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## U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements

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# NOTES

## U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From The Bremen's License to the Sky Reefer's Edict

### ABSTRACT

*Through a series of cases culminating with Vimar Seguros Y Reaseguros v. M/V Sky Reefer, the U.S. Supreme Court has developed a strong pro-arbitration stance regarding disputes arising out of international commercial contracts. This Note analyzes the Court's reasons for this stance and compares those reasons with the history and purposes of the Federal Arbitration Act and the New York Convention. The author concludes that the Court's reasons are at odds with the FAA and the New York Convention. The Note further articulates the dangers posed to U.S. public policies that are created by allowing arbitration of statutory claims. The author argues that the Court has expanded the scope of arbitrable issues behind that which was intended by the FAA and the New York Convention and to a point dangerously close to unraveling U.S. regulatory schemes.*

### TABLE OF CONTENTS

I.	INTRODUCTION .....	60
II.	ALTERNATIVE DISPUTE RESOLUTION .....	62
III.	HISTORY OF ARBITRATION .....	62
	A. Common Law .....	62
	B. Federal Arbitration Act .....	63
	C. New York Convention .....	64
	D. Conclusion.....	67

IV. U.S. SUPREME COURT INTERPRETATION OF THE FAA AND THE NEW YORK CONVENTION ..... 68

A. *Wilko v. Swan*..... 68

B. *The Bremen v. Zapata Off-Shore Co.* ..... 70

C. *Scherk v. Alberto-Culver Co.* ..... 71

D. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* ..... 73

E. *Vimar Seguros Y Reaseguros v. M/V Sky Reefer* 75

F. *Conclusion*..... 78

V. DANGERS TO U.S. REGULATORY SCHEMES POSED BY THE SUPREME COURT’S PRO-ARBITRATION STANCE..... 81

A. *The Current Structure of Arbitration Prevents Courts from Reviewing Arbitral Awards* ..... 81

B. *Arbitral Awards are Rarely Vacated* ..... 84

1. FAA Section 10(a)(4): Arbitrators Exceeded Their Powers; Manifest Disregard..... 86

2. Article V(2)(a): Subject Matter Inarbitrable..... 87

3. Article V(2)(b): Public Policy of the Forum..... 88

C. *Parties May Opt Out of Regulatory Statutes ..* 89

1. Congress Did not Intend the Goal of International Business Harmony to Override All Other U.S. Policies.... 89

2. Comity is not Applied by Other Nations 91

D. *Arbitral Tribunals are Not Appropriate Fora for Interpretation of U.S. Public Policy ....* 92

VI. CONCLUSION..... 94

I. INTRODUCTION

Through a series of cases,<sup>1</sup> the U.S. Supreme Court has developed a preference for arbitration of disputes arising out of international commercial contracts containing an arbitration clause. The Court’s preference began with the assumption that the United States cannot presume to tell the world that all

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1. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Wilko v. Swan*, 346 U.S. 427 (1953).

disputes arising between a U.S. citizen or corporation and another country's citizen or corporation must be decided by U.S. courts.<sup>2</sup> The Court recognized the special role forum selection and choice of law clauses have in obtaining certainty and stability in international commercial transactions.<sup>3</sup> The Court's focus on international commercial parties' freedom of contract, however, has hidden, or at least minimized, the danger that pre-dispute resolution agreements pose to U.S. public policies as expressed in U.S. statutory regulations.

The Court articulated reasons for its preference, such as comity between nations, certainty and stability in the choice of law between parties to international commercial contracts, quickness in dispute resolution, and freedom of contract. It emphasized the passage of the Federal Arbitration Act (FAA)<sup>4</sup> and the U.S. ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention")<sup>5</sup> when it allowed parties to avoid U.S. regulatory statutes by arbitrating securities,<sup>6</sup> antitrust,<sup>7</sup> and COGSA<sup>8</sup> disputes. Indeed, the reasons given by the Court in this line of cases ignore both the history of arbitration and its real consequences to U.S. regulatory schemes. It is important, therefore, to review the reasoning behind the FAA, as well as the New York Convention, to reveal whether the U.S. Congress intended to alter the *status quo* and allow arbitration of regulatory statutes in addition to contractual and common law disputes.

This Note analyzes the Court's reasoning behind its pro-arbitration stance and compares it with the history and purposes of the FAA and the New York Convention. The Note points out the false security of recognizing public policy defenses to enforcement of arbitral awards since the defense, though available, is virtually never successful. The Note then articulates the dangers posed to U.S. public policies that arbitration of statutory claims would create. This Note argues that the Court has expanded the scope of arbitrable issues beyond that which was intended by the FAA and the New York Convention and to a point dangerously close to

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2. *The Bremen*, 407 U.S. at 9.

3. *Scherk*, 417 U.S. at 516.

4. 9 U.S.C. §§ 1-16 (1994).

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-07 (1994)) [hereinafter New York Convention or Convention].

6. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

7. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

8. See *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322 (1995).

unraveling U.S. regulatory schemes. Finally, this Note suggests adopting an amendment to the FAA which declares claims arising under regulatory statutes inarbitrable and awards rendered on such claims unenforceable.

## II. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) refers to a non-litigation process that attempts to resolve disagreements to the satisfaction of all parties in an expedient and economically feasible manner.<sup>9</sup> ADR has become a mainstay in the business community because "[a] swift resolution of the conflict is more likely to preserve the relationship among the parties to the dispute, and to reduce the enormous stress and resentment litigation creates."<sup>10</sup> There are many types of ADR, including negotiation, mediation, conciliation, mini-trials, and other variations. Arbitration,<sup>11</sup> however, is the most common method of ADR used to resolve business disputes.<sup>12</sup>

## III. HISTORY OF ARBITRATION

### A. Common Law

In the Middle Ages, arbitration<sup>13</sup> was used more frequently than the courts to settle private commercial disputes.<sup>14</sup> The King's courts in England were not as knowledgeable in mercantile matters as merchants themselves and thus were not a preferable forum to hear such matters.<sup>15</sup> The King's courts eventually rejected this preference for arbitration, believing that public policy dictated judicial settlement of disputes and that courts could not be ousted of their jurisdiction.<sup>16</sup> This view prevailed in statutory

9. MARGARET C. JASPER, *THE LAW OF DISPUTE RESOLUTION: ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION 1* (1995).

10. *Id.*

11. Arbitration is typically a voluntary process involving a neutral third party (the arbitrator) who listens to both sides of a dispute and renders a binding decision. *Id.* at 7.

12. *Id.* at 12.

13. These extra-judicial fora were termed "merchant courts." Robert B. von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 *BROOK. J. INT'L L.* 583, 584 (1986).

14. *Id.* at 583-84.

15. *Id.* at 584.

16. *Id.* at 586.

form which "envisage[d] arbitration as a process conducted under the tutelage and with the support of the courts rather than as a largely autonomous alternative to formal judicial proceedings."<sup>17</sup> Executory agreements to arbitrate, therefore, were held revocable and non-enforceable, but agreements to arbitrate after the dispute arose were enforced.<sup>18</sup> Arbitration, therefore, developed in England largely as an alternative process for resolving disputes under *private law* and *after* the dispute arose.<sup>19</sup>

### B. Federal Arbitration Act<sup>20</sup>

During the Nineteenth Century, the attitude among U.S. courts toward arbitration agreements resembled England's common law. U.S. courts also assumed that pre-dispute arbitration agreements were revocable and non-enforceable.<sup>21</sup> A party in breach of the arbitration agreement would be liable in damages but could not be forced to arbitrate the dispute.<sup>22</sup>

Early reformers of arbitration law challenged this revocability rule as "an anachronism [to] be eliminated as soon as possible."<sup>23</sup> The reformers initially focused their crusade on the states. Their success began with the enactment of the modern New York Arbitration Statute, which allowed specific enforcement of pre-dispute arbitration agreements.<sup>24</sup> Soon after the passage of the New York Arbitration statute and other state statutes modeled thereon, the reformers turned their focus to the federal courts. A committee of the American Bar Association drafted the United States Arbitration Act (USAA or FAA),<sup>25</sup> modeled on the New York Arbitration Statute. As did the New York statute, the USAA provided that arbitration agreements "shall be valid, enforceable

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17. *Id.* at 587-88.

18. *Id.* at 585. Arbitration of a dispute may arise by demand because of a pre-dispute arbitration clause in a contract, or by submission because of an agreement between the parties to an existing dispute. JASPER, *supra* note 9, at 9.

19. Von Mehren, *supra* note 13, at 596.

20. 9 U.S.C. §§ 1-16 (1994). The FAA applies to arbitration agreements in any maritime transaction or contracts evidencing a transaction involving commerce. *Id.* § 2.

21. Von Mehren, *supra* note 13, at 589-90.

22. IAN R. MACNEIL, AMERICAN ARBITRATION LAW 20 (1992). This refusal to grant specific performance of the arbitration agreement rested on the theory that a court could not be ousted of their jurisdiction. *Id.* at 22.

23. *Id.* at 31.

24. *Id.* at 48.

