Toward a New Federal Law on Arbitration

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

The book is dedicated to my daughter, **Sara Lucille Carbonneau***, a talented graduate of Sarah Lawrence College, who is interested in Asian culture and medicine. She is the true miracle in my life. She is now beginning to write her own book and I wish her the very best—all of the satisfactions and achievements that her rich talent warrants.*

Contents

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Introduction

AT THE OUTSET of my career in legal scholarly writing, I engaged in a study and evaluation of the 1980 and 1981 French Decrees on arbitration. After translating them and speaking briefly to several established scholars in the area, in particular Philippe Fouchard, I understood how remarkable an achievement the French legislation was both from a substantive and compositional point of view. It codified—in the civilian sense of that term—years of French court decisional law on arbitration. In their assessments of arbitration, French judges often were influenced by Jean Robert, the first leading expert on French arbitration law, and the editorial group at *La Revue de l'Arbitrage*. The principles that were incorporated into the law were the expression of a perfect regulatory equilibrium that balanced the public interests of the State and the practical needs of an emerging private adjudicatory system. The laws had been elaborated in the final moments of the Valéry Giscard d'Estaing administration before the socialist regime of François Mitterand "took power." It was written by an *aggrégé* with a recognized talent for statutory drafting. At the time, it was the best statement of arbitration law in the world. The language was molded by a trinity of contradistinctive virtues; it was terse, complete, and elegant. It said what needed to be said, beautifully. Since the end of WWII, the French experience with arbitration had been both unique and intense. The French were the first to understand the critical importance of arbitration to international commerce. The recent reformulation of the law bears a technocratic imprint that robs it of some of its substantive and linguistic genius.

After the French statute, the next milestone was the 1996 UK Arbitration Act. This statute, also written by a single individual, ably articulated not only the governing legal doctrine, but also the essential principles needed to organize arbitrations and manage their operation. It merged legal rules with practical reality and thereby revealed how the legal system should regulate the recourse to arbitration. The 1996 Act, however, was a statute, not a set of code provisions. It had a narrative quality that could not rival the poetic density of codified law. I taught the English statute in a number of settings, presenting

it as the best expression of the rules of contemporary arbitration practice. The focus upon the structure and content of the English statute also allowed me to understand the fragile character of language and the virtual impossibility of crafting fully stable general legal propositions. Class discussions demonstrated that the strength of cohesive language could be decimated by a barrage of analytical variables. What appeared to be rock-solid propositions at the beginning of the process became, upon critical examination, shattered rules and concepts. I did not pursue similar exercises with the arbitration provisions of the French Code of Civil Procedure, but I suspect that all general organizing statements would suffer a similar fate in these circumstances. Even unrelenting efforts cannot capture an unattainable form of perfection.

After being an academic for so long, it is difficult for me to make decisions and reach conclusions. Ponderous consideration applies to nearly everything. For example, I was hastened to assess *Hall Street Associates* and came to an evaluation that I completely revised nearly two years later after a period of teaching and reflecting upon the case. The possibility of reconsidering and rewriting—of suspending the erosion of time, as it were—transforms academic legal work into a quest with eternal trappings. As the years passed, I have replaced my professional arrogance with a more humble sense of mission. After publishing an article advocating for the inarbitrability of civil rights, I realized that the opinions which mattered in terms of lawmaking were the U.S. Supreme Court's—not mine. I abandoned my lofty perch and its associated pretensions and resolved to elucidate and explain the Court's teachings on arbitration to lawyers and law students. There was a veritable revolution afoot and the members of the legal community—present and future—needed to be made aware of it and its implications. The Court's doctrine on arbitration was reworking the Bill of Rights and the core guarantees of U.S. citizenship. Procedural due process itself was being re-evaluated and redefined.

Therefore, in light of this experience, having now arrived at the twilight of my career in legal scholarship, I have undertaken to write an American statute on arbitration. For all the reasons that I related about the difficulty of writing, it has been a daunting task. Moreover, the prospect of enactment is remote. The partisan differences that divide the U.S. Congress—differences that inhere in the fabric of American society itself—are true obstacles to implementation. The proposed statute is, admittedly, a "swing for the fences" that will probably not yield a score or even a hit. Nonetheless, the work of the U.S. Supreme Court on arbitration deserves a more modern and complete statutory expression. The Court's rulings are as creative and astute a doctrine

as any that results from the French Court of Cassation or the English High Court. In its present form, the FAA is ancient and has been completely outdistanced by the very decisional law that it has generated. There is a critical need for a restatement of the law. The United States is entitled to a worthy statutory statement of its excellent principles on arbitration.

