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The Reception of Arbitration in United States Law

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I. INTRODUCTION

The willingness of any national legal system to endorse the process of arbitral adjudication can be measured by whether its governing statutory law and accompanying case law sustain the validity of arbitration agreements and limit judicial supervision of arbitral proceedings and awards—in effect, whether the laws of a nation establish a cooperative relationship between the courts and the arbitral process.[1] On both scores, United States law on arbitration evinces a clear determination to support the process. The development of the law has given the framework of arbitral adjudication its necessary systemic autonomy.[2]

Since 1970, when the United States ratified the New York Arbitration Convention,[3] the United States legal system has actively par-

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1. *See* Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39-57 (1984). For a general discussion of arbitration, see G. WILNER, DOMKE ON COMMERCIAL ARBITRATION (rev. ed. 1984).

2. *See* Carbonneau, *supra* note 1, at 45-53, 65-77. *See generally* F. KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948); Holtzmann, *U.S.A.*, 9 Y.B. COM. ARB. 60 (1984); Holtzmann, *United States*, 2 Y.B. COM. ARB. 116 (1977).

3. 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 at 9 U.S.C. §§ 201-208 (1982)).

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* de Vries, Book Review, ARB. J., Sept. 1982, at 61; Book Note, 18 TEX. INT'L L.J. 243 (1983); Carbonneau, Book Review, 24 VA. J. INT'L L. 527 (1984); Harrington, Book Review, 16 J. MAR. L. & COM. 129 (1985). *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, *Commentary Volumes V and VI*, 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). *See generally* G.

ticipated in the growing international consensus on arbitration. In fact, federal court decisions have recently assumed a role of preeminence (albeit a somewhat questionable one) in solidifying and advancing that consensus. Invoking its policy favoring international trade and commerce, the United States Supreme Court has guided the federal courts toward an unequivocal endorsement of arbitration for the resolution of private international commercial disputes.[4] Additionally, the Court's most recent pronouncements join in a trend toward less national control of arbitration, *viz* the development of "anational" arbitration, under which international commercial arbitration is exempted from almost all national legal strictures.[5]

Similar developments are at work in United States domestic law. Pursuant to the Federal Arbitration Act,[6] the Court has systematically minimized the juridical restrictions on arbitration—even sacrificing federalism interests to the elaboration of a national policy on arbitration.[7] This unwavering support for arbitration in domestic law, however, raises questions about the integrity of the Court's conception of arbitration. Is arbitration, along with the alternative dispute resolution (ADR) movement, merely being used to achieve greater efficiency in federal judicial administration? As one critic[8]

Gaja, INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION (1978) (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); 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).

4. *See infra* text accompanying notes 45-62.

5. *See infra* note 61 and accompanying text.

6. Federal Arbitration Act, ch. 213, §§ 1-15, 43 Stat. 883-886 (1925) (current version at 9 U.S.C. §§ 1-14 (1982)).

7. *See infra* text accompanying notes 20-39.

8. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985). *See also* J. AUERBACH, JUSTICE WITHOUT LAW? 144-46 (1983).

A representative sample of the current writings on the ADR movement and the debate that attends it include the following: M. DEUTSCH, THE RESOLUTION OF CONFLICT (1973); J. HIMES, CONFLICT AND CONFLICT MANAGEMENT (1980); P. STEIN, LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE RESOLUTION (1984); Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337 (1985); Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3 (1987); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); Sarat, *The Litigation Explosion, Access to Justice and Court Reform: Examining the Critical Assumptions*, 37

argues, does ADR serve as a means to effectuate a political agenda of deregulation and anti-statism? Also, the recent convergence of the Court's rulings on international and domestic arbitration eliminates formerly meaningful distinctions between separable areas of arbitral activity. The widening proportions of the Court's doctrine appear to have engendered confusion and misunderstanding as to the mission of arbitration and its viability as a dispute resolution mechanism.[9]

Moreover, the decisions on international commercial arbitration can be integrated (either as a generating source or as a derivative development) into a burgeoning "internationalist" federal case law on transnational litigation. This case law places primary emphasis upon considerations of comity and attempts to elaborate decisional principles that are responsive to the actual character of transnational litigation.[10] Despite its growing sensitivity to international matters, however, the Court has not proffered uniform internationalist guidance.[11] Consequently, this increasingly significant area of adjudication lacks a stable decisional predicate. Future directions are uncertain; even the course of arbitral "internationalism" now appears to be somewhat confounded.

A useful comparison can be drawn between the contemporary status of arbitration in the United States law and that of its Canadian analogue. Prior to 1986, the Canadian law on arbitration embodied much of the traditional Anglo-Saxon distrust of non-judicial dispute resolution. In Canada, arbitral adjudication was not a favored method of dispute resolution, and was one to which parties seldom resorted.[12] Courts, lawyers, and business interests preferred

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RUTGERS L. REV. 319 (1985); Sipes, *Reducing Delay in State Courts—A March Against Folly*, 37 RUTGERS L. REV. 299 (1985); Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76 (1984).

For a more critical perspective on ADR and responses to the criticism, see THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982); Comments on Galanter, 46 MD. L. REV. 40 (1986); Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, [1985] WISC. L. REV. 1359; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *The Legal Malaise; or, Justice Observed*, 19 L. & SOC'Y REV. 537 (1985); Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987); *Litigation in America*, 31 U.C.L.A. L. REV. 1 (1983); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985). *See also The Litigation Explosion Debate*, 11 JUST. SYS. J. 259 (1986).

9. *See infra* text at section VI.

10. *See infra* text accompanying notes 64-82.

11. *See infra* text accompanying notes 72-82.

12. For a discussion of the status of the Canadian law on arbitration prior to 1986, see L. KOS-RABCEWICZ-ZUBKOWSKI, COMMERCIAL AND CIVIL LAW ARBITRATION IN CANADA (1978); R. MCLAREN & E. PALMER, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1982); Brierley, *International Trade Arbitration: The Canadian Viewpoint*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 826 (1974);

to rely upon the "real thing." In 1986, after lengthy efforts to overcome federalism obstacles, Canada ratified the New York Arbitration Convention and adopted the United Nations Commission on International Trade Law (UNCITRAL) rules on arbitration, thereby making Canada instantaneously and unqualifiedly receptive to international commercial arbitration.[13]

To draw a limited parallel to human experience, the current Canadian adhesion to arbitration is akin to a *coup de foudre.* Canada's sudden wholehearted embrace of arbitration raises questions concerning the basic quality and possible longevity of the relationship. The United States has had a more settled experience with arbitration. Hesitant at first, the United States courtship has resulted in a rather harmonious union between the legal system and arbitration. Contemporary developments in the United States, however, suggest that a critical stage has been reached in the marriage of these contrasting adjudicatory ethics. The flirtation with "anational" arbitration and the unwieldy (perhaps unrealistic) view of the scope of arbitral jurisdiction in domestic law may tax the foundations of the relationship to the point of threatening its stability. The United States experience with arbitration, therefore, could alert Canada to the potential pitfalls of developing an overly exuberant policy on international and domestic arbitration.

