

10-1-2007

## Doctrinal Development In United States Arbitration: A Metamorphosis Of Paradigms Beyond Gregor Samsa's Imagination

Pedro J. Martinez-Fraga

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### Recommended Citation

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**DOCTRINAL DEVELOPMENT IN UNITED STATES  
ARBITRATION: A METAMORPHOSIS OF PARADIGMS  
BEYOND GREGOR SAMSA’S IMAGINATION**

*By Pedro J. Martinez-Fraga\**

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## I. INTRODUCTION

In the *Museo del Prado* there hangs a masterful work by Francisco De Goya entitled "*Duelo a Garrotazos*," meaning "A Duel With Clubs."<sup>1</sup> This canvas is arresting and foreboding. Set in the context of a stark sunset two men face one another, both buried knee high so as to preclude any hope of escape, armed with clubs that are being swung in each other's direction. Their inability to dodge blows or otherwise flee from the deadly contest is underscored by the sense of rigidity arising from being "planted." The menacing intuition in the spectator of lethal harm is eloquently spawned by the outstretched clubs that inevitably shall find their immovable, fixed targets. Pursuant to this methodology doubtless the underlying dispute shall somehow be settled and the particular conflict resolved by agreement of the parties, without state intervention or furtherance of national social policies incident to otherwise dispositive judicial recourse.

Domestic and international institutional arbitration in the United States, much like Goya's "alternative dispute resolution" depiction in the form of a *Duel Using Clubs*, was perceived by commentators, the judiciary, practitioners, and captains of industry as a blunt and, therefore, imprecise methodology for dispute resolution.<sup>2</sup> In addition to finding

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<sup>1</sup> Francisco de Goya, *Duelo a Garrotazos*, circa. 1820–1823, mural transposed to linen, 123 x 266 cm.: donation of Emile d' Erlanger.

<sup>2</sup> See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953) ("[I]t has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."); *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) ("[I]n some situations Congress has allowed parties to obtain the advantages of arbitration if they 'are willing to accept less certainty of legally correct adjustment' but we do not think that this is one of them. In short, we conclude that antitrust claims raised here are inappropriate for arbitration."); *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956) ("[F]or the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury

arbitral proceedings as bereft of the expertise and procedural safeguards endemic to judicial processes, arbitrators also were viewed as wanting in authority to award liquidated damages, costs, punitive damages, or attorneys' fees under most statutorily crafted causes of action, if not under all claims irrespective of normative foundation.<sup>3</sup> In the United States, however, the pendulum now has swung to maximum apogee in the opposite direction.

Four specific factors have contributed to the recognition of arbitration in *pari materia* with judicial proceedings. First, the United States Supreme Court has interpreted "international contract" as a normative basis for according special deference to arbitral proceedings in an international context.<sup>4</sup>

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that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial."); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744 (1981) ("[B]ecause the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA [Fair Labor Standard Act], thus depriving an employee of protected statutory rights."); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 291–292 (1984) ("[F]inally, arbitral fact finding is generally not equivalent to judicial fact finding. As we explained in *Gardner-Denver*, '[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1974)). It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial. Consequently, accordingly preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide."); *and Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56–57 (1974) ("[A]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate form for the final resolution of rights created by Title VII.").

<sup>3</sup> See, e.g., *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

<sup>4</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

Second, in poignant contrast with the orthodox view of arbitration as a blunt and imprecise instrument inimical to the equitable administration of justice in specific complex judicial disciplines, a perceived need for specialization akin to the creation of “unique subject matter tribunals” has spawned a plethora of uniquely tailored institutional arbitral proceedings in the realm of domestic arbitration.<sup>5</sup>

Third, the beginning of the new millennium highlights and emphasizes a unique phenomenon in the history of private procedural international law. The absence of civil and commercial transnational courts is glaring.<sup>6</sup> Parties engaged in transnational commerce may (i) submit to the jurisdiction of foreign courts, (ii) refrain from engaging in cross-border commercial activities, or (iii) avail themselves of arbitration as a preferred methodology for international dispute resolution. From a pragmatic standpoint, the first two options are unavailing. Only international arbitration may serve as the conceptual historical dispute resolution bridge until such time as international civil and commercial

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<sup>5</sup> By way of example, the American Arbitration Association has propounded no less than twelve sets of arbitration rules each specialized in a particular industry: (i) Professional Accounting and Related Services Dispute Resolution Rules, (ii) Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), (iii) Home Construction Arbitration Rules and Mediation Procedures, (iv) Employment Arbitration Rules and Mediation Procedures, (v) Employee Benefit Plan Claims Arbitration Rules, (vi) Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes Supplementary Procedures, (vii) Resolution of Patent Disputes Supplementary Rules, (viii) AAA Arbitration Supplementary Procedures, (ix) AAA Domain Name Dispute Supplementary Rules; these rules are a supplement to the Rules for Uniform Domain Name Dispute Resolution Policy (The rules) adopted by the United States Department of Commerce, (x) The AAA of Olympic Sport Doping Disputes Supplementary, (xi) Real Estate Industry Arbitration Rules, (xii) Securities Arbitration Supplementary Procedures, (xiii) Wills and Trusts Arbitration Rules, and (xiv) Wireless Industry Arbitration Rules of the American Arbitration Association. *See* American Arbitration Association Arbitration & Mediation, [http://www.adr.org/arb\\_med](http://www.adr.org/arb_med) (last visited Sept. 5, 2007).

<sup>6</sup> Indeed, the American Law Institute has undertaken laudable efforts in the daunting task of developing transnational rules of civil procedure. The consultative group charged with this effort has generated very serious, coherent, and virtually viable work product. Despite these gains, however, the requisite “hybrid” and “cross fertilization” of multiple legal cultures across the entire globe remains both strategically and tactically quite distant.

tribunals come into being to administer justice equitably in transnational disputes of this ilk.

Finally, the fifth and most recent historic revolution of international transcendence is economic globalization.<sup>7</sup> Porous borders in the ambit of international commerce finds no historical economic precedent. The international community now experiences the virtually instantaneous flow of funds as part of the ordinary course of business attendant to transnational commercial activity. The complexities incident to multiple jurisdictions, different judicial and cultural backgrounds among business persons, increasingly intricate corporate and juridic entities serving diverse functions under the banner of “expediency and economic efficacy,” all militate in favor of a methodology for dispute resolution that comports with the parties’ expectations concerning the fair administration of justice as well as application of their respective judicial cultures. Only arbitration is capable of satisfying both prongs.

Arbitration in the United States has experienced vertical and horizontal proliferation. The verticality resides in a unique and rather inordinate degree of specialization generated by the rigors of particular industry and professional exigencies. The horizontality has been galvanized by the practically universal acceptance in the United States of arbitration as a flexible, reliable, and predictable methodology for domestic and international dispute resolution that fosters party-autonomy, uniformity, and predictability, while preserving the parties’ cultural and juridic expectations. The recognition of arbitration in *pari materia* with ordinary contracts, let alone judicial proceedings, however, was a gradual and somewhat painstaking process. To be sure, it is yet to find its perfect workings.

This analysis thus shall be divided into four specific sections. The first part shall focus on the formation and transformation of the status of arbitration (both domestic and international) in the United States. Here, emphasis shall be placed on what will be identified as the “historically conventional view of arbitration in the United States.” The second section shall consist of an exegesis of shifting paradigms bottomed on sustained analysis of the United States Supreme Court’s

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<sup>7</sup> For purposes of this analysis five “revolutions” are material: (i) the Copernican Revolution, (ii) the Agrarian Revolution, (iii) the Industrial Revolution, (iv) the Technological Information Technology Revolution, and (v) Economic Globalization.

strictures in *Wilko v. Swan*,<sup>8</sup> *Scherk v. Alberto-Culver*,<sup>9</sup> and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>10</sup> The third section shall address unresolved doctrinal precepts in institutional domestic and international arbitrations. This part of the analysis will emphasize the conceptual bilateralism underlying the public and political nature of judicial proceedings versus the private character of arbitral processes. Three particular components will be scrutinized: (i) the judicial effort to engage in the equitable administration of justice versus the resolution of individual disputes, (ii) two points of view: the mirror image, a brief analysis of traditional arbitration and “delocalized” arbitral proceedings, and (iii) the applicable procedural law to an international arbitration.

Indeed, it will be asserted that arbitral procedural law in the context of “taking of evidence” has undergone a revolutionary transformation such that it shall require continental law practitioners to master fundamental precepts of U.S. common law discovery. The “revolutionary trilogy” commencing with the U.S. Supreme Court’s directive in *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>11</sup> *In re Application of Roz Trading Ltd.*,<sup>12</sup> and *In re Clerici*,<sup>13</sup> will be identified in support of this novel proposition.

## II. THE FORMATION AND TRANSFORMATION OF THE STATUS OF INTERNATIONAL AND DOMESTIC ARBITRATION IN THE UNITED STATES—INTRODUCTION

### *A. The Historically Conventional View of Arbitration in the United States.*

It is impossible to sever the early bias on the part of the U.S. judiciary against arbitration from the disdain directed at arbitral proceedings that pervaded English courts. A brief historical schematic is compelled.

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<sup>8</sup> *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>9</sup> *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974).

<sup>10</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>11</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

<sup>12</sup> *In re Application of Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

<sup>13</sup> *In re Clerici*, 481 F.3d 1324 (11th Cir. 2007).

Indeed, after the 1687 enactment of the Statute of Fines and Penalties,<sup>14</sup> arbitration agreements were stripped of all juridic efficacy for many reasons. Primarily, however, because they were not enforceable in equity, could not give rise to a cognizable cause of action, and did not constitute a viable ground for issuance of a stay of a judicial proceeding based on the identical underlying cause of action between the very same parties.<sup>15</sup> Significantly, the Act of 1854<sup>16</sup> vested courts with discretion to stay a legal proceeding in deference to arbitration agreements and that such a stay would be irrevocable but for leave of court. In this same vein, the Arbitration Act of 1889<sup>17</sup> rendered arbitration agreements irrevocable absent court order to the contrary. Additionally, this Act provided that an arbitration agreement was endowed with the same effect as if issued by court order and bestowed courts with authority to review legal questions raised during the final arbitration hearing.<sup>18</sup> Notwithstanding these enactments, in the middle of the eighteenth century arbitration agreements were deemed to be against public policy because of two rudimentary reasons. First, arbitration agreements were perceived as private contracts

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<sup>14</sup> Statute of Fines and Penalties, 1697, 8 and 9 Will. III c. 11, § 8 (Eng.).

