

# FEDERAL COMMON LAW AND ARBITRAL POWER

Alan Scott Rau\*

## I. AMENDING THE FAA

It is not strange, however much it may be regretted, that such an exuberance of enterprise should cause some individuals to mistake change for progress.

—Millard Fillmore<sup>1</sup>

Rau draws considerable comfort and self-satisfaction from his faith in temperate and clever lawyerly distinctions.

—Tom Carbonneau<sup>2</sup>

In a symposium dedicated to change in the Federal Arbitration Act—my original letter of invitation announced that we would be compiling “concrete suggestions for Congress”—I may be the only participant entirely committed to the proposition that it would be far better if we were to leave the FAA completely alone. The power of Congress over the practice of arbitration should, I think, be precisely equivalent to that of the Czar over the far-flung peasant villages of Russia—absolute, but exercised at an inconceivably remote distance.

The point is not simply that courts are more likely than legislators to “get it right.” (Although, I believe, they are: How is it possible to improve on judgments continually informed by the insights of practice, and by what Dewey called “thorough absorption in a multiplicity of allied experiences”<sup>3</sup>—judgments that are honed by argument—and that are duty-bound to be responsive to the dialectic and concreteness of adversarial presentation?) Nor is it simply that legislation is inevitably a clumsy and unwieldy tool, making even changes on the margin with a meat cleaver. Nor that the missteps and misjudgments of statutory revision may be expected to be particularly resistant to change.

\* Burg Family Professor of Law, University of Texas at Austin School of Law.

My particular thanks to all of the participants at the excellent symposium, “Rethinking the Federal Arbitration Act,” held at the Saltman Center for Dispute Resolution at the William S. Boyd School of Law, University of Nevada, Las Vegas, on January 26, 2007: I enjoyed all our conversations, and benefited from (even if I did not always acquiesce in) all your ideas.

<sup>1</sup> Millard Fillmore, Third Annual Message (Dec. 6, 1852), <http://www.presidency.ucsb.edu/ws/index.php?pid=29493>.

<sup>2</sup> Tom Carbonneau, *Le Tournoi of Academic Commentary on Kaplan: A Reply to Professor Rau*, MEALEY’S INT’L ARB. REP., Apr. 1997, at 35, 39.

<sup>3</sup> JOHN DEWEY, HOW WE THINK: A RESTATEMENT OF THE RELATION OF REFLECTIVE THINKING TO THE EDUCATIVE PROCESS 124 (1933) (“such is ability to judge in its completest form”).

(Although for the moment, happily, all the weight of inertia is in opposition to innovation.)

Nor does my preference for legislative inaction rest entirely on what is conjured up by the prospect of revisiting received entitlements—that is, the classic image of Pandora’s Box: I fear that the most plausible outcome would be to let loose all sorts of unanticipated errors and evils—that modest and incremental reform would quickly be swept aside in favor of a cascading Night of August 4.<sup>4</sup> (I hesitate as to one question only: Which scenario, I wonder, would in fact be more chilling—for statutory revision to slip through unnoticed in obscurity? Or for it to command wide public attention? Is arbitration “reform” better left to the lobby, the organized bar, the academy, or to the posturing of the democratic process?)

Here are some illustrations of what we would have every reason to expect from an ongoing program of statutory reform—some embarrassments that seem to typify the false notes most often struck by arbitration legislation, arranged under what seem to be the most common headings. There is alas no shortage of examples from which to choose.

Many can be drawn from state regulation. (I note in passing that the possible justification even for the continuing existence of state arbitration laws has always eluded me: But at least the potential damage they may cause is finite, limited as it is by their virtual irrelevance.) The new Revised Uniform Arbitration Act in particular presents some of the nicest lessons in the dangers of law making by committee. In general it should not be surprising that—at least as of this writing—the greatest clumsiness, the widest misunderstandings, can be found in state capitals. This must be due at least in part to the peculiarities of local conditions and politics—and in somewhat greater part to the fact that with respect to this rather arcane field, state lawmakers have been far more malleable, far more amateurish, far more immune to sensible advice.

### 1. *Codifying Conceptualism*

To begin with, we might expect a certain tendency to codify conceptualism. What, for example, are we to make of section 6 of the “new and improved” Uniform Arbitration Act, under which:

- (b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
- (c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled . . . .<sup>5</sup>

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<sup>4</sup> Throughout the night of August 4, 1789—a “moment of patriotic drunkenness,” in the words of an observer—noble deputies arose in the French National Assembly to renounce, one by one, an endless sequence of feudal privileges. In these improvised, indiscriminate outbursts, all were slung wholesale “onto the heap of demolished anachronisms”—and all in the name of Enlightenment, “rationalism,” “modernity,” and “patriotism.” See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 439 (1989). At one point the Assembly’s secretary, fearful of the effects of “this noble enthusiasm and violent impulsiveness for the public good,” passed a note to the President on which he had written, “They have lost all self-control. Adjourn the session.” PATRICK KESSEL, *LA NUIT DU 4 AOÛT 1789* 158 (1969) (my translation). See also *id.* at 137 (“as if in one single night all the past would be swept away”).