There is little that is ideological in the statute that I am proposing. I have not used my academic work on arbitration as a platform for expressing political convictions. I attempted to do so while on a recent sabbatical leave, but concluded that the effort was misguided and should be abandoned. The ideological references in the text soon became substantive footnotes that were, upon further reflection, dropped from the work entirely. My fondness for arbitration is not political. It arises from my temperament and substantial misgivings about the adversarial trial. Arbitration is sensible and effective. It works. For the most part, it provides parties with fair and useful outcomes. Most significant, it makes international litigation a reality. I believe that arbitration is a minor miracle. It is a solution-oriented process that is intolerant of persistent failure.

The indisputable ideological element in the U.S. law of arbitration is adhesive arbitration. *AT&T Mobility v. Concepcion* and *The American Express Merchants' Litigation* addressed the issue head-on and clearly favored arbitral autonomy over consumer protection. Arbitration triumphed in both cases. In terms of adhesive arbitration, I find it difficult to accept the legality of unilaterally drafted imposed contracts. That bargain seems un-American because it is the result of overpowering strength that arbitrarily deprives affected citizens of their freedom of choice. It smacks of contract formation by browbeating. In its wisdom, the Court has been adamant about the legitimacy of adhesion. The proposed statute, therefore, accepts the existence of adhesive arbitration, but institutes an arbitration process that favors the interests of the weaker party structurally and decisionally. Otherwise, the proposed statutory text is devoid of any conscious political views or ideological positions. It represents the best statement I could muster about how a democratic society with a common law legal system, dedicated to capitalism, could effectively and productively regulate arbitral adjudication in its own best interests and that of arbitration as well.

I have little doubt that the statutory language I have crafted is both frail and flawed. It can and will break down if too many factual variations are loaded onto it. Nonetheless, the proposed statutory provisions are solid general propositions that provide essential guidance in the regulation of arbitration. They have been worked and reworked, drafted and redrafted—sometimes

the editing led to a new formulation that endorsed an entirely different rule than the one originally intended. In the end, assuming some sort of external adoption or evaluation, the courts will provide the proposed statute's ultimate meaning. A statutory framework is meaningful only once it is applied. It derives its significance from actual cases and controversies.

As the table of contents reveals, the book is divided into three major Parts, organized in a logical progression. Part I describes the origins of the FAA and its statutory content. It demonstrates how the Court used the FAA as a springboard for elaborating a federal judicial doctrine on arbitration. The discussion identifies the essential principles of the decisional law on arbitration, assesses the impact of landmark cases, criticizes the weaknesses in some of the rulings, and argues for a new statute that embodies the case law developments. Part II contains the text of the proposed statute, and Part III provides commentary explaining each provision from the drafter's perspective. Thereafter, readers have the task of developing their own assessment of the proposed statute and arbitration.

PART I

The Current Federal Law on Arbitration

Introduction to Part I

THE CONTEMPORARY PRACTICE of arbitration originated, in all likelihood, as an unintended benefit of WWII and the concomitant increase in North American–European relations. Military activities generated familiarity with, and an appetite for, foreign cultures and lifestyles, from which a de facto international marketplace eventually emerged. The conduct of regional business also coincided with, and was reinforced by, the new political responsibilities of the United States resulting from the Cold War. American foreign policy, as well as the NATO military alliance, were dedicated to containing the influence of communism throughout the world. United States' policies endeavored to proclaim the benefits of capitalism and demonstrate that freedom was essential to human dignity. Moreover, when business dealings grew in foreign venues with foreign partners, they required a workable and effective system of transborder adjudication. Claims of commercial breach in "anational" circumstances generally could not be effectively processed through domestic legal systems. Cultural, political, and legal diversity demanded recourse to a "truly international" adjudicatory process capable of yielding finality and providing for the conclusive enforcement of outcomes.