25. The U.S. Arbitration Act is also known as the Federal Arbitration Act. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 29 (1994).

and irrevocable, save upon such grounds existing at law or in equity for the revocation of any contract."<sup>26</sup>

In light of the conflicting federal and state rules on enforceability of pre-dispute arbitration agreements, the USAA was proposed to Congress in 1924.<sup>27</sup> Before its approval on the House floor on June 6, 1924, it stated that "[t]he bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."<sup>28</sup> The House Report reiterated this understanding of arbitration agreements:

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.<sup>29</sup>

The Act passed without opposition in both houses of Congress.<sup>30</sup>

It is clear that the congressional intent in passing the FAA was merely to reconcile the conflicting federal and state court policies regarding enforceability of pre-dispute arbitration agreements. Since arbitration arose as a method for resolving contract and common law disputes, strong evidence must be produced if one is to show that Congress intended to alter the *status quo*. However, there is no evidence that suggests Congress intended to transform arbitration into a mechanism for resolving statutory disputes.

### C. New York Convention

The New York Convention<sup>31</sup> is the product of an international effort to unify the law regarding recognition and enforcement of

26. MACNEIL, *supra* note 22, at 68.

27. The bill was submitted to Congress in 1923, but it remained in a Senate Judiciary Committee due to the lateness of the session. The bill was resubmitted in 1924. *Id.* at 91.

28. *Id.* at 100.

29. Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 245 (1993) (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924)).

30. *Id.* The Act was signed into law on February 12, 1925, and became effective on January 1, 1926. *Id.*

31. See New York Convention, *supra* note 5.

foreign arbitral awards.<sup>32</sup> Although it was adopted in New York on June 10, 1958, many countries did not become signatories until years later.<sup>33</sup> This hesitancy has been attributed to the fear of many nations, including the United States, that many of the New York Convention's provisions conflicted with national law.<sup>34</sup> The U.S. State Department addressed this fear when it advised the U.S. Senate<sup>35</sup> of the availability of Article II(1) of the New York Convention which allows a court to refuse enforcement of an arbitration agreement if it calls for arbitration of a "subject matter [in]capable of settlement by arbitration."<sup>36</sup> The United States ratified the New York Convention in 1970.<sup>37</sup>

Signatories to the New York Convention must enforce foreign arbitral awards<sup>38</sup> issued by other member nations unless a ground for vacatur applies. The grounds for vacating a foreign arbitral award are found in Article V of the New York Convention, and includes incapacity of the parties or lack of a valid arbitration agreement,<sup>39</sup> inadequate notice to or opportunity of a party to

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32. Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 *FORDHAM INT'L L.J.* 920, 929 (1995).

33. *Id.* at 925.

34. *Id.*

35. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 613, 625 (1985).

36. See New York Convention, *supra* note 5, art. II(1), 21 U.S.T. at 2519, 330 U.N.T.S. at 38.

37. Roy, *supra* note 32, at 930.

38. Article I(1) of the New York Convention defines foreign awards to which it applies as those "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, *supra* note 5, art. I(1), 21 U.S.T. at 2519, 330 U.N.T.S. at 38. Additionally, the Convention applies to awards rendered in the enforcing state but which are not considered domestic. New York Convention, *supra* note 5, art. I(1), 21 U.S.T. at 2519, 330 U.N.T.S. at 38. The guiding rule is that "an award [will] be considered [non-domestic if] the relationship involves property located abroad, envisaged performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." Vincent Sama, *Problems in Enforcement of Foreign Arbitral Awards*, Address at the Baker & McKenzie Seminar on Problems in Enforcement of Foreign Judgments, Awards, and Interim Orders (November, 1994), in 6 *WORLD ARB. & MEDIATION REP.* 77, 77 (1995).

39. Article V(1)(a) provides:

The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

New York Convention, *supra* note 5, art. V(1)(a), 21 U.S.T. at 2520, 330 U.N.T.S. at 40.



present a case,<sup>40</sup> an award rendered on a subject beyond the scope of the arbitration agreement,<sup>41</sup> and a defect in the composition of the arbitral tribunal or the arbitral process.<sup>42</sup> In addition, Article V, Section 2, contains two other grounds for vacating an arbitral award that may also have reduced the hesitation many nations felt about ratifying the New York Convention:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought 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.<sup>43</sup>

Similar to its intention in enacting the FAA, Congress ratified the New York Convention to ensure enforceability of pre-dispute arbitration agreements. More importantly, by ratifying the New York Convention, Congress approved uniformity in the law regarding enforcement of awards. However, Congress equated uniformity with exclusivity, not with consistency. In other words, the New York Convention states grounds for vacatur that are exclusive but which leave their interpretation to the individual signatories.<sup>44</sup> Therefore, as was the case with the FAA, there is

40. Article V(1)(b) provides, "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." New York Convention, *supra* note 5, art. V(1)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

41. Article V(1)(c) provides:

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

New York Convention, *supra* note 5, art. V(1)(d), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

42. Article V(1)(d) provides, "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." New York Convention, *supra* note 5, art. V(1)(c), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

43. New York Convention, *supra* note 5, art. V(2), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

44. Grounds for vacatur, found in Article V(2)(a) (in-arbitrable subject matter) and V(2)(b) (public policy of the forum) of the Convention, inherently contain the recognition that different nations have different policies. It is also implicit in the mandate of Article III that no signatory shall "impose[] substantially more onerous conditions . . . on the . . . enforcement of arbitral awards to which this Convention applies than are imposed on the . . . enforcement of domestic

no evidence that Congress intended to change the *status quo* with regard to the arbitrability of statutory claims.

#### D. Conclusion

The history of the FAA, and of arbitration generally, shows that Congress simply intended that arbitration agreements be treated the same as other contract provisions.<sup>45</sup> At the time, arbitration was generally perceived as a vehicle to resolve disputes concerning contract interpretation or other issues of private law.<sup>46</sup> There is no indication that the reformers or Congress intended the FAA to transform arbitration into a means by which businesses escape public regulation by forcing another party to forego litigation and arbitrate statutory claims. Indeed, the FAA was passed before the rise of regulatory schemes in the United States. It was only around the time of the New Deal that "critics launched a frontal assault against [arbitration] as a bastion of business power insulated from social responsibility and contrary to the public interest."<sup>47</sup>

The New York Convention, though ratified by the United States well after these concerns were articulated, explicitly granted member nations the right to refuse to enforce foreign arbitral awards on the grounds that the subject matter was incapable of arbitration, or that the award was contrary to the public policy of the enforcing nation.<sup>48</sup> It also required enforcement of the arbitration agreement if the subject matter was capable of arbitral resolution.<sup>49</sup> These provisions eased the reservations of a Congress that was concerned about the effect the New York Convention would have on national laws. Presumably, Congress was referring to national statutory laws as opposed to common law.<sup>50</sup> Decisions by the Supreme Court, however, convey a very different interpretation of congressional intent in passing the FAA and ratifying the New York Convention.

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arbitral awards." New York Convention, *supra* note 5, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40. Thus, if domestic awards are difficult to enforce, the New York Convention does not make foreign awards any less difficult to enforce. Ramona Martinez, Comment, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 INT'L LAW. 487, 496 (1990).

45. See discussion *supra* Parts III.A and III.B.

46. Von Mehren, *supra* note 13, at 596.

47. MACNEIL, *supra* note 22, at 62.

48. See discussion *supra* Part III.C.

49. See discussion *supra* Part III.C.

50. See discussion *supra* Part III.C.

## IV. U.S. SUPREME COURT INTERPRETATION OF THE FAA AND THE NEW YORK CONVENTION

The interpretation of congressional intent in passing the FAA and ratifying the New York Convention has had an interesting evolution in the Supreme Court. At first, the Court did not impute to Congress any bias in favor of arbitration of statutory claims simply because of Congress' enactment of the FAA. Indeed, the Court did not require an explicit congressional determination of arbitrability and gave equal consideration to congressional intent and policies behind the enactment of other statutes besides the FAA. After ratification of the New York Convention, however, the Court's attitude changed, at least with regard to arbitration of statutory claims arising out of international transactions. It effectively determined that through the New York Convention, Congress had subordinated fundamental policy determinations embodied in its statutory law to broad and vague notions of international comity and the promotion of international business.

A. *Wilko v. Swan*

The Court's first opportunity to address whether the FAA mandated arbitration of statutory claims in the face of an arbitration clause occurred in *Wilko v. Swan*.<sup>51</sup> Although the case involved domestic rather than international arbitration, the Court's concerns over arbitration of statutory claims are just as applicable in an international context.

Petitioner, a customer, brought an action against respondents, partners in a securities brokerage firm, under Section 12(2) of the Securities Act of 1933.<sup>52</sup> Respondents moved to stay the litigation pending arbitration pursuant to the arbitration clause contained in the margin agreements governing the parties' relationship.<sup>53</sup> The district court denied the motion. The Second Circuit Court of Appeals reversed.<sup>54</sup> The Supreme Court reversed the appellate court, holding that a pre-dispute arbitration agreement is void under Section 14 of the Securities Act of 1933.<sup>55</sup>

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51. 346 U.S. 427 (1953) *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

52. *Id.* at 428.

53. *Id.* at 429.

54. *Id.* at 430.