<sup>5</sup> UNIF. ARBITRATION ACT § 6 (amended 2000).

“A condition precedent to arbitrability.” (As opposed, that is, to the question whether a dispute is “subject to an agreement to arbitrate.”) Hmmm.

For the moment I pass over the word “arbitrability,” about which I have had much to say elsewhere—a relentless generator of confusion, unequalled in its potential for mischief, and which should properly speaking play no part whatever in our discourse about arbitration. But how curious that the drafters of the Uniform Act should have been so mesmerized by the taxonomy of 19th century contract law—or by dim memories of an obsolescent legal education—that they were impelled to adopt terminology long abandoned by restaters and commentators alike.<sup>6</sup> (I remember my own Contracts professor inviting us to draw lines between “conditions precedent” and “conditions subsequent”—but I very much doubt that even in 1964 he really believed in any of this himself.)

For many years it seemed in fact to have simply been taken as axiomatic that once one labels an issue as a “condition precedent,” one must hold that it is to be decided by a *court*.<sup>7</sup> The following thought experiment might raise a warning flag: What if the parties were to draft as follows:

It is understood by the parties to this agreement that *it shall be a condition precedent to the existence of any obligation to submit any dispute whatever to arbitration*, that the arbitration agreement contained herein shall have been approved and ratified by the shareholders of the corporation at the next duly-held shareholders meeting, and in the absence of such ratification and approval any consent to arbitrate is hereby denied.

The drafting seems reasonably explicit, and I strongly suspect that by writing this, the parties would be taken to have “waived” or “varied the effect” of § 6(c).<sup>8</sup> And yet, what have they done, other than to closely track the language of § 6(c) itself?

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<sup>6</sup> Cf. 8 CATHERINE M.A. McCAULIFF, CORBIN ON CONTRACTS: CONDITIONS 11 (Perillo ed., rev. ed. 1999) (“[I]t may take many years before we give up these familiar, if confusing and misleading, words.”); RESTATEMENT (SECOND) OF CONTRACTS § 224 cmt. e (1981) (“This terminology is not followed here.”).

<sup>7</sup> E.g., *Wagner Constr. Co. v. Pac. Mech. Corp.*, 157 P.3d 1029, 1033 (Cal. 2007) (Provisions of state insurance code, under which “[n]o cause of action shall accrue to the insured . . . unless within one year from the date of the accident . . . [t]he insured has formally instituted arbitration proceedings,” constitutes “a condition precedent to arbitration,” and “[f]ailure to act within this time limit constitutes a waiver of the right to arbitrate, and such waiver may be determined by a court whose jurisdiction is invoked for that purpose.”) (emphasis omitted). *City of Alamo v. Garcia*, 878 S.W.2d 664, 665 (Tex. App. 1994) (failure to give “[n]otice of demand for arbitration”; “[b]reach of a condition precedent affects the enforceability of the provision to which the condition is attached,” and so the trial court properly refused to refer the dispute to arbitration). In particular, note the conflation—presented as the most natural thing in the world—between “conditions precedent” and “arbitrability” in *Smith Barney Shearson Inc. v. Sacharow*, 666 N.Y.S.2d 990, 992 (N.Y. 1997) (“The threshold question for us to decide is whether the [six-year “eligibility” provision of the NASAD Code] is a condition precedent to arbitration and, thus, whether it constitutes a question of arbitrability.”).

<sup>8</sup> See UNIF. ARBITRATION ACT § 4(a) (amended 2000).

I doubt that the statutory language is particularly well suited to focus the attention of the decisionmaker on the proper question.<sup>9</sup> It does not, for example, invite him to discriminate among

- (a) Something that must occur before one's duty of performance under a contract is triggered;<sup>10</sup>
- (b) Something that must occur before one becomes obligated to engage in arbitration—a requirement, for example, that the claimant initiate a proceeding within a certain period of time<sup>11</sup> or that he first resort to mediation;<sup>12</sup>

<sup>9</sup> Cf. 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 136-37 (3d ed. 1961) (“It is a source of confusion of thought that the word ‘condition’ is frequently used without exact recognition of what the supposed condition qualifies.”).

<sup>10</sup> A husband signs an agreement to buy a new Chrysler Sebring. Part of the price is to be in the form of a trade-in of a BMW convertible owned jointly by him and his wife; the agreement also contains an arbitration clause. The BMW is surrendered to the dealer, who sells it; however, the wife later refuses to sign over the title. It will inevitably be argued here that the wife's approval of the trade-in was a “condition precedent to the formation of the contract to purchase the Sebring, [which in turn] determines the existence of the arbitration agreement.” *Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 786 N.E.2d 1045, 1051 (Ill. App. Ct. 2003). The court dutifully found that a remand was appropriate to determine whether any such “conditions precedent” to the formation of the contract to purchase existed and were satisfied—so that the trial court must pass on whether “these, and any other arguments as to the existence of an agreement to arbitrate,” were valid.”

Of course, a much more accurate way of posing the proper question would be simply to ask whether his wife's consent was “a condition precedent to the husband's present duty of performance under the contract.” When the question arises whether the husband's obligation to go through with the sale survives his wife's refusal to agree to the trade-in, isn't it plausible that he and the dealer might both have been willing to submit this question to arbitration?

