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CONTRACT AND JURISDICTION

INTRODUCTION

Over the last dozen years, the Supreme Court has rewritten the law governing commercial and employment arbitration in the United States. So bold has the Court been that its work in this field could be said to exemplify the indeterminacy of American law, confirming the hypothesis of Critical Legal scholars that our judges (or at least our Justices) are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections.¹

This article is a comment on five cases decided by the Court in the 1994 and 1995 Terms, all of them presenting issues of commercial arbitration law.² The field of arbitration is sufficiently ar-

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¹ For example, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L J 1 (1984).

² *Doctors' Associates, Inc. v Casarotto*, 116 S Ct 1652 (1996); *Allied-Bruce Terminix v Dobson*, 115 S Ct 834 (1995); *First Options of Chicago, Inc. v Kaplan*, 115 S Ct 1920 (1995); *Mastrobucchio v Shearson Lehman Hutton, Inc.*, 115 S Ct 1212 (1995); *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 115 S Ct 2322 (1995). For additional comment, see Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash U L Q 637 (1996); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-*

cane that these cases are not likely to have been closely observed by any but *cognoscenti*. But what the Court has done in these cases and in recently antecedent cases has significant implications for much American law and offers instruction to students of the Court about the character of that institution at the end of the twentieth century.

The Court's aggression has been the product of two worthy but overindulged impulses. One impulse has been to encourage international trade by enforcing dispute resolution provisions in international commercial contracts. The second has been to conserve scarce judicial resources by encouraging citizens to resolve disputes by private means. Few readers of this Review would quarrel with either of these impulses, and we do not. But to elevate them, as the Court has, to the rank of imperatives is to disregard serious risks of injustice and lawlessness sometimes attending the enforcement of such provisions. It was suggested that Great Britain acquired its empire in the nineteenth century in a "fit of inadvertence"; that term may be equally useful as an account of the Court's remaking of arbitration law.

Three features of the law emerging from the Court's decisions animated by these impulses of internationalism and privatization are striking. First, the Court has enforced arbitration clauses that were until recently deemed invalid impairments of rights conferred by Congress in its regulation of commerce, thereby weakening enforcement of the national law.³ Second, the Court has completely federalized a body of law that was until recently regarded as an appropriate subject for the exercise of state sovereignty,⁴ thereby substantially disabling states from effective regulation of commercial and employment transactions.⁵ Third, the Court appears to be

Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood, 11 Ohio St J on Disp Resol 297 (1996); and see Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 Ohio St J on Disp Resol 231 (1989).

³ For example, *Rodriguez de Quijas v Shearson/American Express*, 490 US 477 (1989); *Vimar*, 115 S Ct 2322.

⁴ This action of the Court had an antecedent in *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395 (1967), when for the first time the Court held that the 1925 Act was an exercise of the commerce power, not as previously believed an exercise of the power of Congress over the federal courts. But the Court in that case stopped far short of sweeping preemption of state law.

⁵ For example, *Southland Corp. v Keating*, 466 US 1 (1984); *Dobson*, 115 S Ct 834; *Casarotto*, 116 S Ct 1652.

transforming a dispute-resolving process traditionally regarded in this country as nonlegal into a process more nearly resembling that of a court of law.⁶ This legalizing transformation is an almost inevitable if unforeseen consequence of the two previously stated features of the new national arbitration law the Court has crafted; its potential effect is to deprive commercial arbitration of its traditional virtues of efficiency and dispatch.

Those who have been prejudiced by the Court's handiwork include many American consumers, patients, workers, investors, shopkeepers, shippers, and passengers. Those whose interests have been served include all those engaged in interstate or international commerce deploying their economic power to evade enforcement of their contractual duties or the lash of those state or federal commercial laws that are privately enforced.

We present these developments as evidence that when the Court turns to the task of constructing broad national policies, it is capable of doing quite a bad job. In a time when we are prone to discredit Congress and the political process, it is well to keep in mind that the Court is not necessarily a superior source of wise political leadership.⁷ James Bradley Thayer's historic dictum to that effect⁸ remains sound. For all its shortcomings, Congress remains the legitimate source of national policy. The people share responsibility for its misdeeds, but have no responsibility for bad law made by Justices with life tenure, and are entitled to resent an institution taking it upon itself to construct law that is in so many ways injurious to their interests.

THE COURT AND FREEDOM OF CONTRACT

Before turning to the perplexing technicalities of arbitration law, we note that the phenomenon we observe may be seen as an aspect of a larger feature of the Court's work. Both the impulse to superinternationalism and the apparent passion for ADR can be

⁶ For example, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985); *Vimar*, 115 S Ct 2322.

⁷ We join Neil Komesar in acknowledging that all our institutions are imperfect. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Univ of Chicago Press, 1994).

⁸ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 8 Harv L Rev 129, 144 (1893).

attributed to the Court's simple faith in freedom of contract. Cass Sunstein has called attention to the enduring vitality of that faith,⁹ and Richard Shell has found it to be in recent times a pervasive influence on the Court.¹⁰ In its sometimes uncritical acceptance of the importance of freedom of contract, the Court curiously ignores the national experience in this century, and even its own misadventures.

The unwisdom of blind commitment to freedom of contract was forcefully depicted by Roscoe Pound in 1909¹¹ and has been remarked many times since. Contract is not merely a source of economic power, but it is also a deployment of that power¹² that can effect a transfer of wealth from the weak to the strong. The Progressives recognized this potential and used the police power of the state and federal governments to limit predations by those with economic power over workers, consumers, tenants, insureds, shopkeepers, shippers, and passengers.¹³ Much of that legislation restricted freedom of contract and much of it was directed at imposed contracts.

In 1919, Edwin Patterson, commenting on recent developments in state courts, introduced into our legal vocabulary the term "contract of adhesion."¹⁴ The term applied to agreements that are not the result of bargaining.¹⁵ An early paradigm was the contract made with customers by Thomas Hobson, a seventeenth-century London liveryman; his name is still associated with nominal choices that are in reality not choices at all.¹⁶ Patterson noted that in such

⁹ Cass Sunstein, *Lochner's Legacy*, 87 Colum L Rev 873 (1987).

¹⁰ G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Colum L Rev 431 (1993).

¹¹ Roscoe Pound, *Liberty of Contract*, 18 Yale L J 454 (1909).

¹² Richard A. Posner, *Economic Analysis of Law* 29 (Little Brown, 3d ed 1986).

¹³ See generally Richard A. Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (Knopf York, 1955).

¹⁴ Edwin Patterson, *The Delivery of a Life-Insurance Policy*, 33 Harv L Rev 198, 222.

¹⁵ For a more elaborate definition, see Todd D. Rakoff, *Contracts of Adhesion: An Essay of Reconstruction*, 96 Harv L Rev 1174 (1983). His definition would exclude franchise agreements that provide many of the cases discussed here, but he recognized them as contracts of adhesion "at least in situations in which the franchisee is also a lessee." Id at 1178 n 15.

¹⁶ Hobson's customers were required to take the horse nearest the door. *Cincinnati Enquirer* (July 30, 1995), p D5. Another example is provided by Henry Ford's dictum regarding the Model A Ford—the buyer could choose any color he liked so long as it was black.

transactions, “‘freedom of contract’ rarely exists,” and courts therefore “strain the language out of its clear meaning”¹⁷ to protect the party who casually or inadvertently assents to a very improvident term. While such adhesion contracts are contracts in form, they lack the characteristics traditionally providing the moral justification for enforcing the promises they contain.¹⁸

Thirty years before Patterson wrote, the Supreme Court itself explained the difficulty. On March 12, 1880, *Montana*, en route from New York to Liverpool, ran aground in Holyhead Bay, Wales, and lost much of its cargo. The owner of the cargo sued for negligence; the carrier’s defense relied on a clause in the bill of lading exempting the carrier from liability for negligence. The Court noted that the term was not the product of free exercise of the right to make enforceable promises; to the contrary, a shipper “prefers to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases, he has no alternative but to do this, or to abandon his business.”¹⁹ When a contract is imposed in this fictive manner, the Court held, it should be enforced only if its terms are “just and reasonable.”

That decision was prescient in foretelling the development of contract law. In many situations exemplified by the bill of lading, our law proceeds from the premise that the instrument was not read or understood by the party on whom its terms are imposed.²⁰ The Restatement (Second) of Contracts assumes that parties using standardized, printed forms do not expect their customers to read or understand what they are required to sign.²¹ Sometimes, as with insurance policies, the purchaser may not have an opportunity to read or sign because the written instrument is delivered after the transaction has been made.²²

¹⁷ Patterson, *The Delivery of a Life-Insurance Policy* at 222 (cited in note 14).

¹⁸ Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 Cal L Rev 1152 (1976).

¹⁹ *Liverpool Steam Co. v Phenix Ins. Co.*, 129 US 397, 441 (1889).

²⁰ Rakoff, *Contracts of Adhesion* at 1179 (cited in note 15).

²¹ Restatement (Second) of Contracts § 211, comment B (“A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.”).

²² W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S Cal L Rev 1, 12 (1974). See also Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum L Rev 629, 632 (1943).

While thus suspect as true contracts embodying a meeting of minds, contracts of adhesion such as printed bills of lading serve useful social functions.²³ They are perhaps inevitable in an economy dominated by mass production and mass distribution.²⁴ They permit businesses to reduce juridical risk, being “an important means of excluding or controlling the ‘irrational factor’ in litigation,”²⁵ and reduce transaction costs.²⁶ But as Patterson and Kessler and many courts have recognized, they can be abusive. While the reaction of American courts to such “contracts” has, as Kessler noted more than fifty years ago, been sometimes “highly contradictory and confusing,” what has emerged in the Restatement (Second) of Contracts²⁷ and gained expression in the Uniform Commercial Code²⁸ is a conception of contracts of adhesion widely understood and applied that permits courts to respond flexibly to the social realities underlying imposed contracts.

A lucid explanation of the prevailing view was provided by Karl Llewellyn, the draftsman of the Code:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the more broad type of the transaction, but one thing more. The one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent term the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print that has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.²⁹

²³ Arthur Allen Leff, *Contract as Thing*, 19 Am U L Rev 131, 143–44 (1970).

²⁴ Kessler, *Contracts of Adhesion* at 631 (cited in note 22). Kessler believed that adhesion contracts were associated with the tendency of mature capitalism to move toward monopoly. Writing forty years later, Rakoff demonstrated that they are useful even in the absence of oligopolistic power. *Contracts of Adhesion* at 1218 (cited in note 15).

²⁵ Kessler, *Contracts of Adhesion* at 632 (cited in note 22).

²⁶ Leff, *Contract as Thing* at 143–44 (cited in note 23).

²⁷ See, e.g., Restatement (Second) of Contracts §§ 205, 211.

²⁸ See, e.g., id § 2-302.

²⁹ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (Little Brown, 1960). On the relation between this idea and the Code, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan L Rev 621 (1975).

Those who resisted Progressive politics a century ago often celebrated the sanctity of contract as a precept of constitutional law.³⁰ That sanctification resonated with the social Darwinism infecting the thinking of many Americans in the earlier period of industrialization, when both legislatures and courts backed away from laws to protect workers, consumers, or even merchants from the overbearing conduct of nascent industry.³¹ Reflecting the constitutional law of that earlier era was the work on contracts of Samuel Williston, who disregarded the distinctive features of adhesion methods, and treated them as true contracts.³²

The Court abandoned freedom of contract as constitutional doctrine when the federal government began to regulate the national economy in the second and fourth decades of this century. From the mid-1930s, states as well as the federal government were free to impose restraints on freedom of contract in order to protect the weak from the strong.³³ Thus, state legislatures as well as Congress have added to the list of those needing protection from overbearing contracts those thousands of small businesses operating as franchisees, often of multinational corporations owning trademarks that by means of modern media have become almost essential to success in many otherwise local enterprises.³⁴

Despite these developments in constitutional law and the law of contracts as administered by state courts, the Court may now be seen as a born-again Willistonian believer in freedom of contract.³⁵ In the days of *Lochner*, the Court as the champion of freedom of

³⁰ For example, Christopher Tiedemann, *A Treatise on the Limitations of Police Power in the United States* (Thomas Law Book, 1886).

³¹ Herbert Spencer, *Social Statics; or, The Conditions Essential to Human Happiness Specified and the First of Them Developed* (Williams & Norgate, 1872), an English work, was perhaps the most noted expression of this view. William Graham Sumner was the leading American exponent of social Darwinism, having derived many of his ideas from Herbert Spencer. See Jonathan H. Turner, *Herbert Spencer: A Renewed Appreciation* (Sage, 1985). For an account of the relation between their extreme individualism and the constitutional doctrine of that era, see Richard Hofstadter, *Social Darwinism in American Thought, 1860-1915* (Beacon, 1944); Les Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origin of Laissez Faire Constitutionalism*, 3 L & Hist Rev 293 (1985).

³² See, e.g., Samuel Williston, 1 *A Treatise on the Law of Contracts* § 35 (W. Jaeger, 3d ed 1957); Restatement (First) of Contracts § 70 (1932).

³³ Stephen A. Gardbaum, *Why the New Deal Was Not a Nationalist Revolution in Constitutional Terms*, U Chi L Rev (forthcoming, 1997).

³⁴ See generally William Laird Siegel, *Franchising* (Wiley, 1982); and *Franchising 1987: Business Strategies and Legal Compliance* (Practicing Law Institute, 1987).

³⁵ The reference to Williston is explained in the text at note 34.

contract was employing its power of judicial review to strike down Progressive legislation as unconstitutional restraints on freedom of contract;³⁶ in these days of greater judicial restraint, the Court is not invalidating Progressive regulation of economic power, but is more subtly effecting similar results by favoring the freedom of those having sufficient economic strength to contract out of effective private enforcement of regulations adverse to their interests. Herbert Spencer's *Social Statics*, so long lost from constitutional law,³⁷ has been found by the Court to be alive and well and residing in the Federal Arbitration Act of 1925.

It is possible to find in this development a moment of triumph for the academic movement identified in recent decades as law-and-economics.³⁸ Those imbued with its dogma tend to believe that efficiency, the mother of all worthy values, is best served by the unseen hand of the market, and hence that "rational choice does not mean conscious choice."³⁹ If that were so, then there would be no reason to distinguish contracts of adhesion from real contracts,⁴⁰ or to be concerned for a party who unconsciously and improvidently submits to an adverse choice of forum for the enforcement of his rights because the market will always provide him with all that he deserves. Whether the development we depict is a triumph for such thinking is open to doubt. There is meager evidence of such a victory in the Court's opinions.

An alternative explanation is that the Court is so absorbed in matters of seemingly greater public moment that its members have failed to attune themselves to the values and the realities of private law. While some members of the Court, notably Justice Stevens, have at times seemed to be conscious of what the Court has been doing, a majority have generally been content to rest their decisions on formal grounds, falsifiable assumptions, or sweeping doc-

³⁶ For a contemporaneous account, see Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Callaghan, 1904).

³⁷ *Lochner v New York*, 198 US 45, 75-76 (1905) (Holmes, J, dissenting).

³⁸ See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J L & Econ 293 (1975); James A. Brickley et al, *The Economic Effects of Franchise Termination Laws*, 34 J L & Econ 101 (1991).

³⁹ Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 Harv L Rev 1431, 1439 (1986).

⁴⁰ Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 Nw U L Rev 303 (1983).

trines derived not from the actual texts of the controlling statute and treaty (and sometimes at odds with those texts) but from cosmic purposes mistakenly attributed to the legislators who made them.

The field of commercial arbitration, it must be said, is not an easy one to master. The statute is brief, but dense. The treaty governing recognition of foreign awards, like many, is vaporous. The relationship between private and public institutions is complex, and the illumination of that relationship provided by counsel is often dim. In any case, the Court's opinions seem more the product of underattention to practical consequences than to overattention to grand theory.

THE FEDERAL ARBITRATION ACT OF 1925

There is no need here fully to recount the history of the Federal Arbitration Act of 1925. It has been quite accurately reported by Justice O'Connor,⁴¹ and more recently and fully by Ian Macneil.⁴² But for readers who are not familiar with arbitration law, it may be helpful to summarize.

A principle widely accepted by American courts in the nineteenth century, and still the law in some states, is that a clause providing for arbitration of a nonexisting dispute is non binding. Contrary to a frequently expressed shibboleth,⁴³ this principle was not necessarily the product of hostility to arbitration. While there was a strand of thought derived from English precedent guarding judicial jurisdiction against "ouster" by contract,⁴⁴ arbitration was widely favored in America.⁴⁵ Awards of arbitrators were as enforceable in federal and most state courts as were judicial judgments.⁴⁶

⁴¹ *Southland Corp. v. Keating*, 465 US 1, 21 (1984) (O'Connor, J, dissenting).

⁴² Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 15-133 (Oxford, 1992).

⁴³ For example, *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F2d 978, 985 (2d Cir 1942). (Jerome Frank, J) quoted by Justice Blackmun in *Mitsubishi*, 473 US at 623.

⁴⁴ Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale LJ 595 (1927); A. W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 Cardozo L Rev 287, 322 (1989).

⁴⁵ Macneil, *American Arbitration Law* at 19 (cited in note 42).

⁴⁶ For example, *Hamilton v Liverpool, London & Globe Ins. Co.*, 136 US 242 (1890); *Red Cross Line v Atlantic Fruit Co.*, 264 US 109 (1924).

It was, however, perceived by at least some courts that the existence of genuine mutual assent was suspect when parties agreed to arbitrate a future dispute, and that a dispute resolution clause could be a trap for the unwary. As one court put it: “[b]y first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.”⁴⁷ This view of commercial reality (a view roughly corresponding to that expressed by Llewellyn in the passage quoted above) led to the opinion that the best way to assure true assent to arbitration was to afford a party having promised to arbitrate a future dispute an opportunity to withdraw assent when a real dispute has arisen and the revoking party is at last likely to be attentive to the hazards of dispute resolution and well-advised.

Revocability (or, more accurately, rescindability), while thus justifiable as an application of elementary contract doctrine requiring comprehending mutual assent, proved to be an impediment to commerce in the age of railroads and industrialization. When parties began to make contracts with people whom they did not know and who resided in distant jurisdictions whose courts might reasonably be feared as xenophobic, it became more important to provide for future disputes.⁴⁸ Well-advised parties unwilling to expose themselves to the risks of suit in the other party’s court could sometimes make deals if both were assured of a neutral arbitral forum. Irrevocability was needed to give that assurance and foster interstate commerce.

For this reason, many states, often but not always by legislation, moved away from the principle of revocability and began to enforce arbitration clauses contained in commercial contracts. An early New York case conceded that arbitration clauses

induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure, might well be refused a specific performance or disregarded, when set up as a defense to an action. But when the parties stand upon an equal

⁴⁷ *Parsons v Ambros*, 121 Ga 98, 48 SE 696 (1904). Compare *Cocalis v Nazlides*, 308 Ill 152, 139 NE 95 (1923); *W. H. Blodgett Co. v Bebe Co.*, 190 Cal 665, 214 Pac 38 (1923). And see *Handbook, National Conference of Commissioners on Uniform State Laws* 60–73 (1924).