55. *Id.* at 438. Section 14 of the Securities Act of 1933 provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules

The Court specifically noted the conflicting policies behind the Securities Act of 1933 and the FAA. The Securities Act was designed to protect investors through a system of full and fair disclosure along with the special private right of action devised to effectuate that policy. On the other hand, the FAA was designed to establish the desirability of arbitration as an alternative to litigation.<sup>56</sup> The Court, however, emphasized the weaknesses of arbitration of statutory claims: situations where "arbitrators' conception[s] of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact'" cannot be scrutinized by the courts since awards may be made without reasoned opinions, and the power to vacate an award is limited under the FAA.<sup>57</sup> Under these circumstances, and with the language of Section 14 of the Securities Act of 1933 in mind, the Court determined that the policy behind the Securities Act should trump the FAA.<sup>58</sup>

Although *Wilko* was overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>59</sup> it is still frequently cited, and invoked, for one line of its dicta: When discussing its concern about the non-reviewability of arbitral awards, the Court rather whimsically declared that "interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."<sup>60</sup> The Manifest Disregard Doctrine is one of the most frequently invoked defenses to confirmations of arbitral awards, and will be discussed below.<sup>61</sup>

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and regulations of the Commission shall be void.'" *Id.* at 430 n.6 (quoting 48 Stat. 84 (1933), 15 U.S.C. § 77n). The Court determined that pre-dispute arbitration agreements are a "stipulation" and that "the right to select the judicial forum is the kind of 'provision' that cannot be waived." *Id.* at 434-35.

56. *Id.* at 431.

57. *Id.* at 436 (citation omitted). The Court pointed out that:

Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law.

*Id.* at 435-36 (footnotes omitted).

58. *Id.* at 438.

59. 490 U.S. 477 (1989).

60. *Wilko*, 346 U.S. at 436-37 (emphasis added).

61. See *infra* Part V.B.1.

B. *The Bremen v. Zapata Off-Shore Co.*

The *Wilko* Court's neutral attitude toward arbitration soon changed. In *The Bremen v. Zapata Off-Shore Co.*,<sup>62</sup> the Court became more lenient toward forum selection clauses.<sup>63</sup> It was in this case that the Court first articulated the undesirability of forcing U.S. laws and courts on the international business community.

The parties, a U.S. corporation and a German corporation, entered into an international towage contract that contained a forum selection clause providing for litigation in England.<sup>64</sup> The barge was damaged during the tow and Zapata brought suit in the United States.<sup>65</sup> The defendant-corporation invoked the forum selection clause and moved to stay the litigation pending determination by the High Court of London.<sup>66</sup> The district court denied the motion and granted Zapata's motion to restrain the defendant from litigating in England.<sup>67</sup> The Fifth Circuit Court of Appeals affirmed.<sup>68</sup> The Supreme Court vacated and remanded.<sup>69</sup>

The Court held that a forum selection clause "should control absent a strong showing that it should be set aside."<sup>70</sup> The Court looked at the interests of the immediate parties involved and noted that:

[M]uch uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or in rem jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.<sup>71</sup>

Therefore, the party seeking to avoid enforcement must show that enforcement would be unreasonable and unjust.<sup>72</sup> The Court

62. 407 U.S. 1 (1972).

63. In a later case, the Court characterized an arbitration agreement as a "specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

64. *The Bremen*, 407 U.S. at 2.

65. *Id.* at 3.

66. *Id.* at 4.

67. *Id.* at 6.

68. *Id.* at 7.

69. *Id.* at 20. Because the district court and appellate court engaged in a forum non conveniens analysis, the Supreme Court remanded for a determination under its newly articulated test of whether enforcement of the forum selection clause would have been unreasonable and unjust. The burden to show unreasonableness is on the party seeking to avoid enforcement. *Id.* at 15.

70. *Id.*

71. *Id.* at 13-14.

72. *Id.* at 10.

held that this burden could not be satisfied by showing that a foreign court would apply a law directly contrary to U.S. law,<sup>73</sup> explaining that “[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”<sup>74</sup> It emphasized freedom of contract and characterized the “ouster” argument as a “vestigial legal fiction.”<sup>75</sup>

In holding as it did, the Court ignored the interests of the U.S. government and the public. These interests first, and most importantly, require U.S. regulatory statutes to be applied to disputes involving a regulated party and, second, require these statutes to be interpreted and applied by a U.S. court accountable to the U.S. public. This Supreme Court trend toward focusing on business interests such as convenience and predictability, while completely ignoring U.S. governmental and public interests, developed into an uncompromising method of legal reasoning in subsequent cases.<sup>76</sup>

### C. *Scherk v. Alberto-Culver Co.*

*The Bremen* dealt with forum-selection clauses choosing the courts of a particular country. However, the consideration of international business interests was extended to determinations of the validity of arbitration clauses in *Scherk v. Alberto-Culver Co.*<sup>77</sup> The Court in this case chose to treat these interests, not the FAA-New York Convention, as the controlling factors in such determinations.

Plaintiff Alberto-Culver, a U.S. corporation, entered into a contract with defendant Scherk, a German citizen, to purchase several business entities owned by Scherk.<sup>78</sup> The contracts contained an arbitration clause requiring arbitration in Paris. Plaintiff discovered that the defendant had misrepresented the

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73. The contract at issue in *The Bremen* contained an exculpatory clause which would have been enforceable in England, but not in the United States. *Id.* at 2, 7.

74. *Id.* at 9. A party cannot meet this burden by claiming the forum is inconvenient when that inconvenience was clearly foreseeable at the time of contracting. *Id.* at 17-18. Indeed, to show that enforcement would be unfair, unjust, or unreasonable, a party must show that trial in the forum would be so “gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.” *Id.* at 18.

75. *Id.* at 12.

76. See discussion *infra* Parts IV.C, IV.D, and IV.E.

77. 417 U.S. 506 (1974).

78. *Id.* at 508. The purchased entities were organized under the laws of Germany and Liechtenstein. *Id.*

fact that several trademarks were encumbered, and brought suit claiming a violation of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.<sup>79</sup> The district court, relying on the Court's decision in *Wilko*, denied defendant's motion to stay litigation and compel arbitration. The Seventh Circuit Court of Appeals affirmed.<sup>80</sup> The Supreme Court reversed.<sup>81</sup>

The majority focused extensively on the "truly international" character of the contract between Scherk and Alberto-Culver when it held *Wilko* inapposite to the case at bar.<sup>82</sup> It stressed the resulting uncertainty as to which country's law would be applied to the contract, as opposed to the unquestionable conclusion in *Wilko* that U.S. securities laws would apply.<sup>83</sup> This uncertainty, in the majority's view, was of sufficient importance to justify an arbitration and choice of law clause as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."<sup>84</sup> The Court further found that a refusal to enforce such clauses "would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages,"<sup>85</sup> a result left undistinguished from purely domestic litigation and therefore seemingly acceptable to the Court in that context. The public policy interests embodied in the Securities Exchange Act of 1934<sup>86</sup> took a back seat to these parties' private interests, a result clearly at odds with the intent of regulatory statutes that subordinate private interests to public interests. The Court

79. *Id.* at 509.

80. *Id.* at 510.

81. *Id.* at 520-21.

82. *Id.* at 515. The Court noted:

The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

*Id.*

83. *Id.* at 515-16.

84. *Id.* at 516.

85. *Id.* at 516-17.

86. The Securities Exchange Act of 1934 was designed to protect investors from issuers of securities through the imposition of a scheme of systematic disclosure requirements. Section 10(b) and Rule 10b-5 promulgated thereunder are the main anti-fraud provisions under the Act. *Id.* at 522-23 (Douglas, J., dissenting).

pointed out that courts, when sitting to determine the validity of an arbitral award, are able to refuse enforcement on public policy grounds.<sup>87</sup> The Court expressed no opinion as to whether the New York Convention, apart from the considerations expressed in the opinion, would require enforcement of the arbitration agreement.<sup>88</sup>

D. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*

The *Scherk* Court relied on international business interests when it allowed the arbitration of securities claims. It found the U.S. ratification of the New York Convention supported its conclusion, but it did not find the New York Convention controlling. In allowing arbitration of antitrust claims that arise in international transactions, the Court in *Mitsubishi Motors Corp. v. Sales Chrysler-Plymouth, Inc.*<sup>89</sup> also emphasized the business interests and comity factors, but with greater focus on the FAA and the New York Convention. As in *Scherk*, the Court justified its judgment by relying upon an award-enforcement stage to provide a chance for a court to ensure the arbitrator applied U.S. statutory law.

Plaintiff Mitsubishi, a Japanese corporation, entered into a distributorship and sales agreement with defendant Soler Chrysler-Plymouth, a Puerto Rican corporation, which contained an arbitration clause providing for arbitration in Japan.<sup>90</sup> Disputes arose under the contract culminating in an action brought by Mitsubishi pursuant to the FAA and the New York

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87. Although the question is undecided:

[P]resumably the type of fraud alleged here could be raised, under Art. V of the [New York Convention] in challenging the enforcement of whatever arbitral award is produced through arbitration. Article V(2)(b) of the [New York] Convention provides that a country may refuse recognition and enforcement of an award if 'recognition or enforcement of the award would be contrary to the public policy of that country'.

*Id.* at 519 n.14.

88. Without reaching the issue of whether the [New York] Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case . . . this country's adoption and ratification of the [New York] Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision [reached].

*Id.* at 520 n.15.

89. 473 U.S. 614 (1985).

90. *Id.* at 616-17.