In the latter part of the twentieth century, many countries felt impelled to give at least lip service to the growing international consensus on arbitration. By and large, these countries adopted the UNCITRAL Model Law on International Commercial Arbitration. The uniform law embodied the global consensus on arbitration. Along with commercial lawyers, political and business leaders were beginning to understand that arbitration was a useful counterpoint to the parochial forces of tradition in judicial litigation and the inefficient and unworkable outcomes they generated. Moreover, many countries wanted to profit from international commerce and reap the revenue associated with hosting international arbitral proceedings. Adoption of the UNCITRAL Model Law and even the ratification of the New York Arbitration Convention, however, might represent a merely symbolic adherence to arbitration. By contrast, the countries of the former Western military

alliance were the stalwart proponents of the reconfigured international economic order and the recourse to arbitral adjudication. In fact, the global endorsement of arbitration, symbolized by the UNCITRAL model law, was initially forged by court decisions in France, England, and the United States. Moreover, France and England enacted statutes on arbitration that bettered in many respects the uniform law. North American-European democracies championed arbitration and engaged unreservedly in cross-border business.

One of the great ironies of contemporary global practice in arbitration is that the United States, acknowledged as one of the leading jurisdictions in the development of arbitration law, lacks a modern arbitration statute. Like the tattered urchin in a Dickens tale, the United States stands alone among its peers because it has failed to enact a contemporary statutory framework on arbitration. It relies on case law to voice its exceptional support for the arbitral process. Given its structure and content, and despite its positive attributes, there can be little doubt that the Federal Arbitration Act (FAA) is in need of an overhaul.

The statute contains omissions, gaps, and approximations. The American statutory statement on arbitration can no longer be forced to fit into a "special interest" mold that reflects the concerns of a bygone age and the dynamics of pre-*Erie* federalism. The FAA should stand as a robust federal declaration on arbitral adjudication, presenting it as a legitimate and necessary substitute for judicial litigation and adversarial trials. A reconsidered statute should acknowledge that arbitration is vital to civil justice in both the domestic and transborder context. Rather than rely on federalization, the new law should establish federal question jurisdiction for matters of arbitration, thereby rendering unnecessary the patchwork of judicial doctrine that fills the current jurisdictional void. Relatedly, a modern version of the FAA should expressly establish that U.S. citizens possess a legal right to engage in arbitration—a right protected by federal law. These legal dispositions would make apparent the principles upon which the U.S. law of arbitration is built. The U.S. legal system needs to have a statute that announces and embodies its staunch support for arbitral adjudication. The American legislation should tower over any counterpart. It is untoward to have the U.S. business and legal communities rely on an obsolete statute and the haphazard developments of case law for an accounting of the law applicable to arbitration.

A reformulated FAA should recognize the several (and separable) usages of arbitration. Labor arbitration borne of collective bargaining agreements ("CBA arbitration" or "labor arbitration"), maritime arbitration, State-Investor arbitration (SIA), and adhesive arbitration are related, but distinct forms of arbitration. Their unique characteristics should be identified

and rules propounded that fit the contours of their particular characteristics: for example, the union's role and the quid pro quos in the operation of CBA arbitration; the recognition of third-party interests (e.g., insurers) in maritime arbitration; the political undertow of natural resources issues and the role of special interest groups in SIA; and the need to compensate for party disparity in adhesive arbitration. A viable statute must articulate regulations that are relevant to the basic mechanism of arbitration, but it cannot fail to address the customized versions of the remedy.

Another major lacuna in the present version of the FAA involves the concept of subject-matter inarbitrability: What substantive areas, if any, cannot be submitted to arbitration as a matter of law? The current law fails to address the issue, except for an oblique reference to the employment contract exclusion and the definition of the statute's narrow scope of application (limiting it to interstate and foreign commerce and maritime transactions). The case law rule leaves the application of the subject-matter inarbitrability defense to the language in specific federal laws in which Congress expressly prescribes judicial recourse as the sole means of adjudicating the relevant statutory claims. In reality, the U.S. Supreme Court has never found the language of a statutory restriction clear enough to enforce. The decisional rulings, therefore, establish virtually unlimited subject-matter arbitrability—a standard that should be expressly incorporated in a reformulated statute.