⁴⁸ Simpson, *Contracts for Cotton* at 321–24 (cited in note 44).

footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice.⁴⁹

By 1920, a widespread effort was afoot to modify arbitration laws in all states to secure better enforcement of arbitration agreements. This movement to “modernize” arbitration law was driven by those engaged in interstate trade; its oft-stated purpose was to “make the benefits of arbitration generally available *to the business world*.”⁵⁰

There was, however, opposition to the enactment of state statutes aiming to assure the arbitrability of future disputes. As late as 1924, both the National Conference of Commissioners on Uniform State Laws and the American Bar Association took positions firmly in opposition to what was perceived by some to be an idiosyncrasy of New York law, that is, the enforcement of arbitration clauses contained in printed contracts.⁵¹ Macneil quotes as illustrative the statement of one opponent:

Under the New York Act you are called upon to agree in advance through a clause that is in the contract, most often in small type, that all controversies of any nature, kind, or description are to be taken out of the courts and are to be submitted to an arbitrator either named then or to be named later. It is felt by the great majority of the [ABA] committee that this is wrong in principle, to call upon men to agree in advance to arbitrate any difficulties that might arise, particularly in view of the fact that that would be done in most instances without any realization on the part of the contracting parties as to what they were really doing. Of course, we all agree that men ought to know what they are doing when they are signing contracts, but we all know from a practical experience that the fine type of contracts whilst entirely binding, is seldom read, and we do feel that is a giving up rights that the American people really regard as sacred and they shouldn't be called upon to do so.⁵²

⁴⁹ *President, Managers, and Comp. of Delaware & Hudson Canal Co. v Pennsylvania Coal Co.*, 50 NY 250 (1872); cf *Henry v Lehigh Valley Coal Co.*, 215 Pa 448, 64 Atl 635 (1906).

⁵⁰ *Robert Lawrence Co. v Devonshire Fabrics, Inc.*, 271 F2d 402, 407 (2d Cir 1959) (citing S Rep No 536, 68th Cong, 1st Sess at 3) (italics supplied).

⁵¹ Macneil, *American Arbitration Law* at 49–51 (cited in note 42).

⁵² *Id* at 51.

Reflecting this opposition, the Uniform Arbitration Act of 1924 did not provide for the enforcement of agreements to arbitrate future disputes.⁵³

However, that Act was adopted in only four states, and the “modern” reformers succeeded over the next four decades in securing legislation in all but three states providing for the enforcement of such arbitration clauses.⁵⁴ Instrumental in that effort was the “modern” Uniform Arbitration Act of 1955,⁵⁵ which was enacted in over thirty states, often with significant modifications, but always with provisions for the specific enforcement of arbitration clauses. The prevailing view was that as between contracting parties of reasonably equal strength and sophistication, there is no substantial public interest to be served by precluding parties from so moderating the rights they create by their contract, and ample reason to enforce agreements to arbitrate claims asserting such rights. Yet, in 1991, the Supreme Court of Nebraska held that Nebraska’s “modern” legislation was in violation of the Nebraska constitutional provision assuring that “all courts shall be open, and every person, for any injury done him in his goods, person, or reputation shall have a remedy by due course of law, and justice administered without denial or delay.”⁵⁶ That holding set off a major effort of “modern” reformers to amend Nebraska’s constitution, an effort that appears at the moment to have been successful.⁵⁷

It was in the context of this prolonged debate over the reform of state law that Congress was in 1925 importuned to act. The “modern” law, particularly that of New York, had been disregarded in federal litigation in admiralty and diversity cases. An influential 1915 opinion of Judge Hough exclaimed that federal

⁵³ Uniform Arbitration Act of 1925, § 1.

⁵⁴ Macneil, *American Arbitration Law* at 55–57 (cited in note 42).

⁵⁵ Uniform Arbitration Act of 1955, 7 Unif Laws Ann 1 (1996). Maynard Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 11 Bus Law 44 (1956). For an account of the current state legislation, see George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 NC J Intl L & Comm Reg 419 (1992).

⁵⁶ *State v Nebraska Association of Public Employees*, 239 Neb 653, 477 NW2d 577, 580 (1991); but see *Dowd v First Omaha Securities Corp.*, 242 Neb 347, 495 NW2d 36 (1993) (holding Nebraska law preempted).

⁵⁷ Nebraska voters approved an amendment in May 1996, but there is pending litigation contesting the adequacy of the notice to the voters of the content of the amendment. *Omaha World Herald* (May 19, 1996), at 14B.

courts were powerless to compel arbitration because it was too well settled as a matter of federal equity that an arbitration agreement could not be specifically enforced.⁵⁸ The damages remedy for breach being ineffective, a party seeking to evade an arbitration agreement could find a refuge in the federal admiralty or diversity jurisdictions. Congress was asked to eliminate this refuge from state law by authorizing federal courts to specifically enforce arbitration clauses valid under the controlling state law of contracts.

No one suggested in 1925 that Congress ought to consider enacting a law creating a federal right to enforce an arbitration clause. Had such a right been created, it would surely have provided, as all other federal rights do, an independent ground for federal jurisdiction, something the Act clearly did not do. On the widely shared understanding that the Act was intended merely to accommodate federal courts deciding diversity and admiralty cases to local state law, opposition to the 1925 Act was slight.⁵⁹ Unopposed were those members of the ABA who had just taken a position favoring the revocability of arbitration clauses, but who had no objection to federal court enforcement of New York law foreclosing revocation. The federal legislative aim of 1925 was made largely redundant by the decisions of the Court in *Erie*⁶⁰ and *Guaranty Trust v. York*,⁶¹ holding that a federal court in a diversity case must supply the same remedies for the enforcement of state-created rights as the local state courts would provide.

The ultimate victory of “modern” reformers in state legislatures and in state courts was incomplete even in those many states in which they prevailed. Many, perhaps most, state legislatures recognized arbitration clauses as a potential means of economic oppression; accordingly, they qualified their arbitration laws in diverse ways responsive to the concern stated in 1924 by the opponents of enforcement of arbitration clauses. The states regulated arbitration clauses both substantively and procedurally.⁶² Many state legislatures specified substantive categories of cases that are not subject

⁵⁸ *United States Asphalt Refining Co. v. Trinidad Lake Petro. Co.*, 222 Fed 1006, 1012 (S D NY 1915).

⁵⁹ Macneil, *American Arbitration Law* at 115–17 (cited in note 42).

⁶⁰ *Erie R. R. v. Tompkins*, 304 US 64 (1938).

⁶¹ *Guaranty Trust Co. v. York*, 326 US 99 (1945).

⁶² Macneil, *American Arbitration Law* at 69–71 (cited in note 42).

to arbitration. Some state courts interpreted other laws of their states to create rights that could not be put at risk by arbitration clauses. Other states restricted the use of arbitration clauses to weaken substantive rights by imposing special requirements for the procedure by which agreements to arbitrate are made. Most required that arbitration agreements be in writing, thus extending the principle of the statute of frauds to such agreements. Many imposed additional requirements designed to assure that a party signing another party's form fully understands the import of the arbitration clause.

Congress has never considered the possibility that any of these state laws might be inconsistent with federal policy, nor has it considered the possible uses of arbitration to diminish or nullify rights that it has conferred on citizens. Arbitration as practiced in 1925 between merchants engaged in interstate and marine commerce was not a means of diverting from courts disputes arising in the enforcement of Progressive legislation regulating business to limit economic power and protect the weak from the strong. And Congress could not in 1925 foresee its use for that purpose because it was enacting law then applicable primarily to admiralty and diversity cases in federal courts, that is, cases generally involving the enforcement of rights that the parties themselves created by contract.

Commercial arbitration, at least as it is practiced in America, is a method of dispute resolution, but not necessarily a method of enforcing legal rights.⁶³ It has been a nonlegal process, often conducted by nonlawyers working under the aegis of trade associations or the American Arbitration Association, a body founded and supported by merchants and traders.⁶⁴ As Justice Black remarked in 1967, arbitrators may be "wholly unqualified to decide legal is-

⁶³ See generally Ian R. Macneil, Richard E. Speidel, and Thomas J. Stipanowich, *Federal Arbitration Law: Agreements, Awards and Remedies and the Federal Arbitration Act* § 4.07 (Little Brown, 1994). Edward A. Dauer, *Manual of Dispute Resolution, ADR Law and Practice* (McGraw Hill, 1994); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tulane L. Rev. 1, 13-31 (1987); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 11 Ohio St. J. on Disp. Res. 211 (1995); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 Ohio St. J. on Disp. Res. 241, 247-64 (1996).

⁶⁴ For a brief account of institutional arbitration, see Martin Domke, *The Law and Practice of Commercial Arbitration*, § 2.01 (G. Wilner ed., Callaghan, 2d ed. 1968); on the freedom of arbitrators to do equity and nurture amiability, see id. §§ 1-01-1.03; and see Kenneth S. Carlston, *Theory of the Arbitration Process*, 17 L. & Contemp. Probs. 631, 633-47 (1952).

sues.”⁶⁵ And if qualified, the arbitrator has been under no duty to resolve a dispute in compliance with the parties’ legal rights. A Latin phrase sometimes employed to describe the spirit of much American commercial arbitration is *ex aequo et bono*—a resolution is sought that is equitable, minimizes harm to either party, and enables potential adversaries to maintain a valuable commercial relationship; the role of such an arbitrator is said in Europe to be that of an *amiable compositeur*. It is said of the American commercial arbitrator that he “may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement.”⁶⁶ Many awards resulting from such proceedings might also be described as Solomonic, halving the objects in dispute.

In 1970, the United States acceded to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards,⁶⁷ which had been opened for signing in 1958.⁶⁸ The purpose of the treaty was to facilitate recognition of awards made by arbitrators outside the United States and thus to facilitate international trade. A second chapter was added to Title 9 to align the enforcement of foreign awards with the enforcement of domestic awards,⁶⁹ and federal jurisdiction was conferred on actions “falling under the Convention.”⁷⁰ Contrary to the usual American practice, some foreign awards are the product of a process designed to enforce legal rights. The rules of the International Chamber of Commerce in Paris,⁷¹ and the UNCITRAL Rules,⁷² often incorporated

⁶⁵ *Prima Paint Corp.*, 388 US 395, 407 (Black, J, dissenting).

⁶⁶ *Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308, 461 NE2d 1261, 1266 (1984).

⁶⁷ 84 Stat 692, Pub L No 91-368 § 1 (1970).

⁶⁸ On the history of the accession, see S Rep 702, 91st Cong, 2d Sess (1970); George Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw U L Rev 1 (1971). In 1990, the United States acceded to the Inter-American Convention on International Commercial Arbitration, which closely resembles the earlier UN Convention, and Chapter 3 of Title 9 of the United States Code was added to make provision for the enforcement of this treaty. 9 USC §§ 301 et seq (1994).

⁶⁹ 9 USC §§ 201–08 (1994).

⁷⁰ 9 USC § 203 (1994).

⁷¹ International Chamber of Commerce Rules of Arbitration, Art 13(4) (1988). L. Craig, W. Park, and J. Paulson, *International Chamber of Commerce Arbitration* 312–13 (Int'l Chamber of Commerce, 2d ed 1990).

⁷² United Nations Commission on International Trade Law Arbitration Rules, Art 33(2) (1976). On the meaning of the terms in this context, see Henry J. Brown and Arthur L.

into international commercial agreements forbid arbitrators to proceed *ex aequo et bono* or in the role of *amiable compositeur* except by agreement of the parties. Nevertheless, authority for such proceedings is not rare in commercial contracts in many countries,⁷³ and there are many foreign awards that are like typical American awards in that they are results of procedures that are not intended to assure fidelity to law.

Whether the arbitration is domestic or foreign, and whatever duty foreign law might or might not impose on arbitrators to apply controlling law, there is inherent in the institutions of private dispute resolution an endemic disinclination to enforce legal rights rigorously. Even International Chamber of Commerce arbitrators are dependent for their careers, to a degree that no judges are, on the acceptability of their awards to the parties, and perhaps especially on their acceptability to parties who are "repeat players." This circumstance creates pressure on arbitrators to appear to be considerate of the interests of all parties, even those who have sorely abused the rights of others. For this reason, while there are doubtless many courageous arbitrators and many weak judges, reluctant parties have cause to believe that their legal entitlements will be more squarely observed in court than in an arbitral tribunal, even an International Chamber of Commerce tribunal.

This disinclination of arbitrators to observe legal entitlements is most likely to manifest itself in regard to those rights that are not created by the contract from which they derive their jurisdiction. For the reason that their own status is linked to the contract, parties may reasonably expect arbitrators to tend to uphold and enforce a contract, sometimes even at the expense of rights existing independently of that contract.

The assessment that arbitrators are less likely to enforce rights is further reinforced by contrasts in accountability. Given the non-legal informality of traditional arbitral proceedings and awards, judicial review of the merits of awards was rightly viewed as not merely aimless, but a serious intrusion on a process designed not to protect rights but to resolve disputes quickly, efficiently, with civility and dispatch. With this consideration in mind, the FAA

Marriott, *ADR Principles and Practice* 63 (Sweet & Maxwell, 1993). See also UNCITRAL Model Law on International Commercial Arbitration, Art 28(3) (1985).

⁷³ Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials* 135 (Kluwer, 1994).

limits judicial review of awards to narrow grounds such as fraud, bias, or serious misconduct by the arbitral tribunal.⁷⁴ As Richard Speidel has emphasized, nonreviewability is a “core ingredient” giving arbitration its advantage over litigation.⁷⁵ Seemingly precluded by the FAA is judicial review of awards to correct errors of law or even egregiously mistaken findings of fact.⁷⁶

Indeed, the FAA does not require arbitral tribunals to explain their decisions or even to record the evidence on which they are based, so that it is often impossible to detect whether a particular award is or is not a faithful application of the controlling law. The relation between the recording of evidence and the possibility of effective review to assure fidelity to law has been well understood at least since the time of Justice Story.⁷⁷ In part, the absence of this requirement in arbitration reflects another traditional aim that is of signal importance to many who use private ADR: privacy.⁷⁸ Making a transcript of evidence presented at a hearing, and requiring statements of reasons that can circulate, threaten public exposure of evidence that it may be the legitimate aim of the parties to escape. This consideration is most appropriate where matters such as trade secrets are at issue, but also suggest a reason for concern when matters of legitimate public concern are diverted from courts to arbitral tribunals.

In contrast to customary American practice, the International Chamber of Commerce Rules, rooted in the vision of arbitration

⁷⁴ 9 USC § 10 (1994).

⁷⁵ Richard Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 Ohio St J on Disp Resol 157, 191 (1989).

⁷⁶ There have been occasional suggestions that an award might be set aside if it were found to be in “manifest disregard of the law.” Justice Frankfurter, dissenting in *Wilko v Swan*, 346 US 427, 440 (1953), asserted that “Arbitrators may not disregard the law. . . . [T]heir failure to observe the law ‘would constitute grounds for vacating the award’ . . .” citing dicta of Chief Judge Swan in the same case, 201 F2d 439, 445 (2d Cir 1953). Compare *In re I/S Stavborg v National Metal Converters*, 500 F2d 424 (2d Cir 1974); *Merrill Lynch Pierce Fenner & Smith v Jaros*, 70 F3d 418 (6th Cir 1995). More accurate is the statement in *Bernhardt v Polygraphic Co. of America*, 350 US 198, 203 n 4 (1956): “Whether the arbitrators misconstrued a contract is not open to judicial review.” The same may also be generally the result if arbitrators misapply a statute. See *Merrill, Lynch, Pierce, Fenner & Smith v Bobker*, 808 F2d 930 (2d Cir 1986); *Rostad & Rostad Corp. v Investment Management & Research, Inc.*, 923 F2d 694 (9th Cir 1991); *R. M. Perez & Assocs v Welch*, 960 F2d 534 (5th Cir 1992). Judge Haight concluded that such review is especially inappropriate when the court is asked to confirm a foreign award. *Brandeis Intsel Limited v Calabrian Chemicals Corp.*, 656 F Supp 160 (S D NY 1987).

⁷⁷ *Parsons v Bedford*, 3 Pet 433 (1830).

⁷⁸ Soia Mentschikoff, *Commercial Arbitration*, 61 Colum L Rev 846, 849 (1961).

as a legal process, do require a statement of reasons, and an award issued under Chamber auspices is reviewed by its International Court of Arbitration before it is regarded as final.⁷⁹ This of course adds materially to the cost and delay of the proceeding, but it lends credence to the otherwise very questionable assumption that arbitration is a means of enforcing the law. The UNCITRAL Rules likewise require a statement of reasons unless the parties waive the requirement,⁸⁰ but there is no provision for review to consider whether the reasons stated are sound or even plausible. Such “speaking awards” are also common in labor arbitration practice in the United States, but are not associated with judicial review for errors of law or fact.⁸¹ In the industrial context, speaking awards by labor arbitrators serve to create a “law of the shop.”

The FAA confers a subpoena power on arbitrators,⁸² but otherwise makes no provision for discovery. Given the date of its enactment thirteen years before promulgation of the Federal Rules of Civil Procedure, it would be remarkable if the Act had made provision for lawyers to exercise the prerogatives conferred on them by Rules 26–37 of the 1938 Rules. American arbitrators may employ their subpoena power to accomplish many of the aims of the discovery rules,⁸³ but the absence of such a provision marks an important difference between arbitration under the FAA or in international practice and adjudication in a federal court. While discovery may be regarded as a mixed blessing at best, because of its costs, it cannot be doubted that the availability of discovery assures that courts are in general more effective than arbitral tribunals in detecting wrongdoing and enforcing the rights of victims, whether of securities fraud, price-fixing conspiracies, race or gender discrimination, or environmental misdeeds. Because discovery is a unique feature of American civil procedure, it is unsurprising that no provision is made for it in the international rules generally in use. Indeed, in arbitrations conducted in other countries, it is not unlikely that the parties will not only have no opportunity to dis-

⁷⁹ International Chamber of Commerce Rules of Arbitration, Art 32 (1988).

⁸⁰ UNCITRAL Rules, Art 32(3).

⁸¹ David E. Feller, *Relationship of the Agreement to External Law*, in Christopher A. Barreca et al, eds, *Labor Arbitrator Development* (Bureau of National Affairs, 1983).

⁸² 9 USC § 7 (1994).

⁸³ Macneil et al, *Federal Arbitration Law* at § 34-2 (cited in note 63).

cover documents or other evidence, but will have no opportunity to see witnesses, much less cross-examine them.⁸⁴ In some countries, arbitrators have no subpoena power; and in some it may be a crime for an arbitrator to attempt to put a witness under oath or otherwise expose him or her to the hazard of perjury. The one assurance given by the FAA is that each party must have an opportunity to be heard by the arbitrators,⁸⁵ but even with that assurance, some courts have questioned whether there is any constitutional requirement of procedural due process applicable to arbitration.⁸⁶

Despite the many and manifest limitations of arbitral tribunals as institutions for the enforcement of legal rights, the Court has insisted that the “streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.”⁸⁷ No matter how frequently the Court may insist on this view, it is, for the reasons stated, simply false doctrine. Whatever its strengths as a means of resolving disputes, traditional arbitration⁸⁸ is inferior to adjudication as a method of enforcing the law, as Congress and the state legislatures have consistently understood.