<sup>15</sup> The Statute of Fines basically provided that any action on a bond issued for purposes of guaranteeing performance of an agreement, would be limited only to the actual damages that the claimant sustained. *See e.g.* 9 C.J. 128, 129; 11 C.J.S. *Bonds* §120; WILLIAM HOLDSWORTH, 12 HISTORY OF ENGLISH LAW 519–520 (1938). Accordingly, this legislation in effect eviscerated Coke’s landmark case styled *Vynior’s Case*, 8 Coke 81B (1609), holding that the penal bond posted to ensure enforcement of an arbitration agreement would give rise to a judgment for damages in the bond’s amount, i.e. the quantum of the actual penalty. Even though in 1698 parliament enacted a statute, Arbitration Act, 1698, 9 Will. III, c. 15 (Eng.), that sought to remedy this problem by providing that arbitration agreement could be reduced to a court order and, therefore, a breach would be susceptible to punishment for contempt of court, the statute proved to be of little moment. Courts narrowly construed it and strictly limited its scope.

<sup>16</sup> Common Law Procedure Act, 1854, 17 & 19 Vict., c. 125 (Eng.).

<sup>17</sup> English Arbitration Act, 1889, 52 & 53 Vict., c. 49 (Eng.).

<sup>18</sup> *See* Paul Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 607 (1928); 47 L.R.A. (N.S.) 436; ZECHARIAH CHAFFEE, JR. & SIDNEY POST SIMPSON, *CASES AND MATERIALS ON EQUITY* (1934).



that “oust the jurisdiction” of otherwise courts of competent jurisdiction.<sup>19</sup>

Second, the majority view appeared to contend that, if left unsupervised by courts, arbitrations would be unwelcomed and for this reason the enactment of legislation providing for judicial supervision of arbitral proceeding was purportedly necessary. Both arguments, however, seem to be belied by the very acts of the English judiciary and Parliament. For example, it is somewhat anomalous to contend that arbitration agreements are violative of public policy because they “oust the jurisdiction” of the courts and yet enforce arbitration awards both at law and equity. Equally asymmetrical and inconsistent is the strict enforcement of releases and covenants not to sue, both of which also arguably divest courts of otherwise competent jurisdiction. As to the perceived need to supervise judicially arbitrators, instead of devising methodologies to protect parties to arbitration agreements, the English courts consistently restricted the construction placed on numerous statutes intended to render arbitration agreements viable and legally binding.<sup>20</sup>

The English aversion for arbitration was largely reflected by the proclivity of U.S. courts in the nineteenth century against arbitral proceedings. In fact, the United States Supreme Court in *Hamilton v. Liverpool*<sup>21</sup> asserted three rudimentary precepts adverse to arbitration agreements. First, the argument said, an arbitration agreement does not constitute a sufficient basis on which to premise a stay of a judicial proceeding bottomed on the *same* causes of action arising out of or pertaining to the agreement itself. Second, specific performance is not a

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<sup>19</sup> This phrase was turned into a term of art in the case of *Kill v. Hollister*, 1 Wils. 129 (1746). It has found some foundation because jurists sought analytical support for it by referring to *Coke on Littleton*, 53 b; “if a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbors, and not by sought or plea,” nevertheless an “action of waste shall lye, for the place wasted cannot be recovered without a plea.” See Creswell & Campbell, *Critical Comments*, in *Scott v. Avery*, 5 H.L.C. 811, 837, 853 (1856).

<sup>20</sup> See CHAFFEE & SIMPSON, *supra* note 18, at n. 520; *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (No. 14065); 2 JOSEPH STORY, EQUITY JURISPRUDENCE § 670.

<sup>21</sup> *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U.S. 242, 255 (1890).

category of damages that can be awarded based upon an arbitration agreement without more. Third, such an agreement would not be accorded effect as a plea at bar, “except in limited instances, i.e. in the case of an agreement expressly or impliedly making it a condition precedent to litigation that an award issue determining some preliminary questions of fact upon which any liability would be contingent.”<sup>22</sup>

Even though in the early twentieth century the Supreme Court in *dicta* fleetingly alluded to a possible new horizon that would construe arbitration agreements in a more favorable light with greater affinity with judicial proceedings, technically the issue was not ripe in those few extraordinary proceedings.<sup>23</sup> The Supreme Court, however, in *Marine Transit Corp. v. Dreyfus*,<sup>24</sup> observed that, at least theoretically, the Federal Arbitration Act (the “Act”) was crafted with the intent to alter substantially and meaningfully the prevailing judicial penchant against arbitration.<sup>25</sup> Even though some of the 1925 language in the

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<sup>22</sup> *Id.*

<sup>23</sup> *See, e.g.*, *The Atlanten*, 252 U.S. 313, 315 (1920); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123 (1924).

<sup>24</sup> *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 275 (1932).

<sup>25</sup> *See* H.R. REP. No. 68–96, pt. 1 (1924):

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs. . . . the need for the law arises from the anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principal became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. . . . it is particularly appropriate that the action should be taken at this time where there is

Congressional archives is more than a shade anachronistic, it is quite emblematic because it constitutes the first formal and most forceful congressional statement evincing that Congress rejected the judicial branch's derision of arbitration. Also, the Act marked a trend encouraging institutional arbitration. By way of example, an arbitration provision was included in the Federal Prison Industries Act of 1930.<sup>26</sup> Illustrative as well is the Norris-La Guardia Act that proscribed petitions for injunctive relief where a party had failed to meet the predicate of undertaking "a reasonable effort" to settle a labor dispute pursuant to arbitration.<sup>27</sup> Likewise, fairly elaborate provisions providing for arbitration form part of the Railway Labor Act of 1926.<sup>28</sup>

Engrafting upon a rich English common law tradition the fundamental premises accounting for the derisive attitude of U.S. courts toward arbitration would fall short of a complete and intellectually honest account. Indeed, the proposition that (i) arbitration agreements are violative of public policy because they divest courts of their otherwise competent jurisdiction and (ii) arbitrators cannot be trusted to administer justice equitably absent the auspices of a judicial tribunal, *do* find their genesis in the English history of juridic development of arbitral proceedings.<sup>29</sup> The most pernicious tenets pervading U.S. jurisprudence

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so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

<sup>26</sup> 18 U.S.C. § 744(g) (1930).

<sup>27</sup> 29 U.S.C. § 108 (1932).

<sup>28</sup> 45 U.S.C. § 157–159 (1926).

<sup>29</sup> The early history of English jurisprudence with respect to the recognition and enforcement of arbitration agreements remain mysterious and somewhat opaque. While it is somewhat established that medieval guilds and some very early maritime transactions availed themselves of arbitration as a dispute resolution methodology choice, substantial scholarship is now of a single voice in contending that its roots are formally embedded in Greek law. *See, e.g.*, PEDRO J. MARTINEZ-FRAGA, THE NEW ROLE OF COMITY IN PRIVATE PROCEDURAL INTERNATIONAL LAW 120 n. 160 (2007) (*citing* SHEILA AGER, INTERSTATE ARBITRATION IN GREECE (1996)); THUCYDIDES, HISTORY OF THE PALOPENISIAN WAR, Chapter XXVIII, Lines 2 to 3; Sturges & Murphy, *Some Confusing Matters Relating To Arbitration Under the United States Arbitration Act*, 17 LAW AND CONTEMP. PROBS. 580 (1952). *See also* Paul Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597 (1927); Jones,

against arbitration, however, were terms cultivated in the petri dish of national legal culture and not imported from the other side of the Atlantic. These two propositions dominated judicial thinking and law-making (the common law) until 1985. First, it was asserted that arbitration was confected for the resolution of simple contractual disputes between parties and not for adjudication of complex commercial domestic or international disputes. Second, the majority view was of a single voice in holding that statutory causes of action aimed at providing a specific protected class of consumers or prospective plaintiffs with a remedy such that, unlike other claims resting upon legislatively created rights, prospective plaintiffs would be serving as “private attorney-general[s] who protect the public interest.”<sup>30</sup>

The Second Circuit Court of Appeals’ analysis and holding in the seminal case of *American Safety Equipment Corp. v. JT Maguire & Co., Inc.*, stands as a paradigm illustrating these two propositions.<sup>31</sup>

Despite the procedural morass underlying *American Safety Equipment*, the facts are simple and didactically helpful. There the licensee plaintiff, American Safety Equipment Corp. (“ASE”) filed an action in federal district court against defendant Hickok Manufacturing Co., Inc. (“Hickok”) seeking declaratory relief asserting that the license agreement entered into between the parties “was illegal and void *ab initio* and that no royalty obligations had or would accrue under it.”<sup>32</sup> In addition, the complaint averred that the operative agreements “violated the Sherman Act because they unlawfully extended Hickok’s trademark monopoly and unreasonably restricted ASE’s business.”<sup>33</sup>

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*Development of Commercial Arbitration*, 21 MINN. L. REV. (1927), 240, 243–244; Baum & Pressman, *The Enforcement of Commercial Arbitration*, 8 N.Y.U. L. REV. (1930) 238, 239–249, and BUCKLAN, *TEXTBOOK OF ROMAN LAW* 527–528 (1921); RADIN, *HANDBOOK OF ROMAN LAW* 308 (1927).

<sup>30</sup> See, e.g., *Waldron v. Cities Service Co.*, 361 F.2d 671, 673 (2d Cir. 1966). The rationale underlying this proposition is that specific statutes are tailor made to serve both private and public interests and, therefore, provide private rights for the general public that may be susceptible to certain earmarked statutory torts that transcend damages to just a single individual.

<sup>31</sup> *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

<sup>32</sup> *Id.* at 823.

<sup>33</sup> *Id.*

Significantly, the License Agreement upon which the complaint, in part, was premised<sup>34</sup> contained an arbitration clause.<sup>35</sup> Invoking this clause, twelve days subsequent to the filing of the main action, defendant's assignee J.P. Maguire & Company, Inc. ("Maguire") invoked the arbitration clause seeking to arbitrate a claim for approximately \$321,000 of purported royalties allegedly due under the License Agreement. At that juncture, however, ASE filed a second declaratory judgment action, this time directed at Maguire, incorporating the identical claims averred against defendant, and adding a count seeking to enjoin Maguire's request for arbitration.<sup>36</sup> Maguire responded by petitioning the court for a stay of the declaratory judgment proceeding pursuant to the Federal Arbitration Act, 9 U.S.C. §§2-4, 6, pending the complete adjudication of all arbitral issues. An identical stay also was filed as to ASE's initial underlying cause against defendant.<sup>37</sup> Upon formally abandoning all rights to enforce the challenged provisions of the License Agreement, defendant demanded that plaintiff arbitrate all issues pertaining to the License Agreement and also moved to stay plaintiff's declaratory relief proceeding pending the end of all arbitral labor in that arbitration. Not to be outdone, plaintiff filed an additional motion seeking preliminary injunctive relief against this second arbitral demand as well.<sup>38</sup>

The district court held that the arbitration clause was sufficiently broad so as to encompass all claims. In this connection, it also found and ruled that arbitration of the antitrust causes of action did not violate public policy. Thus, "the judge stayed [plaintiff's] two declaratory judgment actions pending arbitration, and directed arbitration with

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<sup>34</sup> *American Safety Equipment* also predicated claims on a Manufacturing Agreement entered into between the parties, which had extended their business relationship for seven years, from 1959 until 1966. *Id.*

<sup>35</sup> The arbitration clause in pertinent part reads: "All controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration. . . ." *Id.*

<sup>36</sup> The complaint averred that: (i) the License Agreement was illegal because of the purported antitrust violations, (ii) the district court had exclusive jurisdiction to adjudicate the alleged illegality, and (iii) Maguire's request for arbitration was not viable if premised on the License Agreement because defendant's (Hickok) assignment was invalid. *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

respect to ‘all claims, disputes and controversies between the parties relating to the License Agreement, including the issue as to the validity thereof.’<sup>39</sup> On appeal the Second Circuit succinctly enunciated the issue before it as “whether the district court erred in staying ASE’s actions and ordering arbitration of ASE’s antitrust allegations.”<sup>40</sup> The court further crystallized the issue adding a foreboding single sentence observation after the query; “[t]he question before us is whether the statutory right ASE seeks to enforce is of a character inappropriate for enforcement by arbitration. This is a difficult issue, not often litigated.”<sup>41</sup>

In reversing the district court’s ruling and holding “that the antitrust claims raised here are inappropriate for arbitration,” the Court rested its analysis on four fundamental observations.