Another court similarly mesmerized by “condition precedent” foolishness was the federal district court in *Eady v. Bill Heard Chevrolet Co.*, 274 F. Supp. 2d 1284, 1285-86 (M.D. Ala. 2003). Sale of a pick-up truck was made “subject to final credit approval and is not valid until such approval.” The buyer was denied credit by the finance company, and so the seller informed him that there was “no sale.” The court held that “there was a failure of a condition precedent to the contract, namely that the financing for the sale was not approved,” and this failure of a condition precedent “renders the contract invalid, and, without a valid contract for the sale of the vehicle, there is no consideration for the Arbitration Agreement.” This seems even sillier than *Bahuriak*. The precise question in *Eady* was not even whether the seller was required to go through the sale after financing was denied—it was whether the plaintiff could recover for damage allegedly caused to his trade-in while it was in the seller's possession. (“[I]t appeared as if someone had been living in the car.”) Had the parties considered ex ante their positions in the event that the expected financing should fail, so that the buyer's trade-in would have to be returned to him? Surely it is at the very least conceivable—in fact it seems rather plausible—that they might have been willing to submit this limited question to arbitration.

<sup>11</sup> This is apparently the case the Act's draftsmen had in mind, see UNIF. ARBITRATION ACT § 6 cmt. 2 (amended 2000) (“[I]ssues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.”). Is this formulation in any way an improvement on what the Court did in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002) (“we cannot conclude that the parties intended to have a court, rather than an arbitrator, interpret and apply” the NASD rules on “eligibility” for arbitration)?

<sup>12</sup> Where contracts make mediation a “condition precedent” to invoking the arbitration process, many courts will frequently proceed without discussion to decide the issue themselves. See *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 42 (1st Cir. 2003) (“Because the parties intentionally conditioned arbitration upon either party's request for mediation, we

(c) Something that must occur before any arbitration agreement is formed (for example, “the present agreement to arbitrate shall not enter into force until it has been approved in a signed writing by the Board of Directors”);<sup>13</sup>

conclude that [the claimant’s] failure to request mediation precludes it from compelling arbitration under the FAA.”); *In re Pisces Foods, L.L.C.*, 228 S.W.3d 349, 353-54 (Tex. App. 2007) (“The agreement expressly requires mediation as a precondition for requesting arbitration”; “the arbitration clause has not been triggered,” and so “the trial court did not abuse its discretion by refusing to compel arbitration.”).

*Cf. Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287, 1290-91 (11th Cir. 2002) (After the claimant filed a lawsuit, the respondent moved to stay the proceedings pending arbitration; the motion was denied on the ground that under the contract, “in order for there to be a duty to arbitrate, the parties must first mediate their dispute”; since “neither party gave notice to mediate or arbitrate . . . the duty to arbitrate was not triggered.”). *Kemiron* is rather troubling: The precise holding was not merely that arbitration could not be compelled, but that the judicial action should not be stayed in favor of arbitration since “the arbitration provision has not been activated and [so] the FAA does not apply.” The court expressly declined to hold that the respondent had “waived its right to arbitrate.” *Id.* at 1291 n.3. But lacking a finding of “waiver,” why should the suit be permitted to continue—causing the respondent permanently to forfeit the contractual right?

In *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 357 (Tex. App. 1995) (emphasis omitted), a construction contract provided that in the event of any dispute

the parties shall initially cooperate in good faith to resolve the same . . . and will explore whether techniques such as mediation, mini-trials, mock trial or other techniques of alternative dispute resolution might be useful in resolving the matter in question. If the parties cannot agree within 10 days on a different method of resolving the matter, the matter shall be submitted by the parties to and be decided by binding arbitration.

The parties attempted mediation, but failed to reach agreement, and the contractor then moved to compel arbitration. The court held that the motion should be denied: Because the parties had agreed to submit their dispute to mediation, what was a “condition precedent” to mandatory arbitration—the failure of the parties to agree on an alternate method of dispute resolution—had simply not been satisfied. The court found this holding dictated by “the plain language of the contract.” This, though, is nothing but a grotesque perversion of the language of the contract. The absurdity of the result—that when a party tries to resolve a dispute by mediation, he somehow forfeits his own right to arbitration in case the mediation fails—must be obvious even to a casual observer.

I suspect that in many of these cases, the analysis can be attributed simply to poor lawyering. But one theme throughout this piece is that legislation seems particularly likely to invite error. Consider a statute under which “agreement of the parties to submit a dispute to conciliation is an agreement of the parties to stay a judicial proceeding or arbitration from the beginning of conciliation until the termination of conciliation.” TEX. CIV. PRAC. & REM. CODE ANN. § 172.207(a) (Vernon 2007). I think it fairly obvious that the draftsmen never even contemplated the question of the appropriate decision maker. But the language clearly invites a judicial stay of arbitration where the “condition” of conciliation has not yet been fulfilled.

<sup>13</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 217 illus. 2 (1981):

A and B sign a written agreement for an exchange of real property and leave it with C, an attorney, on the oral understanding that it is not to take effect until each has consulted his wife and notified C that he still wishes to close the exchange. There is no contract until each has notified C.