The FAA does not authorize a court to compel a party to arbitrate any matter in the absence of an explicit agreement to do so. Where a party denies having agreed to submission, the Act acknowledges and affirms the right to jury trial, except in admiralty cases, on the issue.⁸⁹ It specifies that in admiralty, the issue of whether there is a contract to arbitrate shall be decided by the court. It also allows revocation of an arbitration clause “upon such

⁸⁴ Arthur Marriott, *Evidence in International Arbitration*, 5 Arb Intl 280 (1989).

⁸⁵ 9 USC § 10(c).

⁸⁶ For example, *Stroh Container Co. v Delphi Industries, Inc.*, 783 F2d 743 (8th Cir), cert denied 476 US 1141 (1986). See generally Edward Brunet, *Arbitration and Constitutional Rights*, 71 NC L Rev 81 (1992).

⁸⁷ *Shearson/American Express Inc. v McMahon*, 482 US 232 (1987).

⁸⁸ The one significant exception may be the “Rent-a-Judge” system in California which employs retired judges and provides for application of judicial procedures and appellate review. For an account, see Anne S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 Duke L J 166 (1994).

⁸⁹ 9 USC § 4 (1994). This section reads in pertinent part:

If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

grounds as exist in law or equity for the revocation of any contract.”⁹⁰ These provisions left ample room for federal courts to administer state contract law with appropriate sensitivity to the possible abuses of arbitration agreements by strong parties to diminish the rights of weaker ones by applying the widely accepted principle expressed by Llewellyn.⁹¹

The FAA does not state or imply that the issue of the revocability of an arbitration clause could be decided by the arbitral tribunal. Inasmuch as the issue is one “in law or equity,” it would seem to imply that the decision, like that of whether an agreement to arbitrate was made, should be decided by a law court, not the arbitral tribunal. A consideration supporting this reading is that the arbitral tribunal forfeits jurisdiction, and hence compensation for its members, when it decides in favor of revocation, and so has a conflict of interest in deciding that issue. On the other hand, if a party seeking to revoke can defer arbitration by, for example, claiming fraud in the inducement to sign the contract containing the arbitration clause, the hope for a quick, amiable disposition of a contract dispute is significantly diminished. Impressed more by the dangers to the integrity of arbitration posed by delay than it was by the potential conflict of interest in permitting arbitrators to decide the scope of their jurisdiction, the Court in 1967 held that parties might by broad terms in an arbitration clause confer on the arbitral tribunal the jurisdiction to decide issues of revocability such as fraud in the inducement.⁹²

WAIVING ACCESS TO COURTS

A party in control of the drafting process is, of course, not limited to the mandatory arbitration clause in its efforts to use

⁹⁰ 9 USC § 2 (1994):

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

⁹¹ Quoted in text at note 31.

⁹² *Prima Paint Corp.*, 388 US 395, following *Robert Lawrence Co. v. Devonshire Fabrics Inc.*, 271 F2d 402 (2d Cir 1959).

contract to undermine the enforceability of rights potentially threatening to it. Perhaps the most extreme example of such a use of contract is the cognovit note. Such a note waives the constitutional right of the promisor to notice of a suit filed to enforce the note, and authorizes the promisee in the event of a default on the note to take a default judgment against the promisor without prior notice. The cognovit note does not destroy the ability of the defaulter to secure relief from the judgment. The judgment cannot be executed without prior notice, giving the promisor an opportunity prior to execution to secure relief from the judgment if he or she can prove nonliability. The cognovit does, however, reassign the burden of going forward with litigation and the burden of proof. While far short of a total abrogation of the promisor's rights not to be held liable for a promise that he or she did not make or had already performed, it is effectively a significant diminution of those rights because the promisee holding a cognovit note has the whip hand in proceedings to resolve disputes over such defenses. The power gained by the promisee is so great, in fact, that most states do not allow the device.⁹³ The Supreme Court of the United States, while upholding its use between two sophisticated corporate parties, noted that Charles Dickens had denounced the practice⁹⁴ and cautioned that its use in less appropriate circumstances might constitute a taking of property in violation of the Due Process Clause of the Fourteenth Amendment.⁹⁵

Another device inviting comparison to the arbitration clause is the forum selection clause designating the courts of a named jurisdiction as those in which the contract or other rights arising out of the contract may be enforced.⁹⁶ Such clauses were long disfavored by American courts, who suspected that such clauses were devices to deprive weaker parties of their rights by making it too difficult to assert them.⁹⁷ Even the Court deciding *Lochner* ac-

⁹³ H. Ward Classen et al., *A Survey of the Legality of Confessed Judgment Clauses in Commercial Transactions*, 47 Bus Law 729, 731 n 6, 758-72 (1992).

⁹⁴ Charles Dickens, *The Posthumous Papers of the Pickwick Club* ch 47, 750-52, 754 (1837, Robert L. Patten ed; Penguin, 1972).

⁹⁵ *D. H. Overmyer Co. v Frick Co.*, 405 US 174, 177 (1972). Compare *Peralta v Heights Medical Center, Inc.*, 485 US 80 (1988).

⁹⁶ *Scherk v Alberto-Culver Co.*, 417 US 506, 516 (1974).

⁹⁷ Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L Rev 291, 308 (1988).

knowledge of the power of Congress to create rights of workers that cannot be waived in their contracts of employment,⁹⁸ and that decision was followed by a holding that an employer cannot impose on a worker a disadvantageous choice of a forum in which such rights must be asserted.⁹⁹

But forum selection clauses can facilitate transactions, especially in international trade. On that account, the National Conference of Commissioners on Uniform State Laws in 1968 approved a Model Act giving limited sanction to these clauses,¹⁰⁰ and in 1971, the American Law Institute approved the enforcement of such clauses when not "unfair or unreasonable."¹⁰¹ The next year, the Supreme Court of the United States in *M/S Bremen v Zapata Off-shore Co.*¹⁰² held that such agreements may be enforceable in federal courts exercising admiralty jurisdiction, but cautioned against too broad a reading of its holding, emphasizing that the agreement under consideration in that case was made at arm's length between sophisticated corporations.

The forum chosen in *Bremen*, the courts of the United Kingdom, was, the Court noted, a suitably neutral ground for the resolution of a dispute between German and American corporations, each of whom might be reasonably fearful of subjecting its claims or defenses to the national courts of the other contracting party. It may also have been relevant that the claim asserted by the party invoking the clause was one arising under the agreement, and thus no public regulatory policy aimed at protecting one party against the power of the other was compromised by having the dispute resolved by a British court.

The lower federal courts applying *Bremen* have demonstrated varying degrees of receptivity to forum selection clauses in adhesion contracts. Some have enforced them with apparently little concern for the fact that they were buried in fine print,¹⁰³ and,

⁹⁸ *Philadelphia, Baltimore & Washington Railroad Co. v Schubert*, 224 US 603 (1912) (applying provision in Federal Employers Liability Act of 1906 making workers' rights under the statute nonwaivable).

⁹⁹ *Boyd v Grand Trunk Western Ry. Co.*, 338 US 263 (1949).

¹⁰⁰ Willis M. Reese, *The Model Choice of Forum Act*, 17 Am J Comp L 292 (1969).

¹⁰¹ Restatement (Second) of Conflict of Laws § 80 (1988).

¹⁰² 407 US 1 (1972).

¹⁰³ For example, *General Eng'g Corp. v Martin Marietta Alumina, Inc.*, 783 F2d 352 (3d Cir 1986); *Bryan Elec. Co. v Fredericksburg*, 762 F2d 1192 (4th Cir 1985); *Lien Ho Hsing*

rejecting the Restatement rule requiring reasonableness, despite manifest inconvenience to the party against whom they were enforced.¹⁰⁴ One court emphasized that "no one deterred [the party] from getting his glasses and reading the contract."¹⁰⁵ Other courts, however, have been wary of enforcing such clauses and declined to enforce them absent evidence that the party against whom the clause is invoked was aware of the clause and its consequences,¹⁰⁶ or where in light of the circumstances at hand the choice of forum was "unreasonable."¹⁰⁷

The courts have also demonstrated varying degrees of willingness to enforce forum selection clauses where the forum selected would not enforce the rights asserted by the party against whom the clause was invoked. Some, going beyond *Bremen*, have enforced clauses in which the parties designated foreign fora in which parties would be unable to protect rights conferred on them by federal law.¹⁰⁸ Others, including all who have considered cases in which Americans would have been required to assert claims in the courts of the Islamic Republic of Iran,¹⁰⁹ have refused on the ground that such a clause would be unreasonable.

In 1967, the Second Circuit en banc held that a forum selection

Steel Enter. Co. v Weibtag, 738 F2d 1455 (9th Cir 1984); *Norman Sec. Sys. v Monitor Dynamics Inc.*, 740 F Supp 1364 (N D Ill 1990).

¹⁰⁴ For example, *In re Diaz Contracting*, 817 F2d 1047 (3d Cir 1987); *Coastal Steel Corp. v Tilghman Wheelabrator*, 709 F2d 190 (3d Cir 1983). The level of inconvenience needed to invalidate a forum selection clause generally has been treated as a question of fact to be determined by the trial court.

¹⁰⁵ *Hoffman v National Equipment Rental, Ltd.*, 643 F2d 987, 991 (4th Cir 1981); see also *Mercury Coal & Coke v Mannesmann Pipe & Steel Corp.*, 696 F2d 315 (4th Cir 1982); *Gaskin v Stumm Handel GmbH*, 309 F Supp 361 (S D NY 1975).

¹⁰⁶ *Colonial Leasing Co. of New England v Pugh Brothers Garage*, 735 F2d 380 (9th Cir 1984); *Couch v First Guaranty Ltd.*, 578 F Supp 331 (N D Tex 1984); *Quick Erectors, Inc. v Seattle Bronze Corp.*, 524 F Supp 351 (E D Mo 1981); *Cutter v Scott & Fetzer Co.*, 510 F Supp 905 (W D Wis 1981); *Peterson v Zochonis (U.K.) Ltd. v Compania United Arrows S.A.*, 493 F Supp 626 (S D NY 1980); *Kolendo v Jerrell, Inc.*, 489 F Supp 983 (S D W Va 1980).

¹⁰⁷ For example, *Copperweld Steel Co. v Demag-Mannesmann-Bobler*, 578 F2d 953 (3d Cir 1978); *Calzavara v Biehl & Co.*, 181 So2d 809 (La App 1966); *Cerami-Kote, Inc. v Energywave Corp.*, 116 Idaho 56, 773 P2d 1143 (1989).

¹⁰⁸ For example, *Bense v Interstate Battery System of America Inc.*, 683 F2d 718 (2d Cir 1982); *Medoil Corp. v Citicorp*, 729 F Supp 1456 (S D NY 1990).

¹⁰⁹ For example, *McDonnell Douglas Corp. v Islamic Republic of Iran*, 758 F2d 341 (8th Cir 1985); *Rockwell Intl Sys., Inc. v Citibank N. A.*, 719 F2d 583 (2d Cir 1983); *Harris Corp. v National Iranian Radio & Television*, 691 F2d 1344 (11th Cir 1982). For other cases, see Gregory C. Lehman, *Comment, Mandatory Forum Selection Clauses and Foreign Sovereign Immunity: Iran's Litigation Problems in United States Courts*, 12 Brooklyn J Intl L 553 (1986).

clause in an ocean bill of lading contravenes the provision of the Carriage of Goods by Sea Act¹¹⁰ invalidating clauses that relieve the carrier of liability for negligence or that might "lessen" such liability.¹¹¹ That holding was reaffirmed in 1981 by the Fourth Circuit, the court distinguishing *Bremen* as a case not subject to COGSA and its nonwaiver provision. Both courts of appeals noted that the selection of a distant forum could substantially deny the shipper any effective relief for negligence by the carrier.¹¹² A stellar example was provided by the facts of the 1967 case, which involved a claim for rust on a barrel of nails. The carrier sought to require the plaintiff to sue in Oslo, as required by the clause in its printed bill of lading. The settlement value of a claim of a New York plaintiff for rust in one barrel of nails is effectively reduced to zero if that claim can be asserted only in Oslo, so the clause did as a practical matter not merely lessen, but eliminated the liability of the carrier for its negligence.

More recently, in a much-criticized decision,¹¹³ the Court in *Carnival Lines v. Shute*¹¹⁴ held that a federal court in the state of Washington was obliged to enforce a forum selection clause contained in the fine print of a cruise ticket; the clause required all litigation between passenger and cruise line over a personal injury alleged to have occurred aboard ship to be conducted in Florida. The Court reaffirmed its earlier statement that such clauses are "subject to judicial scrutiny for fundamental fairness," but found the designation of the ship's home port as fundamentally fair, at least as long as the home port is in another state of the United States that will presumably give effect to any applicable law of Washington. The Court acknowledged but chose not to apply Section 183 of the Limitation of Vessel Owner's Liability Act explic-

¹¹⁰ 46 USC § 1300 et seq.

¹¹¹ *Indussa Corp. v. S. S. Ranborg*, 377 F2d 200 (2d Cir 1967) (en banc).

¹¹² *Union Insurance Society of Canton, Ltd. v. S. S. Elikon*, 642 F2d 721 (4th Cir 1981).

¹¹³ Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash L Rev 55 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 Tex Intl L J 323 (1992); Edward A. Purcell, *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses and the Rehnquist Court*, 40 UCLA L Rev 423 (1995); and see *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F2d 372, 376 (7th Cir 1990) (Posner, J) ("If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary.").

¹¹⁴ *Carnival Cruise Lines, Inc. v. Shute*, 499 US 585 (1991).

itly invalidating any agreement between the owner of a vessel and a passenger that limits liability for personal injury or purports to “lessen” or “weaken” the right of a personal injury claimant to “trial by a court of competent jurisdiction,”¹¹⁵ a statutory provision very similar to that contained in COGSA.

The Court did not find it necessary to explain how there could be mutual assent to a clause contained in a ticket delivered after the passage had been booked and paid for, a problem that other courts in other contexts might well have found insurmountable.¹¹⁶ Had the contract, for example, been governed by the Uniform Commercial Code, the onerous provision added so belatedly might well be deemed outside the contract and invalid.¹¹⁷ In the specific context of the cruise ticket, the passenger will normally have planned a vacation and made a heavy emotional investment in that plan before learning of the clause, diminishing the possibility that he or she will view critically the new terms inserted into the contract as embodied in the ticket. Finally, the cruise ticket was on its face nonrefundable, so the passenger would have had to consult a lawyer in order to know that he or she might reject the ticket and secure a refund.

The court of appeals held the clause to be revocable by the Shutes. Applying the standard expressed in *Bremen* and the Restatement, it held that a forum selection clause in a contract of adhesion such as a passenger ticket is not enforceable because it has not been negotiated.¹¹⁸ The Supreme Court reversed this holding, concluding that Florida was in the circumstances a reasonable choice of forum. Among the reasons given were that the forum selection clause usefully eliminated the issue of jurisdiction, thus sparing the parties the expense of disputing that issue, and that “it stands to reason that passengers who purchase tickets containing a forum selection clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”¹¹⁹

This benefit stands to reason only if one makes assumptions that

¹¹⁵ 46 USC § 183c.

¹¹⁶ See Restatement (Second) of Contracts § 237, Comment f.

¹¹⁷ See USC § 2-207.

¹¹⁸ *Shute v Carnival Cruise Lines*, 897 F2d 377, 388–89 (9th Cir 1990).

¹¹⁹ *Carnival Cruise*, 499 US at 594.

are demonstrably false.¹²⁰ The term is not negotiated, the specific market is noncompetitive, the issue of forum choice is of trivial importance to an individual passenger *ex ante*, and the unadvised passenger cannot be expected to assign a suitable value to the clause; hence, the savings resulting from the enforcement of the clause went straight to the bottom line of Carnival Lines. In offering its unrealistic analysis of economic effects, the Court did on this one occasion pay its respects to neo-Spencerian law-and-economics.¹²¹ It recalls uncomfortably the 1842 opinion of Chief Justice Shaw that engineers voluntarily undertook risks as demonstrated by the fact that they received higher rates of pay than machinists.¹²²

Turning to the nonwaiver provision in the Limitation of Vessel Owner's Liability Act, the Court in *Carnival Lines* asserted that the forum selection clause in the ticket did not "take away" the right to trial.¹²³ But the Act forbids the vessel owner not merely to insert any clause taking away rights, but also from inserting a clause purporting to "lessen, weaken, or avoid" the "right of the claimant to a trial by court of competent jurisdiction." It seems evident that the Shutes claims would command a higher price in a settlement negotiation if they were free to litigate in the courts of Washington than they would if limited to proceedings in courts so distant from their homes. In that essential respect, the Shutes' rights were clearly "lessened" by the operation of the clause. While conceptually they were not deprived of their rights by the clause, in reality, as the court of appeals noted,¹²⁴ they were.

In concluding, the Court emphasized that the Limitation of Liability Act was aimed at arbitration clauses. "There was no prohibition of forum selection clauses" that allow a judicial resolution of the Shutes' claims.¹²⁵ It did not note, as it might have, that the

¹²⁰ Lee Goldman, *Public Policy: My Way and the Highway: Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 Nw U L Rev 700 (1992).

¹²¹ For example, Richard A. Posner, *Economic Analysis of Law* 102 (Little Brown, 3d ed 1986).

¹²² *Farwell v Boston & Worcester Railroad Corp.*, 45 Mass (4 Met) 49, 57.

¹²³ *Carnival Cruise*, 499 US at 596.

¹²⁴ 897 F2d 377, 387 ("Dismissal of this suit from Washington effectively may prevent the Shutes from obtaining relief.").

¹²⁵ *Id.*

forum selected was the court of a state, and not of a foreign country where enforcement of the applicable American law might fail to be enforced.

One point made by the Court may have somewhat greater force. As the Court noted, a bad accident at sea could, if the clause is not enforced, result not only in high legal costs caused by the need repetitively to defend the ship in the courts of every place from which an injured passenger came. Worse, perhaps, than the cost would be the unevenness in the enforcement of the rights of passengers and the duties of shipowners. The possibility of unevenness may be an especially appropriate consideration given the tradition of admiralty law, manifested for example in the law of general averaging,¹²⁶ which strives to distribute the risks of disaster evenly among those sharing risk. If the forum selection clause were invalid, the ship's liability to its passengers for a disaster would differ radically according to the jurisdiction from which they came. Co-passengers suffering identical injuries in a common accident might receive vastly different settlements. This consideration would seem to warrant some form of procedural accommodation, whether by enforcing a forum selection clause or by other means, such as transfer,¹²⁷ class action,¹²⁸ or interpleader.¹²⁹ The weakness of this argument as applied to the *Shutes* is that their claim arose from an isolated event involving no other passengers. Nevertheless, the admiralty tradition offers a basis for distinguishing *Carnival Lines* in future cases in which consumers find inside their new washing machines or electric shavers a warranty certificate containing a clause mandating a distant forum for enforcement of the warranty.