First, it underscored that there was substantial and meaningful authority standing for the proposition that arbitration should not be stayed in deference of a judicial proceeding.<sup>42</sup> Second, the Second Circuit highlighted that contrary to this plethora of authority, the case

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<sup>39</sup> *Id.* at 823–824.

<sup>40</sup> *Id.* at 824.

<sup>41</sup> *Id.* at 825. Here the Second Circuit quoted the then seminal case *Wilko v. Swan*, 346 U.S. 427 (1953). The *Wilko* decision, which reached the Supreme Court from the Second Circuit (*Wilko v. Swan*, 201 F.2d 439 (2d Cir. 1953)), shall be analyzed in the next section of this analysis.

<sup>42</sup> Specifically, the Court underscored five cases: *Fallick v. Kehr*, 369 F.2d 899 (2d Cir. 1966) (holding that discharge and bankruptcy did not stay claims asserting misappropriation of partnership funds then invoked arbitration); *Greenstein v. National Skirt and Sportswear Ass’n.*, 178 F.Supp. 681 (S.D.N.Y. 1959), *appeal dismissed*, 274 F.2d 430 (2d Cir. 1960) (holding that stay of arbitration proceeding pursuant to a collective bargaining agreement even where plaintiff averred that the agreement violated the Sherman Act); *U.S. for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir.), *dismissed under Rule 60*, 385 U.S. 924 (1966) (holding that arbitration was appropriate in contention concerning Miller Act claim); *Evans v. Hudson Cole Co.*, 165 F.2d 970 (3d Cir. 1948) (approving arbitration of a claim predicated on the Fair Labor Standards Act); *and Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (holding that despite averment that contract and painting arbitration clause was void *ab initio* based upon allegation of fraud in the inducement, the graveman issue of whether the contact actually was the product of fraudulent inducement was within the ambit of an arbitration proceeding).

before it was distinguishable in fundamental ways. By way of example, the case at bar raised the issue of whether the claim predicated on a contract is void and, therefore, legally unsustainable because of a federal statute. Consequently, it brought into high relief “the conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a ‘prompt, economical and adequately solution of controversies.’”<sup>43</sup>

Third, the stale and home grown prejudice concerning the arbitrability of specific statutory rights was raised as a salient analytical principle. “A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney general who protects the public’s interest. . . . [W]e do not believe that Congress intended such claims to be resolved elsewhere than in the courts. We do not suggest that all antitrust litigations attain these swollen proportions; the courts, no less than the public, are thankful that they do not. But in fashioning a rule to govern the arbitrability of antitrust claims, we must consider the rule’s potential effect.”<sup>44</sup> Although related to the second point, this third tenet draws yet a finer distinction perhaps suggesting that in crafting an appropriate rule in the context of antitrust statutory rubric, a distinction should be observed where the legislation at issue is less likely to affect the national economy, or even a lesser number of prospective claimants.<sup>45</sup>

The fourth and final pillar of the court’s reasoning reposes on the twin national principle that diminishes arbitration as a viable alternative

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<sup>43</sup> *American Safety Equipment*, 391 F. 2d at 826 (citing *Wilko*, 346 U.S. at 438) (emphasizing that “[i]n that case, the Supreme Court frankly recognized a similar collision of public policies and faced up to it; we must do no less here.”).

<sup>44</sup> *Id.* at 826–7.

<sup>45</sup> There appears that with respect to this point the court itself stresses the issue as being one of first impressions, without so stating. In this connection, it is worth noting that it found no conceptual distinction between a statute that spawns a policy of ascribing rights to large segments of the population having an inferior bargaining position, and an adhesion contract. “For the same reason, it is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations,” adding that “Congress would hardly have intended that.” *Id.* at 827.

dispute resolution methodology when compared to judicial recourse; namely, that arbitration is best tailored for simple contractual disputes entailing *de minimus* complexities and little, if any, public policies. There is no substitute for the opinion's own language:

On the other hand, the claim here is that the agreement itself was an instrument of illegality; in addition, the issues in antitrust cases are *prone to be complicated*, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest. As Judge Clark said concerning the analogous situation in *Wilko v. Swan*, 201 F.2d at 445 (dissenting opinion):

Adjudicating by such arbitrators may, indeed, provide a business solution to the problem if that is the real desire; but it is surely not a way of assuring the customer that objective and sympathetic consideration of his claim, which is envisaged by the Securities Act.<sup>46</sup>

The Second Circuit's virtually mechanical recitation, and even more egregious, its reflexive application of the twin propositions on which the judiciary generally based its antagonism toward arbitration generally (inapplicability to statutory causes of action providing private rights to a class of individuals with inferior bargaining postures, and arbitration as wanting in ability to adjudicate and process complex technical matters with possible public policy ramifications) is both disconcerting and disappointing. Put simply, these twin tenets are treated akin to sacrosanct first principles and, therefore, never do we find a court questioning, analyzing, or otherwise scrutinizing the very guiding principles upon which it purports to premise its adjudication, which presumably affects public policy, the protected class at issue, congressional intent, and the practicing bar and bench. The lack of sustained analysis and rigor to which these two principles were submitted is equaled only

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<sup>46</sup> *Id.* at 827 (emphasis added).



by the less than clear *dicta* presumably purporting to vest the opinion with conceptual symmetry.

By way of example, the court speculated that the averred antitrust violations do not constitute a defense to Maguire's claim for royalties. "[T]he arbitration might promptly proceed within defined limits, leaving it to the arbitrators to decide what goods were so sold. However, the district court, rather than ruling on these several contentions, held that they should all be decided by arbitrators. In that it erred; the antitrust claims pressed by appellant may not be submitted to arbitration. The district court should have, in the first instance and with appropriate expedition, determined so much of this case as may be necessary in order that in the arbitration, if there is one, of the claims under the License Agreement, the arbitrators will not be called upon to determine antitrust issues."<sup>47</sup>

Even though the extent to which the issue was technically before the appellate tribunal in the first instance is unclear, the Court still addressed the issue of arbitrability where a non party to the subject arbitration agreement may be involved, as would be the case with Maguire's (the assignee) claim. Oddly, after identifying the argument from the perspective of the adverse parties, the Second Circuit delegated the issue to the district court. "Whether Maguire can compel ASE to arbitrate is an issue to be decided by the courts."<sup>48</sup> In furtherance of this latter proposition, the Second Circuit attempted, without actually referencing the "separability doctrine," to distinguish its holding from Supreme Court and Second Circuit precedent<sup>49</sup> where the arbitration clause in an agreement allegedly entered into pursuant to fraud in the inducement was severed from the entire contract and the case referred to arbitration. The Court dismissed applicability of this authority and of the separability doctrine without undertaking any sustained analysis or significant inquiry. Disappointingly, it merely stated the vacuous proposition that the "approach is not available here; it accomplishes nothing to treat the arbitration clause separately if Maguire is not a party to it."<sup>50</sup>

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<sup>47</sup> *Id.* at 828 (citations omitted).

<sup>48</sup> *Id.* at 829 (citations omitted).

<sup>49</sup> *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 399–400 (1967); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, and *appeal dismissed*, 364 U.S. 801 (1960).

<sup>50</sup> *American Safety Equipment*, 391 F.2d at 829.

The fraud in the inducement cases are directly applicable to this case. There, the gravamen of the claim is that the substance of the actual contract is void as a result of the purported fraud. Here, the issue is whether the entire contract or those aspects of it concerning antitrust claims, are illicit because of the public policy favoring the protection of certain classes having less than an arms-length bargaining posture outweighs the parties' explicit intent to arbitrate. At issue in both cases is the actual viability of the contract. Maguire's standing to arbitrate is an issue squarely within the ambit of classical arbitrability. If indeed he is not a party to the License Agreement *and* could not be an assignee but for ASE's approval, which was never forthcoming, then that claim falls within the scope of arbitration as much as a fraud in the inducement claim where the separability doctrine dictates arbitrability because the averred fraudulent inducement is directed at the subject matter of the contract generally and not the arbitration clause specifically.

The Court's parceling of issues and instructions to the district court on remand certainly do not present a useful analysis either doctrinally or *in praxis*.

The weight and influence of the twin precepts galvanizing judicial hostility against arbitration was far reaching and decisive. The judiciary, however, was less than of a single voice on the issue. Consequently, even in cases where antitrust claims in "*notice pleading*" jurisdictions were averred, the Seventh Circuit, by way of illustration, attempted to diminish the weight of the statutory causes of action in favor of staying all judicial proceedings and referring the case to arbitration where an arbitral clause was present. The analysis in *University Life Ins. Co. of America v. Unimarc Ltd.* is eloquent and illustrative as to this point.<sup>51</sup>

In that case the Seventh Circuit affirmed a district court ruling that compelled arbitration despite defendant's subsequent filing of a judicial proceeding that the district court stayed upon holding an evidentiary hearing.<sup>52</sup>

After canvassing authority holding that statutory antitrust claims are not arbitrable (including the Second Circuit's pronouncement in *American Safety Equipment Corp.*), the Court engaged in an analysis that

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<sup>51</sup> *University Life Ins. Co. of America v. Unimarc Ltd.*, 699 F.2d 846 (7th Cir. 1983).