Convention to compel arbitration.<sup>91</sup> Soler counterclaimed alleging antitrust violations by Mitsubishi.<sup>92</sup> The district court ordered arbitration.<sup>93</sup> The U.S. Court of Appeals for the First Circuit reversed the district court's order to arbitrate the antitrust claims.<sup>94</sup> The Supreme Court reversed the Court of Appeals and ordered arbitration of the antitrust claims.<sup>95</sup>

The Court first stated that nothing in the FAA raised a presumption against the arbitration of statutory claims.<sup>96</sup> To the contrary, the Court found it significant that the congressional intent behind the FAA was to enforce these private arbitration agreements.<sup>97</sup> It stated that a party does not surrender his or her statutory rights by agreeing to arbitrate, but only submits their resolution to a different forum—an arbitration panel.<sup>98</sup> The Court did not pass upon the question regarding arbitrability of antitrust disputes arising from domestic transactions. But in invoking the “[i]dential considerations govern[ing] the Court’s decision” in *Scherk*<sup>99</sup> and *The Bremen*, the Court concluded that:

concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.<sup>100</sup>

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91. *Id.* at 618.

92. *Id.* at 619-20.

93. *Id.* at 620. Relying on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the district court held that the international nature of the case required enforcement of the arbitration agreement even though antitrust claims presumably would not be arbitrable if arising from a purely domestic undertaking. *Id.* at 621.

94. *Id.* at 623. The Court of Appeals did, however, affirm the order to arbitrate all other disputes arising under the contract. *Id.* at 621.

95. *Id.* at 640.

96. *Id.* at 625. The Court also stated that Article II(1) of the New York Convention (requiring recognition of agreements to arbitrate which involve a subject matter capable of settlement by arbitration) “contemplates exceptions to arbitrability grounded in domestic law,” as opposed to internationally recognized principles. *Id.* at 639 n.21. Although recognizing that the U.S. State Department had advised the Senate of this option before accession to the New York Convention, the Court dismissed these facts, stating “[l]et in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope.” *Id.* Therefore, the Court “decline[d] to subvert the spirit of the United States accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.” *Id.* at 639-40 n.21.

97. *Id.* at 625.

98. *Id.* at 628.

99. *Id.* at 630.

100. *Id.* at 629.

The Court found that these comity concerns were buttressed by the "emphatic federal policy" favoring arbitration, especially in the field of international commerce since the U.S. accession to the New York Convention.<sup>101</sup>

The Court dismissed the danger of a business bias in the arbitration panel by concluding that "[i]nternational arbitrators frequently are drawn from the legal as well as the business community."<sup>102</sup> The Court then stated that while the private damages remedy provided for in the antitrust statutes has a central role in enforcing the statutory regime, arbitration is just as appropriate a forum for that enforcement as a judicial forum. Although the Court recognized that an "international arbitral tribunal owes no prior allegiance to the legal norms of particular states" and "has no direct obligation to vindicate their statutory dictates," arbitrators are bound to carry out the parties' intent when that intent includes application of U.S. statutory law.<sup>103</sup> In a footnote, the Court noted that if the agreement's choice of forum and choice of law clauses functioned as prospective waivers of the statutory claims, it would be void as against public policy.<sup>104</sup>

Finally, the Court justified its decision by stating that the New York Convention allows the award to be reviewed at the award-enforcement stage to ensure that "enforcement of the antitrust laws has been addressed."<sup>105</sup> Immediately after this statement, however, the Court conceded that substantive review should remain minimal at the award-enforcement stage and limited to ensuring that the panel took cognizance of the antitrust claims and in fact decided them.<sup>106</sup>

#### E. *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*

The *Mitsubishi* Court reaffirmed the great significance the Court attaches to international business interests and comity concerns, but placed that significance in the context of the FAA and the New York Convention. It determined that those interests do not outweigh the interests in having U.S. antitrust laws apply to the arbitration. However, in the absence of a congressional determination that certain statutory claims are inarbitrable, the

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101. *Id.* at 631.

102. *Id.* at 634.

103. *Id.* at 636. Although the sales agreement included a choice of law clause providing for the application of Swiss law, *Mitsubishi* conceded that U.S. law applied to the antitrust claims and that these claims had been submitted as such to the Japanese arbitral tribunal. *Id.* at 637 n.19.

104. *Id.* at 637 n.19.

105. *Id.* at 638.

106. *Id.*

award-enforcement stage, not the agreement-enforcement stage, is the appropriate time to ensure that U.S. statutes were applied. The Court in *Vimar Seguros Y Reasegueros v. M/V Sky Reefer*<sup>107</sup> took this analysis one step further, concluding that a court should do everything possible to avoid interpreting a U.S. statute as declaring a claim arising under it inarbitrable.

A New York partnership (Bacchus) contracted with a Moroccan fruit supplier (Galaxie) to purchase a shipload of fruit. The form bill of lading contained a choice of law and arbitration clause.<sup>108</sup> Upon discovering the fruit was damaged during shipment, Bacchus brought suit under the bill of lading. Galaxie requested that the district court stay proceedings and compel arbitration in Tokyo. Bacchus argued that the arbitration clause was unenforceable under the FAA because it was a contract of adhesion and also violated section 3(8) of the Carriage of Goods by Sea Act (COGSA).<sup>109</sup> The district court granted the motion to stay and to compel arbitration.<sup>110</sup> On interlocutory appeal, the First Circuit Court of Appeals affirmed.<sup>111</sup> The Supreme Court affirmed.<sup>112</sup>

The Court declined to resolve any conflict between COGSA and the FAA, noting that the two statutes can be interpreted to

107. 115 S.Ct. 2322 (1995).

108. *Id.* at 2325. Clause 3 of the form bill of lading was entitled "Governing Law and Arbitration," and provided:

(1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc., in accordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

*Id.*

109. *Id.* Carriage of Goods by Sea Act § 3(8), 46 U.S.C. § 1303 provides: Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

*Id.* at 2326-27.

110. *Id.* at 2325.

111. *Id.* at 2326. The First Circuit assumed that forum selection clauses were invalid under COGSA § 3(8) and then determined that the FAA preempts this invalidation since the FAA was enacted later in time and specifically allows for enforcement of arbitration agreements in bills of lading. *Id.*

112. *Id.*

exist harmoniously. The Court held section 3(8) of COGSA does not forbid foreign forum selection clauses.<sup>113</sup>

The Court rejected Bacchus' first argument that a foreign arbitration clause lessens liability under section 3(8) of COGSA by increasing the transaction costs of obtaining relief.<sup>114</sup> The Court stated that the language of section 3(8) does not support Bacchus' conclusion since:

The statute . . . addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability. The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.<sup>115</sup>

In other words, section 3(8) of COGSA contains specific substantive obligations and procedures that a carrier may not limit or alter in a bill of lading; it does not, however, specify a particular forum in which those obligations must be enforced.

Further, the Court noted that of the sixty-six countries that have signed onto the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (hereinafter "Hague Rules"), on which COGSA is modeled; the only countries that do not allow foreign forum selection clauses have specific provisions against these clauses in their domestic versions of the Hague Rules.<sup>116</sup> Because the Hague Rules were designed "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade," the Court felt it should be consistent with the other signatories in the Rules' interpretation.<sup>117</sup> Additionally, the Court cited its familiar reasons for upholding forum selection clauses in international agreements: promotion of international comity, expansion of U.S. business into the world market, and predictability of international business transactions.<sup>118</sup>

Finally, as additional support for construing COGSA as allowing choice of forum clauses in bills of lading, the Court cited the FAA's policy of enforcing arbitration agreements where there is no independent basis in law or equity for revocation.<sup>119</sup> The

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113. *Id.* at 2325. The Court did not pass upon the validity of the choice of law clause since the arbitrator decides that question in the first instance. *Id.* at 2330.

114. *Id.* at 2326.

115. *Id.* at 2327.

116. *Id.* at 2328.

117. *Id.* (quoting *Robert C. Herd Co. v. Krawall Mach. Corp.*, 359 U.S. 297, 301 (1959)).

118. *Id.*

119. *Id.* at 2329.

Court warned that interpreting domestic legislation in a manner that would violate an international agreement could compromise the U.S. role in multilateral endeavors.<sup>120</sup>

The Court also rejected Bucchus' second argument that there is a risk that foreign arbitrators would not apply COGSA<sup>121</sup> or would interpret COGSA differently than would a U.S. court. Bucchus argued that the Japanese Hague Rules allow the carrier a defense based on the acts or omissions of the stevedores hired by the shipper. COGSA, however, makes the carrier's obligations nondelegable.<sup>122</sup> The Court stated that it is still unresolved as to whether the carrier's duty safely to load and stow cargo is nondelegable under COGSA, and in any event, it was unclear at this interlocutory stage what law the arbitrator would utilize. The claim that the carrier's liability would be lessened due to the substantive law applied in arbitration was premature since it depended upon what law the arbitrator would choose<sup>123</sup> and whether the duties under COGSA are delegable or nondelegable.<sup>124</sup>

The Court stressed the importance of two factors in making its decision: (1) the district court retained jurisdiction over the case and would have the opportunity for subsequent review at the award-enforcement stage; and (2) the Court was not persuaded that the forum and law selection clauses operated prospectively to waive the right to pursue statutory remedies.<sup>125</sup> In the absence of these two factors, the Court stated it would not hesitate to void the clause as against public policy.<sup>126</sup>

#### F. Conclusion

As evidenced by this line of cases, the Supreme Court has viewed the FAA as a congressional determination that private parties in international commercial transactions should be

120. *Id.*

121. The clause in the bill of lading stated that Japanese law was to govern any dispute. *See supra* note 108.

122. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2329 (1995).