II. THE EARLY VIEW OF ARBITRATION

Until its contemporary stage, United States law on arbitration evolved in a rather typical fashion, characteristic of most developed Western legal systems.[14] Nineteenth century United States courts espoused an inhospitable view of arbitration, perceiving it as an unwarranted intrusion into the domain of judicial authority.[15] The

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Claxton, *Commercial Arbitration Under Canadian Law,* 21 CAN. B. REV. 171 (1943); Guillbault, *Les Lois québecoises de conciliation et d'arbitrage,* 11 REV. BARREAU 221 (1951); Kos-Rabcewicz-Zubkowski, *Canada,* 2 Y.B. COM. ARB. 16 (1977); Nadelmann, *Enforcement of Foreign Judgments in Canada,* 38 CAN. B. REV. 68 (1960); Perrault, *Clause compromissoire et arbitrage,* 5 REV. BARREAU 74 (1945); Verge, *De la souveraineté décisionelle de l'arbitre,* 19 MCGILL L.J. 543 (1973).

13. *See generally* Alvarez, *La nouvelle législation canadienne sur l'arbitrage commercial international,* [1986] REV. L'ARBITRAGE 529; Chiasson, *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. BARREAU 259 (1987) (English language version in 13 CAN. BUS. L.J. 58 (1987-1988)); Comment, *Canadian-American Perspectives on the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards,* 3 CAN.-AM. L.J. 219 (1986).

14. *See generally* Carbonneau, *supra* note 1, at 57-59, 82.

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

United States judicial position was molded to a large extent by English attitudes toward arbitration.[16] In England, arbitral proceedings were perceived essentially as ancillary fact-finding procedures; arbitrators merely attempted to "play judge" and could not render cogent adjudicatory determinations. As a consequence, in early United States law, arbitration agreements were not judicially enforceable until an award had been rendered.[17] This rule was manifestly intended to discourage party recourse to arbitration and to prevent the non-judicial framework from acquiring a legitimate institutional stature, inasmuch as parties would not agree to arbitrate if one of the parties (the likely loser) could withdraw from the proceeding prior to the award. Moreover, in most statutes on arbitration, the agreement to submit an existing dispute to arbitration, the submission, was preferred to the compromissory clause, the agreement to submit future disputes to arbitration. In many cases, the submission was the only legally valid type of arbitration agreement.[18] Again, such a rule undermined the recourse to arbitration. Parties in conflict were unlikely to agree upon a non-judicial alternative once their disagreement had surfaced.

The reliance of the early United States law on English concepts of arbitration, however, was not complete in every instance. At times, borrowings were partial or incorporated in modified form. For example, English courts traditionally engaged in a merits review of arbitral awards through the stated case procedure.[19] This form of judi-

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> 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 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).

16. *See* Carbonneau, *supra* note 1, at 45-52.

17. *See supra* note 15 and accompanying text.

18. *See, e.g.*, Carbonneau, *supra* note 1, at 53 n.88.

19. For general sources on the English law of arbitration that explain the stated case procedure, see E. LEE, ENCYCLOPEDIA OF ARBITRATION LAW (1984); M. MUSTILL & S. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND (1982); 2A H. SMIT & V. PECHOTA, THE WORLD ARBITRATION REPORTER 2701-61 (1987); A. WALTON & M. VITORIA, RUSSELL ON THE LAW OF ARBITRATION (20th ed. 1982); Hunter, *Arbitration Procedure in England: Past, Present and Future*, 1 ARB. INT'L 82 (1985); Steyn, *England*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION England-

cial supervision reflected the view that arbitrators, because they lacked judicial training, might compromise the integrity of the substantive law in their rulings. Judicial second-guessing of arbitral determinations was not expressly integrated into the United States law on arbitration; the proximity between English and American law, however, did result in the incorporation of unreasoned awards into United States arbitral practice. In England, the rendering of arbitral awards without the statement of reasons was a means of avoiding judicial supervision of the merits; in the United States, this practice, presumably adopted simply for historical reasons, contributed further to the aura of illegitimacy that surrounded the arbitration process.[20]

III. ARBITRATION REHABILITATED

Commercial realities, as advocated especially by New York business groups, eventually resulted in a reconsideration of the institutional stature of arbitration.[21] Commercial relationships suffered badly under the juridical approach to dispute resolution. While the legal system placed primary importance upon intricate procedural safeguards and the requirements of abstract substantive principles, the business community's basic disposition was to salvage relationships despite conflict. Commercial parties needed an adapted process—one which could render commercially knowledgeable and relatively rapid determinations, not an unassailable procedural framework. Business community pressures led to the enactment of the 1925 Federal Arbitration Act (FAA).[22] The FAA was one of the first modern arbitration statutes, and its enactment attested to the coming-of-age of arbitration in the United States.

Congressional proponents of the legislation were concerned that the legal appraisal of arbitration was not in tune with commercial realities.[23] The legislative history makes clear that the allegiance to

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1 (1984); Steyn, *England*, 8 Y.B. COM. ARB. 3 (1983).

20. *See generally* Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 581-86 (1985).

21. *See* Carbonneau, *supra* note 1, at 45-53.

22. Federal Arbitration Act, ch. 213 §§ 1-15, 43 Stat. 883-886 (1925) (current version at 9 U.S.C. §§ 1-14 (1982)). Present arbitration legislation retains the vast majority of the original language. *See generally* Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223 (1982); Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986).

