Court proffers against the potential compromise of rights and arbitral abuse is judicial review of awards at the enforcement stage. When applied under existing rules and procedures for review, such protection is likely to be ineffective. Although awards of the International Chamber of Commerce (ICC) usually constitute an exception to this practice, arbitral awards generally do not contain reasons, and scrutiny is usually given only to basic procedural matters. If a more stringent review standard is applied—one, for example, applying to the merits or which requires arbitrators to conform strictly to legal due process requirements—it is likely to do substantial damage to the autonomy of the arbitral process. A policy meant to give absolute free reign to arbitration could result in the gradual defacement of the process through an increase of judicial supervision.

The Court suggests in *McMahon* that its ruling is quite simply mandated by the congressional intent underlying the FAA.<sup>265</sup> Given the radical transformation of the American law of arbitration that *McMahon* achieved, however, that suggestion is unconvincing. A more likely explanation appears to reside in the Court's desire to take as much dispute resolution as possible out of judicial fora and to promote efficient judicial administration by reducing court dockets. But, if the American juridical culture is in crisis because of the predominance of the adversarial ethic and litigious dispositions, the answer to that problem, although it may reside in alternative approaches to dispute resolution, does not lie in simply shifting the maximum possible adjudicatory burden to arbitration. Arbitral adjudication works well for some disputes, especially those that are commercial and international in character, but it is not a panacea—it is not a remedial structure of universal application. There are some disputes that truly implicate core public concerns or involve parties whose bargaining position and knowledge are fundamentally unequal. In such cases, arbitration is inappropriate. Moreover, it is inappropriate to respond to a situation in which access to justice is a problem by making such access completely impossible. Although the volume of claims is thereby reduced, such barriers do not improve the quality of justice that is dispensed.

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<sup>265</sup> 107 S.Ct. at 2337, 2343.

The imbalance in the Court's analysis illustrates a willingness to compromise fundamental rights and values, not for rational reasons, but out of a sense of desperation arising from the volume of litigation. Unfortunately, the Court's desperation may also lead it to compromise the effectiveness of arbitration itself and the integrity of the case law that advanced the favorable policy underlying the FAA. The dire prophecy of the Douglas dissent in *Scherk* appears to be materializing and influencing all aspects of the American law of arbitration. Rather than creating a sound and structured juridical pathway for the exercise of contractual discretion in dispute resolution, the Court appears to have abdicated its function of providing necessary guidelines and balance to the institution of a cooperative relationship between the judicial and alternative processes.<sup>266</sup> The

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<sup>266</sup> The Court's ruling generated a number of reactions. In response to the *McMahon* decision, the American Arbitration Association enacted a new set of rules to deal specifically with matters of security arbitration. See American Arbitration Assoc., Securities Rules (effective Sept. 1, 1987). In some respects, the variegated content of these rules demonstrates the difficulty of providing for recourse to arbitration in this setting. In general, however, the procedures established attempt to accommodate as appropriately as possible the disparity of position between the parties and the potential public law aspect of the claims. (Information obtained in telephone interviews on Dec. 6, 1988 with Mr. Richard Lerner, American Arbitration Assoc., New York City Office, and Mr. David Tick, American Arbitration Assoc., San Francisco Regional Office).

The stock market collapse on October 19, 1987 put the *McMahon* decision and the administrative powers of the SEC to the test. While the Commission contemplated asking Congress to prohibit pre-dispute arbitration clauses in securities agreements, it ultimately decided to request a study and is in the process of reviewing that study. The current status of securities arbitration and the relative inaction of the Commission belies the confidence the *McMahon* Court placed in the process and in the SEC's supervisory functions. See *Arbitration backlog keeps investors waiting for relief*, Christian Science Mon., Oct. 21, 1988, Business section, at 13.

Also, Massachusetts enacted legislation that prohibits mandatory arbitration provisions in investor-broker contracts. Under the regulation, brokers must advise clients of their legal right to pursue judicial relief and cannot refuse to do business with clients who do not agree to arbitration. The Massachusetts provision conflicts with federal law as established by the *McMahon* opinion and also may represent the initial development of a trend against arbitration. See *Massachusetts Says Brokers Can't Insist on Arbitration*, Wall St. J., Sept. 22, 1988, at 39, cols. 5 and 6. The Massachusetts law was struck down at the federal district court level on constitutional grounds. See *Securities Ind. Assoc. v. Michael J. Connolly, Sec. of State*, C.A. 88-2153 - W.D. Mass. [U.S. DIST. LEXIS 14587, decided Dec. 19, 1988]. Appeal is envisaged.

Finally, the Court recently agreed to review (57 U.S.L.W. 3347 [Nov. 14, 1988]) a decision in which the Fifth Circuit Court of Appeals held that claims arising under the 1933 Securities Act can be submitted to arbitration. In its opinion, the lower court simply extended the *McMahon* Court's evaluation of the *Wilko v. Swan*



unqualified recourse to the principle of freedom of contract is as dangerous as it is unintelligent. It transforms the invocation of that principle into indiscriminating sloganeering.

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precedent to its logical conclusion, holding that the latter opinion in effect had been reversed. If upheld on appeal, the decision would effectively eliminate the significance of the inarbitrability defense, further compromise the position of individual investors in the securities markets, and continue to undermine the integrity of the arbitral process. See *Rodriguez De Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296 (5th Cir. 1988) ("We thus follow the reasoning of the Supreme Court in *McMahon* and our own decision in *Noble* [*v. Drexel Burnham Lambert, Inc.*, 823 F.2d 849, 850 n.3 (5th Cir. 1987)] which lead directly to the obsolescence of *Wilko* and the arbitrability of Securities Act § 12(2) claims." 845 F.2d at 1299).