There are numerous other additions and emendations that a revamped statute should contain: a provision describing the role of courts in relation to the arbitral process; the requirements for establishing the contract validity of the arbitral clause and the submission under federal law; the "one-off" character of arbitral proceedings; the question whether to permit the clarification of awards and clarification's relationship to the *functus officio* doctrine; the need for reconsidered grounds in award enforcement; the choice of counsel and the type of adversarial representation that is tenable in arbitral proceedings; the authority of arbitrators to decide jurisdictional challenges and matters of contract arbitrability; the function of emergency or interim arbitrators; the provision of reasons with awards and their express or "unofficial" communication to the parties; the rights of nonsignatory parties in relation to arbitration agreements and the arbitral process; the desirability of privacy and confidentiality in arbitration and its impact on lawmaking; the rights and duties of arbitrators (as to the proceedings, the ruling, and disclosures); the recourse to internal arbitration appeal as a substitute for court supervision; the consultations between the arbitrator and the parties in terms of the award; and the basic rules for regulating international commercial arbitration and SIA.

The domestic decisional law and global arbitral practice are both fertile sources of new content for the FAA. Previously, the U.S. Congress impliedly delegated the fashioning of U.S. arbitration law to the U.S. Supreme Court. Given the substantial character of the Court's work, it is time to encourage Congress to take a different position that requires it to codify the Court's decisional contribution and align it with, and enable it to guide, transborder standards. The systemic necessity of arbitration makes an improved and amplified U.S. statutory framework on arbitration indispensable. Government budgetary uncertainty guarantees the future need for arbitral adjudication. Arbitration makes little or no demand for government subsidies. Simply adopting the UNCITRAL Model Law as a framework is not a sensible course of conduct. The American experience in arbitration is too energetic and intelligent to be effectively encapsulated in a predetermined, fixed statutory framework that is limited by its own bureaucratic, methodological, and linguistic flaws. There needs to be a remarkable American statutory statement on the regulation of arbitration because the American judicial contribution to the crafting of arbitration law is nothing less than remarkable. An acceptable statutory statement is one that is unprecedented in the clarity and elegance of its language and in the brilliance and lucidity of its content. It should become the mandatory point of reference for other legislative undertakings in the area.

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The Statute

THE U.S. ARBITRATION Act[1] (also known as the Federal Arbitration Act [FAA]) was enacted in the first quarter of the twentieth century.[2] It was special interest legislation promoted by and benefitting commercial groups from New York.[3] These enterprises wanted to avoid the legalistic twists and turns of judicial litigation and have customary trade-based rules resolve the disputes that emerged in their transactions.[4] They also wanted colleagues to "judge"

1. 9 U.S.C. § 1-16 (2012).

2. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 124–25 (2012) [hereinafter CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION]. The original law contained Sections 1–14 and was enacted on February 12, 1925. *Id*. at 125 n.4. The law today contains much of its original language, but a few adjustments—including the addition of two chapters and two sections to the first chapter—have been made by amendment. *Id*.

3. THOMAS E. CARBONNEAU, THE REVOLUTION IN LAW THROUGH ARBITRATION (2008), *reprinted in* CARBONNEAU ON ARBITRATION: COLLECTED ESSAYS 3, 16–22 (2010) [hereinafter CARBONNEAU, THE REVOLUTION IN LAW THROUGH ARBITRATION] ("The impetus for its enactment centered around a recent New York state law on arbitration. The New York Chamber of Commerce believed that a federal law on arbitration was necessary to complement the state legislation that favored arbitration. In the age of *Swift v. Tyson*, federal courts needed a federal statute on arbitration to enforce arbitration agreements when they ruled in litigation on the basis of diversity. The FAA, therefore, was not a sequel to the Magna Carta; it represented, in fact, a small concession to the commercial interests in New York City. In effect, the FAA reinforced the mercantile interest in self-regulation and customized adjudicatory procedures. It represented a legislative acknowledgement of the self-governing ethos of trade and commerce—a ceding of power to affected groups permitting expedient solutions to commercial and transactional disputes."); *see also* Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. Rich. L. Rev. 1499 (1995).