23. 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

English concepts of arbitration was to be abandoned.[24] Although it did not create substantive rights, the FAA was designed to make the procedure of arbitration available to commercial parties and those who engaged in maritime transactions.[25] Pursuant to these objectives, section 2 of the FAA declares that arbitration agreements are "valid, irrevocable, and enforceable,"[26] thereby equating them with ordinary contracts and eradicating the tradition of judicial hostility. Thus, although an agreement to arbitrate ousts judicial jurisdiction, it is the legitimate exercise of contractual prerogatives. In addition, the FAA establishes very limited grounds for judicial review of arbitral awards, excluding the possibility of a review of the merits. The FAA grounds permit judicial supervision of clearly unacceptable determinations that involve excesses of arbitral authority and violations of basic due process and procedural fairness considerations.[27]

> 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) (statement of Rep. Graham of Pennsylvania).

For a discussion of the FAA, see Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U.L.Q. 238 (1930); *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153 (1925); Note, *Contracts—Effect of the United States Arbitration Act*, 25 GEO. L.J. 443 (1937).

24. *See supra* note 23.

25. *See* 9 U.S.C. § 2 (1982).

26. *Id.*

27. *See id.* at §§ 10-11.

The FAA does not expressly contain a ground for reviewing arbitral awards on the basis of public policy. It could be argued, however, that such a ground might be implied by the language of the other review provisions and by the existence of an explicit public policy defense to the enforcement of foreign arbitral awards under the New York Convention. The later ratification of the New York Convention would have modified impliedly the content of the earlier domestic law.

Such an interpretation—adding in effect another ground for challenging and opposing the arbitral process through judicial action—might contravene the general tenor of the existing federal decisional law on arbitration. Because domestic awards result from an integrated national process where applicable norms are shared and familiar, they do not pose the same potential threat to consecrated legal standards and values. By its malleability, a public policy exception—even if only implied—invites greater interference with the arbitral process and might lead to untoward judicial intrusions. The legislative intent of excluding such a ground, therefore, appears clear and well motivated and should remain controlling.

It is difficult to imagine, however, that a court would not stretch the content of the

Although judicial construction could have undermined the FAA, decisional law has given effect both to the statute's letter and to its underlying spirit. Federal decisions consistently reiterate a support for the clear statutory mandate, namely, to uphold the validity of the contractual recourse to arbitration and to make arbitration a fully viable adjudicatory option.[28] Moreover, the case law has not only solidified, but also extended the aims of the federal legislation. One example is the Court's adoption of the separability doctrine, providing that the arbitration clause and the main contract have separate juridical identities.[29] This judicial gloss strengthened the arbitral process by insulating it from dilatory tactics and by increasing the jurisdictional authority of arbitral tribunals. Under the separability doctrine, allegations that the main contract is invalid (e.g., for reasons of fraud) will not impede the recourse to arbitration unless the arbitral tribunal determines that the fraud also tainted the arbitration clause.[30] In addition, the Supreme Court eventually de-

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available grounds for review under the FAA to find some basis for quashing an award that it believes to be contrary to public policy. A parallel reference to labor arbitration is instructive in this regard. Although the FAA does not apply to contracts of employment, the federal courts have looked to the FAA for guidance in resolving matters of labor arbitration. *See United Paperworks v. MISCO*, 108 S. Ct. 364, 372 n.9 (1987). In labor arbitration, an award can be denied enforcement on the basis of public policy:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.

Id. at 301.

The federal policy favoring the recourse to arbitration in labor disputes is as strong as and is, in reality, synonymous with the federal policy embedded in the FAA. The integration of a public policy exception to the enforcement of labor arbitration awards through common law contracts principles has not disturbed the judicial support for labor arbitration or compromised the integrity of the process. The guidance sought by the federal courts from the FAA in labor arbitration matters could become more of a reciprocal process, thereby allowing public policy considerations to have an impact on the enforcement of commercial and maritime arbitral awards.

28. Recent federal court decisions continue to recognize a strong federal policy in favor of arbitration. E.g., Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 841 F.2d 508-510 (3d Cir. 1988); 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); Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 719 n.21 (D.C. 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); Local 703, Int'l Bd. of Teamsters v. Kennicott Bros. Co., 771 F.2d 300, 302 (7th Cir. 1985); Liskey v. Oppenheimer & Co., 717 F.2d 314, 319 (6th Cir. 1983).

29. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-404 (1967) (federal courts may adjudicate claims of fraud in the "making" of the agreement to arbitrate, but not of fraud in the inducement of the contract generally).

30. *See* G. WILNER, *supra* note 1, § 8:01, at 89-91.

termined that the FAA is more than a procedural enactment—that it contained substantive directives that are imposed upon federal courts as a matter of congressional authority.[31] Ultimately, the Court held that the FAA embodies a federal policy that unequivocally supports the recourse to arbitration.[32]

These earlier decisions presaged a trilogy of recent cases dealing more extensively with arbitration and federalism questions. Striking in their doctrine, several recent cases herald a new era of United States arbitration law and signal the erosion of state authority over arbitration. With the advent of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[33] *Southland Corp. v. Keating*,[34] and *Dean Witter Reynolds, Inc. v. Byrd*,[35] it has become evident that the FAA is the springboard for the elaboration of a national policy on arbitration—the basis for the federalization of United States law on arbitration.[36] Invoking the constitutional mandate of the commerce clause and the supremacy clause, the Court has declared that the FAA embodies a strong federal policy supporting arbitration.[37] The validity of arbitration agreements is a consecrated tenet of that policy. In the context of interstate commerce, application of state statutes cannot invalidate or frustrate the tenet.[38] Nor can considerations regarding the mere efficiency of dispute resolution undo the controlling effect of the federal policy favoring arbitration. The

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31. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. at 404-405. In a dissent, Justice Black argued that the majority went beyond the specific intent of the Act, which, he asserted, was 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 (Black, J., dissenting).

Justice Black also contended that the effect of the separability doctrine was to place arbitration agreements, not 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 Justice Black, was inseparable from its other contractual promises. *Id.* at 423-25.

32. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985). *See also supra* note 28 and accompanying text.

33. 460 U.S. 1 (1983).

34. 465 U.S. 1 (1984).

35. 106 S. Ct. 1238 (1985).

36. *See generally* Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

37. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. at 24. *See also supra* note 28 and accompanying text.