<sup>52</sup> *Id.* at 848, 853.

clearly sought to enforce arbitration over formal technical arguments entailing the mechanical application of categorical rules. In this very same vein it observed that “[e]ven if there were an iron clad rule that arbitration must be stayed when antitrust issues permeate the issues to be arbitrated, the rule would not be activated by mere allegations of an antitrust violation”.<sup>53</sup> The argument was amplified to highlight that “[o]therwise a party to an arbitration agreement who wanted to delay arbitration as long as possible could achieve this end simply by filing a frivolous antitrust suit—which seems to be what happened here.”<sup>54</sup> The Court was impelled to address the technical pleading issue endemic to “a regime of notice pleading.” Hence, it reiterated that even though the allegations at issue may survive a Fed.R.Civ.P. 12(b)(6) motion to dismiss, the issue would be one for the California district court to decide and not the appellate tribunal. Moreover, were plaintiff’s antitrust claims dismissed, they would still be allowed to file a second amended complaint. The pleading before the court, however, (the first amended complaint) raised antitrust averments that were “insubstantial and thus provide no basis for refusing to order arbitration.”<sup>55</sup>

The Seventh Circuit’s salubrious attitude towards arbitration and against a formulistic approach to adjudicating the propriety of a motion to stay an arbitral proceeding in favor of a judicial action, despite the parties’ explicit intent to have all claims submitted to arbitration, is artfully summarized in its recognition that “there’s a special providence in the fall of a sparrow,” *Hamlet, Act V, Sc. II, Line 232*, is not the contemporary philosophy of antitrust.”<sup>56</sup> Even though the Seventh Circuit’s analytical fulcrum is ostensibly the insufficiency of the antitrust averments advanced in the first amended complaint, the studious reader cannot help but posit whether the Court in fact used technical arguments so as to advance substance over form in the configuration of the proposition that an enforceable arbitration clause gives rise to an alternative dispute resolution methodology in *pari materia* with judicial recourse. Conspicuously present because of its absence is *any* reference in the opinion, even fleetingly and in passing, to *any* of the four badges and vestiges of conceptual prejudice upon which judicial hostility directed at

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<sup>53</sup> *Id.* at 851 (citation omitted).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 853.

<sup>56</sup> *Id.*

arbitration was premised: (i) the ousting of jurisdiction from otherwise courts of competent jurisdiction, (ii) the view that an arbitration proceeding requires judicial supervision, (iii) the conviction that arbitration was not well suited for administering complex domestic or international cases, and (iv) that arbitration is not the appropriate dispute resolution methodology to administer certain types of statutory claims that provide individual prospective defendants with rights in situations where they lacked equal bargaining fiat.

Thus, without seeking to depart from settled jurisprudence and precedent, the Seventh Circuit crafted an analytical framework pursuant to which the purportedly non-arbitral claims are scrutinized for “substantiality,” despite the *lax rigors* of a “*notice pleading*” federal standard, for purposes of enforcing a valid arbitration clause. *University Life Ins. Co. of America* stands as an emblematic case where strict procedural analysis allowed for the exaltation of substance over form in the context of a judicial environment favoring the converse with respect to the subject matter at issue: arbitration.

In addition to the four precepts of prejudice that galvanized judicial antagonism against arbitration, the development of a judicial consciousness and awareness that would recognize arbitration as equal to a judicial proceeding was contingent on a more modest proposition. An arbitration agreement had to be recognized as equal to any other contract consonant with the goals of the Federal Arbitration Act. Even though it appeared beyond cavil that the Federal Arbitration Act is rooted in Congressional authority to enact substantive rules under the Commerce Clause, it was not until 1967, forty-two years after the Act’s enactment, that the Supreme Court held that “it is clear beyond dispute that the federal arbitration statute is premised upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”<sup>57</sup>

The exact issue before the Court in *Prima Paint* was “whether the federal court or an arbitrator is to resolve a claim of ‘fraud in the inducement,’ under a contract governed by the United States Arbitration Act of 1925, where there is no evidence that the contracting parties intended to withhold that issue from arbitration.”<sup>58</sup> The facts giving rise

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<sup>57</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (citing H.R. REP. NO. 68-96, at 1 (1924); S. REP. NO. 68-536, at 3 (1924)).

<sup>58</sup> *Id.* at 396–97 (footnote omitted).

to this issue are succinct. Plaintiff, Prima Paint Co., filed an action in federal district court premised on a purchase agreement and a consulting agreement arising from its acquisition of defendant's business and retention of defendant's chairman in an advisory capacity. The complaint alleged, among other things, that defendant had "fraudulently represented that it was solvent and able to perform its contractual obligations, whereas it was in fact insolvent and intended to file a petition under Chapter XI of the Bankruptcy Act, 52 Stat. 905, 11 U.S.C. s. 701 *et seq.*, shortly after execution of the consulting agreement."<sup>59</sup>

Simultaneously with the filing of its complaint, Prima Paint Co. moved the Court for issuance of an order enjoining defendant from proceeding with arbitration. Defendant cross-moved to stay the district court action pending conclusion of all arbitral labor under the theory that the issue presented, whether there was fraud in the inducement of the consulting agreement, was a question for the arbitrators and not the district court.<sup>60</sup> Defendant's motion to stay the legal proceeding pending arbitration was granted, and the Court held "that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one<sup>61</sup> was a question for the arbitrators and not for the court."<sup>62</sup> An appeal ensued to the Second Circuit, which dismissed Prima Paint's petition holding that "the contract in question evidenced a transaction involving interstate commerce; that under the controlling *Robert Lawrence Co.* decision a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts; and that this rule—one of 'national substantive law'—governs even in the face of a contrary state rule."<sup>63</sup> The Supreme Court affirmed the Second Circuit's ruling.

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<sup>59</sup> *Id.* at 398.

<sup>60</sup> *Id.* at 399.

<sup>61</sup> The clause at issue read: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association . . ." *Id.* at 398.

<sup>62</sup> *Id.* at 399. The District Court found analytical support for this proposition in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, and *appeal dismissed*, 364 U.S. 801 (1960).

<sup>63</sup> *Id.* at 399–400.

At the outset of a three-prong analysis, the Supreme Court held that the consulting agreement between plaintiff, Prima Paint Co., and defendant flatly fell within the ambit of contracts specified in Sections 1 and 2 of the Act and, therefore, provided a legal foundation for invoking the stay provision of Section 3.<sup>64</sup> The Court further underscored that plaintiff had “acquired a New Jersey paint business serving at least 175 wholesale clients in a number of States, and secured [defendant’s] assistance in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland.”<sup>65</sup> Thus, it concluded that “[t]here could not be a clearer case of a contract evidencing a transaction in interstate commerce.”<sup>66</sup>

Second, the Court resolved a split among the circuits on the question of whether a claim of fraud in the inducement of the entire contract is to be adjudicated by a federal court, or referred to arbitration.<sup>67</sup>

Even though the Supreme Court observed and stressed that, pursuant to a plain language analysis, the Act’s statutory language does not necessarily allow federal courts to adjudicate fraud in the inducement claims, Section 4 plainly does not relate to scenarios where a stay of a federal proceeding is petitioned in deference of an arbitral proceeding. The Court, however, enunciated that it would be

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<sup>64</sup> *Id.* at 401.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> On this issue the Second Circuit Court of Appeals holds that pursuant to federal law arbitration clauses are “separable” from the contract of which they form a part and, consequently, absent a claim that the fraud at issue was specifically directed to the arbitration clause itself, a broad arbitration clause shall be found to encompass arbitration of the averment that the contract itself was induced by fraud. *See, e.g.,* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959); *In Re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961). In stark contrast, the First Circuit Court of Appeals had repeatedly held that the issue of “separability” must be governed by state law. The argument thus says that where a state deems such a clause as inseparable from the corpus of the contract, a claim for fraud in the inducement *must* be adjudicated by court of competent jurisdiction. *See, e.g.,* Lummas Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 923–924 (1st Cir. 1960), *cert. denied*, 364 U.S. 911 (1960). Accordingly, the issue of arbitration in federal court or, stated otherwise, the standing of an arbitration agreement with respect to any other enforceable contract, remained less than clear.

inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a Section 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate, 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 the contrary, be speedy and not subject to delay and obstruction in the courts.<sup>68</sup>

The fourth and final tenet upon which the decision rests relates to the question of whether a federal court's issuance of a stay in deference of an arbitral proceeding, notwithstanding a contrary state rule, is constitutional. This inquiry was answered in the affirmative.<sup>69</sup> After reviewing the mandate in venerable chestnuts such as *Erie R. Co. v. Thompkins*,<sup>70</sup> and *Guaranty Trust Co. of New York v. York*,<sup>71</sup> the Court predicated its affirmance of the rule's constitutionality on a thoughtful and eloquent exegesis of the legislative intent and jurisprudence construing the Act.<sup>72</sup>

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<sup>68</sup> See *Prima Paint Corp.*, 388 U.S. at 404 (1967). Section 4 in pertinent part reads:

The court shall hear the parties, and upon being satisfied that the making of the argument for arbitration for the failure to comply therewith is not an issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be an issue, the court shall proceed summarily to the trial thereof.

<sup>69</sup> *Id.* at 405.

<sup>70</sup> *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938).

<sup>71</sup> *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945).

<sup>72</sup> This jurisprudential analysis compels citation in its entirety:

It is true that the Arbitration Act was passed thirteen years before this Court's decision in *Erie R. Co. v. Thomkins*, *supra*, brought to an end the regime of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (1842), and that at the time of enactment Congress had reason to believe that

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it still had power to create federal rules to govern questions of ‘general law’ arising in simple diversity cases—at least, absent any state statute to the contrary. If Congress relied at all on this ‘oft challenged’ power, see *Erie R. Co.*, 304 U.S., at 69, 58 S.Ct., at 818, it was only supplementary to the admiralty and commerce powers, which formed the principal basis of the legislation. Indeed, Congressman Graham, the bill’s sponsor in the House, told his colleagues that it ‘only affects contracts relating to interstate subjects and contracts in admiralty.’ 65 Cong. Rec. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill “[relates] to maritime transactions and to contracts in interstate and foreign commerce.’ S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).

Non-congressional sponsors of the legislation agreed. As Mr. Charles L. Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, told the Senate subcommittee, the proposed legislation ‘follows the lines of the New York Arbitration Law, applying it to the field wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce.’ Hearing on S.4213 and S.4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923). In the joint House and Senate hearings, Mr. Bernheimer answered ‘Yes; entirely’ to the statement of the Chairman, Senator Sterling, that ‘what you have in mind is that this proposed legislation relates to contracts arising in interstate commerce.’ Joint hearings on S.1005 and H.R.646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924). Mr. Julius Henry Cohen, draftsman for the American Bar Association of the proposed bill, said the sponsor’s goals were: ‘[F]irst . . . to get a State statute, *and then to get a federal law to cover interstate and Foreign commerce and admiralty*, and, third, to get a treaty with Foreign countries.’ Joint Hearings, *supra*, at 15 (emphasis added). See also Joint Hearings, *supra*, at 27–28 (statement of Mr. Alexander Rose). Mr. Cohen did submit a brief to the Subcommittee urging a jurisdictional base broader than the commerce and admiralty powers, Joint Hearings, *supra*, a 37–38, but there is no indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and his own testimony took a much narrower tack.