*Cf. id.* § 36(2) (“[A]n offeree’s power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.”); *id.* § 224 cmt. c. (Where “an offer has become an option contract . . . the acceptance is a condition under the definition in this section.”).

For another possible example, see *Empresa Generadora de Electricidad Itabo, S.A. v. Corporacion Dominicana de Empresas Electricas Estatales*, No. 05-5004, 2005 WL

(d) Something that must occur before one can say that *any agreement whatever* has been entered into.<sup>14</sup>

While the first two are indeed presumptively matters for the arbitrator, the last two, I am afraid, must always be questions for judicial determination. The reason why the Act's conceptual framework is of no help whatsoever is that it papers over such critical distinctions with a thick glaze, or glop, of formalism.

## 2. *Once A Bold Innovation, Now A Dusty Backwater*

When first proposed, Section 10 of the Revised Uniform Act must have seemed quite an imaginative and enterprising solution to the fraught problem of multi-party disputes:

*[U]pon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims . . . .*

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1705080, at \*3 (S.D.N.Y. July 18, 2005) (contract provided that “[i]n the event that the Dominican Republic should ratify the New York Convention . . . the parties agree to settle their disputes via international arbitration”).

<sup>14</sup> The locus classicus is *Pym v. Campbell*, 119 Eng. Rep. 903, 904 (Q.B. 1856). In discussing a contract by which the defendant would buy rights in the plaintiff's invention, the parties agreed that to save time, the contracts would be signed, but that the defendants would thereafter submit the invention to an engineer; “if [he] approved of the invention, [the signed writing] should be the agreement, but if [he] did not approve, should not be one.” The court was “of [the] opinion that the evidence shewed that in fact there was never any agreement at all.” A century and a half later we have *Rapid Settlements, Ltd. v. BHG Structured Settlements, Inc.*, 202 S.W.3d 456, 461-62 (Tex. App. 2006). The state Structured Settlement Protection Act, TEX. CIV. PRAC. & REM. CODE ANN. § 141.001-.007 (Vernon 2007), requires prior judicial approval of the transfer of rights to structured settlement payments; no such transfer is to be effective unless it has been approved in a final court order finding that it is in the best interests of the payee. Since judicial approval is “a condition precedent to the formation of an enforceable contract,” then it follows that in the absence of such approval, “none of its provisions, including the arbitration clause, can be enforced.” *Rapid Settlements*, 202 S.W.3d at 461-62.

One frequently finds such cases mixed up with those properly belonging in section (a) above: Such confusion is nicely demonstrated by the cases in footnote 10 *supra*, but for another example of this common muddle, see *Mega Air, Inc. v. USA Jet Airlines, Inc.*, No. 226297, 2002 WL 265899, at \*2 (Mich. Ct. App. Feb. 19, 2002) (defendant argued that “no enforceable contract existed between the parties because a definitive sales contract and a satisfactory pre-purchase inspection were conditions precedent that had to be satisfied before defendant was obligated to perform”). But one critically significant element distinguishes the two categories: It's only where the parties have in fact bound themselves to an otherwise enforceable contract—but have merely conditioned their performance—that they should be expected to use good faith or best efforts to cause the condition to be fulfilled. *See, e.g.*, *Omni Group, Inc. v. Seattle-First Nat'l Bank*, 645 P.2d 727, 729-30 (Wash. Ct. App. 1982) (“transaction is subject to purchaser receiving an engineer's and architect's feasibility report”; “[i]n essence, this initial language requires [purchaser] to attempt, in good faith, to obtain an 'engineer's and architect's feasibility report' of a type recognized in the real estate trade”). *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 225 cmt. b (1981) (failure of condition may be excused if its occurrence has been prevented “through a breach of the duty of good faith and fair dealing”). Whether such an obligation has been fulfilled will require an assessment of conduct and commercial context—and these are matters to which arbitrators chosen by the parties themselves are likely to be particularly sensitive.

This provision is an “adaptation” of an older California statute, which it indeed tracks quite closely;<sup>15</sup> reversing a longstanding default rule,<sup>16</sup> it permits courts to order consolidation of related arbitrations as long as the parties themselves have not ruled this out by contract. While the statute speaks only of the “consolidation of separate arbitration proceedings,” it has been relied on by California courts as the basis for their asserted authority to order arbitration on a classwide basis.<sup>17</sup>

But surely any such statutes have now been rendered simply obsolete by *Bazzle*?<sup>18</sup> Surely the whole point of the Supreme Court’s decision there is that state law is now preempted by a federal-common-law presumption—requiring us now to assume *the parties intended to grant to the arbitrators themselves* the power to decide whether a classwide arbitration is permissible? Under *Bazzle*, then, “the question of classwide arbitration became one of construction with which the state courts had no business interfering.”<sup>19</sup> Nor may a state *statute*—by carefully delineating the circumstances in which a local court should exercise its discretion to consolidate<sup>20</sup>—supersede a federal default rule of arbitral competence. Nor may a state statute even provide an alternative mechanism for aggregation—not, at least, as long as a prior judicial ruling would supplant what would otherwise be an arbitral decision to the contrary.<sup>21</sup>

<sup>15</sup> CAL. CIV. PROC. CODE § 1281.3 (2007); see UNIF. ARBITRATION ACT § 10 cmt. 3 (amended 2000); Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 PEPP. DISP. RESOL. L.J. 1, 3, 16 (2003) (reflecting California’s “attempts to reflect modern trends in dispute resolution,” “California is at the forefront in providing a statutory regime for consolidation”).