38. *See* Southland Corp. v. Keating, 465 U.S. at 10-16.

agreed upon recourse to arbitration must take place even though it requires the piecemeal adjudication of claims.[39] State statutes requiring exclusive judicial remedies are unconstitutional. The supremacy clause will not permit the undermining of the federal policy on arbitration.[40]

Since the pre-FAA era, the United States law on arbitration, therefore, has made a complete "about-face." Arbitral adjudication is no longer an unlawful exercise of party autonomy in contract—a usurpation of public jurisdictional authority. The FAA has rehabilitated arbitration, and the implementing decisional law has given arbitration an autonomous institutional standing. Federal authority has adapted the process to an increasingly national commercial activity. In balancing various juridical interests against the adjudicatory viability of arbitration, the Court seemingly believes that unflinching support is necessary to insulate arbitration from the possibility of dilatory practices and intrusions from local law.

IV. THE INTERNATIONAL CASE LAW

The New York Convention,[41] currently ratified by more than seventy countries, is the universal charter of international commercial arbitration. Its ratification is a measure of a nation's acceptance of international commercial arbitration. The Convention regulates the two vital features of the arbitral process: the validity of arbitration agreements, and the judicial supervision of arbitral awards.[42] Signatory states agree to recognize the validity of arbitration agreements and their jurisdictional effect upon court authority.[43] Moreover, the Convention contains very limited grounds for the judicial review of awards, closely paralleling their counterparts in the FAA, but for the presence of an express public policy provision in article V(2)(b).[44] In

39. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. at 20.

40. *See* Southland Corp. v. Keating, 465 U.S. at 16. For a discussion of the recent cases, see Hirshman, *supra* note 35; Comment, Dean Witter Reynolds, Inc. v. Byrd: *The Unraveling of the Intertwining Doctrine*, 62 DEN. UNIV. L. REV. 789 (1985); Note, *Mixed Arbitrable and Nonarbitrable Claims in Securities Litigation:* Dean Witter Reynolds, Inc. v. Byrd, 34 CATH. UNIV. L. REV. 525 (1985); Note, *Preemption of State Law Under the Federal Arbitration Act*, 15 UNIV. BALT. L. REV. 128 (1985); Note, *Investor-Broker Arbitration Agreements:* Dean Witter Reynolds, Inc. v. Byrd, 20 UNIV. SAN. FRAN. L. REV. 101 (1985); Recent Developments, *The Federal Arbitration Act: A Threat to Injunctive Relief*, 21 WILLAMETTE 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 (1985-1986).

41. 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 at 9 U.S.C. §§ 201-208 (1982)).

42. For a thorough discussion of the Convention, see A. VAN DEN BERG, *supra* note 3.

43. *See* The New York Arbitration Convention, *supra* note 41, at art. II(1), (3).

44. *See supra* text and accompanying notes 26-27.

addition to excesses of arbitral authority, a denial of recognition and enforcement can be based upon the arbitral tribunal's failure to follow the dictates of basic procedural fairness.[45] Also, there is an inarbitrability defense and a public policy exception to recognition and enforcement.[46] A claim of inarbitrability refers to circumstances in which the subject matter of the award cannot be submitted to arbitration under the law of the requested state. To some extent, the public policy exception overlaps with the inarbitrability defense; it applies when the recognition or enforcement of an arbitral award violates fundamental juridical concerns of the requested jurisdiction.

The United States ratification of the Convention in 1970 was a landmark event. United States adhesion solidified the evolving transnational consensus on arbitration. It also created a context in which the United States Supreme Court could develop an internationally minded case law relating specifically to arbitration and, more generally, to transnational litigation. While the progression of this internationally minded case law had been essentially uninterrupted, recent pronouncements, involving the merging of the international and domestic arbitration doctrines and non-conforming rulings in other international cases, have introduced a degree of ambiguity that challenges the soundness, direction, and viability of the Court's internationalist attitude.

The history of the seminal United States decisions on international commercial arbitration is well known and studied. For present purposes, it is sufficient to recall the salient features. *Scherk v. Alberto-Culver Co.*,[47] decided in 1974, held that, in the context of an international contract, claims arising under the Securities Exchange Act of 1934 could be submitted to arbitration. The Alberto-Culver Company alleged that it had been defrauded by Scherk, an Austrian seller of trademarks.[48] In *Wilko v. Swan*, a prior domestic case involving claims arising under the Securities Act of 1933, the inarbitrability defense held sway because of the unique judicial remedies provided by the Securities Act and because of its policy imperatives.[49] The *Scherk* Court, however, disregarded the *Wilko* holding on two grounds. First, resorting to a technical—somewhat forced—analysis of the securities acts, the Court held that, despite their similar objectives, the statutes differed as to their requirement for exclusive judicial recourse.[50] The Court found sufficient differences to warrant the conclusion that judicial remedies were not re-

45. The New York Arbitration Convention, *supra* note 41, at art. V(1).
46. *See id.* at art. V(2).
47. 417 U.S. 506 (1974).
48. *Id.* at 509.
49. 346 U.S. 427, 438 (1953).
50. 417 U.S. at 512.

ally mandated by the Securities Exchange Act.[51]

Second, and more significantly, the Court invoked a larger policy dimension, holding the *Wilko* precedent inapplicable because of the "truly international" character of the *Scherk* contract.[52] The rule of domestic law as to the inarbitrability of securities claims could not be extended to matters of transnational litigation. Using now celebrated language, the Court echoed the reasoning of *Bremen v. Zapata Off-Shore Co.*[53] and elaborated a judicial doctrine on international trade.[54] It admonished the federal courts to avoid parochialism in transnational adjudicatory determinations. If United States commercial interests were to participate effectively in world trade, the federal courts could not espouse a nationalistic view of the resolution of international commercial conflicts. The need for neutrality and predictability in transnational contracting mandated that agreements to arbitrate be sustained by national judicial fora.[55] Otherwise, the international market place would become "a legal no-man's land,"[56] making the efficient resolution of commercial conflicts impossible and undermining the stability of international commerce. Succinctly stated, rather than attribute primary importance to the regulatory interests and the legal rights involved, the Court assumed a broader policy perspective, focusing upon the vital importance of arbitration to the viability of international commerce.