Both Supreme Court cases enforcing forum selection clauses arose in the exercise of the admiralty jurisdiction. In neither case was there any reference to state law. In routine diversity litigation, the law controlling the validity of contract clauses is, of course,

¹²⁶ Grant Gilmore and Charles L. Black, *The Law of Admiralty* 244–71 (West, 2d ed 1975). On maritime law as a distinct tradition, compare *Hodes v SNC Achille Lauro*, 858 F2d 905, 909 (3d Cir 1988).

¹²⁷ 28 USC §§ 1404, 1407.

¹²⁸ FRCP 23.

¹²⁹ 28 USC § 1335. For example, *State Farm Fire & Cas. Co. v Tashire*, 386 US 523 (1967).

state law. Some lower federal courts have assumed to the contrary with respect to forum selection,¹³⁰ despite the clearly controlling principle of *Erie*.¹³¹ Where, as in *Bremen*, the transaction is one in international commerce, it is at least barely plausible to contend that the enforcement of the forum selection clause bears on international relations and is therefore a proper subject of federal common law,¹³² but none of the cases creating a federal common law of international relations have involved matters of such slight political consequence as the exercise of jurisdiction over a dispute between parties to a commercial transaction, and no federal court to date has rested a decision enforcing a forum selection clause on the premise that federal law controls in matters other than admiralty. The Court has held that the weight to be given a forum selection clause by a federal court when considering a possible transfer of venue for "fairness and convenience" is an issue of federal law, being governed by Section 1404,¹³³ but no court of appeals has applied that holding when the issue arises on a motion to dismiss.¹³⁴

One reason the issue whether state or federal law is being applied has seldom arisen is that *Bremen*, if not *Carnival Lines*, is conventional in its analysis and result, applying the doctrine stated in the Restatement (Second) of Conflict of Laws.¹³⁵ State courts confronting forum selection clauses have generally cited *Bremen*,¹³⁶ whether the transaction was interstate or international,¹³⁷ and have

¹³⁰ *In-Flight Devices Corp. v Van Dusen Air, Inc.*, 466 F2d 220, 234 n 24 (6th Cir 1972); *Wellmore Coal Corp. v Gates Learjet Corp.*, 475 F Supp 1140, 1143 (W D Va, 1979); *Public Water Supply Dist. No. 1 of Mercer County, Mo. v American Ins. Co.*, 471 F Supp 1071, 1072 (W D Mo 1979).

¹³¹ *Erie*, 304 US 64.

¹³² Compare *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964) (act of state doctrine) and *Zschernig v Miller*, 389 US 429 (1968). See David Westin and Gary B. Born, *The Aerospatiale Decision: Its Foundation and Application in State Court Proceedings*, 26 Colum J Transnatl L 901 (1988); Daniel C. K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 Iowa L Rev 165 (1988); A. M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 Yale J Intl L 1 (1995).

¹³³ *Stewart Org., Inc. v Ricoh Corp.*, 487 US 22 (1988).

¹³⁴ For example, *Alexander Proudfoot Co. World Headquarters L. P. v Thayer*, 877 F2d 912, 918 n 12 (11th Cir 1989).

¹³⁵ Restatement (Second) of Conflict of Laws § 80 (1988).

¹³⁶ As of July 1996, *Bremen* had been cited 228 times by state courts.

¹³⁷ For example, *Abadou v Trad*, 624 P2d 287 (Alaska, 1981); *Societe Jean Nicholas et fils, J. B. v Mousseux*, 123 Ariz 59, 597 P2d 541 (1979); *Smith, Valentino & Smith, Inc. v Supreme Court*, 17 Cal3d 491, 551 P2d 1206, 131 Cal Rptr 374 (1976).

exercised varying degrees of rigor in scrutinizing the reasonableness of a selected forum. But some state courts have rejected *Bremen* and continued to hold that forum selection clauses are not enforceable, at least in cases involving American litigants.¹³⁸ Some legislatures have expressed themselves on the question, Nebraska enacting a statute that may be more favorable to enforcement than the opinion of the Court in *Bremen*,¹³⁹ and Montana enacting a statute that provides:

Restraints upon legal proceedings void. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void. This section does not affect the validity of an agreement enforceable under Title 27, chapter 5 [Montana Uniform Arbitration Act].¹⁴⁰

There is no visible basis on which the Supreme Court could legitimately require Montana or other state courts to enforce forum selection clauses in cases not involving international litigants, and it has so far refrained from suggesting that its decisions on such matters have any applicability to state court litigation even when international litigants are involved.

Forum selection by contract may be achieved by implication. An example is provided by *Burger King v Rudzewicz*.¹⁴¹ That case was brought in Florida by Burger King against a Michigan franchisee for alleged breach of the franchise agreement. That agreement contained a clause describing the contract as one made and to be performed in Florida and governed by Florida law. While there were other factors present,¹⁴² the Court relied in important part on that clause as a submission by the franchisee to the jurisdiction of Florida courts.¹⁴³ The Court was untroubled that the franchisee's defense rested in part on the Michigan Franchise Investment

¹³⁸ For example, *Redwing Carriers Inc. v Foster*, 382 So2d 554 (Ala, 1980); *Davenport Mach. & Foundry Co. v Adolph Coors Co.*, 314 NW2d 432 (Iowa, 1982); *Fidelity Union Life Ins. Co. v Evans*, 477 SW2d 535 (Texas, 1972).

¹³⁹ See *Haakinson & Beaty Co. v Inland Ins. Co.*, 216 Neb 426, 344 NW2d 454 (1984).

¹⁴⁰ Mont Code Ann § 28-2-708 (1995).

¹⁴¹ 471 US 462 (1985).

¹⁴² *Id* at 466-67, 479-80 (noting that McShara trained in Florida).

¹⁴³ *Id* at 482.

Law,¹⁴⁴ an enactment intended to protect local franchisees from the overbearing exercise of economic power by franchisers such as Burger King. The enforcement of that law was left to the mercies of courts sitting in Florida. The Court did not suggest that the clause precluded suit by the franchisee in a Michigan court to obtain rights conferred by the Michigan law, but in the circumstances of the case, such an action might have been premature,¹⁴⁵ so that the clause as interpreted operated as a practical matter to "oust" the Michigan courts of the opportunity to enforce the state's law. However, because the Court did not regard the clause as an overt forum selection clause, it did not find it necessary, in the manner of its *Bremen* opinion, to defend the selection of Florida as a fair and reasonable choice. It bears notice that if the Court had read the franchise agreement written by Burger King in the same spirit in which insurance contracts are read,¹⁴⁶ the choice of law clause could have been read as a disavowal of any purpose of the contract to effect a selection of forum; if Burger King wanted a Florida forum, it could have said so in language as plain as that in which it expressed its preference for Florida law, and its failure to do so could therefore be taken as a concession that any litigation would be conducted in Michigan, but pursuant to Florida law, except insofar as Michigan might disallow such a choice of law.¹⁴⁷

As the Court in *Bremen* acknowledged, and as both state and federal courts have had frequent occasion to observe, any forum selection clause (whether explicit or implicit) potentially threatens to diminish the value of substantive entitlements. This is so for at least two reasons. One is the potential transaction cost of asserting a claim or defense in a distant forum where one must employ unfamiliar counsel and bear special costs of transport and communication. The other is the risk that the forum selected will be unreceptive to the claim or defense at issue. Unreceptivity may result from ethnocentric choice of law, reduced competence to under-

¹⁴⁴ Id at 489.

¹⁴⁵ On requirements of ripeness in Michigan courts, see 1 David J. Lanciotti, Jacqueline E. Lanciotti, and William B. Murphy, *Michigan Pleading and Practice* § 215 (Callaghan, 1996 rev).

¹⁴⁶ See John Alan Appleman and Jean Appleman, 13 *Insurance Law and Practice* § 7401 (West, 1976).

¹⁴⁷ Pamela J. Stephens, *The Single Contract as Minimum Contacts: Justice Brennan "Has It His Way,"* 28 Wm & Mary L Rev 89, 110 (1986).

stand the law on which the claim or defense is asserted, the unavailability of discovery, or xenophobia in the evaluation of testimony, among other causes.

To the extent that the rights jeopardized by a disadvantageous forum selection clause are those created entirely by the contract of which it is a part, there is diminished public interest in the protection of the rights so exposed to risk, and hence less reason for close scrutiny of the reasonableness of the choice made. On the other hand, where Congress has conferred a measure of inalienability on rights not created by the parties themselves, as with the Carriage of Goods by Sea Act or the Limitation of Vessel Owner's Liability Act, there is every reason for a court to take scrupulous care to disallow a forum selection that will impede the assertion of that right. Contrary to the clearly expressed purpose of Congress to assure full enforcement of the rights of shippers and passengers, claims brought under either of those statutes will settle for fewer dollars than they would have had the Court been more attentive to the use of forum selection to evade the national law and frustrate the policy it expresses.

ARBITRABILITY IN FEDERAL LAW¹⁴⁸

The 1925 Act contained one provision comparable to those in state legislation designed to protect weaker parties from the loss or diminution of their rights through arbitration conducted pursuant to contracts of adhesion. That was the exclusion from the Act's coverage of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁴⁹ Section 2 of the Act conferred validity and irrevocability only on arbitration clauses in writing set forth in a maritime or commercial transaction.¹⁵⁰ Those conditions met, a federal court having jurisdiction over a dispute was directed to compel performance of an agreement to arbitrate "an existing controversy arising out of such a contract [or] transaction" unless the arbitration clause is revocable "upon such grounds as exist in law or in equity for the revocation of any contract."

¹⁴⁸ See generally Macneil et al, *Federal Arbitration Law* at § 15.1 (cited in note 63).

¹⁴⁹ 9 USC § 1 (1994).

¹⁵⁰ Ch 213, § 2, 43 Stat 883 (1925) (current version at 9 USC § 2 (1994)).

An issue of arbitrability did not reach the Court until 1953. That year, in *Wilko v Swan*¹⁵¹ the Court held that an arbitration clause is not binding on a plaintiff seeking a recovery under the Securities Act of 1933.¹⁵² The Court relied on the language of the Securities Act declaring void any “condition, stipulation, or provision binding any person acquiring any security to waive compliance with any [of its] provision[s].”¹⁵³ The Court noted that the entire Act had the purpose of protecting unsophisticated investors from savvy brokers by affording them more accessible judicial remedies for fraud. It concluded that “the intention of Congress concerning the sale of securities is better carried out by holding invalid . . . an agreement for arbitration of issues arising under the Act.”¹⁵⁴ In reaching this conclusion, it followed the position taken by the Securities and Exchange Commission in its amicus brief.¹⁵⁵

The court of appeals in *Wilko* was more prescient than the majority of the Court. It held that claims arising under the Act were arbitrable, but that the failure of the arbitrators to observe and enforce the provisions of the Securities Act “would constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act.”¹⁵⁶ Justice Frankfurter, dissenting, agreed with the assumption made by the court of appeals, concluding that “appropriate means for judicial scrutiny must be implied in the form of some record or opinion, however informal, whereby such compliance will appear.”¹⁵⁷ He also noted that the plaintiff had not proved that “in opening an account [he] had no choice but to accept the arbitration stipulation”; had such proof been tendered, then Justice Frankfurter stood ready to regard the clause as “unconscionable and unenforceable.”¹⁵⁸ There was thus no member of the Court in 1953 willing to enforce a boiler-plate arbitration clause against a party asserting a nonwaivable right conferred by

¹⁵¹ 346 US 427 (1953).

¹⁵² Id at 434–35.

¹⁵³ Section 14 of the Securities Act of 1933, 15 USC § 77 n (1988).

¹⁵⁴ *Wilko*, 346 US at 438.

¹⁵⁵ Id at 428, 435.

¹⁵⁶ 201 F2d 439, 445 (1953).

¹⁵⁷ *Wilko*, 346 US at 440 (Frankfurter, J, dissenting).

¹⁵⁸ Id.

Congress for the public purpose of deterring fraud in securities transactions, but there was opinion favoring the transformation of the arbitral process to make it accountable for its fidelity to law.

Wilko won acceptance and approval.¹⁵⁹ The Second Circuit, sitting in New York and comprised of judges familiar with traditional commercial arbitration in that city, applied *Wilko* to invalidate arbitration clauses in bills of lading,¹⁶⁰ just as it had earlier invalidated forum selection clauses in ocean bills of lading. It also held that claims arising under the antitrust laws of the United States are not arbitrable pursuant to adhesive clauses.¹⁶¹ In the latter case, there was no statutory text in the Sherman Act from which the court could derive authority, but it reasoned that the aim of the law was to protect those with less economic power from those with more, and that this purpose would be partly frustrated if the stronger party could impose on the weaker an agreement to arbitrate future antitrust claims in a forum not accountable for its fidelity to the law.

The UN Convention and the implementing legislation ratified and enacted in 1970 stop far short of being a full faith and credit clause for foreign awards. Articles V and XIV of the Convention enumerate eight grounds on which a court of a signatory nation may decline to enforce a foreign award; these include that the court finds that "(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."¹⁶² The principle of *Wilko* was thus explicitly acknowledged by the Convention, and it was never suggested that acceding to it would disable Congress or state legislatures from protecting weaker parties from overbearing use of arbitration by those endowed with economic power. Indeed, other signatory nations had asserted that foreign awards presuming

¹⁵⁹ See Note, *Arbitration Under the Securities Act of 1933*, 49 Nw U L Rev 101 (1954); Note, *Securities Act*, 66 Harv L Rev 1326 (1953); see also Note, *Enforceability of Arbitration Agreements in Fraud Actions Under the Securities Act*, 62 Yale L J 985 (1953) (urging the Court's result prior to the Court's ruling).

¹⁶⁰ In the Matter of *AAACON Auto Transport, Inc.*, 537 F2d 648 (2d Cir 1976).

¹⁶¹ *American Safety Equipment Corp. v J. P. Maguire & Co., Inc.*, 391 F2d 821 (2d Cir 1968).

¹⁶² Art V, para 2.

to adjudicate liabilities under their regulatory laws would not *pro tanto* be recognized in their courts.¹⁶³

It was perhaps a misfortune that the first case to reach the Court after accession to the Convention was *Scherk v Alberto-Culver Co.*¹⁶⁴ In that case, a substantial American manufacturer of toiletries sought to assert rights under the Securities Exchange Act of 1934 against a German who sold it trademarks alleged by the plaintiff to have been subject to undisclosed encumbrances. It sought to enjoin arbitration in France pursuant to the arbitration clause in the contract of sale, invoking the no-waiver provision of the 1934 Act, and citing *Wilko*. This was scarcely a situation in which arbitration threatened a right conferred on a weak party by a paternal Congress; indeed, it was not clear that any American law was applicable to the transaction. A majority of the Court thought *Wilko* distinguishable, and emphasized, as one difference, the international character of the transaction at bar.¹⁶⁵ Four Justices dissented, Justice Douglas protesting in their behalf that

[T]he international aura which the Court gives this case is ominous. We now have many multinational corporations in vast operations around the world—Europe, Latin America, the Middle East, and Asia. The investments of many American investors turn on dealings by those companies. Up to this day, it has been assumed by reason of *Wilko* that they were all protected by our various federal securities Acts. If these guarantees are removed, it should take a legislative enactment. I would enforce our laws as they stand, unless Congress makes an exception. . . .¹⁶⁶

Scherk set the stage for *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*,¹⁶⁷ the 1985 decision in which the Court set itself firmly on the course that it has since taken. Soler was a dealer in Puerto Rico for automobiles manufactured by a Tokyo firm that

¹⁶³ Justice Stevens cites Belgian, Italian, and German examples in *Mitsubishi*, 473 US at 660–61, nn 35–36; and see Gary B. Born, *International Commercial Arbitration in the United States: Commentary & Materials* 527 (Kluwer, 1994). With respect to the enforceability of adhesion contracts, even in international commerce, compare Civil Code of Italy, Arts 1341–42.

¹⁶⁴ 417 US 506 (1974).

¹⁶⁵ *Id.* at 513–16.

¹⁶⁶ *Id.* at 533 (Douglas, J., dissenting).

¹⁶⁷ 473 US 614 (1985).

was a joint venture of Mitsubishi Heavy Industries and Chrysler. A dispute arose over Soler's refusal to pay for cars that it was alleged to have ordered. Mitsubishi initiated arbitration pursuant to the dealership agreement, which provided for arbitration in Japan of all disputes arising between the parties, and brought an action in the federal court in Puerto Rico to compel Soler to arbitrate. Soler counterclaimed for defamation and violation of the Sherman Act, the Federal Automobile Dealer's Day in Court Act,¹⁶⁸ the Puerto Rico competition act,¹⁶⁹ and the Puerto Rico Dealers' Contracts Act.¹⁷⁰ The counterclaims were also asserted against Chrysler, Soler's principal supplier who had mediated the transaction with Mitsubishi, and who had not imposed an arbitration clause on its own contract with Soler. At issue in the Supreme Court was only the order compelling Soler to arbitrate its antitrust claim against Mitsubishi in Japan.

The Court affirmed the order, Justice Blackmun explaining that international arbitration fostered international trade: if arbitral tribunals

are to take a central place in the international legal order, national courts will need "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 of favoring commercial arbitration.¹⁷¹

This superinternationalism brought a strong dissent from Justice Stevens and others:

The Court's repeated incantation of the high ideals of "international arbitration" creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so it is equally unwise to allow a vision of world unity to distort the

¹⁶⁸ 15 USC § 1221 et seq.

¹⁶⁹ P R Laws Ann Tit 10, § 257 et seq (1976).

¹⁷⁰ P R Laws Ann Tit 10, § 278 et seq (1976 & Supp 1983).

¹⁷¹ *Mitsubishi*, 473 US at 638-39 (quoting *Kulukundis Shipping Co.*, 126 F2d 978, 985).

importance of the selection of a proper forum for resolving this dispute. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well—the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention . . . recognizes that private international arbitration is incapable of achieving satisfactory results.¹⁷²

The majority responded to the dissent with the promise tendered by Justice Frankfurter in *Wilko*. It undertook to assure that the arbitration in Japan would faithfully enforce the Sherman Act, calculating that the task for the Japanese arbitrators was not different from that performed by federal courts discerning foreign law in the manner provided by Federal Rule 44.1.¹⁷³ A transcript would be made, the Court assured itself, an opinion would be prepared by the three Japanese arbitrators, and their award would be reviewed by the federal court in Puerto Rico for errors of law.¹⁷⁴ As it happens, proceedings in the Japan Commercial Arbitration Commission may be conducted in English,¹⁷⁵ but the Court manifested no interest in that fortunate circumstance.