<sup>16</sup> On the longstanding default rule to the effect that courts may not order consolidation of related arbitration in the absence of an express agreement so providing, see ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 897-901 (4th ed. 2006).

<sup>17</sup> See, e.g., *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev’d on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1, 9 (1984) (“It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act authorizing consolidation of arbitration proceedings, intended to preclude a court from ordering classwide arbitration in an appropriate case”; indeed “the interests of justice that would be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation.”). See also *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 321 (Ct. App. 1986) (judicial authority to order classwide arbitrations is “recognized within the penumbra of the express statutory power courts retain to order arbitrations consolidated”).

<sup>18</sup> *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

<sup>19</sup> Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 105-06 (2003) [hereafter Rau, *Separability*]; see also Alan Scott Rau, ‘Separability,’ ‘Illegality,’ and Federalism: The Cardegna Case in the Supreme Court, MEALEY’S INT’L ARB. REP., Oct. 2005, at 31, 38 (2005) (“presumptions with respect to the allocation of responsibility between courts and arbitrators are an important part of federal common law—and one that escapes state control”; whether the FAA preempts a state law rule presumptively granting such responsibility to state courts is “in fact what [*Bazzle*] was all about”).

<sup>20</sup> Section 10(a)(4) of the RUAA “requires courts to consider whether the potential prejudice resulting from a failure to consolidate is outweighed by ‘undue delay’ or ‘hardship to the parties opposing consolidation.’” UNIF. ARBITRATION ACT § 10(a)(4) cmt. 3 (amended 2000).

<sup>21</sup> See *Garcia v. DirectTV, Inc.*, No. B158570, 2002 WL 31769224, at \*3 (Cal. Ct. App. Dec 11, 2002) (“[O]ur courts have authority to order classwide arbitration.”), *vacated and*

It has seemed an inevitable corollary of *Bazzle* that the permissibility of consolidation, too, should be presumed a matter for the arbitrators.<sup>22</sup> The analogy is of course far from perfect<sup>23</sup>—and on an operational level there are abundant occasions for awkwardness and hiccups: Should it be proposed, for example, to consolidate two pending and parallel proceedings, just who is supposed to be the surviving arbitrator?<sup>24</sup> But to the extent that here too *Bazzle* allocates decisionmaking authority to the arbitrators, then to that extent also subsequent developments have rendered the statute irrelevant.

Here, of course, there is a particularly fruitful area for innovation and reform on a private level: The rules of an administering institution may, for example, provide that *the institution itself will decide matters of consolidation* if two arbitrations have been initiated invoking the same rules. This seems in

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remanded “for further consideration in light of *Green Tree*” *Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); remanded to 9 Cal. Rptr. 3d 190, 191-92 (Ct. App. 2004) (“The Supreme Court has spoken.”).

The result would presumably be otherwise should the parties’ choice of a state law be thought to have captured also that state’s arbitration regime. But let’s put this aside: As I have suggested elsewhere, what once seemed to promise an end-run around the inevitable finding of federal preemption, has proven to be quite simply a dead end. See *infra* note 108.<sup>22</sup> See *Yuen v. Superior Court*, 18 Cal. Rptr. 3d 127, 128, 130 (Ct. App. 2004) (In cases governed by the FAA “the arbitrator should likewise decide whether the parties’ arbitration agreement permits consolidation of two arbitration proceedings”; where a “broad” arbitration agreement calls for the arbitration of “‘all disputes’ relating to the contract” *Bazzle* “mandates that consolidation is such an issue,” and it was therefore error for a court to order consolidation in its own discretion pursuant to California law.). Cf. *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577 (7th Cir. 2006) (“[T]he question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve”; however, acknowledging uncertainty as to the precedential value of the plurality opinion in *Bazzle*, the court relied instead on the decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).).

<sup>23</sup> See, e.g., *Rau, Separability*, *supra* note 19, at 106 n.282 (“in the typical ‘consolidation’ case the party ‘in the middle’—say, the owner of a construction contract—is attempting to bring into the same proceeding two parties with interests adverse to each other—say, the architect and the contractor; no such dynamic is present where a number of consumers wish to aggregate their identical claims against a lender like *Green Tree*”).

<sup>24</sup> See *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can.*, 210 F.3d 771, 773 (7th Cir. 2000) (Posner, J.) (“Arbitral panels are ad hoc, making it difficult to coordinate their decisions on such a question.”); *Markel Int’l Ins. Co. v. Westchester Fire Ins. Co.*, 442 F. Supp. 2d 200, 204 (D.N.J. 2006) (If multiple panels are required to decide the question of consolidated arbitration, then different panels may reach “conflicting decisions about consolidation which will ultimately require a district court to decide which panel’s interpretation of the agreement was correct.”).