The *Scherk* Court was, therefore, willing to embellish upon statutory enactments and to act as the institutional oracle for implementing a United States policy on international trade. As Justice Douglas warned in his dissent,[57] in the shadows of the oracular pronouncements on world trade policy, there lurked the ominous implications of a restriction of national regulatory policies and statutorily created rights. The wide generalities of the majority reasoning clouded those implications. The reference to policy imperatives and the concomitant neglect of national legal considerations, however, announced the Court's prospective disposition toward issues raised by international litigation. Rather than refer to domestic law rules or a choice-of-law methodology, the Court embedded its decisional approach in the universalism of transnationally acceptable principles. Private international law was being modified; from a set of conflicts provisions, it was becoming a source of positive law. In matters of transnational litigation, designated rules of domestic law were no longer controlling. A set of nationally articulated, but internationally ori-

51. *Id.*
52. *Id.* at 515.
53. 407 U.S. 1 (1972).
54. Scherk v. Alberto-Culver Co., 417 U.S. at 518-20.
55. 417 U.S. at 516-17.
56. *Id.* at 517.
57. *Id.* at 529 (Douglas, J., dissenting).

ented substantive rules, tailored to the particular character of transnational litigation, would govern.[58]

More than a decade passed before the full implications of the *Scherk* doctrine could be properly assessed. In 1985, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[59] the Court reaffirmed and extended its internationalist approach. The question in *Mitsubishi* was whether antitrust claims based on the Sherman Act and arising in connection with an international contract could be submitted to arbitration.[60] Again, as in the *Scherk* litigation, domestic precedent held that antitrust claims were inarbitrable. According to *American Safety Equipment Corp. v. J.P. Maguire & Co.*,[61] antitrust claims could not be submitted to arbitration because of the regulatory importance of antitrust legislation; the highly technical and elaborate discovery that usually accompanied such litigation which necessitated recourse to judicial procedures; and because arbitrators usually have a commercial background, preventing them

58. 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 (1945). Both phrases have been subject to criticism for their imprecision, but each has survived 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). 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. SCHMITTHOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE 21 (2d ed. 1981).

59. 105 S. Ct. 3346 (1985). For commentary on the case, see Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of* Mitsubishi, 19 VAND. J. TRANSNAT'L L. 265 (1986); Lipner, *International Antitrust Laws: To Arbitrate or Not to Arbitrate*, 19 GEO. WASH. J. INT'L L. & ECON. 395 (1985); Robert, *Une date dans l'extension de l'arbitrage international: L'arrêt*, Mitsubishi c/ Soler, [1986] REV. L'ARBITRAGE 173; Note, *International Arbitration and the Comity of Error:* Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 19 CONN. L. REV. 435 (1987); Recent Developments, *Arbitration: Arbitrability of Antitrust Claims in International Tribunals*, 27 HARV. INT'L L.J. 227 (1986). *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); Symposium, *The Future of Private International Arbitration: Beyond* Mitsubishi Motors v. Soler Chrysler Plymouth [sic], 12 BROOKLYN J. INT'L L. 579 (1986). In particular see Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOKLYN J. INT'L L. 629 (1986).

60. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. at 3353.

61. 391 F.2d 821 (2d Cir. 1968).

from having the requisite impartiality to decide antitrust disputes.[62] As in *Scherk*, the Court disregarded the domestic precedent and declared that it was elaborating a special rule for international contract cases. The Court categorically defended the suitability of arbitration for adjudicating antitrust claims.[63] In addition, it held, perhaps in an attempt to assuage concern about the demise of the inarbitrability defense, that a form of merits review would be available against international arbitral awards that contained rulings on antitrust matters.[64]

The *Mitsubishi* opinion, on the one hand, is significant because it develops the Court's support for international commercial arbitration and the viability of international trade. On the other hand, there is much that is unfortunate about its reasoning and methodology. As Justice Stevens indicated in his dissent (a dissent which resembles Justice Douglas's dissenting opinion in *Scherk*), the majority is misguided; it advances a distorted and disproportionate view of arbitration, transforming a mechanism for contractual dispute resolution into a would-be pathway to world peace.[65] This visionary embellishment distances arbitration from its essential reality. Arbitration was never intended nor designed to deal with the adjudication of regulatory claims. Regulatory disputes are embedded in national legal processes and are within the special province of the public adjudicatory authority of national courts. At the very least, a decision to exclude their application in transnational commercial dealings should be a legislative determination. Moreover, an appropriate balance could be struck between the need for arbitral autonomy and national legal interests simply by segregating contractual and regulatory issues and submitting them to separate adjudicatory processes. Severance of claims might impose some delay upon the arbitral process, but it would not undermine its contractual jurisdiction. It would have the great advantage of instilling a measure of peaceful coexistence and equilibrium between the transnational framework and national policy concerns.

It could be argued that, given the realities of international adjudication through arbitration, a severance of claims at the outset of the proceeding would pose a substantial threat to the arbitral process. The possibility of using a regulatory claims exception as a preliminary defense ultimately might dissuade international merchants from having recourse to arbitration because the defense could be used as a dilatory tactic or it could prevent disputes from being resolved by a single, neutral international forum. While this dire view

62. *Id.* at 826-27.

63. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. at 3356-57.

64. *Id.* at 3360.

65. *Id.* at 3361, 3374 (Stevens, J., dissenting).

may contain some seeds of truth, the current doctrine on the arbitrability of regulatory claims certainly protects the integrity of the arbitral process, but it also robs the regulatory claims exception of any meaningful significance. It provides that all claims, whether contractual or statutory, shall be submitted to arbitration. Once the arbitrators have ruled, a domestic court sitting in an enforcement proceeding can supervise the merits of that adjudicatory ruling. In other words, if the process is to undergo a challenge, that challenge occurs at the end rather than at the inception of the process. The investment of time and resources, however, is likely to create a presumption of valid arbitral adjudication. Moreover, since the reversal of a final arbitral determination is likely to be even more crippling to the process than an effective preliminary challenge, the exercise of a merits review is likely to be perfunctory. In effect, the adjudication of regulatory claims in transnational litigation is being abandoned by the federal courts and left to the exclusive province of international arbitrators.

In *Mitsubishi*, the submission of the plaintiff's antitrust claim to Japanese arbitrators may well have deprived the plaintiff of its statutorily conferred rights. While recourse to extraterritorial application of domestic law is a very questionable means of creating a transnational rule of law, regulatory rights should not be eliminated by the fact of participation in international commerce unless a legislative determination so provides. Until public regulatory provisions of a truly international character exist and reflect an authentic consensus among sovereigns, national regulatory law is one of the few available means of creating limits upon transnational conduct. Courts should adapt such provisions to the private international context through a considered balance of comity interests and the need for orderly commercial behavior. Purely private commercial conduct should not completely divest sovereigns of their regulatory authority without some legislative approbation.