In so deciding *Mitsubishi*, the Court appeared to lose sight of at least two foreseeable consequences. One of these was the plight of Soler in presenting its counterclaim to arbitrators in Tokyo. It is, of course, true, as the Court pointed out,¹⁷⁶ that judges sometimes apply foreign law, and that Japanese arbitrators may be equally capable of doing so. It is, however, a commonplace observation that even judges are prone, when in doubt, to apply the law they know, and may be more prone to err when they try to apply unfamiliar law. Moreover, even assuming utmost good faith and professionalism on the part of Japanese arbitrators, the logistics were in Soler's case prohibitive, given the stakes. Effective presentation would require the participation of an American lawyer to attend the hearing. The hearing would almost certainly be con-

¹⁷² Id. at 665.

¹⁷³ FRCP 44.1.

¹⁷⁴ *Mitsubishi*, 473 US at 634 n 18.

¹⁷⁵ Japan Commercial Arbitration Association Rule 52(1) provides that "The language or languages to be used in arbitral proceedings shall be Japanese or English or both."

¹⁷⁶ *Mitsubishi*, 473 US at 634 n 18.

ducted discontinuously in the manner of Japanese civil litigation,¹⁷⁷ requiring Soler's lawyer to cross the Pacific perhaps numerous times.¹⁷⁸ In addition, Soler would in 1985 have needed a Japanese *bengoshi* to address the arbitrators.¹⁷⁹ Perhaps the evidence could be entirely documentary; if not, the transport of parties and witnesses would also be required. Of course, Soler's counterclaim would, like most claims, be settled. But its settlement value, whatever its merit, was reduced to a peppercorn.

Second, the Court appeared to give no consideration to the implications of its decision for domestic manufacturers and franchisers. If Mitsubishi is to be permitted thus to evade the Sherman Act, are its American competitors to be allowed to do the same? It almost surely had to follow that General Motors could require its Puerto Rico dealers to come to Detroit or New York, or perhaps even Japan if its cars contain Japanese parts, to arbitrate any claims they might have under the Sherman Act. But to the extent that General Motors must afford its dealers a more convenient forum than does Mitsubishi, competition in the automobile business is a somewhat less than level playing field, for Mitsubishi is less inhibited by American law in its business practices and dealer relations than are its American competitors.

Mitsubishi foretold reconsideration of the arbitrability of securities fraud claims. In 1987, the Court held that such claims arising under the Securities Exchange Act of 1934 are arbitrable¹⁸⁰ even though the Act contained a nonwaiver provision very similar to that held in *Wilko* to preclude enforcement of the clause requiring arbitration of a future dispute.¹⁸¹ The Court distinguished *Wilko* on the entirely formal ground that it interpreted the 1933 rather than the 1934 Act,¹⁸² a distinction long and universally rejected by lower federal courts¹⁸³ and dismissed as merely "colorable" by the

¹⁷⁷ Takaaki Hattori and Dan Fenno Henderson, *Civil Procedure in Japan* 7-59 to 7-78 (Mathew Bender, 1985). This problem is not limited to Japan, but is also a feature of arbitration in Europe as well. Born (cited in note 163) at 86.

¹⁷⁸ For example, *Fotochrome, Inc. v Copal Co., Ltd.*, 517 F2d 512 (1975).

¹⁷⁹ Japanese law was revised in 1996 to permit foreign lawyers to appear in international arbitral proceedings. Foreign Legal Consultants Law of Japan, Art 58-2.

¹⁸⁰ *Shearson/American Express*, 482 US 220.

¹⁸¹ See Securities Exchange Act of 1934 § 29, 15 USC § 78.

¹⁸² *Shearson/American Express*, 482 US at 228-29.

¹⁸³ Macneil et al, *Federal Arbitration Law* at § 16.23 (cited in note 63).

Court itself in *Scherk*. Its more cogent point was that the Securities Exchange Commission in 1987 favored arbitration of fraud claims, contrary to its position at the time of *Wilko*. One could dismiss this change of position as merely a reflection of changing presidential politics: a Commission appointed by President Reagan could be expected perhaps to sympathize with securities brokers and firms having a distaste for securities fraud litigation. But it was true that the Commission had in the intervening years acquired a role in the oversight of arbitration in the securities industry and had taken steps to assure the disinterest, economy, and effectiveness of the process. Moreover, Congress did in 1975 enact legislation favoring self-regulation in the industry.¹⁸⁴ That legislation reflected a not unfounded belief that the securities industry, perhaps more than any other, has a large stake in the effectiveness of its own regulation. If it allows the public to perceive that fraud goes unredressed, the theory goes, everyone with a stake in the market will suffer the consequences.¹⁸⁵ That theory may be correct, and if it is, then brokers accused of committing fraud on their clients may have even more to fear from arbitration than from trial by jury.

The claim under the 1934 Act was joined with another under the Racketeer Influenced and Corrupt Organizations Act,¹⁸⁶ which the Court also held to be arbitrable. RICO contained no non-waiver provision comparable to Section 14 of the Securities Act, but did provide for the recovery of treble damages, a feature of the antitrust laws that lower courts had taken as a sign that plaintiffs enforcing the legislation serve as private attorneys general whose function should not be subject to subversion by means of contract terms diverting their claims into inefficient or ineffective forums.¹⁸⁷ By the standards of an earlier day, contract clauses requiring arbitration of future RICO claims would not have been enforceable, and this holding cast doubt on the principle hitherto so well established in the lower courts with respect to antitrust claims,¹⁸⁸ at least in the absence of an international transaction.

¹⁸⁴ 29 USC § 19.

¹⁸⁵ S Rep No 94-75 (1975); H R Conf Rep No 94-229 (1975).

¹⁸⁶ 18 USC § 1961 et seq.

¹⁸⁷ *Shearson/American Express*, 482 US at 241-42.

¹⁸⁸ See, e.g., *Kotam Electronics, Inc. v JBL Consumer Products, Inc.*, 93 F3d 724 (11th Cir en banc 1996), overruling *Cobb v Lewis*, 488 F2d 41 (5th Cir 1974).

In 1989, the Court explicitly overruled *Wilko* and enforced a clause requiring arbitration of a future claim under the 1933 Act.¹⁸⁹ The Court was on firm ground in describing its 1987 decision as indistinguishable. But four Justices dissenting were on equally firm ground in stating that when the lower courts have relied for thirty-five years on a decision giving “a statutory provision concrete meaning, which Congress elects not to amend” for that period, it is the duty of the Court to respect the judgment of Congress.¹⁹⁰ Congress had revised the act many times without expressing the least doubt about the correctness of *Wilko*.

The Court took yet another questionable step in 1991. In *Gilmer v Interstate/Johnson Lane Corporation*,¹⁹¹ it held that a claim arising under the Age Discrimination in Employment Act¹⁹² is arbitrable. The Court justified its disregard of the provision of Section 1 of the FAA excluding employment contracts from the coverage of the Act by reference to the fact that the applicable clause was not in a contract but in an application seeking registration as a broker. The application was made on a printed form entitled “Uniform Application for Securities Industry Registration or Transfer,” and the arbitration clause was mandatory under Rule 347 of the New York Stock Exchange.

The Court pointed out that there was no explicit language in the ADEA forbidding enforcement of arbitration agreements,¹⁹³ and that the Act favored informal methods of conciliation,¹⁹⁴ but failed to observe the large difference between mandatory, binding arbitration of the sort required by Rule 347 and voluntary, non-binding conciliation of the sort envisioned by ADEA. The Court also concluded that private enforcement of the Act was unimportant, that it can be adequately enforced by the Equal Employment Opportunity Commission without the aid of bounty-hunting private plaintiffs. The Court distinguished three of its own earlier decisions holding that employment discrimination claims arising under Title VII of the Civil Rights Act are not subject to binding

¹⁸⁹ *Rodriguez de Quijas*, 490 US 477.

¹⁹⁰ *Id.* at 486 (Stevens, J, dissenting).

¹⁹¹ 500 US 20.

¹⁹² 29 USC § 621 et seq.

¹⁹³ *Gilmer*, 500 US at 29.

¹⁹⁴ *Id.*

arbitration foreclosing access to either courts or the Commission¹⁹⁵ on the ground that arbitrators serving pursuant to collective bargaining agreements, as were those involved in those three cases, have no authority to decide civil rights claims, but are restricted to enforcement of the contract conferring their authority. The implication of the distinction is that an arbitration clause in an individual contract of employment can extend arbitral jurisdiction to Title VII claims despite the FAA's explicit exclusion of employment contracts.

Justices Stevens and Marshall, dissenting, contended that the FAA does not apply to employment disputes whether the clause is in a contract or in a registration application; that because arbitration can afford no broad injunctive relief extending to the protection of the plaintiff's co-workers, it is not consistent with the legislative scheme of ADEA fostering class remedies; and that the means by which ADEA is enforced is no business of the New York Stock Exchange, whose provisions should be read to be inapplicable to civil rights disputes. The latter point may have warranted even greater emphasis; while it is arguable that the securities industry can be trusted to regulate itself to prevent fraud, there is no reason to assume that its arbitrators will faithfully enforce civil rights laws in actions against major investment banking firms.¹⁹⁶ This was not the kind of self-regulation of the industry that Congress had had in mind in 1975. The dissent also did not note, as it might have, that the ADEA (even more than RICO) was written at a time when it would have been almost unthinkable that any federal court would have enforced an agreement subjecting otherwise justiciable civil rights claims to arbitral jurisdiction. The dissent aptly concluded, however, that "the Court has put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other."

Gilmer has been faithfully applied by lower federal courts to claims of individual brokers alleging other forms of discrimina-

¹⁹⁵ *Alexander v Gardner-Denver Co.*, 415 US 36 (1974); *Barrentine v Arkansas-Best Freight System, Inc.*, 450 US 728 (1981); *McDonald v City of West Branch*, 466 US 284 (1984).

¹⁹⁶ Securities industries arbitrators are not selected for their experience and judgment in civil rights matters. Steven A. Holmes, *Arbitrators of Bias in Securities Industry Have Slight Experience in Labor Law*, New York Times (April 15, 1994) at B-4.

tion.¹⁹⁷ Some courts have also enforced arbitration clauses in individual employment contracts to compel former employees to arbitrate wrongful discharge or sexual harassment claims, notwithstanding the exclusion of employment disputes from the coverage of the FAA.¹⁹⁸ One court of appeals, encouraged by *Gilmer*, has gone so far as to read the FAA as applicable to clauses in all employment agreements except for those of workers "actually engaged in the movement of goods in interstate commerce."¹⁹⁹ And at least one has suggested that *Gilmer* overrules *Alexander v Gardner-Denver*.²⁰⁰ On the other hand, another court of appeals has held that an individual broker was not bound to arbitrate pursuant to a clause in a contract that she was not allowed to read before signing, that contained a reference to a manual she was not provided, and that made no explicit reference to Title VII discrimination claims.²⁰¹ The court in the latter case stands out as one of the few in recent years that has noticed how adhesive pre hiring arbitration clauses can be; as Katherine Stone depicts them, they are "today's 'yellow-dog contracts.'"²⁰²

This extension of arbitration into employment law has generated not merely criticism,²⁰³ but resistance. In 1994, a Special Task Force created by the leaderships of the National Academy of Arbitrators, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution, and the National Em-

¹⁹⁷ For example, *Mago v Shearson Lehman Hutton, Inc.*, 956 F2d 932 (9th Cir 1992).

¹⁹⁸ For example, *Matthews v Rollins Hudig Hall Co.*, 72 F3d 50 (7th Cir 1995); *Metz v Merrill, Lynch, Pierce, Fenner & Smith*, 39 F3d 1482 (10th Cir 1994); *De Gaetano v Smith Barney*, 1996 WL 44226, 70 FEP Cases 401, 68 Empl Prac Dec, ¶ 44,024; *Gulenia v Bob Baker Toyota*, 915 F Supp 201 (S D Cal 1996), enforced an arbitration clause in an employment contract in an age discrimination case. Compare *Pritzker v Merrill Lynch Pierce Fenner & Smith, Inc.*, 7 F3d 1110 (3d Cir 1993); *Saari v Smith, Barney, Inc.*, 789 F Supp 155 (D NJ 1992).

¹⁹⁹ *Asplundh Tree Expert Co. v Bates*, 71 F3d 592 (6th Cir 1995); but see *Acre v Cotton Club of Greenville, Inc.*, 883 F Supp 117 (N D Miss 1995).

²⁰⁰ For example, *Nghiem v NEC Electronics*, 25 F3d 1437, 1441 (9th Cir 1994). See also *Austin v Owens-Brockway Glass Container, Inc.*, 78 F3d 875 (4th Cir 1996).

²⁰¹ *Prudential Ins. Co. of America v Lai*, 42 F3d 1299 (9th Cir 1994), cert denied 116 S Ct 61 (1995).

²⁰² Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: Agreements to Arbitrate or Conceding to Capitulation?* (forthcoming).

²⁰³ See Christine Godsil Cooper, *Where Are We Going with Gilmer? Some Ruminations on the Arbitration of Discrimination Claims*, 11 SLU Pub L Rev 203 (1992).

ployment Lawyers Association proposed a protocol for the arbitration of statutory discrimination claims providing an equal role for the employee in selecting the arbitrator, discovery, and review for errors of law.²⁰⁴ The Judicial Arbitration and Mediation Service announced its withdrawal from employment cases unless its standards of due process were met by the arbitration clauses they were asked to enforce.²⁰⁵ The National Employment Lawyers Association, an organization of over two thousand attorneys representing employees, announced a boycott of dispute resolution service providers taking employment cases pursuant to clauses not meeting that organization's standards.²⁰⁶ The United States Equal Employment Opportunity Commission has also expressed its opposition to the use of arbitration to circumvent the Commission's authority to enforce the civil rights laws, and in 1996 issued its own National Enforcement Plan.²⁰⁷ In at least one case in 1995, the Commission secured the invalidation of an arbitration clause requiring the employee to pay half the cost of the arbitration.²⁰⁸ Similarly, the National Labor Relations Board compelled an employer to reinstate an employee fired for refusing to agree to arbitrate unfair labor practice claims.²⁰⁹ The American Arbitration Association also adopted National Rules for the Resolution of Employment Disputes that reserve the right to the Association of refusing to administer cases under contracts not meeting "due process standards."²¹⁰

In 1995, the Court in *Vimar Seguros y Reaseguros, S. A. v M/V Sky Reefer*²¹¹ applied its newly reconstructed FAA to a case in which a shipper sought to avoid an arbitration clause as a violation of the provision in the Carriage of Goods by Sea Act invalidating contract terms "lessening" the liability of carriers.²¹² The Court

²⁰⁴ Arnold M. Zack, *Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model*, 7 World Arbitration & Mediation Rep 10 (1996).

²⁰⁵ 6 World Arbitration & Mediation Rep 240 (1995).

²⁰⁶ Id.

²⁰⁷ 7 World Arbitration & Mediation Rep 51 (1996).

²⁰⁸ *EEOC v River Oaks Imaging*, 1995 WL 264003 (S D Tex 1995).

²⁰⁹ *Arbitration: Accord Reached on Unfair Labor Practice Case Involving Mandatory Arbitration Pledge*, 1996 Daily Labor Reporter (BNA) 96 d15.

²¹⁰ 7 World Arbitration & Mediation Rep 123 (1996).

²¹¹ 115 S Ct 2322 (1995).

²¹² Id at 2325.

clauses because of inconvenience to the plaintiffs or insular distrust of the ability of foreign arbitrators to apply the law.²¹⁸

Again, the Court seems to have overlooked readily visible consequences of its decision. In relying on *Carnival Lines* and disregarding the difference between forum selection clauses and arbitration clauses, the Court implied that a forum selection clause could be set forth in ocean bills of lading without regard for the choice of location or the willingness or ability of the foreign court selected to apply controlling American law. If this is indeed the case, then the qualifications expressed in the Court's opinion in *Bremen* are no longer operative. It will be recalled that the Court in *Bremen* emphasized the equality of the parties, the arms-length character of the bargain, and the reasonableness of the choice of a neutral turf. In *Vimar*, it appears that the Court would now enforce a clause in a bill of lading issued by a carrier bearing a Liberian or Panamanian flag (as many do) requiring shippers to assert any claims against the carrier in the courts of Liberia or Panama, however worthless that requirement might render the rights not "taken away" but reduced to a merely theoretical existence.

The Court seems also to have been unaware of the consequences of its holding for the shipping market. COGSA was a part of a prolonged multilateral effort to harmonize national laws regulating the terms of bills of lading.²¹⁹ It sought to impose equal burdens of duty on all carriers bringing goods to the United States without regard for the national flags they might fly. As the Act has now been read by the Court, that purpose has been substantially frustrated. Shippers will again be well advised to note the flag of the carrier before placing their goods in the holds of ships unless they are fully insured against loss resulting from the carrier's negligence, in which case insurance companies expecting to subrogate to claims for such losses should consider charging higher premiums for insurance on cargo in the holds of foreign ships, especially those bearing flags of nations whose courts are distant and unlikely to enforce COGSA effectively.

Perhaps more significant was the Court's failure to take realistic account of the international consequences of what it did. While

²¹⁸ Id at 2329.

²¹⁹ Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J Marit L & Comm 1, 4-6 (1991).

relied in part on *Carnival Lines*²¹³ as authority that mere cost and inconvenience in the assertion of a claim does not “lessen” liability. It disregarded the distinction emphasized earlier by the Court in *Carnival Lines*²¹⁴ that the forum chosen by the cruise ticket was not an arbitral tribunal, but a court of law in a state of the United States.²¹⁵ The Court discussed and rejected the analysis of numerous courts of appeals cases holding that a forum selection clause may be invalid as a “lessening” of liability.²¹⁶ With exquisite formalism, it explained that the arbitration clause did not diminish the theoretical liability of the carrier; in part because the arbitral tribunal will be obligated to enforce COGSA, the Court found that there was no conflict between COGSA and FAA.

The case before the Court involved a loss of over a million dollars in damage to fruit in transit from Morocco to Massachusetts. The printed bill of lading provided for arbitration in Tokyo. The insurer who paid the bulk of the loss sued in the federal court in Massachusetts and secured a stay of arbitration. It argued, *inter alia*, that the Japanese arbitrator would apply the Japanese rules exculpating the shipper for the blunder of Moroccan stevedores in mispacking the fruit. The Court held that the stay was premature. Citing *Mitsubishi*,²¹⁷ the Court gave comfort to the insurer that the district court would retain jurisdiction to ascertain whether the Japanese arbitrator applied COGSA. If he did not, then it would be time to set the award aside. The Court also echoed *Mitsubishi* in expressing sentiments of superinternationalism. Referring to the UN Convention, it explained that:

If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration

²¹³ 499 US 585 (1991).

²¹⁴ *Vimar*, 115 S Ct at 2327–28.

