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# LAW AND CONTEMPORARY PROBLEMS

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Volume 67

Winter/Spring 2004

Numbers 1 & 2

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## FOREWORD

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In what is a critical starting point for the ongoing debate about the proper role of mandatory, binding arbitration in the U.S. legal system, the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>1</sup> made the following fundamental assertion about the arbitration process:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>2</sup>

At its bottom, this issue of *Law and Contemporary Problems* is focused upon questioning the validity of the Supreme Court's faith. Is arbitration merely a simple, informal, and expeditious way to achieve generally the same resolutions as those available in the public court system? Or, has our greater experience with the use of binding arbitration led us to call into question the Court's comfort level?

Answering this fundamental issue of confidence is challenging. At times, it seems that we know precious little about how arbitration really works. How often are arbitration procedures utilized in various types of disputes? Do arbitration results generally follow expected norms? One of the purposes of this collection is to provide some insights into the basic question, "What do we really know about arbitration?"<sup>3</sup>

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1. 473 U.S. 614 (1985).

2. *Id.* at 628.

3. See Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55

It is hard to escape the conclusion that the large majority of academic experts on dispute resolution have serious and significant doubts about the wisdom of the Supreme Court's strongly pro-arbitration stance. Many of the articles in this Symposium reflect this deep-felt concern that the Supreme Court has guided us down the wrong track,<sup>4</sup> and that at a minimum, further expansion of the pro-arbitration regime should be limited<sup>5</sup> or that strong pro-consumer changes in the law are justified.<sup>6</sup> This is not to say that arbitration does not have its supporters or those willing to focus on how to make arbitration work better; their views are reflected in this collection as well.<sup>7</sup>

We wish to acknowledge with gratitude the support provided by the Roscoe Pound Foundation. The Foundation provided valuable financial support for a conference to allow the authors published in this Symposium to discuss their

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(Winter/Spring 2004) (reporting the results of an empirical study on the frequency with which the average consumer's purchases are accompanied by arbitration agreements and on the terms of those agreements).

4. See Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (Winter/Spring 2004) (examining the costs consumers are likely to face in bringing their disputes to arbitration and arguing that those costs are often sufficiently high to bar consumers from having access to any dispute-resolution forum); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (Winter/Spring 2004) (examining the relationship between democracy and arbitration and offering a preliminary view that mandatory, binding arbitration tends to undermine core democratic values); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (Winter/Spring 2004) (disagreeing with the Supreme Court's interpretation of the Federal Arbitration Act as broadly preempting state regulation of arbitration and arguing that interpretation is contrary to the legislative history of the Act and to the principles of federalism); Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (Winter/Spring 2004) (examining and criticizing businesses' use of predispute arbitration clauses purporting to cover personal injury claims and calling on courts and legislatures to circumscribe the practice).

5. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (Winter/Spring 2004) (arguing that, through class action preclusion provisions, businesses are using arbitration clauses to shield themselves from liability for illegal conduct and that Congress and state legislatures should stop this form of "do-it-yourself tort reform").

6. See Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207 (Winter/Spring 2004) (arguing that legitimate considerations underlay the historical doctrine, overruled by the Federal Arbitration Act, allowing parties the mutual and reciprocal right to revoke predispute arbitration agreements and urging that Congress revive the doctrine in the context of consumer claims).

7. See Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (Winter/Spring 2004) (suggesting that the primary problem with current practice in commercial arbitration is that one party often controls the design of the dispute-resolution system and that the arbitral systems would provide greater fairness if they were mutually designed by the disputing parties or by a neutral third party and urging that unilaterally designed systems be closely scrutinized by the courts); Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105 (Winter/Spring 2004) (examining what current research might indicate about the accuracy of arbitral decisionmaking as compared to that of juries and offering the tentative conclusion that arbitrators, like judges, might be less subject to cognitive illusions, and therefore more accurate decisionmakers, than are jurors); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (Winter/Spring 2004) (arguing that the FAA requires only general contract-law standards of consent for arbitration clauses and that this comports fully with the Seventh Amendment right to jury trial).

findings and to exchange ideas. The content of the articles and the views expressed therein are those of the authors and not necessarily those of the Foundation.