*Prima Paint Corp.*, 388 U.S. at 405 n. 13 (1967) (emphasis original).



While *Prima Paint* stands for the unquestioned proposition that the Federal Arbitration Act finds its genesis and normative foundation in the Commerce Clause, the opinion only implies that the substantive rules of the Act are to apply in state as well as in federal proceedings. Accordingly, while implicitly holding that the Federal Arbitration Act gives rise to a *corpus* of federal substantive law applicable in state and federal fora, this doctrinal development did not attain "explicit status" until 1983, through the Supreme Court's command in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*<sup>73</sup>

The procedural configuration in *Moses H. Cone* is now eminently predictable. The district court stayed the proceeding pending resolution of a concurrent state court case pursuant to an order to compel arbitration, which initiated the entire proceeding. The Supreme Court held that this court indeed had abused its discretion because there was no indicia of exceptional circumstances warranting issuance of stay. In furtherance of its ruling, the Court observed that "the presence of federal-law issues" pursuant to the Federal Arbitration Act was "a major consideration weighing against surrender [of federal jurisdiction]."<sup>74</sup> Consequently the Court construed the underlying issue of arbitrability as an inquiry of substantive federal law; "federal law in the terms of the Arbitration Act governs that issue in either state or federal court."<sup>75</sup>

Both *Prima Paint* and *Moses H. Cone* illustrate a material doctrinal development that is often undermined, if not altogether ignored, by the broader issue concerning the elevation of arbitration to a state of equal status with judicial proceedings. This predicate and essential transformation of arbitration agreements entails their theoretical development such that they may enjoy equal hierarchy with other forms of binding and enforceable contractual arrangements in the pantheon of U.S. jurisprudence. Hence, *Moses H. Cone*, decided sixteen years after *Prima Paint*, renders explicit what was contained only implicitly in the Court's earlier mandate, i.e. irrespective of state law considerations, a federal court is empowered to issue a stay in favor of having matters adjudicated pursuant to arbitration and not in the context of court proceedings because the Federal Arbitration Act governs the question of arbitrability in either state or federal fora.

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<sup>73</sup> *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

<sup>74</sup> *Id.* at 26.

<sup>75</sup> *Id.* at 27.

To be sure, while the legislative history is far from being opaque, it is also less than clear on the issue of rendering arbitration agreements enforceable beyond just the federal arena. The House Report is suggestive of more universal objectives: “[t]he purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the federal courts.”<sup>76</sup>

The Supreme Court itself has recognized that “[t]his broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce. The Arbitration Act sought to ‘overcome the rule of equity, that equity will not specifically enforce any arbitration agreement.’”<sup>77</sup> It is demonstrable that by 1984<sup>78</sup> it was finally meaningfully identified in the jurisprudence that part of the Act’s goal was to ensure parties to an arbitration agreement concerning interstate commerce that neither federal courts, state courts, nor legislatures would frustrate their expectations. In addition, it also was rendered plain that Congress had been struggling with three rudimentary and, therefore, obstinate problems in fostering the development of arbitration. First, the prejudicial historical legacy of English courts requiring that arbitration proceedings be conducted under the auspices of courts, and that arbitration generally, as a conceptual matter, was somehow against public policy because it “ousted” jurisdiction from courts that otherwise enjoyed competent jurisdiction, weighed heavily on the

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<sup>76</sup> H.R. REP. No. 68–96, at 1 (1924).

<sup>77</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (citing *Hearing on S.4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 6 (1923) (remarks of Sen. Walsh)). The Court went on to cite the House Report attendant to the bill that stated:

[t]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . this jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment. . . .

*Southland Corp.*, 465 U.S. at 13. (citing H.R. REP. No. 68–96, at 1–2 (1924)).

<sup>78</sup> *Southland Corp.*, 465 U.S. at 14–16.

national collective judicial consciousness. Historical baggage, like old habits, apparently is proverbially hard to break.

Second, nationally grown prejudices directed at arbitral proceedings were no less pernicious. The unchallenged precepts that arbitration was ill-suited for the administration of justice arising from certain statutorily created rights as well as the view that arbitrators (together with the arbitral process itself) lacked competence to process complex commercial disputes of a domestic or international nature, certainly hampered legislative efforts to accord arbitration its rightful place as an alternative dispute resolution methodology.

Third, Congress had to identify and then confront the problem arising from state arbitration statutes that fail to mandate enforcement of arbitral agreements. The result of these three sectors of influence was a restricted and restrictive reading of the Act that necessarily would limit the Act's scope to arbitrations only sought to be enforced in federal tribunals. Such a reading "would frustrate Congressional intent."

After overcoming obstacles that hindered the construction of arbitration agreements as equal to other legally binding and enforceable contracts, the fundamental predicate had been placed for the doctrinal development of arbitration as an alternative dispute resolution methodology to reach its natural and intended purpose: equal status with judicial proceedings.

### III. SHIFT PARADIGM: *WILKO V. SWAN*, *SCHERK V. ALBERTO-CULVER*, AND *MITSUBISHI V. SOLER*.

#### A. *Wilko v. Swan*

Despite the increasing juridic consciousness concerning the virtues endemic to arbitral proceedings, the twin domestic badges of doctrinal hostility<sup>79</sup> against arbitration were not readily dispelled and thus required a case controversy that would appropriately frame an issue that may prove to be determinative. Nothing short of a direct analysis of the fundamental question of whether a statutory right is appropriate for arbitration would suffice if the analytical rubric was to be materially

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<sup>79</sup> (a) the conviction that certain classes of statutory rights are not arbitrable, and (b) the belief that arbitration is ill-suited for complex domestic or cross-border controversies.

reconfigured. This very question was raised and thoroughly addressed by the Supreme Court in the paradigm setting case of *Wilko v. Swan*.<sup>80</sup>

The facts in *Wilko* seem tailor made for a re-examination of arbitral proceedings that would place alternative dispute resolution on a level playing field with judicial recourse. There, the plaintiff securities purchaser brought an action against a securities brokerage firm to recover damages pursuant to Section 12(2) of the Securities Act of 1933.<sup>81</sup> The complaint alleged that plaintiff had been defrauded through the instrumentalities of interstate commerce by the brokerage firm into purchasing 1,600 shares of the common stock of Air Associates, Inc. based upon false representations. Specifically, the complaint averred that defendant had represented that “pursuant to a merger contract with the Borg Warner Corporation, Air Associates’ stock would be valued at \$6.00 per share over the then current market price, and that financial interests were buying up the stock for the speculative profit.”<sup>82</sup> Plaintiff further averred that a co-defendant to the underlying action, and a director of and counsel for Air Associates, was simultaneously divesting himself of his own Air Associates’ stock, which included all or some of

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<sup>80</sup> *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>81</sup> 48 Stat. 74, 15 U.S.C. s. 77a et seq., 15 U.S.C.A. s. 77a et seq., s. 12(2), 48 Stat. 84, 15 U.S.C. s. 771(2), 15 U.S.C.A. s. 771(2), reads:

[A]ny person who . . . (2) sells a security (whether or not exempted by the provisions of s. 77c of this title, other than paragraph (2) of subsection (a) of s. 77c of this title), by the use of any means or instrument of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state the material facts necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission) and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such a security from him, who may sue either at law or in equity in any course of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the securities.

<sup>82</sup> *Wilko*, 346 U.S. at 429.

the securities that plaintiff purchased. Finally, scarcely two weeks after acquiring the securities, plaintiff sold the stock at a loss that was ascribed to the brokerage firm's misrepresentations and forbearances of material information.

The brokerage firm did not even answer the complaint and instead filed a motion to stay the judicial proceeding pursuant to Section 3 of the United States Arbitration Act. The motion was accompanied by an affidavit asserting that the parties' relationship was governed by the terms of identical market agreements and underscoring that plaintiff had failed to pursue arbitration as agreed upon.<sup>83</sup>

The district court mechanically held that the arbitration agreement in effect violated public policy because it wrested from plaintiff the benefits and advantages of judicial recourse as a remedy provided for by the Securities Act, and thus denied a stay.<sup>84</sup> A divided Second Circuit Court of Appeals<sup>85</sup> reserved the district court and held that the Securities Act did not proscribe arbitration in lieu of a judicial proceeding where agreed upon by the parties. The Supreme Court exercised certiorari jurisdiction upon finding that the case presented an "important and novel federal question affecting both the Securities Act and the United States Arbitration Act."<sup>86</sup>

The Court aptly framed the issue before it as "whether an agreement to arbitrate a future controversy is a 'condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision' of the Securities Act which s. 14 declares 'void.'"<sup>87</sup> At issue, however, was the *perceived* need to reconcile two policies that *appear* irreconcilable but only upon the most surface and literal analysis. First, it is established, as the court itself observed, that "[t]he reports of both Houses on that Act [the Federal Arbitration Act] stressed the need for avoiding the delays and expenses of litigation,<sup>88</sup> and practice under its terms raises hope for its usefulness both in controversies based on

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<sup>83</sup> *Id.*

<sup>84</sup> *See Wilko v. Swan*, 107 F.Supp. 75, 78-79 (S.D.N.Y. 1952).

<sup>85</sup> *Wilko v. Swan*, 201 F.2d 439 (2d Cir. 1953).

<sup>86</sup> *Wilko*, 346 U.S. at 430 (citation omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 431 (*citing* H.R. REP. No. 96, at 2 (1924); S. REP. No. 536, at 3 (1924)). *See Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932).

statutes<sup>89</sup> or on standards otherwise created.”<sup>90</sup> The second policy that seemed to be at odds with Congressional intent to promote arbitral proceedings is the rights that Congress accorded to investors pursuant to the Securities Act proscribing waiver of any of these statutorily created rights. Significantly, the Court only accorded scant and passing reference to these two policies characterizing them as being in conflict and, therefore in need of reconciliation. This very characterization assumes an inconsistency where, beyond a plain language analysis, there simply is none.<sup>91</sup>

In reversing the Second Circuit and holding that “the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act [the Securities Act],”<sup>92</sup> the Supreme Court reduced an arms-length negotiated arbitration agreement to the status of a “stipulation” within the meaning of 15 U.S.C.A. s. 77 and Section 14.<sup>93</sup> The diminishment of arbitration and subordination of the Act to the Securities Act of 1933 so as to create a semblance of conflict based upon a claim needing analysis is premised on no less than eight insufficient and defective propositions upon which the Court bottomed its opinion.