123. The arbitrator decides the choice-of-law question in the first instance. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

124. *Sky Reefer*, 115 S.Ct. at 2329. If the duties under COGSA are delegable, then the Japanese Hague Rules are consistent with COGSA and liability would not be lessened. If, however, the duties under COGSA are nondelegable, then the Japanese law would contradict COGSA and would lessen liability. As the Court noted, it was premature to decide whether liability would be lessened substantively at an interlocutory stage. *Id.*

125. *Id.* at 2330.

126. *Id.*

allowed to arbitrate almost any statutory claim. The Court ignored the fact that the history of arbitration, which formed the backdrop of Congress' passage of the FAA, included arbitration of only common law claims and contract interpretation.<sup>127</sup> It ignored the reasons behind promotion of a federal arbitration law<sup>128</sup> and imputed to Congress an intent to promote arbitration.<sup>129</sup> Even if Congress had the intent to promote arbitration as arbitration then existed,<sup>130</sup> it is a far leap for the Court to believe Congress intended to promote arbitration of statutory claims at a time when such claims were not customarily arbitrated and before the rise of statutory regulation in the United States.<sup>131</sup>

The cases also show that the Court interpreted the New York Convention as a congressional subordination of statutory policy determinations to the broad and vague notions of international comity and the promotion of international business. Disregarding the hesitation of the United States to accede to the Convention and the subsequent reliance that Congress eventually placed upon the language of Article II(1) (requiring recognition of agreements to arbitrate involving a "subject matter capable of settlement by arbitration"), the Court rendered that language a virtual nullity by noting that Congress did not except statutory claims when it amended the FAA to implement the New York Convention.<sup>132</sup> Of course, Congress could disallow arbitration of claims arising under a statute by explicit statement in its statutes. The Court did not, however, consider the practicality of amending every statute to this effect.<sup>133</sup> Solely because of the act of acceding to an arbitration convention, the Court assumed a widespread congressional policy of promoting international business, which mandates that the interests of the business world be given priority.

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127. See *supra* Part III.

128. See *supra* Part III.B.

129. By giving effect to the parties' agreement to arbitrate, Congress certainly was not condemning arbitration, but this does not mean that it enacted the FAA to promote arbitration.

130. Arbitration was a method of resolving common law claims and issues of contract interpretation. See discussion *supra* Part III.

131. See *supra* note 47 and accompanying text.

132. See *supra* note 95 and accompanying text.

133. Congress certainly could amend the FAA to list those statutory claims it deems inarbitrable, and perhaps this is the only way to overturn the Supreme Court's determinations. However, at the time it acceded to the New York Convention, Congress believed Article II(1) would allow a country, to declare inarbitrable claims arising under its regulatory schemes to be without the formality of enumerating inarbitrable subject matter. See, e.g., *supra* note 96.

Finally, as if the Court itself felt uncomfortable with foreign arbitrators interpreting and deciding issues affecting U.S. statutes, it consistently made reference to the award-enforcement stage wherein a court could ensure that the law had been applied. The Court acknowledged that investigation of arbitral awards should be minimal and assumed that a court could readily ascertain whether the arbitrator took cognizance of and applied the applicable statute. The Court did not address the methodology for determining whether an arbitrator interpreted and applied U.S. statutes in the same way as a U.S. court would have interpreted and applied them. This concern is discussed below in more detail.<sup>134</sup>

Of particular interest is the evolution of the Supreme Court's attitude toward arbitration of statutory claims. In *Willko*, the Court took a neutral attitude and balanced the policy interests that underly the FAA and the securities laws. It did not find the FAA's "pro-arbitration" policy controlling even though Congress had not excepted the Securities Act of 1933 from the FAA. In *The Bremen*, however, the Court's neutral attitude began to change.<sup>135</sup> The Court began focusing on international business interests such as convenience and predictability, as well as the notion of "comity." When the Court decided *Scherk*, its approach firmly emphasized the factors of international business interests and comity. Curiously, however, these two factors were the deciding influence for the Court's decision, rather than the principles of the FAA or the New York Convention.<sup>136</sup> The *Mitsubishi* Court placed much more emphasis on the FAA and the New York Convention than it previously had done before. It focused again on international concerns, but in doing so, relied more on the FAA than in the prior cases. It determined that the award-enforcement stage is an appropriate time for a court to ensure that U.S. statutes were applied. By the time the Court decided *Sky Reefer*, its interpretation of the New York Convention and the FAA as mandating arbitration of statutory claims in the face of an arbitration clause had hardened. Again, the Court mechanically articulated the familiar international interests. More notably, however, the Court radically reasoned that these interests, the FAA, and the New York Convention required a court to do everything possible to avoid a finding that a statute was intended to make a claim arising under it inarbitrable. After *Sky Reefer*, it

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134. See *infra* Part V.

135. Although *The Bremen* dealt with a choice of forum as opposed to an arbitration clause, the Court in *Scherk* characterized arbitration clauses as a type of forum-selection clause. See *supra* note 63.

136. See *supra* notes 77-88 and accompanying text.

is clear that the Court will permit arbitration of statutory claims that arise in international transactions in the absence of a clear congressional direction to the contrary. However, it is not obvious what may constitute a sufficiently "clear Congressional direction."<sup>137</sup>

#### V. DANGERS TO U.S. REGULATORY SCHEMES POSED BY THE SUPREME COURT'S PRO-ARBITRATION STANCE

The Court did not state in any of the above cases that parties may opt out of U.S. regulatory statutes.<sup>138</sup> However, as long as the Court allows arbitration of statutory claims under the current system of arbitration, pre-dispute arbitration agreements can effectively prevent application of regulatory statutes. Therefore, the public policies embodied in these statutes are threatened by their relegation to arbitral tribunals. This relegation is not justified by either the FAA or the New York Convention,<sup>139</sup> nor is it justified by international business concerns or comity.<sup>140</sup> The Court has encroached upon congressional territory by engaging in judicial legislation and policy-making, thus potentially unravelling U.S. regulatory schemes and undermining congressional policies.

##### A. *The Current Structure of Arbitration Prevents Courts from Reviewing Arbitral Awards*

Because of several arguable advantages,<sup>141</sup> contracts involving international trade often contain arbitration clauses.<sup>142</sup>

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137. One can imagine a statute stating, "All claims arising under this Act are inarbitrable." In an effort to interpret the Act as allowing arbitration, one can also imagine a court deeming the language applicable only to primary claims, but allowing arbitration if the claim is secondary in nature (such as a counterclaim or a defense). Based on the *Sky Reefer* Court's language that interpreting domestic legislation to conflict with an international obligation would compromise U.S. efforts in multilateral endeavors, one can also imagine a court deeming the language applicable only to domestic arbitrations, thus allowing the claims to be arbitrated if they arise in an international transaction.

138. Indeed, the Court stated that statutory rights before a dispute arises would violate public policy for a party to waive. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *Vemar Segurus Y Reasegaras, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2330 (1995).

139. See discussion *supra* Part III.

140. See discussion *infra* Part V.C.2.

141. Whether the advantages to arbitration are in fact real is beyond the scope of this Note. However, many of the "advantages" have been criticized. "[I]nternational arbitration is also not infrequently criticized as both slow and expensive," even by its proponents. BORN, *supra* note 25, at 8. "[T]he choice of law complexities which arise in international arbitration do not comport with the



Through these clauses, the parties create their own arbitration system.<sup>143</sup> In international business transactions, parties typically provide in the pre-dispute arbitration clauses that the arbitration should be governed by the rules of a particular arbitral institution.<sup>144</sup> The main dilemma created by arbitral institutions' rules is that they result in a system of secrecy that cloaks the arbitration with impunity from judicial review.

Because the rules of arbitral institutions are designed, to further expediency and finality, the basic attributes of arbitration formalities are minimal.<sup>145</sup> Written transcripts of the proceedings are not required<sup>146</sup> and parties rarely request them.<sup>147</sup> In addition, when the parties cannot agree, the arbitrator decides what law will be applicable to the substance of a dispute under any conflict of laws rules he or she deems appropriate.<sup>148</sup> Further, arbitrators are not required to explain the reasons for their decisions.<sup>149</sup> Therefore, American Arbitration Association (AAA) awards generally consist only of a brief charge to the parties on a single sheet of paper.<sup>150</sup> The parties may request a reasoned

ideals of predictability, informality, and efficiency that arbitration promises." *Id.* at 100.

Some frequently articulated advantages of arbitration include simplicity, privacy, informality, finality, quickness, economic feasibility, and experienced, expert arbitrators. Galbraith, *supra* note 29, at 244.

142. JASPER, *supra* note 9, at 13.

143. ROBERT COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 8 (3d ed. 1987).

144. JASPER, *supra* note 9, at 13; BORN, *supra* note 25, at 4. The three prominent associations are the American Arbitration Association (AAA), the Court of Arbitration of the International Chamber of Commerce in Paris (ICC), and the London Court of Arbitration. COULSON, *supra* note 143, at 122, 132. The ICC is the world's leading international arbitral institution. BORN, *supra* note 141, at 5 n.20.