Finally, the majority's reference to a possible merits review at the enforcement stage[66] is a careless afterthought in the evolving doctrine on international commercial arbitration. As a practical matter, given the circumstances in *Mitsubishi*, it is unlikely that such an award would ever come to the United States for enforcement. The reference to merits review may have been an attempt to assuage concern about the implications of the holding. In terms of arbitration theory, a merits review is untoward and unacceptable. The history of arbitration law illustrates that the possibility of judicial second-guessing of arbitral determinations is antithetical to the process. The inarbitrability defense is well-established; it does not pose the type of threat to the autonomy of arbitral adjudication that

66. *Id.* at 3360.

the possibility of a merits review does. It is certainly a more predictable form of supervision than the ad hoc exercise of judicial scrutiny at the enforcement stage of the process.

Mitsubishi indicates that the Court endorses, at least to some extent, the controversial concept of "anational" arbitration.[67] The basic thesis of "anational" arbitration is that international arbitral proceedings and awards should not be impeded by national legal restrictions relating either to procedural or substantive law matters. The authority of national legal systems should interface with the

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67. According to the proponents of the "anational" legal order, 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 to the territorial authority of municipal systems is both inappropriate and undesirable. A new legal order needs to be fashioned that takes new realities into account. According to Lord McNair, "[T]he complexity of the modern world . . . compel[s] 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 BRITISH 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 19, 21 (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.").

These views have been subject 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, *England Rejects "Delocalised" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193 (1984); Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572 (1960); Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BRITISH Y.B. INT'L L. 35, 45 (1959) ("Lord McNair . . . somewhat surprisingly considers the general principles as affording, in certain cases, 'the choice of a legal system' . . . . 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."); Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 26 (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."); Suratgar, *Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nations*, 2 IND. J. INT'L L. 273, 311 (1962) ("The major criticism of [Lord McNair's] suggestion is that no such legal system exists, and that it could have no connexion with any definable society, and would not amount in positivist terms to a legal system at all.").

But see Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53, 57 (1983) ("What this critique misses is that the delocalised award is *not* thought to be independent of any legal order. . . . The point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country or origin." (emphasis in the original)). *See also* Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

process of international commercial arbitration only to lend the support of public juridical authority to the process and its determinations. Although the Court makes reference to the possibility of a merits review at the enforcement stage—the so-called second-look doctrine—and thereby gives some play to national legal restrictions, the Court's reasoning in *Mitsubishi* appears to go a step further in the anational direction by providing that public law disputes that arise in conjunction with an international commercial transaction governed by a valid agreement to arbitrate must be resolved through the process of international commercial arbitration. This form of "anational" arbitration fails to recognize the fundamental distinction between contractual claims and regulatory jurisdiction. It leaves no place for the integration of national interests and public policy considerations in the international commercial arbitration process. Furthermore, it transcends the spirit of the New York Arbitration Convention which specifically recognizes the possibility that foreign arbitral awards can be denied recognition and enforcement if they violate the arbitrability limitations of the requested jurisdiction or its public policy.[68]

Mitsubishi creates an imbalance between the need to support the development of international trade and commerce and the right of national jurisdictions to establish regulatory policy. Eliminating all restrictions upon the process of international commercial arbitration may be to the detriment of its long-term interests. A valid and functional transnational framework must allow some latitude for the assertion of vital national concerns.

V. The Fusion of Doctrine

The rulings in *Scherk* and especially *Mitsubishi* have converged with other international and domestic cases and their attendant policies. The fusion of the various rationales in these related decisions depicts the simultaneous growth and undoing of the federal arbitral doctrine.

In *Shearson/American Express, Inc. v. McMahon*,[69] decided in 1987, the Court held that claims arising under the Securities Exchange Act of 1934 and RICO could be submitted to arbitration. With *McMahon*, the federal policy favoring arbitration gains so large an institutional stature that it becomes uncontrolled. The policy imperative is so wide that it knows no definitional boundaries. Moreover, the *McMahon* Court's perception of the absolute congressional directive underlying the FAA engulfs its appraisal of international commercial arbitration. The consolidation of the decisional approaches leads to a reevaluation of *Mitsubishi*—which now stands

68. *See supra* note 46 and accompanying text.
69. 107 S. Ct. 2332 (1987).

for the proposition that statutorily conferred rights can be submitted to arbitration. According to the *McMahon* Court, *Mitsubishi* teaches that recourse to arbitration is always valid if there is no express statutory language mandating exclusive judicial remedies. Moreover, if such an express preclusion exists, the courts must further determine that arbitration is an inadequate adjudicatory framework by which to vindicate the statutorily created rights.[70] The protection afforded to arbitration in domestic law, therefore, joins and subsumes the liberality of the doctrine on international arbitration; the demise of the inarbitrability defense becomes part of an all-encompassing United States policy on arbitration. The gravamens of *Scherk* and *Mitsubishi* are transformed; the special character of their transnational holdings abandoned. The United States law on arbitration is now so universal that it is fungible in all contexts and admits of restrictions in none of them.

The majority in *McMahon* also placed significant restrictions on *Wilko*'s precedential value. Although it did not reverse the decision, the Court debased it, stating that its reasoning reflected an historic and outmoded form of judicial hostility toward arbitration.[71] This reevaluation of *Wilko*, patently distortional, attests to the single-mindedness of the Court's advocacy for arbitration. *Wilko* was a type of last stand for the inarbitrability defense and for a rule of reason in United States arbitration law. For all practical purposes, its hold on that law has been broken.

The *Mitsubishi* doctrine also converges with rulings on international jurisdictional matters. Over the last several decades, state and federal courts have elaborated decisional law for asserting jurisdiction over foreign parties in transnational litigation. Early cases[72] adopted the approach of simply transposing domestic rules of long-arm jurisdiction to the international context. In a typical case, the court would apply the relevant state jurisdictional statute in conformity with federal due process constitutional standards. According to *International Shoe Co. v. Washington*,[73] there had to be a finding of minimum contacts between the defendant and the jurisdiction; as a rule, even the most minimal of contacts were sufficient. In effect,

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70. *Id.* at 2339-40.

71. *Id.* at 2340-41.

72. Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851 (1967) (Judge Breitel's dissent, *id.* at 539, 227 N.E.2d at 855, announces the essential doctrinal features of the more contemporary decisional law); Taca Int'l Airlines v. Rolls Royce of England, Ltd., 47 Misc. 2d 771, 263 N.Y.S.2d 269 (1965). The more developed federal court position in matters of international jurisdiction is illustrated in Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 489 (5th Cir. 1974) ("The law of the state in which the federal court sits must confer jurisdiction over the persons of the defendants, and if it does, the exercise of jurisdiction under state law must comport with basic due process requirements of the United States Constitution.").