²¹⁵ Emphasizing the importance of this distinction is Elizabeth A. Clark, *Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA*, 1996 BYU L Rev 483.

²¹⁶ *Vimar*, 115 S Ct at 2326.

²¹⁷ *Id* at 2329–30.

few would wish the United States to be other than a trustworthy partner in multilateral endeavors (or guilty of “insular distrust”), it seems unlikely that international relations will in the long run be advanced by a procedure sending international parties to Japan to arbitrate (or Liberia to litigate) an issue of American law only to deny recognition of the award (or judgment) when it appears that the arbitrator (or judge) did not correctly apply American law. We will return to the problem of judicial review of awards in a later section of this article. But this is the place to observe that the Court’s eager internationalism in sending claimants of rights conferred by American law to foreign tribunals is misplaced for at least three reasons.

First, in the global economy, the predatory conduct of those with greater economic power is seldom inhibited and is generally uncontrollable by any transnational regulatory mechanism. No world government protects consumers, patients, workers, passengers, shippers, or franchisees. This is one reason that the global economy is a mixed blessing—a boon to those who sell sophisticated goods and services and a bust to those in the lower reaches of the economic hierarchy whose vulnerability is made even greater by globalization. As national governments bend to exploit the opportunities of the global economy, they yield some of their ability to protect the weak from the strong. When the Court preempted, as it many times did, state regulatory law inconsistent with more comprehensive national regulatory laws, it was not leaving the weak unprotected, but was putting their protection in other governmental hands. But when the Court preempts both state and federal protections in favor of unregulated freedom of contract in the global economy, it leaves weaker parties quite without the possibility of governmental protection from predators in a position to impose contractual terms upon them. The result can be described as regulatory arbitrage. If courts of all nations were to join the Court in generous, unquestioning enforcement of arbitration clauses made in the course of international trade, the result would be to strip weaker parties everywhere of the protections afforded by privately enforced national laws.²²⁰ Because American law relies so heavily on enforcement by private actions, it is especially impor-

²²⁰ Jay R. Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?* 65 Tulane L Rev 1661, 1663 (1991).

tant in this country that multinational firms be constrained from using their economic power to impede adjudication of rights provided American consumers, workers, shippers, passengers, and franchisees. There is not a syllable in the Convention from which one might reasonably infer a duty of national courts to allow the use of arbitration clauses in international contracts to subvert national law in that way. To the contrary, as we have noted, Article V of the Convention, as quoted above, affords ample room to subordinate foreign awards to the need to protect weaker parties to bargains from timidly or inadvertently waving their rights under applicable American law.

A second consideration weighing against enthusiastic extension of international legal texts by the Court is that international treaties and conventions are the appropriate object of intermittent negotiation by the executive branch of the government. When courts extend special courtesies to foreign litigants or overenforce foreign arbitral awards, they may not only disadvantage American litigants, but they may also deprive the Department of State of a bargaining chit. Special concessions to international interests could and should be exchanged for comparable courtesies to Americans interests.²²¹ Courts cannot bargain, so nothing is received in exchange for what they give away. For this reason, as Jay Westbrook has observed, the only hope for the establishment of agreed, effective transnational regulation of abusive practices in international trade is aggressive regulation by each sovereign.²²²

A third reason for scruples against overextension of the UN Convention is to give appropriate protection to the political role of the United States Senate in ratifying treaties and conventions not presented to it as substantial modifications of American law.²²³ The UN Convention, like others advanced under the auspices of the Hague Conference on Private International Law,²²⁴ and like

²²¹ Hans Smit, *Recent Developments in International Litigation*, 35 S Tex L Rev 215, 220–23, 226–28, 239–42 (1994) (arguing against the Hague Service and Evidence Conventions as against the interests of the United States).

²²² Jay Westbrook, *Extraterritoriality, Conflict of Laws and the Regulation of Transnational Business*, 25 Tex Intl L J 71, 85, 92–96 (1990).

²²³ For broader discussion, see Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 Am U J Intl L & Pol'y 559 (1996).

²²⁴ For example, The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 UST 2555, 28 USC § 1781 (1994); The Hague Convention on

friendship treaties the United States has made with many nations,²²⁵ was presented to the Senate and the public as serving the American national interest by conceding equal status, not special status, for foreign nationals or foreign awards in our courts. Such treaties and conventions are of course proposed for ratification by the Department of State with the support of international interests, many of whom are among the most adept and well-financed lobbies in Washington. There was no lobby opposing the Convention or other treaties of the sort described. Of course, no such treaty or convention would be ratified if it were disclosed to the Senate that it would adversely affect the rights of American consumers, patients, workers, shippers, passengers, or franchisees. It was never imagined by any Senator that the UN Convention would enable foreign manufacturers to require their American franchises to arbitrate their antitrust claims in Beijing, or their American employees' age discrimination claims in Paris.

There is now substantial evidence that international litigants fare better in our courts than Americans do.²²⁶ The Court's super-internationalist treatment of the UN Convention suggests one reason this may be so. But it is not merely discrimination against American litigants or American arbitral awards that has resulted. Instead, to prevent such discrimination, the Court has diminished the effectiveness of privately enforced American law, making it in important respects as weak as the nonexistent international law that is unavailable to regulate business conducted in the global economy. Only marginally do international litigants benefit more from that weakness than do our own powerful enterprises.

In light of *Mitsubishi*, *Rodriguez de Quijas*, *Gilmer*, and *Vimar*, it is not clear that there remains any private claim of federal right that cannot be diverted into an arbitral tribunal. Even the explicit exclusions set forth in the FAA may be substantially inoperative. The national law constraining fraud in our investment markets, monopolization and other abuses of open markets, and even much of our civil rights laws can now be diverted by adhesion contracts

the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, 20 UST 361, 28 USCA FRCP 4 (West, 1992).

²²⁵ See, e.g., Japan-United States Friendship Treaty, 22 USC cf 44 § 1901 et seq.

²²⁶ Kevin Clermont and Theodore Eisenberg, *Commentary: Xenophilia in American Courts*, 109 Harv L Rev 1120 (1996).

from the courts that have enforced them and be entrusted to arbitral forums that are not infrequently erected by the very parties whom those laws were enacted to regulate and that are in any case not bound to enforce substantive rights.

The Court has not so far allowed employers to require job applicants to agree to arbitrate any claims they might someday have to be paid the minimum wage required by the Fair Labor Standards Act.²²⁷ And one awaits with interest how the Court will deal with the Automobile Dealer's Day in Court Act. As the title to the latter Act suggests, that statute had as its only purpose the dispatch of the federal courts on the errand of correcting the imbalance in bargaining power between automobile dealers and automobile manufacturers. Its substance is a vaporous declaration that manufacturers shall not act other than "in good faith."²²⁸ What good faith means in this context was plainly intended by those who drafted and enacted the statute to be, in at least some circumstances, a jury issue.²²⁹ How indeed will the Court explain its likely holding that even a claim under that act can be diverted to arbitration if a dealer such as Soler should in the dealership agreement submit to a broad arbitration clause written by the manufacturer and requiring arbitration in Tokyo?

One vestige of revocability of arbitration clauses may have been identified by the Ninth Circuit. In *Graham Oil Co. v Arco Products Co.*,²³⁰ that court invalidated an arbitration clause in a distributorship agreement. The claim arose under the Petroleum Marketing Practices Act,²³¹ a rough analogue to the Automobile Dealer's Day in Court Act protecting fuel distributors and service station owners

²²⁷ Compare *Donohue v Susquehanna Collieries Co.*, 138 F2d 3 (3d Cir 1943). And see *Lambdin v District Court for the 18th Judicial District of Arapahoe*, 1995 Colo LEXIS 662, 903 P2d 1126 (1995).

²²⁸ 15 USC §§ 1221 et seq § 1222 provides that "an automobile dealer may bring suit . . . and shall recover damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer; Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

²²⁹ *Woodard v General Motors Corp.*, 298 F2d 121 (2d Cir 1962); *Bateman v Ford Motor Co.*, 302 F2d 63 (3d Cir 1962); *Studebaker Rambler Sales, Inc. v American Motors Corp.*, 375 F2d 932 (5th Cir 1962); *Hanly v Chrysler Motor Corp.*, 453 F2d 718 (10th Cir 1970).

²³⁰ 43 F3d 1244 (4th Cir 1994).

²³¹ 15 USC §§ 2801-06.

from predation by major oil companies. The court acknowledged that claims under the act are generally arbitrable; but found that, in the specific context of this transaction, the arbitration clause was invalidated by its connection to other overreaching provisions by which the distributor was required to waive rights conferred by the Act, including the right to punitive damages and attorneys' fees, and by a foreshortening of the time within which a claim might be brought from one year to ninety days. The court could have saved the arbitration clause and deleted only the three offending provisions, but it found arbitration to be so closely related to the illicit waivers that it, too, should be deemed invalid, and the claim should be permitted to go forward in court.

PREEMPTION

As we have seen, arbitration law was well developed in every state, and often expressed in carefully drafted and politically tested legislation balancing considerations of free markets and freedom of contract against the need to protect weaker parties, especially those who were cast for the role of private attorneys general. The differences in state law were sufficiently ample to excite the enthusiasm of Justice Brandeis for the use of the states as laboratories for legal experiments.²³² After 1938 and the Court's decision in *Erie*, the interesting and troublesome question was whether the FAA could have any application in diversity cases, or whether it was limited in applicability to admiralty and federal question cases.²³³

Almost sixty years after it was enacted, the Court began to regard the FAA as applicable in state courts displacing state arbitration law. This belated application of the preemption doctrine was imposed by a Court that was otherwise inclining in the direction of devolving power to the states and avoidance of implied preemption.²³⁴ The first indication by the Court that the FAA might have

²³² *New State Ice Co. v. Leibmann*, 285 US 262, 311 (1932).

²³³ For example, *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 US 198 (1956); *Prima Paint Corp.*, 388 US 395.

²³⁴ For a useful summary of preemption law, see Appellate Judges Conference, American Bar Association, *The Law of Preemption* (ABA, 1991). On the declining use of implied preemption, see S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 Boston U L Rev 685, 738-47 (1991); Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 806-07, 811-12 (1994). And see *Lividas v. Bradshaw*, 114 S Ct 2068 (1994); *Hawaiian Airlines v. Norris*, 114 S Ct 2239 (1994).

some substantive implications came in 1967.²³⁵ That the FAA had preemptive effect was first confirmed in the 1983 holding in *Moses H. Cone Mem. Hospital v Mercury Construction Co.*²³⁶ The Court there held that a federal court had abused its discretion in staying a diversity action to compel arbitration pending the outcome of a state court action in which a preliminary injunction had been issued staying the arbitration. To reach that conclusion, the Court had necessarily to find that there was a federal right to arbitrate that a state court was obliged to observe, and that a federal court having subject matter jurisdiction was obliged to enforce.

In the next term, the Court in *Southland Corp. v Keating*²³⁷ invoked the Supremacy Clause to invalidate California law treating certain state law claims as inarbitrable. The claims in question arose under the California Franchise Investment Law,²³⁸ which explicitly invalidated arbitration clauses in franchise agreements that would “oust” the state’s courts of jurisdiction to enforce the disclosure requirements in its law. As Professor Macneil and Justice O’Connor have amply demonstrated, the opinion of the Court was an extraordinarily disingenuous manipulation of the history of the 1925 Act.²³⁹ Everyone associated with that legislation, pro or con, assumed that it had no application to state courts. The decision

²³⁵ *Prima Paint*, 388 US at 395, held that the FAA was controlling in a diversity action in federal courts, notwithstanding possibly contrary state law. The Court’s opinion spoke of the FAA as prescribing “how federal courts are to conduct themselves,” indicating that the Court then took the statute to be procedural legislation. *Id.* at 405. Seen thus, the FAA could be compared to the Rules Enabling Act, 28 USC § 2072, in its constitutional status. The Court was, it ought to be acknowledged, vexed by the task of making sense out of the FAA in a post-*Erie* world. On its facts, the case involved a thoroughly negotiated contract for the sale of a business that had been substantially performed before the dispute arose. One of the parties then sought to escape the arbitral forum by alleging fraud in the inducement. Most states limiting the power of revocation would not have recognized such a ground as an acceptable one, and it was not certain that the applicable New York law conflicted with the federal principle created and invoked in *Prima Paint*. The Court emphasized that the FAA made arbitration clauses “as enforceable as other contracts, but not more so.” 388 US 404 n. 12. It also gave assurance that “categories of contracts otherwise within reach of the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act,” citing Section 1. 388 US 403 n. 9.

²³⁶ 460 US 1.

²³⁷ 465 US 1 (1984).

²³⁸ Cal Corp Code § 31000 et seq.

²³⁹ The bogus history had antecedents in the opinion of Judge Harold Medina in *Robert Lawrence*, 271 F2d at 410–23, and in *Prima Paint*, 388 US at 402–05. In his dissent in the latter case, Justice Black vigorously denounced the rewriting of the statute, 388 US at 410–23. One can scarcely imagine what he might have said about its subsequent extensions.

made Title I of the FAA unique: it became the only federal law creating substantive entitlements enforceable only in state courts, for the text of the Act cannot support federal jurisdiction over arbitration litigation, as cases “arising under” federal law.²⁴⁰

In *Southland*, as in other cases considered here, the Court seemed in its zealous devotion to private dispute resolution to be oblivious to consequences. Indeed, the Court relied almost wholly on its bogus legislative history, and made no effort to analyze the practical consequences of preempting state law, perhaps in part because they were not fully briefed on them.²⁴¹ The California law at issue was no different in its aim than Section 14 of the Securities Act of 1933 upheld in *Wilko*. At the time of *Southland*, *Wilko* was still the federal law. Even today the Court has not gone so far as to deny Congress the power to invalidate arbitration or other forum selection clauses when they diminish the effectiveness of privately enforced federal legislation. No reason was given why California should not be allowed to do as Congress may clearly do and designate classes of potential plaintiffs as private attorneys general and also assure them a judicial forum for the litigation of rights that it confers. The Court, ignoring the assurance it had given in *Prima Paint*,²⁴² in effect held that the California legislature could not prevent a party with superior bargaining power from using an arbitration clause to block its private attorneys general from access to its courts. And the Court said nothing in *Southland* about the possibility that a state court might retain jurisdiction (in the manner approved in *Mitsubishi* and in *Vimar*) to review an award to ensure that the arbitrator was faithful to the Franchise Investment Law, as a federal court might do to assure fidelity to the federal antitrust laws in *Mitsubishi* or COGSA in *Vimar*.

*Perry v Thomas*²⁴³ followed *Southland* and foretold *Gilmer*. Like *Gilmer*, it involved a dispute between a stockbroker and his employer and so was subject to arbitration under the rules of the New York Stock Exchange. But California law explicitly provides that

²⁴⁰ FAA § 4 and 28 USC § 1332. It will support federal jurisdiction to enforce a foreign award. § 203.

²⁴¹ This is Justice Breyer's partial explanation of *Southland*. *Allied Bruce Terminix*, 115 S Ct at 837–39.

²⁴² 388 US 403 n 9, quoted in note 235.

²⁴³ 482 US 483 (1987).

an action to recover wages may be maintained “without regard to the existence of any private agreement to arbitrate.”²⁴⁴ The Court brushed aside the California law, again holding the FAA preemptive. Given the explicit exclusion of employment contracts from Section 1 of the Act, it is hard to see how the policy of the FAA requires the displacement of congruent state law.

While the Court in *Mitsubishi* and *Vimar* explicitly directed lower federal courts to review arbitral awards to assure their fidelity to the federal antitrust laws and COGSA, it made no similar accommodation to state courts reviewing awards to assure their fidelity to state law. Neither in *Southland* nor in *Perry* did the Court suggest or imply that a California court might be free to set aside or amplify an award if it found that an award was in manifest disregard of the California Franchise Investment Law or if it determined a wage earner was awarded less than he was legally entitled to be paid. But it is at least possible that the Court will allow California to enforce its public policy by setting aside an award that is manifestly contrary to its law. Such a result would not be easy to square with the text of Section 10 of the FAA, any more than are *Mitsubishi* and *Vimar*, but would serve to alleviate the harm done to the enforcement of state law by the extensive preemption imposed by the Court.

The Court carried preemption to the full limits of Congress’s power to regulate interstate commerce in *Allied-Bruce Terminix Companies, Inc. v. Dobson*.²⁴⁵ It there enforced an arbitration clause in a contract to remove termites from a private home in Alabama. It held that such a contract was one “involving commerce” within the meaning of Section 1 of the FAA, and hence the FAA preempted Alabama law invalidating predispute arbitration clauses.²⁴⁶ In that small-stakes case, the attorneys general of twenty states appeared as amici to implore the Court to overrule *Southland*. As they explained, the *Southland* principle was a serious impediment to the enforcement of state law, empowering parties with bargaining power, as it did, to move claims against them into a forum less likely to enforce rights and duties created by the states.²⁴⁷ The

²⁴⁴ Cal Lab Code § 229.

²⁴⁵ 115 S Ct 834 (1995).

²⁴⁶ Ala Code § 8-1-41(3).

²⁴⁷ Brief Amici Curiae of the Attorneys General of the States of Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Illinois, Mississippi, Missouri, Montana, Nebraska, Nevada,

Court did not deny the premise of the argument. It responded that the *Southland* Court had recognized the preemption issue as difficult, that the issue had been resolved, that private parties had now written contracts in reliance upon the decision, and that Congress had tinkered with the FAA without overruling *Southland*, so that it must be treated as settled law. This is hardly a compelling justification for what the Court has done, given that the law now settled by *Southland* is even yet no more settled than was the principle of state law on inarbitrability when it was belatedly preempted, or than was *Wilko* for over thirty years. The attorneys general did, however, persuade Justice Scalia, who announced in dissent his readiness to overrule *Southland*.²⁴⁸

Justice Breyer, in an almost apologetic opinion of the Court, offered the attorneys general additional comfort by reminding them that the states can still regulate arbitration clauses “upon such grounds as exist in law or in equity for the revocation of any contract.”²⁴⁹ “What States cannot do,” he affirmed, “is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”²⁵⁰ The statutory text on which the Court relied for support of this statement has been quoted above and provides that an arbitration *clause* may be held invalid or revocable upon any ground sufficient to support the invalidation or revocation of a contract. The “plain language” of the Act thus seems to say that if a contract can be revoked for the reason that it is unconscionable, then an unconscionable clause should be equally and independently revocable. It may well be that it is the arbitration clause alone that makes a contract as a whole unconscionable in the contemplation of applicable state law; that might be so (pursuant to conventional contracts law) where its practical effect is to require the weaker party to submit claims of right under a state franchise law or a

New Hampshire, New Jersey, North Dakota, South Carolina, Utah, and Vermont; and the Commonwealths of Massachusetts and Pennsylvania, in support of respondents G. Michael Dobson and Wanda C. Dobson, 115 S Ct 834 (1995) (No 93-1001).