4. CARBONNEAU, THE REVOLUTION IN LAW THROUGH ARBITRATION, *supra* note 3, at 18 n.47 ("The New York business community wanted to avoid the procedural intricacies and delays of judicial litigation." (citation omitted)); *see also* THOMAS E. CARBONNEAU, THE RECEPTION OF ARBITRATION IN UNITED STATES LAW (1998), *reprinted in* CARBONNEAU ON ARBITRATION: COLLECTED ESSAYS 77, 83–84 (2010) [hereinafter CARBONNEAU, THE RECEPTION OF ARBITRATION IN UNITED STATES LAW].

their business conduct.[5] The record of the legislation's presentation to, and discussion in, the U.S. Congress was devoid of any indication that it would transform—in fact, revolutionize—civil adjudication in the United States.[6]

The FAA, in effect, was a small, practically invisible concession by political leaders to mercantile groups. In fact, the proponents of the legislation emphasized in committee and on the floor of the Congress that the bill would not alter the legal rights of American citizens.[7] As a result, even though it legitimated and authorized recourse to arbitration, the bill incorporated a number of jural procedures dedicated to the preservation of legal rights, thereby "judicializing" several aspects of the arbitral process—for example, the use of a jury to determine the factual existence of the agreement to arbitrate or authorizing arbitrators to issue subpoenas against third parties to guarantee

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5. *See, e.g.,* Jeffery W. Stempel, *Twentieth Annual Corporate Law Symposium: Twenty Years after* Shearson/American Express v. McMahon: *Assessing Investors' Remedies: Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 386–87 (2008) (noting that a distinguishable quality of early arbitration was the prevalence of arbitrators with particularized industry expertise); *see also* CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION, *supra* note 2, at 2–3 ("Arbitral Adjudication responds well to the character of commercial transactions and the disputes that disrupt them.... [T]he parties to the arbitration have the right to select the arbitrators. The designated arbitrators ordinarily have considerable expertise in the field of activity. Their commercial experience allows them to reach determinations that reflect merchant practices and expectations. By choosing to arbitrate, therefore, business parties avoid inexpert judges, legalistic solutions, and undesirable publicity.").

6. *See* Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147 (2010) ("The Federal Arbitration Act (FAA) that Congress adopted in 1925 bears little resemblance to the Act as the Supreme Court of the United States has construed it.... The Supreme Court's construction of the statute, especially in the last twenty-five years, amounts to a judicially created legislative program, imposed without congressional input, that has vastly expanded the reach and focus of the original statute."); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U.L. REV. 99 (2006) [hereinafter Margaret L. Moses, *Statutory Misconstruction*]; Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 361–79; *see also* CARBONNEAU, THE REVOLUTION IN LAW THROUGH ARBITRATION, *supra* note 3 at 17–18 ("The FAA ... was a far cry from a comprehensive statute on arbitration. Its goals were modest—to rehabilitate arbitration for groups within the commercial community.... The FAA's actual impact upon the legal system was unexpected both in terms of size and intensity. The evolution and progressive interpretation of the statute, in effect, resulted in a redefinition of civil justice, a modification of the Bill of Rights, and the implicit emendation of the U.S. Constitution.").

7. 65 CONG. REC. 1,931 (1924) (Statement of Rep. Graham) ("The [FAA] ... does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed.... It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement [to arbitrate] in commercial contracts and in admiralty contracts."). For a thorough analysis of the congressional discussion preceding the FAA's enactment, *see* Moses, *Statutory Misconstruction, supra* note 6, at 101–11.

the creation of a thorough evidentiary and documentary record upon which to decide.[8] Safeguarding legal rights was a persistent theme in the legislation, even though that approach could make arbitration less efficient and effective.[9] In a word, a curious cordon of legal vigilance surrounded the legislative authorization of arbitration. It was critical to the drafters that the statutory acceptance of arbitration implicate only trade associations and, even then, not infringe upon their members' constitutional guarantees of citizenship. The Act was intended principally, if not exclusively, to give trade associations legally enforceable access to a form of binding arbitration that remained committed to the essential values of procedural justice.[10]

Despite its concern for elements of legality, the FAA was an early example of national legislation favoring arbitration.[11] It came into existence during the infancy of the modern rehabilitation of arbitration.[12] It may have anticipated, possibly inspired, the revamping of the statutory regulation of arbitration

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8. Jarred Pinkston, *Toward a Uniform Interpretation of the Federal Arbitration Act: The Role of 9 U.S.C. § 208 in the Arbitral Statutory Scheme*, 22 Emory Int'l L. Rev. 639, 690 (2008) (discussing the broad evidence gathering authority arbitrators enjoy under the FAA); Carbonneau, The Law and Practice of Arbitration, *supra* note 2, at 170 ("[A]rbitrators have broad, even unusual, evidence-gathering powers. Their authority to demand compliance with evidentiary requests extends to nonarbitrating parties. . . . [W]hen the FAA governs the arbitral proceeding, the arbitral tribunal has the same subpoena powers as a court of law."); *see also* 9 U.S.C. § 7 (1988).