73. 326 U.S. 310 (1945).

jurisdictional standards had been federalized for both domestic and international cases. The domestic framework was simply extended to transnational litigation without regard to the specificity of such litigation or the interests of comity.

World-Wide Volkswagen Corp. v. Woodson,[74] along with *Shaffer v. Heitner*,[75] inaugurated a new trend in domestic jurisdictional matters. Under *World-Wide Volkswagen*, the standard for establishing constitutionally required minimum contacts became more stringent. Considerations of fairness to the defendant and the likelihood that the defendant's conduct would give rise to a reasonable expectation of suit in the jurisdiction became key ingredients of the new approach.[76] In the Court's view, the conduct of commerce on a national basis did not warrant unlimited possibilities for suit against enterprises.[77] The assertion of jurisdiction would be constrained by a rule of reason.[78] The tenets of this new domestic jurisdictional philosophy were incorporated into transnational decisional law.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of California*,[79] decided in 1987, the Court abandoned the doctrine established in early cases addressing in personam jurisdiction in the international context. The *Asahi* Court held that, in international litigation, the authority to assert in personam jurisdiction over a foreign party was limited by considerations of fairness to the defendant, its reasonable expectation of suit, and the foreign policy impact of haling a foreign party into United States courts.[80] The *Asahi* facts,[81] involving an indemnification action between two foreign corporations before a California court, may restrict the import of its holding. The generality of the reasoning[82] and its alignment with the internationalism of both *Scherk* and *Mitsubishi*, however, suggest the elaboration of a larger doctrine. *Asahi* affirms the view that the days of an imperialistic, extraterritorial jurisprudence are a bygone era; federal decisional law is now anchored in the recognition of the special character of transnational litigation—its unique needs and special interests. Comity has become the rule of the day.

While it evinces an enlightened and rational attitude, this emerging federal internationalism gives rise to misgivings when it is more fully explored. First, the doctrine on international arbitration, especially in light of the implications of *Mitsubishi*, illustrates that a

74. 444 U.S. 286 (1980).
75. 433 U.S. 186 (1977).
76. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 291-92. *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985).
77. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 292-93.
78. *Id.* at 293-94.
79. 107 S. Ct. 1026 (1987).
80. *Id.* at 1034.
81. *Id.* at 1029-31.
82. *Id.* at 1033-35.

judicial position based largely upon policy motives can become severely entangled. On its own, right thinking is not a sufficient foundation for legal rules; an appreciation of the particularities of the institutions and the rights involved must inform the direction of policy. A balance of interests usually is the best means of achieving objectives and is an indispensable feature of artful judicial decision-making.

Second, the new-found internationalism conflicts with case law relating to the extraterritorial application of United States antitrust laws. Beginning with *United States v. Aluminum Co. of America (Alcoa)*,[83] federal courts determined that the antitrust laws could be applied beyond the territorial boundaries of the United States, provided that the allegedly monopolistic conduct occurring in foreign jurisdictions had an effect upon United States commerce. The *Alcoa* ruling was modified, at least to some extent, by two later cases which espoused a rule of reason with regard to the assertion of extraterritorial jurisdiction.[84] The lack of recent activity in this area has not allowed the federal courts either to reaffirm or to reassess their position; therefore, it remains possible to apply domestic antitrust law against foreign defendants on the basis of commercial conduct taking place completely abroad. The *Mitsubishi* doctrine, however, implies strongly that this prior decisional law has been overruled, and the determination in *Asahi* confirms that the extraterritorial approach to transnational regulation has been abandoned.

Third, perhaps most importantly, federal internationalism does not as yet appear to be firmly established. The Court's recent ruling in *Société Nationale Industrielle Aérospatiale v. United States District Court*[85] indicates a divergence of approach in transnational litigation. In *Aérospatiale*, the Court ruled that the provisions of the Hague Evidence Convention were not mandatory, but rather were merely an optional framework for pursuing the discovery of evidence in international cases.[86] The Convention was designed to reconcile the disparity between common law and civil law methodologies for evidence gathering procedures. It was meant to establish a transnational rule of law in this area.[87] Despite its reliance upon the express

83. 148 F.2d 416 (2d Cir. 1945).

84. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

85. 107 S. Ct. 2542 (1987).

86. *Id.* at 2554. *See* Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the* Aérospatiale *Decision*, 63 TUL. L. REV. — (1988) (forthcoming); Note, *A Look Behind the* Aérospatiale *Curtain, Or Why the Hague Evidence Convention Had to Be Effectively Nullified*, 23 TEX. INT'L L.J. 269 (1988).

87. 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*

language of the Convention and its legislative history,[68] the Court's ruling undermines efforts to create a transnational rule of law for international litigation. The determination in *Aérospatiale* may be explained by common law lawyers' concern for matters of procedure and by United States litigants' propensity to engage in highly complex discovery practices. It nonetheless compromises the basic coherence in the Court's approach to transnational litigation. In the context of the decisional law on international matters, *Aérospatiale* implies that procedural considerations are more critical to United States interests than regulatory legislation. The technical reasoning and parochial perspective in *Aérospatiale* are uncharacteristic and directly contravene the Court's approach in *Scherk*, *Mitsubishi*, and *Asahi*. It, in effect, represents a return to the *Alcoa* extraterritorial approach.

VI. CONCLUSIONS

The reception of arbitration in United States law appears to be characterized simultaneously by a clarity and a confusion of position. The early stage of the reception is relatively clear. Through the enactment of the FAA, arbitration was rehabilitated and judicial hostility was abrogated. The statutory rehabilitation was accompanied by the elaboration of a protectionist decisional law that increasingly compromised juridical interests to safeguard the institutional autonomy of arbitration. Some measure of legal sacrifice may well have been necessary to establish a truly national policy on arbitration. The application of state statutes providing for exclusive judicial remedies could have undermined the validity of arbitration agreements and the dispute resolution viability of the arbitral framework.