²⁴⁸ 115 S Ct at 844. Justice Thomas joined in Justice Scalia’s opinion. Unfortunately, Justice O’Connor was no longer willing to stand by her *Southland* dissent, being dissuaded wholly by “considerations of stare decisis.” Justices Stevens and Rehnquist, who also dissented in *Southland*, nevertheless joined to majority in *Allied Bruce Terminix*.

²⁴⁹ 9 USC § 2 (1994).

²⁵⁰ *Allied-Bruce Terminix*, 115 S Ct 834, 843.

state antitrust law to an expensive private forum that is free to disregard those laws. But a court of equity refusing to enforce a partially performed franchise agreement or termite removal contract it deems unconscionable because of an unconscionable arbitration clause would generally salvage as much of the bargain as may be consistent with the conscience of the court. The Uniform Commercial Code explicitly permits a court finding in "any clause [in a commercial contract] to have been unconscionable at the time it was made" to "enforce the remainder of that contract without the unconscionable clause."²⁵¹

Responding to the attorneys general in *Allied-Bruce Terminix*, the American Arbitration Association appeared as an additional amicus to explain how efficient arbitration can be in handling small claims such as those involving termite damage. The AAA is of course correct that arbitration can be expeditious and economic. But so can adjudication.²⁵² Arbitration is not in all circumstances more efficient. There are in many states small claims courts; these sometimes resemble traditional trade association arbitration in being quick, cheap, and loose in their fidelity to the law.²⁵³ AAA arbitration is seldom as cheap as small claims courts. The AAA charges an administrative fee for its services that is generally higher than court filing fees,²⁵⁴ and one is not invited to proceed *in forma pauperis* in AAA arbitration.²⁵⁵ Moreover, while arbitrators may agree to serve without compensation as an act of loyalty to a trade association, most must be paid by the parties, sometimes at handsome hourly rates.

The AAA as amicus argued that arbitration is cheaper than litigation and generally regarded as fair by counsel.²⁵⁶ The AAA did not explicitly argue, as the Court did in *Carnival Lines*, that the

²⁵¹ § 2-302.

²⁵² For a review of the empirical evidence, see Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind L J 425, 452-76 (1988).

²⁵³ For a description, see John A. Goerdts, *Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* (1992).

²⁵⁴ See Macneil et al, *Federal Arbitration Law*, App IV at 20-22 (cited in note 63).

²⁵⁵ Compare 28 USC § 1915.

²⁵⁶ Brief of American Arbitration Association as Amicus Curiae in Support of Petitioners, 93-1001 (1994). For an earlier unqualified proclamation that arbitration is cheaper than litigation, see William A. Rehnquist, *A Jurist's View of Arbitration*, Arb J (March 1977) at 1.

cost saving would be reflected in the price of termite removal; because there is price competition in that field, it is more likely that any cost saving would be reflected in the price of the service than it was with respect to the clause in the cruise ticket. On the other hand, the operative effect of the clause in the termite removal contract was to deny many homeowners having small claims access to any forum at all. In Llewellyn's terms, the arbitration clause may well "eviscerate" the warranty that is a major selling point offered by Terminix.

If the purpose of the clause was to serve the interests of homeowners, the termite company could as a special inducement have offered an arbitration clause providing a genuinely accessible forum for their future claims; or it could have offered two contracts at different prices, one with and one without the more expensive arbitration. Or it could have awaited the assertion of a claim for breach of contract before offering arbitration as a means of saving both sides the allegedly greater cost of litigating. The most effective way to assure that the arbitration is fair to both parties is the traditional way that Alabama followed, making the arbitration clause revocable and thus renegotiable by the parties at a time when the dimensions of their dispute are known and both have consulted counsel. The AAA to the contrary notwithstanding, one need not be hostile to arbitration to prefer the Alabama law to that imposed on Alabama by the Court, which allows Terminix to immunize itself against small and medium-size claims of homeowners disappointed with the quality of their service.

Yet another extension of the preemption of state law occurred in 1996 in *Casarotto v Doctors' Associates*,²⁵⁷ invalidating a provision of the Montana Uniform Arbitration Act requiring prominent notice to persons signing standard contracts containing arbitration clauses. In light of *Southland, Perry* and *Allied-Bruce Terminix*, this outcome was eminently foreseeable, but the case extended preemption by depriving state legislatures of the power to regulate the procedure by which arbitration agreements are formed. As noted above, a common form of state arbitration legislation has sought to assure that the weaker party does in actual fact assent to arbitration. In this respect, legislation requiring special notice of an arbi-

²⁵⁷ 116 S Ct 1652 (1996).

tration clause is a specific form of a larger category of legislative intrusions on freedom of contract to assure that parties to adhesion contracts know and understand the terms to which they are formally assenting.

It is true that the FAA requires only that arbitration clauses be in writing and makes no provision for warning those who sign printed contracts that they may be diminishing the enforceability of their rights. A reason may be that those who drafted and enacted the Act had no cause to envision that it would apply in state courts or to claims arising under federal law. Where the arbitration clause is inserted in a commercial agreement between businessmen (the sort of transaction envisioned by the drafters of FAA) for the purpose of resolving disputes arising in the performance of the contract, there is little reason for a special caution to weaker parties. But when a party is being invited to reduce the enforceability of rights conferred on that party by legislation, the need for fair warning is enhanced. The franchise agreement containing the arbitration clause applied in *Casarotto* was not a consumer or employment contract, nor was the claim asserted by the Casarottos one conferred by a legislature solicitous of their economic vulnerability. Possibly *Casarotto* might be distinguished in later cases involving workers or consumers asserting claims under civil rights or antitrust laws. As noted above, the Ninth Circuit did in one case refuse to compel arbitration of a civil rights claim partially on the ground that the clause did not give adequate notice to a party who might reasonably have supposed that the clause conferred jurisdiction limited to matters of private law.²⁵⁸ It might seem more appropriate to the Court if Montana law required the franchiser to specify any public laws, federal or state, that it intended by the agreement to submit to arbitration. There is, however, nothing in the Court's opinion to suggest such a limitation on the holding.

An issue not briefed in *Casarotto* nor treated in the Court's opinion is one raised by the designated location of the arbitration proceeding.²⁵⁹ The Casarottos claimed that they were induced to invest in a Subway franchise in Great Falls, Montana, by the promise that they would have the opportunity to invest in a preferable loca-

²⁵⁸ *Prudential Ins. Co.*, 42 F3d 1299.

²⁵⁹ The issue was noted in *Doctor's Assocs., Inc. v Stuart*, 85 F3d 975, 979 (2d Cir 1996).

tion in that city when it became available. Their claim was filed in a state court in Great Falls. The defendants' response was a motion to compel arbitration in Bridgeport, Connecticut, in conformity with the franchise agreement. Bridgeport is the home office of the defendant, and the contract written by the defendant called for the application of Connecticut law. This was marvelously convenient for Subway (Doctors' Associates) for it enabled them to resolve all their disputes with franchisees across the continent most efficiently, using a single law firm intimately familiar with its affairs and without need of consultation on the law of any other jurisdiction. On the other hand, the Casarottos live in Great Falls; the contract was negotiated and was to be performed in Great Falls; and the facts in dispute pertain to events and circumstances in Great Falls. So far as appears, the Casarottos were never in Bridgeport and were not amenable to the personal jurisdiction of a Connecticut court. As the Supreme Court of Montana explained, the arbitration clause was massively inconvenient for them, so inconvenient that it effectively extinguished their right to the promised location if such a promise was made:

Regardless of the amount in controversy between these parties, the arbitration clause in the Subway Sandwich Shop Franchise Agreement requires that the Casarottos travel thousands of miles to Connecticut to have their disputes arbitrated. Furthermore, it requires that they share equally in the expense of arbitration, regardless of the merits of their claim. Presumably, that expense could be substantial, since under the Commercial Arbitration Rules of the American Arbitration Association (1992), those expenses would, at a minimum, include the arbitrator's fees and travel expenses, the cost of witnesses chosen by the arbitrator, the American Arbitration Association's administrative charges, and a filing fee of up to \$4000, depending on the amount in controversy. For a proceeding involving multiple arbitrators, the administrative fee alone, for which the Casarottos would be responsible is \$150 a day. In addition, since the contract called for the application of Connecticut law, the Casarottos would be required to retain the services of a Connecticut attorney.

In spite of the expenses set forth above, the procedural safeguards which have been established in Montana to assure the reliability of the outcome in dispute resolution are absent in an arbitration proceeding. The extent of pretrial discovery is within the sole discretion of the arbitrator and the rules of

evidence are not applicable. The arbitrator does not have to follow any law and there does not have to be a factual basis for the arbitrator's decision.²⁶⁰

The opinion of the Court in *Casarotto* manifests no concern for these practical considerations. One might wonder whether the Court would see a problem if the clause had merely provided that the Casarottos must bear all the costs of any arbitration (or litigation) arising from the franchise relationship, whatever the outcome. The Court's opinion in *Allied-Bruce Terminix* indicates a negative answer, that because the other terms of the franchise agreement are unobjectionable, nothing can be done about an unreasonable arbitration clause, but presumably the Court did not really mean what it said.

It bears notice that a clause requiring the Casarottos to sue Subway only in a Connecticut court would be void under the explicit and unpreempted Montana statute quoted above.²⁶¹ By clothing an otherwise unlawful forum selection in the garb of an arbitration clause, Subway successfully evaded Montana's effort to protect weaker parties from precisely this form of predation by stronger ones. The Court could have allowed enforcement of the unpreempted Montana law on forum selection clauses by permitting the Montana court to compel arbitration in Great Falls instead of Bridgeport. The change of venue would have made the clause a reasonable one, consistent with conventional contract law, but would of course have deprived Subway of the unjust advantage that it was the purpose of the clause to secure.

Casarotto could have been explained as an application of Darwinian law-and-economics. The Court could have said that Subway franchisees should unite in gratitude that their disputes with the franchiser will all be conducted in a forum most congenial to the franchiser, because the market assures them that the price of their franchises is less on that account. Perhaps in some minds, that "stands to reason," but no person conscious of the practical realities of dispute resolution would be deceived by that academized theory, and the Court did not advance it.

It is not clear that there is anything a well-advised state can do to redeem the effectiveness of its private attorneys general other

²⁶⁰ *Casarotto v Lombardi*, 51 Mont 1350, 886 P2d 931 (1994).

²⁶¹ See text at note 143.

than address their grievance to Congress. In a time when Congressmen on both sides of the aisle are advocating the devolution of the police power back to the states, it is certainly imaginable that Congress would respond to such an initiative, although it would be opposed by the AAA and by those endowed with economic power who enjoy their ability to partially immunize themselves against enforcement of some state laws.

Although *Terminix* and *Casarotto* leave very little room for the exercise of state sovereignty to protect weaker parties or to arm private attorneys general to enforce state law and policy, states might consider other possible legislative responses. One possibility might be to broaden application of the principle of unconscionability, perhaps by making section 2-302 of the Uniform Commercial Code applicable to services-consumer and employment contracts and to franchise agreements, thus authorizing its courts to review terms in such contracts and delete those it deems unconscionable. It seems possible that if the Montana court had employed its equitable powers to allow revocation of the clause in the Casarottos' franchise as unconscionable, thereby invoking a ground on which Montana equity might allow revocation of any contract, the Court would have had nothing to say about it. A possible flaw in the Montana law that attracted the Court's attention may have been that it was expressed in legislation entitled as a Uniform Arbitration Act, something Montana is apparently not allowed to have.²⁶²

Possibly, as a variation on the extension of the unconscionability principle, the Montana legislature might enact the following response to *Casarotto* as a revision of the statute quoted above:

Restraints upon legal proceedings void. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract *or rights conferred on that party by the laws of this state or by the laws of the United States* by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void. This section does not affect the validity of an agreement enforceable under Title 27, chapter 5 [~~Montana Uniform Arbitration Act~~] *by which a party consciously agrees to arbitrate or litigate in a specified judicial forum, provided that the arbitration or litigation is to be conducted in a place and manner*

²⁶² Macneil et al, *Federal Arbitration Law* at § 10-5 (cited in note 63).

that assures the just, speedy, and inexpensive enforcement of rights created by the contract or conferred on a contracting party by the laws of this state or by the laws of the United States. The courts of this state shall upon request enjoin any proceeding in any forum brought in violation of the restraints imposed by this Act. Any party may demand trial by jury to determine whether there was an agreement of the parties that the dispute later arising between them would be arbitrated or litigated in a specified judicial forum.

The purpose of this revision is to situate the appropriate restraints on arbitration clauses among the parallel restraints on other contract clauses designed to oppress the weak or trap the unwary, and thus to confirm them as “grounds [that] exist at law or in equity for the revocation of any contract.”²⁶³ In essence, it extends the principle applied to forum selection clauses by the Restatement of Conflict of Laws to commercial arbitration. The reader will likely have noted that the aim of “just, speedy, and inexpensive” dispute resolution is drawn from Rule 1 of the Federal Rules of Civil Procedure.²⁶⁴ If such law had been in force in Michigan, Rudzewicz might have secured a Michigan injunction against a Florida adjudication of his rights under the Michigan Franchise Investment Law. If in force in Montana, it might have assured that the arbitration was conducted in Great Falls.

The suggested text treats the making of a contract as potentially an issue of fact.²⁶⁵ A Montana jury might have found as a fact that the Casarottos did not know of, and hence did not assent to, the clause binding them to arbitration in Bridgeport. Treating contract as fact is not incompatible with the text of FAA; to the contrary, it tracks Section 4 of that act.²⁶⁶ Thus, a California court has recently found that a passenger on a Carnival Cruise line did not in the particular circumstances assent to the forum selection clause that bound the Shutes.²⁶⁷ And the Michigan court has held that an employee handbook is not a contract.²⁶⁸ In circumstances such as those existing in *Casarotto*, *Gilmer*, *Terminix* or *Carnival Lines*,

²⁶³ 9 USC § 2 (1994).

²⁶⁴ See Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 Boston U L Rev 1325 (1995).

²⁶⁵ Leff, *Contract as Thing* at 144–55 (cited in note 23).

²⁶⁶ The text is quoted in note 89.

²⁶⁷ *Carnival Lines v Superior Court*, 286 Cal Rptr 323 (Ct App 1991).

²⁶⁸ *Heurbetise v Reliable Business Computers, Inc.*, 550 NW2d 243 (Mich 1996).

findings that there was no assent to the clause would seem eminently plausible.

An alternative solution for the states is to substitute public agencies for private attorneys general. The demerits of that alternative need not be rehearsed here. It will suffice to note that insurance contracts are closely regulated in every state.²⁶⁹ For this reason, insurance policies do not contain provisions requiring insureds and beneficiaries to present their claims to distant fora that are not accountable for their fidelity to the law. Perhaps the Montana insurance commissioner should have his or her jurisdictions enlarged to regulate terms in all consumer or individual employment contracts or franchise agreements made or to be performed in that state. Such a jurisdiction would clearly extend to the contracts of multinational firms such as Mitsubishi.

CHOICE OF LAW CLAUSES

The relation between contractual selection of forum and contractual selection of controlling law has been perplexing, as the *Burger King* example illustrates. The autonomy of parties to determine the controlling law by contract, like their autonomy to designate a forum, has never been unqualified. Restatement black letter law²⁷⁰ precludes Burger King from opting out of the Michigan Franchise Investment Law by the simple gesture of making its franchisees agree that Florida law shall control, because the application of Florida law "would be contrary to a fundamental policy of [Michigan] which has a materially greater interest" in the determination of the rights of Michigan franchisees.²⁷¹

In the course of its aggressive effort to rewrite arbitration law, the Court has twice encountered troublesome choice of law clauses. In *Volt Information Sciences, Inc. v Board of Trustees of Leland Stanford Junior University*,²⁷² the Court was confronted with a construction contract containing both an arbitration clause and a

²⁶⁹ *Appleman and Appleman*, at § 10391 et seq (cited in note 146).

²⁷⁰ Restatement (Second) of Conflict of Laws § 187(2)(b)(1988).

²⁷¹ *Modern Computer Systems, Inc. v Modern Banking Systems*, 858 F2d 1339 (8th Cir 1988); *Winer Motors Inc. v Jaguar Rover Triumph Inc.*, 208 N J Super 666, 506 A2d 817 (1986); *Young v Mobil Oil Corp.*, 85 Ore App 64, 735 P2d 654 (1987).

²⁷² 489 US 468 (1989).

clause designating California law as the controlling law. Volt sought to compel arbitration; the university sought to stay arbitration pending resolution of related litigation involving third parties who had not agreed to arbitration. The California court granted the stay pursuant to an explicit provision of the California arbitration legislation,²⁷³ over the objection that the stay was not authorized by the FAA. The Court affirmed. It commenced its explanation by observing that “the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review,”²⁷⁴ and, pointing to Sections 3 and 4 of the FAA that are explicitly applicable only in federal courts, it concluded that the Act “does [not] reflect a congressional intent to occupy the entire field of arbitration.”²⁷⁵ It assessed the California provision at issue and concluded that it was not at odds with the FAA because a stay of arbitration pending the outcome of related litigation does not “undermine the goals and policies of the FAA.”²⁷⁶ It then concluded with the observation that the purpose of the FAA and of the Court was to enforce the intent of the parties as expressed in the contract, and the parties appeared to have intended to incorporate into their agreement the California arbitration law authorizing the stay.²⁷⁷ The dissent noted that the FAA is the law of California (as it is the law in all states) and argued that states cannot allow parties by contract to “nullify a vital piece of federal legislation.”²⁷⁸

The decision in *Volt* was a tacit acknowledgment by the Court that private dispute resolution is not always efficient, but the Court did not fully elucidate the reason that it would have been inefficient in the case at hand. If the arbitration had preceded the litigation, the contractors litigating with the university would have sought to employ arbitral findings adverse to the university (if announced) as issue preclusive in the later litigation, thereby claiming the benefit of the arbitration without exposing themselves to its hazards. It is uncertain whether such a preclusion would or should

²⁷³ Calif Code Civ Pro § 1281.2(c).

²⁷⁴ *Volt*, 489 US at 474.

²⁷⁵ *Id* at 477.

²⁷⁶ *Id* at 478.

²⁷⁷ *Id* at 479.

²⁷⁸ *Id* at 492. There is irony in this expression, given the Court’s interpretation of FAA as an act allowing parties by contract to nullify many vital pieces of state legislation.

be allowed.²⁷⁹ Hence some and perhaps all the issues arbitrated would be relitigated in court. On the other hand, if a court selected by the defendant university made findings adverse to it, it would be reasonable and likely that an arbitral forum would take the findings as preclusive in arbitration, thus eliminating the prospect of reconsideration of the issue. The FAA makes no provision for a stay of arbitration in such circumstances, in part no doubt because the law of issue preclusion is largely a post-1925 development.