9. Carbonneau, The Law and Practice of Arbitration, *supra* note 2, at 167–73 (noting that FAA §§ 2-4 and 7 demonstrate "the drafters' preoccupation with the protection of . . . the due process rights of American citizens," arguing that promoting arbitration and protecting procedural rights are often conflicting goals that result in "peculiar and cumbersome" procedures, a reality that threatens to undermine the FAA's primary objective of "integrat[ing] arbitration into the procedural guarantees of the legal system").

10. *Id*. at 126 ("The FAA was deemed a procedural enactment that created a statutory framework for the enforcement of arbitral agreements. 'The principal support for the Act came from trade associations dealing in groceries and other perishables from commercial and mercantile groups in major trading centers. . . . Practically all who testified in support of the bill . . . explained that the bill was designed to cover contracts between people in different states who shipped, bought, or sold commodities. . . .' " (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 338 U.S. 395, 409 n.2 (1967) (Black, J., dissenting))).

11. *See* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L. Rev. 101 (2002) (arguing that the FAA was enacted to promote enforcement of arbitration at both the state and federal level); *see also* Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 83–88. ("The FAA was one of the first modern arbitration statutes, and its enactment attested to the coming-of-age of arbitration in the United States.").

12. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 Case W. Res. L. Rev. 91, 92 (2012) ("There was a time when the judiciary was hostile to arbitration and refused to enforce arbitration agreements." (citing Headley v. Aetna Ins. Co.,

in other jurisdictions. Prior to the historical reconsideration of arbitration, however, legal systems, acting principally through courts, depreciated arbitral adjudication and its institutional standing.[13] According to the basic sentiments of the time, the mission of the law could not be accomplished by an inferior adjudicatory mechanism.[14] Additionally, judges wanted to "guard their turf" under the pretext of maintaining the solemnity of the law.

Courts refused to enforce arbitration agreements until adjudicatory proceedings had concluded, thereby allowing parties to avoid their obligation to arbitrate any time prior to the rendition of the award.[15] In other legal systems, arbitral determinations were subject to thorough judicial scrutiny—on the basis of both fact and law.[16] Courts generally believed that arbitrators

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80 So. 466, 467 (Ala. 1918); Rison v. Moon, 22 S.E. 165, 167 (Va. 1895))). These pre-1925 "hostile" judicial rules disfavoring arbitration seem to have been derived from earlier common law dispositions on arbitration that came over from England. *See* Vynoir's Case, (1609) 77 Eng. Rep. 595, 596 (K.B.) (allowing a party to an arbitration to abandon the procedure and pursue his claims in court). For a discussion of *Vynoir's Case, Headley, Tobey v. County of Bristol, infra* note 15, and other early judicial analyses of arbitration, *see* Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 Charleston L. Rev. 331, 333–38 (2010).

13. Wilson, *supra* note 12, at 92; *see also* Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 81 ("Nineteenth century United States courts espoused an inhospitable view of arbitration, perceiving it as an unwarranted intrusion into the domain of judicial authority." (citation omitted)); Thomas E. Carbonneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce (1984), *reprinted in* Carbonneau on International Arbitration: Collected Essays 200, 207–29 (2011) [hereinafter Carbonneau, Arbitral Adjudication).

14. *See* Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 82 (in the eyes of the courts, "arbitrators merely attempted to 'play judge' and could not render cogent adjudicatory determinations.").

15. *Id.* The rule precluding enforcement of arbitral agreements until arbitration concluded "was manifestly intended to discourage party recourse to arbitration and to prevent the non-judicial framework from acquiring a legitimate institutional stature, inasmuch as parties would not agree to arbitrate if one of the parties (the likely loser) could withdraw from the proceeding prior to the award." *See also* Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14, 065) ("Courts of equity do not refuse to interfere to compel [arbitration] because they wish to discourage arbitrations, as against public policy. On the contrary, they [will]…enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.").

16. Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 82–83 ("English courts traditionally engaged in a merits review of arbitral awards through the stated case procedure. This form of judicial supervision reflected the view that

were ill-suited and incapable of performing the demanding task of adjudicating disputes.[17] Arbitrators were often experts in a business field and had little or no training in law. They possessed only a modest understanding of, or sensitivity to, the social implications of decisional work. Moreover, they lacked the temperament and possessed few, if any, of the character traits that enabled adjudicatory decision-makers to exercise judgment over the interests of others.[18] At best, arbitrators could find facts. They were untrained in legal reasoning and, therefore, could not deliver competent adjudicatory results.[19]

Many courts, in fact, deemed the contractual surrender of judicial relief prior to the emergence of a dispute an illegal act, violative public policy.[20]

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arbitrators, because they lacked judicial training, might compromise the integrity of the substantive law in their rulings. Judicial second-guessing of arbitral determinations was not expressly integrated into the United States law on arbitration; the proximity between English and American law, however, did result in the incorporation of unreasoned awards into United States arbitral practice. In England, the rendering of arbitral awards without the statement of reasons was a means of avoiding judicial supervision of the merits; in the United States, this practice, presumably adopted simply for historical reasons, contributed further to the aura of illegitimacy that surrounded the arbitration process." (citations omitted)); *see also* Thomas E. Carbonneau, Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions (1984), *reprinted in* Carbonneau on International Arbitration: Collected Essays 345, 347–53 (2011) [hereinafter Carbonneau, Rendering Arbitral Awards with Reasons].

17. *Id.*

18. *Id.*

19. *Id.; supra* notes 14–16 and accompanying text.

20. Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 82–83 ("[I]n most statutes on arbitration, the agreement to submit an existing dispute to arbitration, the submission, was preferred to . . . the compromissory clause, the agreement to submit future disputes to arbitration. In many cases, the submission was the only legally valid type of arbitration agreement." (citations omitted)); Carbonneau, Arbitral Adjudication, *supra* note 13, at 224 n.88 ("The question of the legal validity of the compromissory clause is a case in point. The *Code de procedure civile* only provided for regulation of a *compromis* ["submission"]. . . . Article 1006 required that a valid *compromis* define the subject matter of the dispute and appoint the arbitrators. It did not have any provisions specifically relating to a *clause compromissoire* ["compromissory clause"]. . . . In L'Alliance c. Prunier, Judgment of July 10, 1843, Cass. Civ., 1843 S. Jur. I 561, the *Cour de cassation*, the French Supreme Court . . . held that . . . article 1006 . . . applied to both the *compromis* and the *clause compromissoire*. Therefore, a valid agreement to submit future disputes to arbitration had to define the subject matter of the dispute and appoint the arbitrators. Because the *clause compromissoire* could not satisfy these requirements, the Court concluded that such clauses were unlawful under French domestic law. The practical consequences of *L'Alliance* were unmistakable. Because parties involved in a contractual dispute are unlikely to reach a mutual consensus about anything, . . . and because mutual consensus is an indispensable element of any arbitration agreement, the only effective arbitration agreement under the *Code de procedure civile* was one relating to future disputes. In effect, the *L'Alliance* holding gutted the possibility of recourse to arbitration in French domestic commercial matters." (citations omitted)).

The arbitral clause, therefore, was an invalid and unenforceable agreement. Often, legislation confirmed arbitration's questionable character and limited legitimacy.[21] Under the ideological convictions prevailing at the time in most legal systems, the decision to arbitrate was both an infringement upon judicial jurisdiction and a dicey and precarious exercise of party discretion. To protect citizens from their own shortcomings, the law provided that parties could engage in arbitration only after a dispute had actually arisen—presumably, when the contracting parties understood their interests more clearly and could more knowledgeably select the remedial process that would provide them with better recourse.[22] An ill-considered abandonment of judicial relief was unwise and likely to be regretted.

Accordingly, the submission agreement became the sole contractual vehicle for engaging in arbitration.[23] Parties already in the midst of discord, however, were not prone to agree about anything—let alone the particulars of designing a specialized process of private adjudication. By making the arbitral clause illegal, the legal system—for all intents and purposes—extinguished the availability of arbitration in the overwhelming majority of cases. As a result, judicial litigation remained the principal and basically unchallenged means of adjudicating disputes.