Contemporary developments are less limpid. The protectionist policy was pursued with too much zeal. The Court began to misperceive its role and to misconceive the needs and mission of arbitration. The virtual elimination of the inarbitrability defense in domestic law, symbolized by *McMahon*, not only protects arbitration from the constraints of the legal system, but also begins to protect arbitration from itself. Such rulings ultimately impinge upon the arbitral framework by dismantling the internal integrity of the process. The Court is not simply balancing opposing needs and interests, but completely redefining the process of arbitration. Because there are few, if any, constraints—limited to loose grounds for review under the FAA—the law of arbitration, in effect, has ceased to

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States Case Law, Convention-Sponsored Review Commissions (1978 & 1979), and Responses of Other Signatory Nations: With Digest of Cases and Bibliography, 16 GA. J. INT'L & COMP. L. 73 (1986).

88. Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S. Ct. at 2550-54.

exist. Unlimited recourse to arbitration is really no longer arbitration at all. Its conventional role and rationale have been undone; its dispute resolution utility extinguished. Arbitration has become an unofficial judicial system for resolving all non-constitutional conflicts.

By requiring consumers in adhesionary circumstances to go to a system of arbitration established and controlled by industry, *McMahon*[89] dually imperils the protection of legal rights and the legitimacy and traditional support for arbitration. In this setting, arbitration no longer symbolizes the recourse to a bargained for, relatively rapid, efficient, knowledgeable, and fair alternative to judicial adjudication; rather, it epitomizes overreaching and the inaccessibility of justice. Having arbitration compensate for the failings of the legal system and obliging it to function in dispute areas where it, by definition, cannot succeed will eventually undermine the legitimacy of the process. The Court's endorsement of arbitration and of ADR generally transforms the promise of a new adjudicatory day into the emasculation of a well-established method of dispute resolution, making it the adjudicatory dumping ground for the federal court system. Foreseeable legislative reprisals may well undermine the general viability of the ADR movement; in any event, society risks losing an expedient dispute resolution process for contractual conflicts.

Recent opinions on international commercial arbitration have also undone prior clarity and balance. *Scherk* evidenced a rather enlightened judicial policy on international trade and commerce—a policy borne of a creative judicial activism having its foundation in the congressional ratification of the New York Arbitration Convention. The support for international arbitration was a means of implementing the congressional goal of effective United States participation in international trade. The idea of protecting international commerce from ill-suited and narrow rules of domestic law had a natural appeal and a logical basis. *Scherk* did not imply nor did its reasoning portend that participation in international trade required a complete sublimation of all national legal interests (including fundamental ones) to the hegemony of private transnational commercial conduct.

Mitsubishi provided an opportunity to establish a balance between national public policy concerns and the perceived necessity of international commercial arbitration. Given the New York Convention's recognition of the public policy exception and the inarbitrability defense, the reasoning in *American Safety* could have easily won the day. The Court, however, refused to confine the exuberance of its new found internationalism and failed to circum-

89. *See supra* text accompanying notes 69-71.

scribe the thrust of its policy within the perimeters of basic and necessary distinctions. International business dealings containing arbitration clauses were now insulated from the regulatory reach of United States law. In its enthusiasm for promoting international trade and commerce, the Court forgot the essential scope of the arbitral mandate and the basic tenets of arbitration law. The reference to a possible merits review of arbitral awards indicated that the integrity of arbitral adjudication had been subordinated (as in domestic law) to an overarching and inchoate policy design.

The deficiencies of the evolving decisional law were exacerbated when the *McMahon* Court collapsed the international and domestic cases into a unitary view of arbitration. Despite the range of its doctrine, the determination in *Mitsubishi*—prior to *McMahon*—could still be seen as providing a basis for elaborating a substantive private international law—a type of positive law for international litigation. The reinterpretation of *Mitsubishi*, as holding that statutorily conferred rights could be submitted to arbitration in both domestic and international matters, undermined that justification for the opinion. The judicial support for arbitration was no longer a creative source of law, but rather merely a mechanism to achieve greater efficiency in judicial administration. *McMahon* was a final and poignant illustration of the Court's unwillingness to understand the special character and capabilities of the arbitral framework—to judge it on its own.

Finally, the Court's decisional law on international commercial arbitration is confusing because it is inconsistent with decisions in other international cases. Although *Asahi* conforms with the basic internationalist approach, *Aérospatiale* clearly does not. Taken as a whole, the Court's doctrine in matters of transnational litigation is scattered and unpredictable. A cogent and unified view has yet to emerge. The lack of a clear direction may compromise the future of international commerce, a paradoxical result in light of the Court's expressed doctrine. Moreover, the implied espousal of "anational" arbitration in *Mitsubishi* is likely to limit the transnational vocation of arbitration. The concept of arbitration as an unrestricted process, eliminating the authority of national regulatory legislation and public policy, makes it exceedingly unattractive to developing countries. Latin America and African countries are unlikely to embrace such a process. Socialist countries, considering any entry into the international market, will probably never accept such an unfettered compromise of national authority. Unequivocal legal support once again works to the detriment of arbitration by eliminating the universality of the remedy.

In some respects, the rehabilitation of arbitration was like the legitimation of a bastard child. Now accepted into the family unit, as the arbitral remedy grows and approaches adulthood, it must be afforded both a true sense of autonomy and the necessary parental

guidance to have it achieve its proper place in the adult world of dispute resolution. In its most recent development, arbitration has been neglected. The United States experience reveals that, in order to cater to other needs of the legal family, the legal system, as parenting force, ignored the basic personality and needs of the arbitral process. The fledgling Canadian rehabilitation of arbitration could profit from the example of the United States. The critical stages in the Canadian reevaluation of the utility and adjudicatory mission of arbitration have yet to be confronted. The viability of the Canadian law of arbitration rests ultimately upon the response of the business community and legal actors to the availability of arbitration. The United States experience teaches that the parenting of arbitration into the mainstream of dispute resolution must be accomplished with an understanding of the potential and of the limitations of the process. The quest to participate effectively in the growth of international trade and commerce needs to be accomplished through the intermediation of arbitration; arbitration, however, must survive its intermediating function. It must not be used simply as a means to an end and discarded along the way. The critical foundations of the arbitration institution—party autonomy, a contractual subject matter, and a cooperative relationship with the courts—must not be dissolved in the process of adaptation and integration. The supporting factor of national statutory and decisional law acceptance of arbitration must remain a viable and active ingredient in the affirmation of arbitration's autonomy and identity. Enslaving arbitration to the accomplishment of other, albeit important, policy objectives will ultimately cripple the process and lead to its demise.