The opinion in *Volt* was a step back from the full-throttle surge of the Court toward arbitration. It suggested the possibility that other state laws bearing on arbitration and not too directly at odds with the Court's policy favoring arbitration might be permitted to escape preemption, but, as we have seen in *Casarotto*, that was not to be. *Volt* remains, however, a potentially significant precedent in cases involving choice of law clauses. It calls attention to the ambiguity of simple choice of law provisions that fail to specify how much of the chosen jurisdiction's law is to be applied; a choice of law provision may, or may not, be taken to include the curial law of the jurisdiction, that is, the law governing the relations between courts and arbitral tribunals, or to include that jurisdiction's rules of arbitral practice and procedure.²⁸⁰

Volt was, however, later distinguished on grounds suggesting that its holding may have very narrow application. The Court in 1995 was confronted with a choice of law clause having the apparent purpose of evading the lash of otherwise applicable Illinois law. *Mastrobuono v Shearson Lehman Hutton, Inc.*²⁸¹ involved yet another printed brokerage agreement containing an arbitration clause and a clause designating the law of New York as controlling. Illinois investors sued their brokers, alleging mishandling of their account and claiming both compensatory and punitive damages. The brokers secured a stay pending arbitration pursuant to the FAA. When the arbitrator awarded compensatory and punitive damages, the brokers moved to vacate the punitive award as contrary to New York law. The brokers were successful in the lower federal courts, but the Supreme Court reversed.

²⁷⁹ Macneil et al, *Federal Arbitration Law* at § 39.3. And see id § 39.5 (cited in note 63).

²⁸⁰ Born, *International Commercial Arbitration* at 25–26, 161–81 (cited in note 163).

²⁸¹ 115 S Ct 1212 (1995).

The brokers and the lower courts relied on a New York decision holding that an arbitral tribunal cannot be empowered by contract to award punitive damages.²⁸² The New York holding rested on the premise that punishment is a role for the state alone, that a party cannot submit to private punishment nor by waiver diminish the power of the state of New York to impose it. It is thus the law of New York that while parties may bargain for private resolution of claims for compensation, their claims for punitive damages are not extinguished by the arbitration clause, but may be pursued separately in court, unless perhaps an award finding no liability might preclude a claim in court for punitive damages.²⁸³ The brokers, however, sought to invoke the choice of law clause as a waiver of any right to punitive damages, a result that would have been at odds with the New York law they invoked.

The Court rightly perceived that the lower courts, although faithful to the Court's precedents, had produced an incorrect result. It surely ought not be that Illinois investors signing a printed brokerage agreement forfeit substantive rights conferred by Congress and the Illinois legislature to protect them from the misdeeds of the author of the contract simply because the agreement contains an obscure choice of law clause. The Court escaped this result by reading the choice of law clause as not embracing any limitations that New York might impose on the power of arbitrators.²⁸⁴ It distinguished *Volt*, perhaps somewhat disingenuously, on the ground that in that case, the Court had deferred to an interpretation of California law by California courts. It must therefore be concluded that as things stand, choice of law clauses have little if any limiting effect on the jurisdiction of arbitral fora.

Not considered by the Court is the possibility that the New York law in question has been preempted by the FAA. Given *Southland*, *Perry*, and *Allied-Bruce Terminix*, it seems at best questionable whether New York can preclude arbitrators in cases af-

²⁸² *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 353 NE2d 793, 386 NYS2d 831 (1976), followed in *Merrill Lynch Pierce Fenner & Smith, Inc. v Cornell*, 7 World Mediation & Arbitration Rep 76 (New York Supreme Court, Feb 14, 1996).

²⁸³ *Dicenci v Lyndon Guaranty Bank of New York*, 807 F Supp 947, 953-54 (S D NY 1992) (severing and staying further arbitral proceedings on punitive damages); *Mulder v Donaldson, Lufkin & Jenrette*, 611 NYS2d 1019, 1021-22 (1994).

²⁸⁴ *Mastrobuono*, 115 S Ct at 1217.

fecting commerce from deciding punitive damage claims.²⁸⁵ The Court circumnavigated preemption in *Volt* by finding that the California law at issue was not inconsistent with the FAA. Although the preemption question appears to be unresolved in *Mastrobuono*, it is not easy to see how the New York rule on punitive damages can be reconciled with the sweeping effect the Court has imparted to the FAA. This is unfortunate if New York had it right. Punishment is not consonant with the amiability that traditional commercial arbitration has sought to engender, and the administration of punishment should be the outcome of a legal process in which the procedural rights of the accused are amply protected, with appropriate review to assure that the punishment is proportional and consistent with substantive law and with due process of law.²⁸⁶ These are not the conditions of commercial arbitration. On the other hand, the New York rule would be very unjust if applied to an arbitration conducted pursuant to a contract of adhesion having the effect of requiring a consumer or employee to split his or claim between arbitral and judicial tribunals.

JUDICIAL REVIEW OF AWARDS

Among its very recent cases, the Court made one decision that can be viewed by reductionists as anti-arbitration. In *First Options of Chicago, Inc. v Kaplan*,²⁸⁷ the Court affirmed a court of appeals decision reversing the earlier decisions of an arbitrator and of a district court determining that the Kaplans had agreed to submit the issue of arbitrability to the arbitrator. The facts require attention. The Kaplans were trading options in the name of their wholly owned corporation. When the account went in the red, a workout was arranged. The broker, First Options, demanded that the Kaplans personally pay the deficiency. When they failed to do so, First Options demanded arbitration pursuant to the workout agreement executed by the corporation. When the arbitrators met, the Kaplans filed an objection to any consideration of their liability

²⁸⁵ Holding that the New York law has been preempted is *Mulder v Donaldson, Lufkin & Jenrette*, 1996 N Y App Div LEXIS 9920 (Oct 8, 1996).

²⁸⁶ See *Honda Motor Corp. v Oberg*, 114 S Ct 639 (1994).

²⁸⁷ 115 S Ct 1920 (1995).

on the ground that they had not personally signed the workout agreement containing the arbitration clause and that they had therefore conferred no jurisdiction on the arbitrators to decide even whether they had agreed to arbitrate. The arbitrators ruled against them and made an award favoring First Options. The district court confirmed the award.

In reversing, the Third Circuit asserted that the courts were obliged "independently [to] decide whether an arbitration panel has jurisdiction over the merits of any particular dispute."²⁸⁸ Characterizing the ruling of the district court as one of law, it reviewed that holding *de novo*. The Supreme Court unanimously affirmed. For the Court, Justice Breyer acknowledged that parties might agree to submit even the arbitrability issue to an arbitral tribunal for decision. Whether they have done so in a particular instance, however, is an issue to be resolved according to state law governing the formation of contracts, which in this case "requires the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration."²⁸⁹ And the court "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." The Court distinguished *Mitsubishi* and other cases indicating a presumption in favor of arbitration as cases involving the arbitration of the merits and not arbitration of the threshold issue as to whether the parties had made a contract to arbitrate. The Court also brushed aside the argument of First Options that by presenting their objections to the arbitrators the Kaplans had conferred authority on them to decide whether those objections were well-founded.²⁹⁰

The unanimity of the Court in *First Options* may indicate that the period of its intoxication with arbitration may be coming to an end. Plausible arguments were made for the contrary result, but persuaded no member of the Court. On the other hand, little can be made of this. In *Casarotto*, the case decided in its most recent term, the Court was almost equally unanimous in holding that Montana law on the procedure for forming an arbitration agreement was preempted.

²⁸⁸ 19 F3d 1503, 1509 (3d Cir 1994).

²⁸⁹ *First Options*, 115 S Ct at 1924.

²⁹⁰ *Id* at 1924.

Perhaps of greater significance is the strength this decision may lend to the suggestion advanced above that the threshold issue of arbitrability may be treated by state law as fact-bound, and in some circumstances ripe for decision by a jury, something that the Kaplans did not demand. Presumably, a party denying the authority of its officer to agree to an arbitration clause would also be entitled to adjudicate the authority of the agent who ostensibly bound it to arbitrate a future dispute. By the same token, what is most troubling about the decision is the prolixity of the process approved. It is a pity that the jurisdictional issue could not have been resolved before the arbitral tribunal conducted a hearing and made a decision on merits that it had no authority to evaluate. A more orderly and efficient resolution would have resulted if arbitrability were resolved by the court in an action to enjoin the arbitration, as California state law and the state statute suggested above provides. In failing to pursue that course, the Kaplans got not one, but three forums repetitively to consider their objections.

The Court in *First Options* made it clear that its holding had no application to judicial review of the substantive merits of arbitral awards. As we have seen, the UN Convention explicitly allows a rigorous judicial review of foreign arbitral awards. It would not have been ratified by so many nations were it otherwise, for many have long traditions of reviewing awards for errors of law,²⁹¹ thus precluding use of arbitration to evade duties imposed by law that are independent of the duties created by the contract. But the FAA, in contrast, as we have also seen, makes no provision for review of the merits of an award.

While there have been occasional suggestions that an American award might be set aside for “manifest disregard of law,” lower federal courts have almost uniformly eschewed any such power or responsibility.²⁹² One reason for this restraint is that commercial awards are seldom “speaking awards,” that is, awards that are ac-

²⁹¹ Danish courts, for example, traditionally review arbitral awards for “clear and significant error”; this necessarily implies a requirement of speaking awards. Joseph M. Lookofsky, *Transnational Litigation and Commercial Arbitration: A Comparative Analysis of American, European and International Law* 622 (Transnational Juris Pub, 1992). For a case holding that a foreign award rendered in India is enforceable under the Convention even though it is still subject to pending judicial review on the merits in an Indian court, see *Fertilizer Corp. of India v IDI Management, Inc.*, 517 F Supp 948 (S D Ohio 1981).

²⁹² See cases cited in note 66; see also Macneil et al, *Federal Arbitration Law* at § 40.7 at 40:80–40:96 (cited in note 63).

panied with a reasoned explanation of the result. Effective review of the merits requires not only such a reasoned explanation, but also access to the proof on which the reasoned explanation rests. In short, review on the merits requires arbitration that conforms in some way with Federal Rules 43²⁹³ and 52²⁹⁴ requiring that a judge in deciding cases make findings of fact and state conclusions of law that are based on a record of the testimony and exhibits. Absent such requirements, review for manifest disregard of the law is merely a caution to the arbitral tribunal not overtly to thumb its nose at the controlling law.

In *Mitsubishi* and in *Vimar*, as we have seen, the Court sent American businessmen to Tokyo to arbitrate their disputed claims arising under American law, but promised them that their rights under American laws would be respected in the arbitration and that the lower federal courts would see that this was done. This was precisely what Justice Frankfurter had in mind doing with the Securities Act claim in *Wilko*.²⁹⁵ Because this form of review is at odds with the text of Section 10 of the FAA, its use must rest on inferences from other federal statutes, COGSA in *Vimar* and the antitrust laws in *Mitsubishi*. If so, then the review of awards may not be available to state courts as a means of assuring fidelity of awards to such laws as the California Franchise Investment Law. On the other hand, if a state court should set aside an award for disregard of state law protecting consumers or employees who arbitrated pursuant to an adhesive arbitration clause, the Court would be forced in review to recognize the consequences of what it has done to the states' abilities to govern, and might recede from some of its excesses.

There is little experience with this form of litigation. The lower federal courts have been slow to scrutinize the fidelity of arbitrators to controlling law.²⁹⁶ Illustrating the difficulties to be encountered is *PPG Industries, Inc. v Pilkington*.²⁹⁷ A district court there compelled arbitration of an antitrust claim in London, but added that

²⁹³ FRCP 43.

²⁹⁴ FRCP 52.

²⁹⁵ *Wilko*, 346 US at 440 (Frankfurter, J, dissenting).

²⁹⁶ *Kotam Electronics, Inc.*, 93 F3d 724.

²⁹⁷ 825 F Supp 1465 (D Ariz 1993).

the Court may, and certainly will, withdraw the reference to arbitration if U.S. antitrust law does not govern the substantive resolution of PPG's claims. In addition, the court directs that any damages determination, or arbitral award, made by the arbitrators shall be determined according to U.S. antitrust law irrespective of any conflict that may exist between those laws and the laws of England. Finally, the court will retain jurisdiction over this matter in order to ensure that the arbitration directed by this order is conducted in accordance with this order.²⁹⁸

This appears to be precisely what the Court had in mind in *Mitsubishi* and *Vimar*, but the result is to transmogrify the arbitral process, making it a joint venture between the court and the arbitral tribunal and requiring of the tribunal a formal record and a speaking award based on the record that justifies the award as an application of the Sherman Act. In other words, the district court has implicitly imposed much of Rule 52 of the Federal Rules of Civil Procedure on an English arbitration forum. While the court does not in its order specify that it will review the arbitrators' legal analysis de novo, there is nothing in the opinion to suggest that the "clear error" standard, much less the "manifest disregard" standard, will qualify the scrutiny given by the court to any award. While this violence to Section 10 of the FAA can be explained as a necessary implication of the antitrust laws and readily reconciled with either clause of paragraph 2 of Article V of the UN Convention,²⁹⁹ this is surely not a process that the authors and ratifiers of that Convention intended to foster.

Thus, while Pilkington contended mightily for its right to arbitrate an antitrust claim in London, it seems probable that when the day is done, counsel will wonder whether this was a useful course. Perhaps they hoped to wear PPG down by thus prolonging the resolution of the antitrust dispute. Perhaps their profit margin is sufficiently high that any delay of proceedings is a net gain to Pilkington, however much is spent to secure the delay. But except for counsel motivated by one or the other of these unworthy motives, it would seem likely that most firms drafting similar agreements in the future will, if well advised, draft their arbitration clauses narrowly to preclude arbitration of future claims arising

²⁹⁸ Id at 1483.

²⁹⁹ Quoted in text at note 162.

under the antitrust laws of the United States. Those who fail to do so may well find their otherwise arbitrable contracts disputes delayed and metastasized with marginal and spurious claims of federal right that the arbitral tribunal will be unable to resolve with finality but which will linger on as subjects of relitigation in court.

It is difficult to see that any identifiable public policy has been usefully served by this transformation. The movement for commercial arbitration, now attired in the name of the ADR movement, is not well served by an arbitration law that thus transposes the simple, efficient, expeditious, and civil process for resolving disputes between business associates into a complex, redundant, dilatory, and combative process for keeping commercial disputes in lawyers' offices for years. It is equally difficult to see what this does for international relations. True, the district court in *Pilkington* is intruding only in a private proceeding, not one conducted by Her Majesty's court, distinguishing it from those in which American courts have recoiled from exercising continuing jurisdiction over matters being litigated in foreign courts.³⁰⁰ Still, the making of truly bargained contracts in the global economy is not likely to be encouraged by the sight of *Pilkington*. Those who benefit from the process the Court has created are those who have the expectation that they can wear their adversaries down in prolonged litigation or who are financially so favored by the law's delay that they can afford whatever its costs. Those who are harmed are American consumers, workers, patients, shippers, passengers, and franchisees whose rights are diminished by the added burden imposed on their assertion.

All that can be said for this procedure is that it is preferable to the alternative of allowing stronger parties to use arbitration clauses altogether to escape the lash of privately enforced laws designed to protect weaker parties to contracts from predation. Sadly, even this much protection of statutory rights is denied to weaker parties who would invoke rights under state statutes, all of which seem to have been preempted. As we noted, the *Pilkington* procedure is not thus far clearly open to state courts enforcing state law because it is derived by inference from the federal antitrust law, to which the Court's reconstructed FAA must make

³⁰⁰ For example, *In re Union Carbide Corp. Gas Plant Disaster*, 809 F2d 195 (2d Cir 1987).

some concession. Indeed, it is not yet clear that the *Pilkington* procedure is available when the arbitration is conducted in an American rather than a foreign arbitral tribunal, although there is no apparent reason to distinguish between them.

CONCLUSION

As architecture, the arbitration law made by the Court is a shantytown. It fails to shelter those who most need shelter. And those it is intended to shelter are ill-housed. Under the law written by the Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees; the protective police power of the federal government and especially of the state governments is weakened; and at least some and perhaps many commercial arbitrations will be made more costly while courts determine whether arbitrators have been faithful to certain federal laws.

Better law would rest firmly on recognition that arbitration and forum selection clauses *in contracts of adhesion* are sometimes a method for stripping people of their rights. Better law would distinguish cleanly those rights that cannot be impaired by that method and those that may be put at risk in order to secure the undoubted benefits of commercial arbitration. Better law would empower state governments to draw some of those lines for the purpose of assuring faithful execution of their privately enforced regulatory laws. Better law would observe the Restatement's requirements that contractual choices of forum and of law be fair and reasonable, applying that same standard to adhesive arbitration clauses designating remote or unreasonably expensive tribunals. Except where Congress or a treaty otherwise explicitly directs, better law would assure all international litigants in American courts of a level playing field, and provide all foreign awards with recognition equal to that given to domestic awards, but never more. Better law would not compel informal arbitration proceedings designed merely to resolve disputes to become formal quasi-judicial proceedings designed to be accountable for the enforcement of legal rights. Alas, there seems to be no possibility that the Court can rebuild the shantytown it has made into such a city on a hill. To extricate itself and the nation from the morass it has created, the Court would have to overrule *Moses Cone*, *Mitsubishi*, *Southland*, *Perry*, *Carnival Lines*, *Vimar*, *Terminix*, and *Casarotto*, and belatedly

limit the holding in *Prima Paint*. If we are to have sound arbitration law, there is no place to look for it except in the halls of Congress.

Compassion and respect for the honored membership of the Court who have done their day's work dictate that humble authors having no responsibility except that of criticism ought be fully satisfied, having chastised the Court so meanly for its shortcomings as professional craftsmen. But we do not stop there, for there is a greater impropriety than mere negligent craftsmanship. What the Court has done was a trespass on the institutions of democratic government. Our city on the hill is not a mythic place, but the one that Congress planned. Had the Court in making commercial arbitration law been more faithful to the controlling legal texts, it would not have built the ugly habitation for which it alone is responsible.

A question the Court might have employed, but did not, was to ask itself whether the texts as it interpreted them could have been enacted. It seems clear to us that if the UN Convention had been presented to the Senate, or if the FAA had been presented to Congress, as legislation having the effects ascribed to them by the Court, neither would have been assured of a single vote of approval. It is hard to imagine any officer accountable to an electorate who would openly avow the purpose of enabling those with economic power to diminish the enforceability of rights conferred by Congress and state legislatures on consumers, patients, employees, investors, shippers, passengers, franchisees, and shopkeepers. Nor would any officer of the United States or any state government admit having deliberately enacted law favoring foreigners in their disputes with Americans. But the Court forgot its duty to interpret legislation as legislators and the people would have it interpreted, and conformed the texts to the elitist sentiments of its members. That has been a more serious mischief than making bad law.³⁰¹

³⁰¹ See generally William N. Eskridge, *Dynamic Statutory Interpretation* (Harvard, 1994); Francis Lieber, *Legal and Political Hermeneutics; or, Principles of Interpretation and Construction in Law and Politics* (1837; 2d ed, Little Brown, 1838, F. H. Thomas, 3d ed 1880; republished in 16 Cardozo L Rev 1883 (1995)).