145. See COULSON, *supra* note 143, at 26 ("In general, the AAA encourages parties to streamline their procedures.").

146. See, e.g., JASPER, *supra* note 9, at 72 app. § 23.

147. See COULSON, *supra* note 143, at 26 ("In arbitration, transcripts are often a waste of money. In most cases, the arbitrator and the attorneys rely upon their own notes.").

148. LAWRENCE FREEDMAN, LEGISLATION ON DISPUTE RESOLUTION 280 (1984) (citing the Revised Rules of Arbitration of the ICC).

149. COULSON, *supra* note 143, at 29. Neither the ICC nor the AAA arbitration rules require written reasoned opinions. However, the AAA has developed a set of international arbitration rules in response to the growing number of international commercial arbitrations. AAA Rules of Procedure of the Inter-American Commercial Arbitration Convention reprinted in BORN, *supra* note 25, at 941-51 app. I. Article 28(2) of those rules requires the arbitrators to state the reasons for their award unless the parties agree otherwise. *Id.* at 948. However, Article 1(1) of those rules states that the parties must affirmatively state in writing that "these International Arbitration Rules" will govern the arbitration, a requirement many parties overlook. *Id.* at 941.

150. COULSON, *supra* note 141, at 29.

opinion, but the AAA, as a general matter, does not encourage them.<sup>151</sup> Finally, an arbitrator should have no further connection with the case once the award is signed, which includes not becoming involved in any subsequent court action.<sup>152</sup>

As a result of these informalities, a court asked to vacate an award has no evidence to help determine whether the arbitrator applied the correct law or made reversible errors. This means that the arbitrator can choose to apply some law other than U.S. law.<sup>153</sup> Without a transcript or reasoned opinion, a court will never know what law the arbitrator chose to apply to the dispute. Because arbitration awards are presumed valid and will not be reviewed for errors or misinterpretations in the law,<sup>154</sup> the court is then left with no choice but to enforce the award.<sup>155</sup>

In sum, because the rules of arbitral institutions currently are designed to expedite dispute resolution between the parties and promote finality, they do not result in awards that are conducive to judicial scrutiny at the award-enforcement stage. Therefore, the Supreme Court's reliance on the award-

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151. *Id.* The AAA does not encourage written, reasoned awards because they provide bases for a losing party to attack, thus threatening finality of the award. *Id.* A written award, in other words, would undercut one of the advantages of arbitration—finality—and open up a winning party to various attacks on the merits, thus transforming arbitration into the first step of litigation. Marta B. Varela, *Arbitration and the Doctrine of Manifest Disregard*, 49 DISP. RESOL. J. 64, 68 (1994); see also Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759, 759 ("For a court to review the merits would reduce arbitration from an efficient, private means of resolving disputes to a mere pre-litigation formality.").

152. COULSON, *supra* note 143, at 29.

153. If the arbitrator were only choosing which law to use in guiding his contract interpretation or in determining validity and elements of non-statutory claims, this would be unobjectionable. This, however, is not always the case. See *supra* Part III.

154. A court will review the award for manifest disregard, as opposed to misapplication of the law, but it is impossible to determine if an arbitrator acted in manifest disregard of the law without a reasoned opinion. See *infra* Part V.B.1.

155. Varela, *supra* note 151, at 68. As an illustration, imagine a dispute arising under a contract containing an arbitration clause, but no choice of law clause. X claims breach of contract, and Y counterclaims with an alleged U.S. antitrust law violation which would invalidate the contract. The arbitrator chooses to not apply U.S. law and decides for X on the breach of contract claim. The award states, "Judgment in favor of X against Y in the amount of \$2,000,000." X takes the award to a U.S. court for enforcement, and Y requests the court to vacate the award since the arbitrator did not apply U.S. antitrust law. The court, not able to discern from the face of the award whether the arbitrator in fact disregarded U.S. law, would enforce the award since it is wholly conceivable that the arbitrator did apply the U.S. antitrust law and found Y's counterclaim meritless. The court could not ask the arbitrator what law was applied because once the arbitrator has signed the award he has no further connection with the case.

enforcement stage to ensure application of U.S. statutes is unrealistic.<sup>156</sup>

### B. *Arbitral Awards are Rarely Vacated*

Instead of declaring certain statutory claims to be inarbitrable at the agreement-enforcement stage, the Court has relied upon the award-enforcement stage to ensure that the statute was applied.<sup>157</sup> The FAA lists four grounds for vacating an arbitral award,<sup>158</sup> and the New York Convention lists seven grounds.<sup>159</sup> Of these eleven grounds for vacatur of an arbitral

156. As Justice Stevens noted, "[t]he rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656-67 (1985) (Stevens, J., dissenting).

157. See *supra* Parts IV.C, IV.D, and IV.E.

158. Section 10 of the FAA provides:

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

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (1994).

159. Article V of the Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

award,<sup>160</sup> only three<sup>161</sup> could allow the enforcing court to vacate an arbitral award because U.S. statutory law was not applied.<sup>162</sup> However, because of the current structure of arbitration, none of these three grounds have proven workable options for a court to vacate an award.<sup>163</sup>

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(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought 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.

New York Convention, *supra* note 5, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42.

160. The FAA grounds for vacatur may only be invoked when the award was made in the United States since section 10 states that only the "United States court in and for the district wherein the award was made can make an order vacating the award." 9 U.S.C. § 10. The New York Convention applies to awards rendered outside the United States, as well as awards rendered within the United States that are considered non-domestic. *See supra* note 38.

161. These three grounds are found in section 10(a)(4) of the FAA and article V(2)(a) and (b) of the New York Convention.

162. For a discussion of the circumstances under which a party may invoke the other grounds for vacatur located in Article V(1) of the New York Convention, see Martinez, *supra* note 44, at 496-506.

163. *See discussion supra* at Part V.A.

## 1. FAA Section 10(a)(4): Arbitrators Exceeded Their Powers; Manifest Disregard<sup>164</sup>

An arbitral award may be vacated “[w]here the arbitrators exceeded their powers.”<sup>165</sup> This section of the FAA typically refers to a situation where an arbitration panel decides a claim not submitted to it.<sup>166</sup> However, many have interpreted the *Wilko* Court’s dictum, that arbitral awards will be reviewed for “manifest disregard” of the law,<sup>167</sup> to be a reference to section 10(a)(4).<sup>168</sup> It is only in the context of “manifest disregard” that section 10(a)(4) could allow a court to vacate an award on grounds that an arbitrator failed to apply a U.S. statute.

The Court did not define “manifest disregard.” Arbitral awards are not reviewed for misapplication or misinterpretations of the law.<sup>169</sup> Therefore, most lower courts have interpreted “manifest disregard” to require a showing that the arbitrator understood and correctly stated the law, but proceeded to disregard it.<sup>170</sup> In the absence of a reasoned opinion by the arbitrator,<sup>171</sup> this has been an impossible burden for those claiming manifest disregard.<sup>172</sup> “[C]onsidering the case law . . . the manifest disregard standard may be effectively dead.”<sup>173</sup>

164. Whether the manifest disregard doctrine applies to awards sought to be enforced under the New York Convention is unresolved. One case, *Brandels Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 165 (S.D.N.Y. 1987), held that the doctrine applies only to awards sought to be enforced under the domestic FAA, not the New York Convention. However, the issue has not been addressed by the Supreme Court, and the doctrine is still invoked by parties seeking vacatur under the New York Convention. For purposes of this Note, the manifest disregard defense will be deemed available under the New York Convention.

165. 9 U.S.C. § 10(a)(4) (1994).

166. For example, if the parties told the arbitrators to decide only the issue of fault, the arbitrators would have exceeded their powers if they also determined a damage amount.

167. The Court stated that the “interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.” *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (emphasts added).

168. For an argument that the manifest disregard doctrine was an articulation of Section 10(a)(4), see generally Galbraith, *supra* note 29. For the argument that the doctrine is a separate, judicially created ground for vacatur, see generally Randall, *supra* note 151.

169. Varela, *supra* note 151, at 68.

170. Galbraith, *supra* note 29, at 251-52.

171. Written arbitral awards generally contain the decisions of the arbitrators, but not their reasons. See *supra* notes 148-49 and accompanying text.

172. The author has been unable to locate any reported case vacating an arbitral award on the basis of manifest disregard of the law. Indeed, courts have

## 2. Article V(2)(a): Subject Matter Inarbitrable

An arbitral award may be vacated if a court finds that the subject matter is inarbitrable under the law of the country where enforcement is sought.<sup>174</sup> This provision is limited only by the requirement that “substantially more onerous conditions” not be placed upon the enforcement of an award than would be imposed on a domestic award.<sup>175</sup> Thus, if the United States declares certain statutory claims to be inarbitrable, a U.S. court may refuse to enforce awards resolving such claims even if the claim arose out of an international transaction.<sup>176</sup>

This would have been a viable ground for vacatur<sup>177</sup> had it not been for the Supreme Court’s determinations that claims arising under most U.S. statutes are arbitrable when such claims originate out of an international business transaction. Securities,<sup>178</sup> antitrust,<sup>179</sup> and COGSA<sup>180</sup> claims are all arbitrable, at least when arising in international transactions. Also, the Court has demanded that all U.S. statutes be interpreted to allow arbitration absent some clear congressional directive to the contrary.<sup>181</sup> Because most U.S. statutes do not contain language clearly and explicitly prohibiting arbitration, this ground for vacatur cannot be relied upon if an arbitrator fails to apply U.S. statutory law.