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<sup>89</sup> *Wilko*, 346 U.S. at 432 (citing *Agostini Bros. Bldg. Corp. v. United States*, 142 F.2d 854 (4th Cir. 1944); *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3d Cir. 1945); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943); *Donahue v. Susquehanna Collieries Co.*, 160 F.2d 661 (3d Cir. 1947); *Evans v. Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948)).

<sup>90</sup> *Wilko*, 346 U.S. at 432 (citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932); *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir. 1953); *Campbell v. American Fabrics Co.*, 168 F.2d 959 (2d Cir. 1948); *Columbian Fuel Corp. v. United Field Gas Co.*, 72 F.Supp. 843 (D.W.Va. 1947), *affirmed*, 165 F.2d 746 (4th Cir. 1948); *Springs Cotton Mills v. Buster Boy Suit Co.*, 88 N.Y.S. 2d 295 (App. Div. 1949), *affirmed*, 300 N.Y. 586 (1949); *White Star Mining Co. v. Hultberg*, 220 Ill. 578 (Ill. 1906); *Oregon-Washington R. R. & Navig. Co. v. Spokane, Portland & Seattle Ry. Co.*, 83 Or. 528 (Or. 1917); WESLEY STURGES, *COMMERCIAL ARBITRATIONS & AWARDS* 793–798 (1930)).

<sup>91</sup> *See Wilko*, 346 U.S. at 438.

<sup>92</sup> *Id.*

<sup>93</sup> 15 U.S.C.A. §77. Section 14 reads: “Any condition, *stipulation*, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.” (emphasis supplied).

First, it is assumed that because the case before the Court “requires subjective findings on the purpose and knowledge of an alleged violator of the Act,” these findings must be “applied by the arbitrators without judicial instruction on the law.”<sup>94</sup> This extraordinary observation is but blind adherence to the juristic prejudice asserting that the arbitral process is somehow ill-equipped or otherwise disadvantaged when faced with complex factual or legal analysis, let alone the intricate application of law to fact. The proposition is articulated without whatsoever analysis.

Second, it is observed that arbitral awards “may be made without explanation of their reasons”<sup>95</sup> and hence a person seeking relief under the Securities Act of 1933 would likely be prejudiced. The character and nature of an arbitral award is here misapprehended, as is the arbitration procedure altogether. Unlike appellate opinions, arbitration awards are not binding and do not purport to have *stare decisis* effect on subsequent arbitrations concerning identical legal issues and similar factual patterns. Consequently, arbitrators are not charged with the responsibility of crafting a ruling, as would an appellate tribunal, because they are resolving a particular dispute between individuals rather than creating binding legal precedent as part of a state’s or a geopolitical subdivision’s exercise of its sovereignty. To infer from the formal and substantive differences between an appellate judicial opinion and an arbitral award that a claimant pursuing a legislatively enacted right would be disadvantaged if forced to honor its agreement to arbitrate instead of seeking judicial recourse is to misapprehend the nature and characters of both arbitration and judicial proceedings.

Third, in this same vein, the Court notes that arbitrations lack a “complete record of their proceedings,” and, therefore, presumably here too a claimant would be prejudiced. As with the second proposition, this premise assumes that a record of the proceedings identical to a judicial action is a *sine qua non* to the equitable administration of justice. It, however, turns a blind eye on the practical likelihood of an arbitral process keeping meticulous records of evidence and testimony, not to mention that the multiple federal and state judicial jurisdictions lack uniformity with respect to dispositive rules of judicial administration.

Fourth, it is assumed that “the arbitrator’s conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable

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<sup>94</sup> *Wilko*, 346 U.S. at 436.

<sup>95</sup> *Id.*

care' or 'material fact,' cannot be examined."<sup>96</sup> The Court's novel exegesis of the juridic conceptual categories attendant to arbitrators finds no foundation and quite remarkably the Court does not purport to craft any such pretext. This extraordinarily bold generalization is merely advanced as yet another ground on which to create an analytical framework that would limit the arbitrability of specific statutorily created rights.

Fifth, the assertion is made that judicial basis on which "to vacate an award is limited."<sup>97</sup> The parties' desire to seek finality is a fundamental tenet of both arbitral and judicial proceedings. This salient element that is elevated as a principal feature of arbitration constitutes one of the critical bargained-for elements that parties simply cannot engraft onto a judicial proceeding, but that is well within the parameters of their control by accepting arbitration as an alternative dispute resolution methodology. The desire for finality in the resolution of disputes is inextricably bound to the valued precept of *party autonomy* that underlies both arbitration and judicial proceedings. Here the Court's generalization and oversimplification completely ignores perhaps the most distinctive principle of the common law system itself, the tenet of party autonomy that supplies a normative imperative rendering possible an "adversarial system" in the first instance.

Sixth, the rosary of predicates purportedly justifying the non-arbitrability of specifically created statutory rights includes the blanket assertion that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."<sup>98</sup> Again, here too the precept of party autonomy plays a critical role that the Court entirely undermines. Narrowing the scope of judicial review is precisely a hallmark of the parties' exercise of autonomy in alternative dispute resolution that cannot be disavowed without doing violence to the integrity of the law of contracts as well.

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<sup>96</sup> *Id.* (citation omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 436–37 (citations omitted). It is critical to underscore that in the context of international arbitration "manifest disregard for the law" is a legally cognizable basis on which to vacate an award that is unique to the United States because it is not one of the basis for vacating an award contained in the New York Convention.



Seventh, the Court embarks on what is perhaps the most opaque premise in support of its holding. This proposition has two parts. At the outset, the Court declares that “[t]he United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.”<sup>99</sup> Quite surprisingly, support for this contention is premised on the United Kingdom Arbitration Act of 1950,<sup>100</sup> and Halsbury’s Statutes of England.<sup>101</sup> In this initial assertion the Court infers that “the protected provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness,”<sup>102</sup> and, consequently, “Congress must have intended s. 14 to apply to waiver of judicial trials and review.”<sup>103</sup> The relevance of the 1950 U.K. Arbitration Act and of Halsbury’s Statutes of England is devoid of precedential or conceptual import. It is suspect even when viewed under the kindest and most generous light. As to the conclusion that statutory “protective provisions” compel a proscription of waiver of a judicial proceeding in favor of agreed to arbitration finds no analytical or logical normative grounding.

Eighth and lastly, it is asserted that “[w]hile the Securities Act does not require petitioner to sue, a waiver in advance of a controversy stands upon a different footing.”<sup>104</sup> When stripped of the observation concerning lack of symmetry, this proposition is but a restatement of the second part of the seventh ground and subject to critique on the identical basis.

The dissent authored by Justice Frankfurter and joined by Justice Minton presents a paradigm of lucid legal reasoning. Plainly put, the dissent observes that there are no facts of record susceptible to judicial notice from which it may be inferred that “the arbitral system as practiced in the City of New York, and as enforceable under supervisory authority of the District Court for the Southern District of New York, would not afford the plaintiff rights to which he is entitled.”<sup>105</sup> In addition, “the tortuous course of litigation, especially in the City of New

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<sup>99</sup> *Id.* at 437 (citations omitted).

<sup>100</sup> Arbitration Act, 1950, 14 Geo. VI, c. 27, §21 (Eng).

<sup>101</sup> 29 Halsbury’s Statutes of England (2d ed.) at 106.

<sup>102</sup> *Wilko*, 346 U.S. at 437.

<sup>103</sup> *Id.* (citation omitted).

<sup>104</sup> *Id.* at 438.

<sup>105</sup> *Id.* at 439.

York,”<sup>106</sup> is placed in sharp relief with “[t]he impelling considerations that led to the enactment of the Federal Arbitration Act.”<sup>107</sup> The gravamen of the majority opinion, i.e. that arbitrators somehow are not bound to adhere to the rule of law, is significantly and meaningfully challenged in the dissent, which explicitly references Section 10 of the Federal Arbitration Act.<sup>108</sup>

Even though the term “party autonomy” is not specifically referenced, Justice Frankfurter concludes his analysis with a meticulous and common sense review of the record and underscores that it *does not* demonstrate “that the plaintiff in opening an account had no choice but to accept the arbitration stipulation, thereby making the stipulation an unconscionable and unenforceable provision in a business transaction. . .

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<sup>106</sup> *Id.* at 440.

<sup>107</sup> *Id.* at 439.

<sup>108</sup> Section 10 of the Act provides:

§ 10. Same; vacation; grounds; rehearing.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evidence partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceed their powers, or so imperfectly execute them that a mutual, final, and definite award upon the subject matter submitted was not made.

[(5) Redesignated (b)]

(b) If an award is vacated in the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States District Court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration for the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Arbitration, 9 U.S.C. § 10 (2007).

[i]t is one thing to make out a case of overreaching as between parties bargaining not at arm's length. It is quite a different thing to find in the anti-waiver provision of the Securities Act a general limitation on the Federal Arbitration Act."<sup>109</sup> Unlike the majority opinion, Justice Frankfurter emphasizes the parties' equal bargaining power in selecting arbitration as the preferred methodology for dispute resolution despite the "benefits" that the Securities Act accords to prospective claimants, and the strictures of the anti-waiver provision.<sup>110</sup>

Read with care and brought to its logical conclusion, the dissent demonstrates that the appearance of a conflict that would be suggested by a simple, plain meaning analysis of the pertinent statutory provisions and "apparently" competing public policies is but an appearance of a conflict and an attendant need for reconciliation. In effect the "special rights" that §12(2) of the Securities Act confers on prospective

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<sup>109</sup> *Wilko*, 346 U.S. at 440.

<sup>110</sup> Congressman Graham of Pennsylvania from the committee on the judiciary expressly addressed the binding effect of a party's agreement to arbitrate in the Report that he submitted to the company H.R. 646. His remarks on this point merit consideration and reconsideration:

The Bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties. There is provided a method for the summary trial of any claim that no arbitration agreement ever was made, and there is also provided a hearing if the defeated party contends that the award was secured by fraud or other corruption or undue influence, or that some evident mistake not affecting the merits exists in the award. ***If the parties to the arbitration are willing to proceed under it, they need not resort to the courts at all. If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected. At the same time the party willing to perform his contract for arbitration is not subject to the delay in cost of litigation.*** Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court.

H.R. REP. NO. 68-96, at 2 (1924) (emphasis added).

plaintiffs<sup>111</sup> are preserved and furthered where the parties have selected arbitration as a dispute resolution methodology. Indeed, no right conferred by the Securities Act to purchasers would be adversely compromised in an arbitral proceeding. Thus, the phenomenology of conflict and need for reconciliation is reduced precisely to just a phenomenon when the eight premises upon which the opinion reposes are challenged and the actual rights conferred by the Securities Act are analyzed in the context of an arbitration regime and the concept of party autonomy as the most defining common law feature and an element endemic to arbitration as well.