Practical problems of this sort are readily averted in simpler scenarios: For example, *Employers Insurance Co. of Wausau* did not involve multiple parties, but rather two agreements entered into between the same parties. The trial court had gone ahead and ordered the parties “to arbitrate both Agreements in one arbitration”; the court of appeals affirmed—but honoring the rule that “questions regarding consolidation are presumptively for the arbitrator,” the court noted that either party remained “free to argue at the arbitration that separate arbitrations” for each agreement were “required under the contracts’ terms.” *Employers Ins. Co. of Wausau*, 443 F.3d at 581-82 (emphasis added). To the same effect is *Certain Underwriters at Lloyd’s London v. Westchester Fire Insurance Co.*, 489 F.3d 580, 588 (3d Cir. 2007) (“Whether requiring the Underwriters to select an arbitrator for each program is consistent with the contractual language will be appropriately resolved by the arbitrators once the panels are convened.”).



fact to be quite the latest thing: It is the effect of recent amendments to the rules of both the AAA and of JAMS;<sup>25</sup> it is found equally in the new Swiss Rules,<sup>26</sup> and is a contribution made by NAFTA to problems arising out of investment treaties.<sup>27</sup> Above all, it is most consistent with the assumptions underlying *Bazzle*. A statutory presumption of judicial power may now, alas, form part of the law of those twelve dynamic states which have already enacted the RUAA<sup>28</sup>—but what once seemed a gleaming express track is now a deserted siding where grass grows among the abandoned rails; the presumption of § 10 has already been relegated to the rubbish bin of history, the shabby museum of discarded intellectual conceits.

### 3. *We Know You Must Have Been Getting at Something: Help Us Out Here*

Here is one more illustration from the Revised Uniform Act. Section 21 tells us that:

(a) *An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.*

This is what I think § 21 means:

- The classic economic notion of “efficient breach” has now become a matter of public policy—so that a party may not contract out of his “right” to breach “efficiently” even if he is handsomely paid to do so—

<sup>25</sup> AAA CONSTR. INDUS. ARBITRATION R. 7 (If the parties “are unable to agree, the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder.”); JAMS INT’L ARBITRATION R. 6.1.

<sup>26</sup> The JAMS International Arbitration Rules are essentially identical to the Swiss Rules of International Arbitration, which entered into force January 1, 2004. Under arts. 6.1 and 4.1 respectively, where a request for arbitration “is submitted between parties already involved in other arbitral proceedings pending under these Rules,” or where a request “is submitted between parties that are not identical to the parties in the existing arbitral proceedings,” then the Arbitration Committee (representing all the participating chambers of commerce) “may decide, after consulting with the parties to all proceedings,” “that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings”; this internal administrative procedure is to “take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings.” See INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 182, 184, 248 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., 2004).

<sup>27</sup> Where different claims “that have a question of law or fact in common” have been submitted for arbitration under NAFTA, any party may request the formation of a special consolidation tribunal, which may—but of course need not—assume jurisdiction over, and then “hear and determine together,” any such claims. To the extent it does so, any other NAFTA tribunal is thereby deprived of its own jurisdiction, and the special tribunal may order that the proceedings of any other tribunal be stayed. North American Free Trade Agreement, U.S.-Mex.-Can., art. 1126, Dec. 17, 1992, 32 I.L.M. 605, 644.

<sup>28</sup> As of September 2007, according to the NCCUSL website, the following states had adopted the RUAA: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. See Uniform Law Commissioners, A Few Facts About the Uniform Arbitration Act - State Adoptions, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-aa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp).

and may at the same time retain the contractual premium he has presumably received. This, I suppose, is congruent with the received wisdom concerning “liquidated damages” and “penalty clauses”—although as far as I can tell most of the arbitration jurisprudence is otherwise.<sup>29</sup>

- A transcript and a record of admitted evidence equally become imperative matters of public policy whenever the parties wish their arbitrators to have even the same limited power to award punitives that courts now possess. (In such circumstances the statute also seems to require, as a practical matter, something resembling a reasoned award.<sup>30</sup>)

<sup>29</sup> See, e.g., *Associated Gen. Contractors v. Savin Bros., Inc.*, 356 N.Y.S.2d 374, 376, 378, 382 (App. Div. 1974), *aff'd per curiam*, 335 N.E.2d 859, 859 (N.Y. 1975). The bylaws of a national trade association of construction firms made it the sole and exclusive representative of its members for the purpose of collective bargaining, and provided that should arbitrators find a breach of the agreement by any member, the association would be entitled to “an amount no less than three times the daily liquidated damage amount provided for in each such heavy and highway construction contract” to which the member was then a party. The Appellate Division found, quite properly, that this clause constituted a “penalty,” since it “bears no reasonable relationship to the amount of damages which may be sustained” by the association. Nevertheless it held that the award should be confirmed—finding that any alleged “public policy” here “protect[s] no discernible public interest” and “serves no overriding public concern where parties of apparently equal bargaining power have voluntarily entered into” the agreement. To hold it unenforceable “simply because of a questionable distinction between penalties and liquidated damages would take the teeth out of such agreements.”