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gone to great lengths to avoid vacatur under this doctrine. For examples of courts’ unwillingness to use this doctrine, see Varela, *supra* note 151, at 68-71.

173. Jay. R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1679 (1991).

174. New York Convention, *supra* note 5, art. V(2)(a), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

175. New York Convention, *supra* note 5, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40.

176. Martinez, *supra* note 44, at 506.

177. Of course, if the dispute was inarbitrable a court would not order the parties to arbitrate. However, a court order to arbitrate is needed only when a party refuses to comply with an arbitration agreement. Therefore, a ground for vacatur because of inarbitrable subject matter would still be needed.

178. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

179. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

180. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322 (1995).

181. *Id.* at 2326.

## 3. Article V(2)(b): Public Policy of the Forum

A court may refuse to enforce an award because it is contrary to the public policy of the country in which the court presides.<sup>182</sup> In light of the dictum in *Mitsubishi* that a prospective waiver of statutory rights would be struck down on public policy grounds,<sup>183</sup> this has been the most frequently litigated defense under the New York Convention,<sup>184</sup> but it is rarely successful.<sup>185</sup>

In various contexts, public policy is equated with policies expressed in statutes, constitutions, or judicial decisions.<sup>186</sup> In the context of the New York Convention, however, U.S. courts equate public policy with the "most basic notions of morality and justice."<sup>187</sup> Whether or not this test is appropriate in light of the *Mitsubishi* and *Sky Reefer* dicta<sup>188</sup> remains a purely academic question since this public policy test has become a standard among the lower courts.<sup>189</sup> This standard has proven insurmountable as there has been only one refusal to enforce an award on public policy grounds.<sup>190</sup> That case appears to be

182. New York Convention, *supra* note 5, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

183. See *supra* note 104 and accompanying text.

184. Martinez, *supra* note 44, at 508.

185. *Id.* at 509.

186. Sever, *supra* note 173, at 1664.

187. Martinez, *supra* note 44, at 509 (quoting *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975) and *Parsons & Whittemore Overseas Co. v. Société Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

188. See *supra* notes 104 and 124 and accompanying text. The Supreme Court was clear that if the clauses operated as a prospective waiver of any statutory rights they would violate public policy. Additionally, the *Scherk* Court seemed to imply that public policy should be equated with the policies found in statutes when it presumed, without deciding, that "the type of fraud alleged here could be raised, under Art. V(2)(b) of the [New York Convention] in challenging the enforcement of whatever arbitral award is produced through arbitration." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974).

189. Martinez, *supra* note 44, at 510.

190. Sama, *supra* note 38, at 81. That case is *Laminors-Trefileries-Cabeleries de Lens, S.A. v. Southwire Col.*, 484 F. Supp. 1063 (N.D. Ga. 1980). Sama summarized that case as follows:

In this case, an ICC award specified two different interest rates depending upon the dates of the invoices in question. The court applied a French law provision that said that, if the award wasn't satisfied within two months of its issuance, there would be an immediate escalation of all applicable interest rates. The court found the higher interest rate to be penal in nature in light of the interest rates available under a Georgia statute, notwithstanding a Georgia statute under which parties in large commercial disputes could agree in writing to whatever interest rate they wanted.

unique since "there have been no cases in which enforcement . . . has been denied when there have been reasonable and fair procedures applied in the arbitration."<sup>191</sup>

### C. Parties May Opt Out of Regulatory Statutes

The Court's decisions to allow arbitration of statutory claims arising from international business transactions were based on comity.<sup>192</sup> In its reliance on comity, the Court made two implied assumptions: (1) that in ratifying the New York Convention, Congress determined that the goal of international business harmony overrides any other U.S. policies; and (2) that other signatories to the New York Convention would retaliate against the United States if it did not allow arbitration of its statutory claims. Neither of these assumptions are warranted.

#### 1. Congress Did Not Intend the Goal of International Business Harmony to Override All Other U.S. Policies

The Court placed great emphasis upon private parties' freedom of contract, allowing parties to international business contracts to choose the forum to resolve disputes. In reaching this determination, the Court assumed a congressional policy of promoting international commerce solely because of the accession to the New York Convention. It equated the New York Convention's uniformity in enforcement of arbitral awards with consistency in interpretation of the grounds for vacatur, an interpretation at odds with congressional equation of uniformity with exclusivity of those grounds.<sup>193</sup> In fact, Congress' hesitation in acceding to the New York Convention was only diminished after it was informed of the inarbitrability provision of Article II(1). There is no evidence, therefore, that Congress intended to promote international commerce or arbitration of statutory claims.

Indeed, "[a]s the state's responsibility for the economy has grown in this century, so, too, has the need to throw a wide net

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Sama, *supra*, at 81.

191. Sama, *supra* note 38, at 81.

192. For purposes of this discussion, comity includes the notion of protecting private expectations, promoting predictability in international business transactions, and effectuating other international business concerns articulated by the Court in its decisions discussed *supra* Part IV. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 44 (1991) ("[T]he rhetoric of comity [includes] balancing state interests, protecting private expectations in international commerce, and avoiding interference with the conduct of foreign relations . . .").

193. See *supra* Part III.C.



over extraterritorial activities that have a direct and substantial impact on its economy."<sup>194</sup> Regulatory schemes are rarely designed to protect the parties involved *per se*, but rather to control in various ways the economic system for the good of all citizens.<sup>195</sup> In this regard, economic regulatory statutes are a matter of business impositions in exchange for guiding the overall economic climate in the United States.<sup>196</sup> These impositions are, of course, made upon businesses engaged in international commerce. Any type of commerce involving a U.S. party will have a potential impact upon the U.S. economy, so the international factor does not make the congressional determinations any less relevant.<sup>197</sup>

The business world, the courts, and foreign governments do not decide such broad economic policy—the U.S. Congress does. Indeed, much of the regulation imposes significant costs upon businesses, costs which the business world would prefer to avoid. To allow parties the freedom to contract around or out of these regulatory schemes would be counter to the congressional determinations that certain business interests should be subordinated to the public interests in the economy.<sup>198</sup> Without more evidence of an intent to promote international commerce than an accession to an arbitration treaty, the courts should not have encroached upon legislative territory, but should have enforced the policies set by the legislature.

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194. Paul, *supra* note 192, at 60. "This need is particularly clear in the areas of competition policy and securities regulation." *Id.*

195. Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 503 (1981); see also William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 176 (1995) ("[L]egislation that promotes a fair stock market or free competition creates direct benefits not only for the contracting parties, but also for the community at large.").

196. For example, the function of the antitrust laws is to "preserve competition and ensure the proper operation of the free enterprise system." Brief for the United States as Amicus Curiae at 5, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), in HAROLD G. MAIER, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: CASES AND MATERIALS FOR AN ADVANCED COURSE IN CIVIL PROCEDURE 173, 177 (Vanderbilt University School of Law Class Pak, 1994) [hereinafter MAIER, Amicus Brief].

197. For example, in its brief as amicus curiae, the government noted that the policy considerations embodied in the antitrust laws "lose no pertinence or weight in an international context." MAIER, Amicus Brief, *supra* note 196, at 182 (quoting Petitioner's brief, app. A20); see also Paul, *supra* note 192, at 66 ("Promoting international business becomes a rationale for exempting conduct that may distort the domestic market . . .").

198. See Paul, *supra* note 192, at 7 ("[C]omity preserves private party [sic] autonomy to opt out of a particular system of domestic regulation. In this sense, comity expands the scope of private transactions as it restricts the scope of public regulation.").

## 2. Comity is not Applied by Other Nations

The Court assumed that interpreting domestic statutes in a manner which would violate the pro-enforcement spirit of the New York Convention could compromise the U.S. role in multilateral endeavors.<sup>199</sup> This assumption was based on the U.S. view of comity as some sort of obligation, but more than “mere courtesy and good will.”<sup>200</sup> Even if all other signatories allowed arbitration of their statutory claims, no evidence suggests that other countries would retaliate if the New York Convention were interpreted as allowing the United States to declare claims arising under its regulatory statutes inarbitrable.

Customary international law does not require a country, in the name of comity, to defer to a foreign sovereign<sup>201</sup> when foreign law would conflict with the forum’s public policy or rights of its citizens.<sup>202</sup> In fact, the courts of most other countries generally do not apply notions of comity,<sup>203</sup> and many attempt to expand their jurisdiction by applying an “effects principle.”<sup>204</sup> The English commentators believe that the application of comity is an abuse of judicial discretion.<sup>205</sup> The United States appears to be the only country that weighs competing foreign and domestic interests in the name of comity.<sup>206</sup> Even if other countries applied some notion of comity, they are on notice that other signatories to the New York Convention may consider certain issues nonarbitrable. As the government argued in *Mitsubishi*:

[B]ecause the many nations that have adopted the Convention have done so in the knowledge that there are certain issues other contracting states may consider nonarbitrable, the United States’ insistence on the nonarbitrability of [statutory] claims seems unlikely to result in either surprise or recrimination on the part of other parties to the Convention.<sup>207</sup>

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199. *Vemar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2329 (1995).

200. Paul, *supra* note 192, at 11.

201. *Id.* at 7.

202. *Id.* at 24.

203. *Id.* at 44. “Although exceptional cases do discuss comity, such cases typically involve questions of sovereignty or public international law.” *Id.*

204. *Id.* at 32. The “effects principle” is the principle that a country’s law will be applied when there is a direct, substantial, and foreseeable effect on that country’s trade and commerce. *Id.*

205. *Id.* at 41.