**B. *Scherk v. Alberto-Culver: A Non-Reversal Reversal***

The transformation that was to place arbitration agreements “on equal footing with other contracts” and *in pari materia* with judicial proceedings occurred in small conceptual increments. The Supreme Court’s command in *Wilko v. Swan* merely reinforced and further entrenched the legacy of prejudices that the Federal Arbitration Act sought to eviscerate. It took twenty-three years for the virtually identical issue, but this time in a different world that ascribed normative features to international commerce and transnational contracts in particular, to reach the Supreme Court anew. Technically, however, the Court sought to “square the circle,” and in many ways succeeded where Leibniz failed. Specifically, it is clear that the Court realized an imperative need to distance itself from its seminal *Wilko v. Swan* ruling by literally reaching the converse result but without expressly reversing itself. By highlighting and emphasizing the principals of certainty, predictability, party autonomy, and unjustified hostility against international contracts and arbitral proceedings, yet under the guise of identifying six salient distinguishing factors from *Wilko v. Swan*, the Supreme Court in *Scherk v. Alberto-Culver*<sup>112</sup> crafted a conceptual link that made possible the judicial change

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<sup>111</sup> These special rights can be summarized as (i) the right to recover for misrepresentation where the seller is made to assume the burden of proving lack of *scienter*; (ii) the enforceability of the special rights in any court of competent jurisdiction federal or state; (iii) a wide choice of venue accorded to the purchaser; (iv) the privilege of nation-wide service of process, and (v) no diversity jurisdiction amount requirement.

<sup>112</sup> *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974).

from its command in *Wilko v. Swan* to the decisive and noteworthy ruling in *Soler v. Mitsubishi*.<sup>113</sup>

In *Scherk v. Alberto-Culver Co.*,<sup>114</sup> the Supreme Court exercised certiorari jurisdiction “[b]ecause of the importance of the question presented.”<sup>115</sup> The specific question that the Court addressed was whether its holding in *Wilko v. Swan*, that “an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of §14 of that Act, barring ‘[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter. . . .’”<sup>116</sup>

This very narrow issue reached the Court after the Seventh Circuit disavowed an arbitration clause contained in a contract between a U.S. plaintiff and German defendant residing in Switzerland, where the contract at issue was executed in Austria with respect to three corporations organized under the laws of Germany and Liechtenstein.<sup>117</sup>

In reversing the Seventh Circuit’s pronouncement, the Court observed that the arbitration agreement at issue was binding, dispositive, and controlling with respect to any dispute relating to the subject international commercial transaction, irrespective of the mandate of §14 of the Securities Act, proscribing all stipulations such as those concerning arbitration that would conflict with this provision.<sup>118</sup> The Supreme Court meticulously enunciated that the (i) plaintiff was a U.S. corporation conducting most of its business activities in the United States, (ii) defendant was a German national whose companies were organized under the laws of Germany and Liechtenstein, (iii) negotiations led to the execution of the contract at issue in Austria and the closing of a transaction in Switzerland, the United States, England and Germany, and (iv) the subject matter of the contract principally concerned the sale-purchase of companies organized under the laws of the European countries and that conducted business mostly, if not exclusively, directed at European

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<sup>113</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>114</sup> *Scherk*, 417 U.S. 506.

<sup>115</sup> *Id.* at 510.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 513.

markets.<sup>119</sup> Clearly, the international character of the facts framing the issues before the Court materially distinguished the case from the Court's prior ruling in *Wilko v. Swan*, where all of the parties were U.S. entities.

Moreover, in holding that "the provisions of the Arbitration Act [Federal Arbitration Act] cannot be ignored in this case,"<sup>120</sup> the Court walked a delicate line ostensibly drawn with the purpose of crafting a new rule of law that would distance it from its ruling of twenty-three years earlier, *Wilko v. Swan*, while not technically reversing itself.

Painstakingly, no less than six purportedly material, distinguishing, factual and/or legal predicates were identified. First, the Court noted that "*Wilko* concerned a suit brought under §12(2) of the Securities Act of 1933, which provides a defrauded purchaser with the 'special right' of a private remedy for civil liability. There is no statutory counterpart of §12(2) in the Securities Exchange Act of 1934, and neither §10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here. While federal case law has established that §10(b) and Rule 10b-5 create an implied private cause of action, the Act itself does not establish the 'special right' that the Court in *Wilko* found significant."<sup>121</sup> Second, the Court observed that while "both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any 'provision' of the respective acts, certain of the 'provisions' of the 1933 Act that the Court held could not be waived by *Wilko's* agreement to arbitrate find no counterpart in the 1934 Act."<sup>122</sup> In this connection, it was emphasized that "the Court in *Wilko* noted that the jurisdictional provision of the 1933 Act, allowed a plaintiff to bring suit 'in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited.' The analogous provision of the 1934 Act, by contrast, provides for suit only in the federal district courts that have 'exclusive jurisdiction,' thus significantly restricting the plaintiff's choice of forum."<sup>123</sup> Fourth, while the Supreme Court accepted the premise that for all practical purposes the respective waiver provisions of the 1933 Act and the 1934 Act are materially identical, despite different wordings of

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<sup>119</sup> *Id.* at 515.

<sup>120</sup> *Id.* at 513.

<sup>121</sup> *Id.* at 513-14 (citations omitted).

<sup>122</sup> *Id.* at 514 (footnote omitted).

<sup>123</sup> *Id.* (citations omitted).

no moment, it highlighted that “respondent’s reliance on *Wilko* in this case ignores the significant and, we find, crucial difference between the agreement involved in *Wilko* and the one signed by the parties here. *Alberto-Culver’s* contract to purchase the business entities belonging to *Scherk* was truly an international agreement.”<sup>124</sup> The Court, confident with its ruling in just the immediately preceding term, in *M/S Bremen v. Zapata Off-Shore Co.*,<sup>125</sup> elevated the status of an “international contract” practically ascribing to it normative foundation:

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claims could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.

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*

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<sup>124</sup> *Id.* at 515.

<sup>125</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

*submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.*<sup>126</sup>

The Supreme Court's concern with increasingly prevalent international transactions and the need for certainty, predictability, and uniformity caused it not only to accord a weight and significance to an international contract that had not been ascribed to such agreements prior to *Bremen v. Zapata*, but also to the six factors used to distinguish *Alberto-Culver* from *Wilko*. This juridic construct at first seems to be but a logical classification of a contractual provision. When submitted to sustained analysis, however, its extraordinary character is rendered plain. Specifically, the Court observed that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."<sup>127</sup>

By stating that an agreement to arbitrate is "a specialized kind of forum selection clause" implicitly placed arbitration at an equal footing as judicial recourse. Even though a forum selection clause suggests that parties shall avail themselves of a specific judicial system that consists, in particular, of (i) rules of evidence, (ii) rules of civil procedure, (iii) norms for judicial administration, (iv) specific order of proof, (v) appellate recourse, (vi) a rubric of damages unique to that jurisdiction, and (vii) considerations of national policies in the construction and application of law to fact pursuant to the equitable administration of justice, none of which form part of arbitration proceedings. The Court's analysis inherently disavows these features as conceptual obstacles to treating litigation and arbitration equally.<sup>128</sup>

Lastly, conceptual distance is placed between *Wilko* and *Alberto-Culver* based upon the analytical support that the Court found in its decision of two terms earlier in *The Bremen*.<sup>129</sup> Once having crossed the

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<sup>126</sup> *Scherk*, 417 U.S. at 515-16 (footnote omitted) (emphasis added).

<sup>127</sup> *Id.* at 519.

<sup>128</sup> Indeed, arbitration clauses, choice of law clauses, and choice of courts or choice of forum clauses, are distinct rather than specialized iterations of each other as they serve different purposes and are selected based upon materially diverse underlying policies considerations. For an excellent analysis that touches upon this issue. See GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION (2004).

<sup>129</sup> *Scherk*, 417 U.S. at 519 n. 14.



conceptual threshold in holding that an arbitration clause is a specialized kind of forum selection clause, then it necessarily follows that the jurisprudence governing forum selection clauses must be applied *equally* to arbitration clauses. Indeed, the Court liberally so proceeds:

In *The Bremen* we noted that forum selection clauses 'should be given full effect' when 'a freely negotiated private international agreement [is] unaffected by fraud. This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum selection clause in a contract is not enforceable *if the inclusion of that clause in the contract was the product of fraud or coercion*.<sup>130</sup>

Accordingly, the determination, by way of example, of an averment of fraud in the inducement into entering a contract now shall be adjudicated by an arbitral panel and not a court where the agreement at issue contains an arbitration clause. Certainly the Court undertook meticulous steps and applied extraordinary rigor in refraining from reversing its earlier decision in *Wilko* while preserving and advancing the integrity of an arbitration agreement within the context of virtually the identical legal issue raised in its earlier holding. Indeed, the Court managed successfully to square the circle even though it did not openly confront the badges of prejudice that historically justified judicial hostility against arbitration and rule that arbitration stands on the same level playing field as a judicial proceeding. It did, however, provide the necessary rubric for the subsequent landmark case, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*<sup>131</sup>

***Mitsubishi v. Soler Chrysler-Plymouth, Inc.:***  
***The Final Decisive Paradigm***

Decided eleven years after *Alberto-Culver*, the Supreme Court in *Mitsubishi v. Soler* addressed what is conceptually a virtually indistinguishable legal issue from those considered in *Wilko* and *Scherk*. As framed by the Court:

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<sup>130</sup> *Id.* (citation omitted) (emphasis added).

<sup>131</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

The principle question presented by these cases is the arbitrability, pursuant to the Federal Arbitration Act, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”) of claims arising under the Sherman Act, and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.<sup>132</sup>

In fact, the Court found it expedient to narrow the issue even further:

We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.<sup>133</sup>

Significantly the Federal District Court ordered Mitsubishi (plaintiff) and Soler (defendant/counter-claimant) “to arbitrate each of the issues raised in the complaint and in all the counterclaims, save two and a portion of a third. With regard to federal antitrust issues, it recognized that the Courts of Appeals, following *American Safety Equipment Corp. v. J.P. Maguire & Co.*, uniformly had held that the rights conferred by antitrust laws were ‘of a character inappropriate for enforcement by arbitration.’”<sup>134</sup> The District Court, however, following the directive in *Alberto Culver* held that the international component of the claims required adherence to the arbitration agreement even with respect to the antitrust claims.<sup>135</sup>

The First Circuit Court of Appeals, finding analytical foundation in the doctrine enunciated in *American Safety*, held that antitrust claims are not susceptible to adjudication pursuant to arbitration proceedings

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<sup>132</sup> *Id.* at 616 (citation omitted).

<sup>133</sup> *Id.* at 624. The facts in *Mitsubishi* are simple and only command cursory recitation. Plaintiff, an automobile manufacturer filed an action against an automobile dealer alleging, among other claims, non-payment of stored vehicles, contractual storage penalties, damage to manufacturer’s warranties and goodwill, and expiration of distributorship. The dealer filed a counterclaim asserting violations of the Sherman Act, the Automobile Dealers’ Day in Court Act, Puerto Rico Dealers’ Act, and Puerto Rico Antitrust and Unfair Competition Statutes.