Affirming, the Court of Appeals agreed that there were involved “no interests of third persons which can be said to transcend the concerns of the parties to the arbitration,” and so “no question involving public policy of such magnitude as to call for judicial intrusion.” 335 N.E.2d at 859-60. Only one year later the Court of Appeals’ (celebrated but now moribund) decision in *Garrity* found *Savin* “inapposite”—on the striking ground that *Savin* did not actually involve a prohibited “award of punitive damages,” but instead “permitted enforcement of an arbitration award of treble liquidated damages amounting to a penalty.” (In *Garrity*, by contrast, the contract simply contained “no provision” at all permitting a penal award!) *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 795 (N.Y. 1976). With admirable restraint, a dissenting judge found this distinction to be rather “thin.” See *id.* at 799 (Gabrielli, J., dissenting). And it apparently continues to be true in New York that an arbitral “penalty”—although imposed in circumstances quite alien to anything that a court would do—need not be stigmatized as unacceptably “punitive.” See *Azrielant v. Azrielant*, 752 N.Y.S.2d 19, 23-25 (App. Div. 2002) (award upheld although it called for a \$1.5 million payment to be made “on one’s day’s notice” in case of “fundamental breach”; “even severe penalties,” which can serve as “an enforcement mechanism,” “are distinct from punitive damages”). A fortiori elsewhere: see *Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 474, 476 (Ga. 2002) (even though he recognized that the acceleration of future license fees—without any reduction for expenses or for present cash value—amounted to “an unenforceable penalty,” the arbitrator awarded damages anyway; although the lower court vacated the award on the ground that the arbitrator had “manifestly disregarded the law,” the state supreme court reversed); *BBF, Inc. v. Alstom Power, Inc.*, 645 S.E.2d 467, 468-69 (Va. 2007) (respondent claimed that the arbitrators “exceeded their powers” by awarding liquidated damages since the claimant had suffered “no damages” and “Virginia law prohibits an award of liquidated damages to a party who has suffered no actual damages”; held, award confirmed; it is not grounds for vacatur that relief “could not or would not be granted by a court of law or equity”).

<sup>30</sup> If an enforceable award requires evidence that “justifies the award under the legal standards otherwise applicable to the claim,” a prudent arbitrator would be well-advised to supply such a “justification.” Section 21(e) also requires the arbitrator to “specify in the award

- Given this apparent policy, my best guess would be that these statutory restrictions are not subject to contrary agreement by the parties. To be honest, though, I can't really be sure. Comment 1 to § 21 does say explicitly that "the parties by agreement cannot confer [the authority to make an award of punitive damages] on an arbitrator where the arbitrator by law could not otherwise award such relief." But even for this statute, the drafting here is particularly inept.<sup>31</sup>

#### 4. *Aping Our Betters (I)*

An even more curious episode than this tinkering with state "uniform acts" can be found when we look at the local boosterism, the poignant self-aggrandizement, that has led to the adoption in a number of jurisdictions of the UNCITRAL Model Law. The Model Law was adopted by the United Nations Commission on International Trade Law in 1985, and was primarily designed as off-the-rack legislation for countries with arbitration laws that were "obsolete or [that] did not meet the requirements of international trade"<sup>32</sup>—some national legislation, for example, may contemplate extensive intervention by courts throughout the arbitration process, or may restrict the power of arbitrators to conduct proceedings in accordance with the rules of the game preferred by the parties or laid down in modern arbitration rules. "[O]thers had no legislation, or incomplete legislation."<sup>33</sup> A number of countries with such anti-

the basis in fact justifying and the basis in law authorizing the award." UNIF. ARBITRATION ACT § 21(e) (amended 2000).

<sup>31</sup> *Id.* I would assume that this phrase ("where the arbitrator by law could not otherwise award such relief") cannot possibly refer to external legal constraints on *arbitral power*—for this is the very power that the Act is conferring—instead, as the comment later says, the phrase must refer to limits on the award of punitives that would be present "*if the claim were made in a civil action.*" All right, then: So I conclude that where a court would be without power to grant the remedy, the parties may not provide otherwise.

But then, § 4 of the Revised Act tells us that with certain specified exceptions, the statutory provisions are default rules which contracting parties "*may waive,*" or the "*effect of which they 'may vary'*"—and § 21 is conspicuously *not* among those exceptions. So should we conclude then that, on the contrary, the parties *may* "vary" the restrictions of § 21? Comment 2 to § 21 reassures us that § 21 is indeed "waivable"—but it draws only the inference that the parties are therefore free to "agree to *limit or eliminate*" the arbitrator's power to award punitive damages. Are they then without power to *expand* the arbitrator's power, making it impossible to confer on him powers broader than those possessed by courts? One might think so—but then, going further, Comment 5 instructs us that the parties are always free by agreement to eliminate the constraints of § 21(e)—thereby freeing the arbitrators from any requirement that they "specify" the "basis in fact" or in law for the award of punitives. If only I could bring myself to take the RUAA at all seriously, I would definitely seek some guidance here.