206. *Id.* at 44. “At best, it is only incidental that some civil-law systems arrive at results comparable to the decisions of U.S. courts.” *Id.* at 35.

207. MAIER, Amicus Brief, *supra* note 196, at 183.

The New York Convention itself allows a country to declare certain subject matters to be inarbitrable.<sup>208</sup> Signatories to the New York Convention, therefore, should not be surprised when other signatories deem particular subject matters inarbitrable. Certainly a determination of inarbitrability should not give rise to retaliation on the part of other signatories. In any event, courts of other countries do not give weight to foreign interests in their determinations, but focus solely on the public policies of their own nations.<sup>209</sup> Therefore, the Supreme Court was wrong to voice comity concerns without an explicit congressional directive.

*D. Arbitral Tribunals are not Appropriate Fora for Interpretation of U.S. Public Policy*

There are two main functions of a judiciary: (1) to provide clarity and certainty in the law through rendering decisions in specific controversies; and (2) to guard and enforce the public policies embodied in the statutory law. Arbitrators are ill-equipped to assume these functions even though statutory claims are still submitted to them. The determination of statutory claims in a forum that is not competent to perform these functions imposes serious consequences upon society.

One consequence of judicial determination of cases is that the law evolves with each individual dispute resolution. With a determination of a statute's meaning and application in each case, that particular statute becomes clearer and more precise. It is apparent that as a substantial body of precedent develops, the statute will become more defined and specific. In turn, parties subject to the particular law can plan their actions with greater certainty and predictability. By encouraging arbitration of statutory claims, courts are denied this opportunity to develop a body of precedent.<sup>210</sup>

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208. See *supra* note 36 and accompanying text.

209. Paul, *supra* note 192, at 35.

210. Professor Fiss noted:

In our political system, courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation.

Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). Although discussing settlements, Professor Fiss' reasoning is just as applicable to arbitrations. A relevant example is when the *Sky Reefer* Court was deprived of the opportunity to decide whether the duties under COGSA are delegable or nondelegable. See *supra* notes 122 and 124 and accompanying text.

Because transcripts of arbitral proceedings and reasoned opinions generally are not available,<sup>211</sup> arbitration does not provide a substitute body of precedent. The law may cease to develop if resolutions of disputes about new problems are no longer being made public.<sup>212</sup> Without precedent interpreting statutes, parties cannot confidently plan their actions in accordance with a given statute. One function of a judiciary, therefore, is not fulfilled by arbitrations of statutory claims.

Another function of the judiciary is to guard and enforce the values embodied in the regulatory statutes. Although often experts in the subject matter of a dispute,<sup>213</sup> arbitrators are not experts in any particular nation's statutory law.<sup>214</sup> Indeed, arbitrators are expected to be unattached to any national regulatory authority.<sup>215</sup> Therefore, arbitrators may not be sufficiently familiar with U.S. statutory law to understand its intricate public policies, nor in a position to guard and enforce those policies.

In litigation, certain types of actions can be settled only with judicial approval because of the effects the settlement may have on parties who did not necessarily participate in settlement negotiations, but who have a stake in the outcome.<sup>216</sup> As Professor Fiss observed, this task is not fulfilled outside of the litigation context:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord

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211. See *supra* Part V.A.

212. See William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 674 (1989) (suggesting that the "evaluation of a country's substantive law" would stagnate if courts are not presented with disputes about new problems).

213. Galbraith, *supra* note 29, at 244.

214. See Von Mehren, *supra* note 13, at 609.

215. BORN, *supra* note 141, at 6. Indeed, even the Supreme Court has noted that an advantage of arbitration is neutrality and that arbitrators are not beholden to any nation's laws. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

216. One such example is class actions. Rule 23(e) of the U.S. Federal Rules of Civil Procedure requires judicial approval of a settlement. FED. R. CIV. P. 23(e). Also, "[t]he [Tunney] Act establishes procedures for giving outsiders notice of a proposed settlement in a government antitrust suit and requires the judge to decide whether a settlement proposed by the Department of Justice is in 'the public interest.'" Fiss, *supra* note 210, at 1081.

with them. This duty is not discharged when parties settle [or arbitrate].<sup>217</sup>

Since the focus of arbitration is solely on the parties involved and does not necessarily take into account any policies which may be embodied in a particular country's statutes, its effects on society and other third parties, as well as the public policies incorporated in a nation's statutes, go unnoticed.<sup>218</sup> As Professor Fiss aptly noted, "The settlement of a school suit might secure the peace, but not racial equality."<sup>219</sup>

With regard to statutory law, arbitrators are ill-equipped to assume the functions of a judiciary. Regulated parties require a developed body of precedent on applicable statutes to effectively plan their actions in conformity therewith. In addition, statutes contain policies which are designed to protect the public, and the judiciary interprets and enforces these policies to ensure the attainment of congressional goals. Since neither of these functions can be performed through arbitration as it currently exists, private parties attain the benefit of individual peace at the expense of the U.S. public. Before irreparable damage is inflicted upon the U.S. public and its regulatory scheme, Congress should amend the FAA to forbid arbitration of any claims arising under a U.S. regulatory statute and prevent the enforcement of any award rendered upon such claim.

## VI. CONCLUSION

Arbitration developed as an alternative method of resolving issues of contract interpretation or common law disputes. In the United States, the courts were originally reluctant to enforce pre-dispute arbitration agreements, but enforced only arbitration agreements which were made after the dispute arose. State legislatures eventually passed arbitration acts which mandated enforcement of pre-dispute agreements. Congress passed the FAA to bring the federal courts' policy regarding these agreements in line with the states. In addition, Congress later overcame its skepticism and ratified the New York Convention with the

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217. Fiss, *supra* note 210, at 1085. Although Professor Fiss was discussing a deficiency of settlement, his observation is applicable to arbitration as well. Both forms of dispute resolution focus on the private interests of the parties involved with no consideration of outside interests or effects.

218. In this regard, see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 526 (1974) (Douglas, J., dissenting) ("If there are victims here, they are not Alberto-Culver the corporation, but the thousands of investors who are the security holders in Alberto-Culver.").

219. Fiss, *supra* note 210, at 1085.

assumption that a country could declare certain subject matters inarbitrable under its provisions. No evidence exists which shows Congress intended to alter this *status quo* by allowing the arbitration of statutory claims.

The Supreme Court, through a series of cases, interpreted congressional intentions, in enacting the FAA and ratifying the New York Convention, in a contrary manner. It focused on a vague notion of comity, including the promotion of international commerce in world markets. It noted the special role forum selection clauses have in obtaining vital certainty and stability in international commercial contracts. It warned against forcing U.S. laws on the world and the dangers that such action would pose to U.S. multilateral endeavors. To the Court, these factors imputed a congressional intention to allow arbitration of statutory claims, at least where Congress did not clearly declare a subject matter inarbitrable. However, the Court was not justified in relying upon these factors for two reasons. First, the ratification of the New York Convention is not sufficient evidence that Congress intended to promote international commerce. Second, other nations do not utilize the same notion of comity applied by the U.S. courts. The United States seems to be the only nation that will subordinate its domestic policies to other countries' domestic law based on some sense of obligation. The Court did not necessarily approve of arbitrators failing to apply U.S. regulatory statutes. However, the Court's decision to interpret all statutory claims as arbitrable in the absence of a clear congressional declaration to the contrary will have the same effect because of the current structure of arbitration.

The Court believed and emphasized that an opportunity for a judicial second look existed at the award-enforcement stage. The only three grounds for vacatur because of an arbitrator's failure to apply U.S. regulatory statutes, however, are rarely successful. First, in the wake of the Supreme Court's mandate that all statutes be interpreted as allowing arbitration, lower courts have strictly interpreted the grounds for vacatur and have devised demanding burdens which are virtually impossible for a party seeking vacatur to overcome.<sup>220</sup> In addition to these stringent standards imposed by the lower courts, parties seeking vacatur face an even more insurmountable obstacle—obtaining tangible evidence of the arbitrator's reasoning. Given that arbitral awards generally consist merely of the decision without expounding upon the reasoning behind it, as transcripts of hearings are rarely taken, arbitrators have no further involvement with the case after the award is rendered, and evidence to prove some sort of

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220. See *supra* Part V.B.

manifest disregard of the law is usually not available. Therefore, a regulated party is essentially free to avoid application of regulatory statutes by inserting an arbitration clause into its contracts. The harmed party then has no recourse.

Injustice between the parties to the arbitration is not the only pitfall to arbitrating claims arising under regulatory statutes. Society is also harmed because it cannot plan its actions with the degree of certainty it could obtain if a body of precedent was developed by the judiciary. Further, the goals and policies of Congress in regulating certain parties are not given effect. Therefore, private peace is secured at the expense of the public good.

The Court originally expressed a mere preference for arbitration, finding neither the FAA nor the New York Convention absolutely controlling. That preference has evolved into an unequivocal mandate which the Court has no intention of revoking. The FAA and the New York Convention have become dangerous tools in the Court's pursuit of international harmony. Before irreparable damage is done to U.S. regulatory schemes, Congress should amend the FAA to provide that any claim arising under a U.S. regulatory statute is inarbitrable and that any award rendered upon such a claim is unenforceable.

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