<sup>134</sup> *Id.* at 620-21 (citation omitted)(footnote omitted).

<sup>135</sup> *Id.* at 621.

and that “neither [the Supreme Court’s] decision in *Scherk* nor the Convention required abandonment of that doctrine in the face of an international transaction.”<sup>136</sup>

For the first time, the Supreme Court placed arbitration on a level playing field with judicial proceedings when it reversed the First Circuit on this specific part of its ruling and actually challenged and refuted the long-standing badges of prejudice that had garnered judicial hostility against arbitration. The majority’s opinion surgically focused on the six rudimentary precepts that had sustained this derisive and diminishing preconception of arbitral processes.

First, the Court observed that “[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum *on the undemonstrated assumption that the arbitration clause is tainted. A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate.*”<sup>137</sup>

It is clear that the parochial and archaic misconception that had been practically decisive in prior decisions holding that a prospective claimant pursuant to a specially enacted statutory cause of action would be prejudiced by the want of recourse to challenge a wrongfully issued arbitration award had now been stripped of all legitimacy. Implicit, if not explicit, in the Court’s ruling on this most critical point is the conviction that arbitration provides parties with ample opportunity to correct wrongs despite the narrow grounds available for such reconsiderations.

Second, the practically perennial objection concerning the perceived ill-suited nature of arbitration to process complex commercial disputes is directly questioned and disavowed by the Court’s analysis. It specifically observed that the “potential complexity should not suffice to ward off arbitration. We might well have some doubt that even the courts following *American Safety* subscribe fully to the view that antitrust matters are inherently insusceptible to resolution by arbitration...in sum, the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.”<sup>138</sup> This proposition was endorsed and supported by arbitration’s hallmark of being able to secure experts even in the most intricate legal fields to participate in the presentation and elucidation of sophisticated factual,

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<sup>136</sup> *Id.* at 623.

<sup>137</sup> *Id.* at 632 (emphasis added).

<sup>138</sup> *Id.* at 633–634.

economic, and legal issues. Identification of this feature so endemic to the arbitration procedure was without precedent in Supreme Court jurisprudence.

Third, it was underscored that it is important to reject “the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly.”<sup>139</sup>

Fourth, when presented with the premise that parties to an arbitration proceeding are somehow inherently incapable of securing able and competent arbitrators who subscribe to standard ethical norms in the performance of their task, the Court noted that it would not “indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.”<sup>140</sup>

Fifth, the argument that the Sherman Act promotes national interests and that, therefore, the treble-damages component to rights accorded to private litigants was not susceptible to adjudication in an arbitral context, was emphatically rejected. Here, for the first time, the Court announced that such remedies are remedial in nature despite also playing an important role in penalizing wrongdoers and thus creating a chilling effect with respect to prospective tortfeasors.<sup>141</sup>

Lastly, the Court highlighted the need for national courts “to shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”<sup>142</sup>

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<sup>139</sup> *Id.* at 634.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 635. The Court specifically found that “[t]he importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court.”

<sup>142</sup> *Id.* at 638–639 (citation omitted).

Accordingly, the First Circuit's ruling was reversed to the extent that it held that statutorily created antitrust claims are not arbitrable. More importantly, however, the Supreme Court disrobed the cloak of legitimacy that had vested the four fundamental badges of judicial hostility against arbitration as grounds for subordinating arbitral proceedings to a role inferior to that of judicial recourse in both domestic and international litigation. This seminal ruling spawned meaningful institutional arbitration (both domestically and internationally) in the United States. Today, claims based upon (i) unfair and deceptive trade practice statutory causes of action,<sup>143</sup> (ii) age discrimination,<sup>144</sup> (iii) sports related claims arising from punishments adjudicated against athletes for violations of collective bargaining agreement,<sup>145</sup> (iv) RICO statutory causes of action,<sup>146</sup> (v) The Civil Rights Act of 1991,<sup>147</sup> (vi) The Labor Management Relations Act, 1947,<sup>148</sup> (vii) seeking the award of punitive damages,<sup>149</sup> and (viii) class actions,<sup>150</sup> to mention just a few, are susceptible to arbitration without material judicial interdiction of any sort.

#### IV. UNRESOLVED DOCTRINAL PRECEPTS

Despite the universally accepted virtues of domestic and international arbitration in the United States, a number of unresolved issues remain as challenges if arbitration indeed is to find its perfect workings and continue to serve as the preferred alternative dispute resolution methodology in international disputes.

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<sup>143</sup> See, e.g., *JLM Industries, Inc. v. Stolt-Nielson*, 387 F.3d 163 (2d Cir. 2004).

<sup>144</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>145</sup> See, e.g., *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001).

<sup>146</sup> See, e.g., *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

<sup>147</sup> See, e.g., *Maye v. Smith Barney, Inc.*, 897 F.Supp. 100 (S.D.N.Y. 1995).

<sup>148</sup> See, e.g., *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, 969 F.2d 1436 (3d Cir. 1992).

<sup>149</sup> See, e.g., *Mastro Buono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

<sup>150</sup> See, e.g., *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

***A. Conceptual Bilateralism: The Public Nature of Judicial Proceedings Versus the Private Character of Arbitration.***

Considerable scholarship must be generated for purposes of defining the specific nature of dispute resolution endemic to judicial proceedings and arbitration so that party expectations may be fulfilled and the cross fertilization of different legal systems in the context of international arbitrations may be successfully applied. The applicable substantive law in an international commercial arbitration proceeding is generated either by judicial precedent or legislative enactments. In either case, organic law or jurisprudence, the normative basis of the legal precept cannot escape engrafting onto the juridic mandate the policies of the sovereign that, in part, exercised its sovereignty through the administration of justice pursuant to a judicial or a legislative process. Consciousness of this basic principle is not as critical to litigants as it should be to parties involved in alternative dispute resolution, particularly in the international arena.

Because arbitrators are not charged with the implementation of national or international political or legal policies, but rather with the task of resolving in accordance with law the specific dispute between the parties to the arbitration agreement, both the parties and arbitrators must be able to sift through legal constructs so as to ensure that the equitable administration of justice is undertaken in conformance with the principles that define arbitration *per se* and that distinguish it in great measure from litigation.

***B. Two Points of View: The Mirror Image***

The conventional view, so the argument says, is that arbitration is a creature of contract. Moreover, most of its elements (i.e. narrow basis for appellate recourse, language, the seat of the arbitration, the arbitral body administering the arbitration, the scope of issues governing the arbitration, and substantive law) are also selected by the parties, presumably pursuant to an arm's-length negotiating process. So much is true. It is not, however, the complete truth.

An illustrative counter-example is eloquently embodied in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention). Here the arbitral proceeding is delocalized. The parties do not have *any* say on the seat of the arbitration, the law applicable to the arbitration, only limited

influence on one of three languages for purposes of conducting the arbitration, the procedural law attendant to the arbitral proceeding, and must subscribe to the conventional law providing for enforcement of arbitral awards and institutional appellate recourse. Most notably, investor arbitrations of this nature do not result from arm's-length, bargained-for contractual processes, but rather from Bilateral Investment Treaties between nations.

The trend or possible trend toward the "delocalization" of arbitration proceedings is one that may influence, if not altogether materially alter, the nature of international commercial arbitration.

***A. The Applicable Procedural Law to an International Arbitration and the Issue of "Discovery" Versus "The Taking of Evidence."***

Even though most commentators and practitioners opine that the procedural law applicable to an international commercial arbitration, where one is not identified by the parties, should be that of the arbitral seat, it is less than clear, however, that this proposition should stand as a universal precept. There may be numerous factual patterns, scenarios, and circumstances where other criteria would better serve the parties' dispute resolution objective. By way of example, (i) the procedural law attendant to the substantive law selected by the parties, (ii) the procedural law of the forum with jurisdiction over the parties, (iii) the procedural rubric of the jurisdiction where the parties anticipate enforcement of the arbitral award, (iv) the procedural law of the jurisdiction where most of the evidence is located, (v) the procedural law best suited to the proceeding based upon the panel's best judgment, or (vi) the procedural law best suited to assist the arbitral tribunal, may prove to be more practical and efficacious to the proceeding than the procedural rubric incident to the arbitral situs. Hence, this seemingly "resolved" concern is far from settled.

Despite rules purporting to promulgate compromise doctrines concerning "the taking of evidence," there is still no actual definition of "evidence" contained in any such effort. Accordingly, this critical linchpin remains opaque at best. U.S. style discovery is now inherent to international arbitration proceedings located outside the United States but with potential evidence situated within the United States. The Supreme Court's command in the landmark case *Intel Corp. v. Advanced Micro*

*Devices, Inc.*,<sup>151</sup> and its progeny, *In re Application of Roz Trading Ltd.*,<sup>152</sup> and *In re Patricio Clerici*,<sup>153</sup> standing for the propositions that an arbitral panel is a foreign tribunal for purposes of 28 U.S.C. §1782 discovery in accordance with the United States Federal Rules of Civil Procedure, has in many ways revolutionized arbitral procedural practice and reconfigured the entire concept of “taking of evidence.” In addition to rendering it necessary for continental law practitioners to familiarize themselves with the United States Federal Rules of Civil Procedure governing discovery, practitioners also must learn methodologies to attempt to avoid the application of this statutory right when drafting arbitration clauses. Such methodologies, however, are yet to be judicially tested.

These fundamental challenges pervade domestic and international arbitration from a U.S. perspective irrespective of the judicial deference now accorded to arbitral proceedings.

## V. CONCLUSION

Eliminating the badges of judicial prejudice and hostility against arbitration has been a gradual doctrinal development, but certainly one that reached fruition with the Supreme Court’s mandate in *Mitsubishi*. The acceptance of arbitration as an alternative dispute resolution methodology in domestic and international contexts by the judiciary, scholars, captains of industry, and practitioners has advanced the cause of fashioning a dispute resolution framework that comports with contemporary economic globalization. Moreover, it has served to create a temporal bridge in dispute resolution until such time as transnational courts of civil procedure competent to adjudicate private commercial disputes become a viable reality. This success, however, has spawned new issues that must be addressed if the cross fertilization of legal systems is to be incorporated into international commercial arbitrations and parties from different juridic and cultural backgrounds are to have their expectations fulfilled when engaging in alternative dispute resolution of this kind.

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<sup>151</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

<sup>152</sup> *In re Roz Trading Ltd.*, 469 F.Supp. 2d 1221 (N.D.Ga. 2006).

<sup>153</sup> *In re Clerici*, 481 F.3d 1324 (11th Cir. 2007).



The challenge is certainly daunting. Yet, under any analysis, is it not one worth having.