Despite its special interests origins, the FAA rebalanced the legal regulation of arbitration.[24] The text of the statute, even though restricted by its

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21. *See, e.g.,* Carbonneau, Rendering Arbitral Awards with Reasons, *supra* note 16, at 350 (discussing England's Common Law Procedure Act, 1854, 17 and 18 Vict., *cited in* Lord Hacking, *The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979*, 14 Int'l L. 95 (1980), which codified the stated case procedure discussed in *supra* note 16); Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 Tul. L. Rev. 1, 16–20 (1980) (discussing French decisional law distinguishing among foreign, international, and domestic arbitral awards, which mandated that domestic awards be rendered with reasons sufficient for judicial review, but enforced non-domestic awards without reasons when doing so was permissible under applicable foreign laws); *see also* Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 80 ("A useful comparison can be drawn between the contemporary status of arbitration in the United States law and that of its Canadian analogue. Prior to 1986, the Canadian law on arbitration embodied much of the traditional Anglo-Saxon distrust of non-judicial dispute resolution. In Canada, arbitral adjudication was not a favored method of dispute resolution, and was one to which parties seldom resorted. Courts, lawyers, and business interests preferred to rely upon the 'real thing.' ").

22. *See supra* note 20 and accompanying text.

23. *Id.*

24. *See* Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 83–88. By shifting the regulatory balance in favor of arbitration, the

attention to legal rights and narrow scope of application, contained accommodating positions on the regulation of arbitration. For example, the statutory language attenuated systemic misgivings about, and legal hostility toward, arbitration. Its central provision made clear that agreements to arbitrate disputes were valid contractual undertakings, fully within the lawful exercise of individual rights and the boundaries of public policy.[25] In fact, parties had an unquestioned legal right to engage in arbitration.[26] Neither contract for arbitration carried a stigma of illegality.[27] Both agreements were valid forms of contracting.

FAA—initially intended to apply only to a small special interest group—rapidly expanded to any industry that could benefit from the many efficiencies arbitration offered. For a discussion of these efficiencies, *see* Christopher R. Drahozal, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St. J. Disp. Resol. 433, 451–53 (2010) ("Why do [businesses] choose arbitration over litigation?…In their pre-dispute shopping, sophisticated parties drafting their contract may choose arbitration because they expect that it will provide them with a better process than litigation, because they expect that it will provide them with better outcomes than litigation, or both.…[A]rbitration may be faster and cheaper than litigation, at least for some types of disputes; arbitration may lessen the risk of punitive damages awards or aberrational jury verdicts; arbitration may decrease exposure to class actions or other forms of aggregate litigation; arbitration may result in more accurate outcomes because of arbitrator expertise and incentives; arbitration may better protect confidential information from disclosure; arbitration may enhance the ability of parties to have their disputes resolved using trade rules; and arbitration may enable the parties to better preserve their relationship. Many of the same reasons apply to transnational contracts. In that context, however, commentators emphasize two additional benefits: arbitration may provide a neutral forum and may be more likely to result in an award enforceable in another jurisdiction." (citations omitted)).

25. Carbonneau, The Reception of Arbitration in United States Law, *supra* note 4, at 84 ("[T]he FAA was designed to make the procedure of arbitration available to commercial parties and those who engaged in maritime transactions. Pursuant to these objectives, section 2 of the FAA declares that arbitration agreements are 'valid, irrevocable, and enforceable,' thereby equating them with ordinary contracts and eradicating the tradition of judicial hostility." (quotations omitted)).

26. *Id.* at 84 ("[A]lthough an agreement to arbitrate ousts judicial jurisdiction, it is the legitimate exercise of contractual prerogatives.").

27. *Id.;* *Id.* at 83–84 n.23 ("During the congressional debate on the Act in 1924, a proponent of the legislation explained its underlying purpose and rationale in the following terms: 'This bill [is prepared] in answer to a great demand for the correction of what seems to be an anachronism in our law, inherited from English Jurisprudence. Originally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England. This bill simply provides…an opportunity to enforce [arbitration agreements] in commercial contracts and admiralty contracts,…when voluntarily placed in the document by the parties to it.'" (quoting 65 Cong. Rec. 1931 (1924) (statement of Rep. Graham of Pennsylvania)); *see also supra* note 7 and accompanying text.