<sup>32</sup> HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1177-78 (1989); see also *id.* at 1193-95; Gerold Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 1, 6-10, 17 (Petar Sarcevic ed., 1989) ("The need for legislation based on the Model Law will be particularly felt in those States which have no developed and comprehensive arbitration law, and it will more and more also be felt by other States whose arbitration law is not fully suitable to international cases.").

<sup>33</sup> HOLTZMANN & NEUHAUS, *supra* note 32, at 1178.

quated or underdeveloped systems of arbitration have in fact been receptive—but remarkably, the adoption rate has been high as well in individual states within the United States—where the glittering hope of increased arbitration business has led to enactment in five of our seven most populous states.<sup>34</sup>

There hardly seems to have been any pressing need for any American state to have added the Model Law to its body of legislation. (Considerable understatement here.) It is frequently suggested that these state statutes are intended to fill “gaps” with respect to the conduct of arbitration proceedings left by the “skeletal” Federal Arbitration Act.<sup>35</sup> Background rules are of course always necessary in contracts, if only as a starting point for predispute planning and drafting. But as a practical matter any apparent “gaps” in the FAA’s statutory scheme have largely been filled by a rich case law, spun out of an ongoing process of statutory interpretation in the usual way, and now part and parcel of the meaning of the statute. They have been filled also by commonplace exercises of private ordering and party autonomy. The “vast majority of parties to international commercial arbitrations” are certain to have chosen institutional or established ad hoc rules (like the UNCITRAL Rules) to govern their arbitration: These rules will regularly supply appropriate presumptions which serve to align arbitration proceedings with a growing consensus in international practice, even though they may depart from the customary American understanding.<sup>36</sup> And there is still more: In any modern arbitration regime the universally

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<sup>34</sup> California International Commercial Arbitration and Conciliation Act, CAL. CIV. PROC. CODE §§ 1297.11-.432 (West 2007); Florida International Arbitration Act, FLA. STAT. §§ 684.01-.35 (2007); Illinois International Commercial Arbitration Act, 710 ILL. COMP. STAT. §§ 30/1-1 to 99-99 (2007); OHIO REV. CODE ANN. §§ 2712.01-.91 (West 2007); Texas International Commercial Arbitration and Conciliation Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 172.001-.215. (Vernon 2007).

The stirring of ambition has been felt in smaller states as well, anxious not to be left behind. *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration, CONN. GEN. STAT. § 50a-100 to 136 (2007); Louisiana International Commercial Arbitration Act, LA. REV. STAT. ANN. §§ 9:4241-4276 (2006); North Carolina International Commercial Arbitration and Conciliation Act, N.C. GEN. STAT. §§ 1-567.30 to .87 (2007); Oregon International Commercial Arbitration and Conciliation Act, OR. REV. STAT. §§ 36.450-.558 (2005).

<sup>35</sup> *See, e.g.*, Richard E. Speidel, *International Commercial Arbitration: Implementing the New York Convention*, in EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 185, 196, 203, 248 (2006) (our legal regime “is fragmented, outdated, and incomplete and depends upon the courts to interpret and fill the gaps”; “our creaking legal framework [depends] upon a ‘common law’ of arbitration”; since there are so “few legislative default rules upon which the parties, the tribunal, or the court can rely . . . it is no wonder that several states have enacted the Model Law as state law”).

<sup>36</sup> *See* David W. Rivkin & Frances L. Kellner, *In Support of the F.A.A.: An Argument Against U.S. Adoption of the UNCITRAL Model Law*, 1 AM. REV. INT’L ARB. 535, 545-50 (1990). *See also* JOSEPH M. LOOKOFSKY, *TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION* 575-76 (1992) (“If the parties have incorporated the UNCITRAL Rules, the Model Law will respect the procedures so agreed; if not, the Law will fill any gaps with virtually identical procedures.”).

So the Model Law may provide—although the usual American understanding is otherwise—that the arbitrators are required to write reasoned opinions, UNCITRAL Model Law on International Commercial Arbitration art. 31(2) (1985). So of course do the UNCITRAL Arbitration Rules art. 32(3) (1976). The Model Law contains no provision with respect to the award of attorneys’ fees, although some state legislation based on the Law—again,

accepted “meta gap-filler,” the residual presumption of overwhelming force, is one of unfettered arbitral discretion and control over the conduct of the proceedings. Deference to arbitral practice is not a whit more “lawless” than what contracting parties must have expected.

It is hard, then, to avoid the conclusion that the passage of international arbitration statutes has largely been driven by the powerful engine of careerism, fed with substantial doses of wishful thinking. The Model Law appears to have been sold by the local establishment bar with the promise that it would turn an enacting state into a more attractive venue for the conduct of international arbitrations: The reasoning apparently is that where foreign parties are given assurances with respect to the hospitable local (legal) climate, and with respect to their ability to arbitrate on the basis of familiar and accessible rules, they may be encouraged to select the state as the site of their arbitration.<sup>37</sup>

To accomplish these goals it was apparently thought necessary to adopt the text of the law verbatim—with little attention to its congruence with federal common law. But none of the following discussion needs even to touch on the problem of preemption, as the principal argument advanced here rests instead on the simple fact of legislative incompetence.

Distinguished commentators have attempted to promote the Model Law by vaunting its adoption in “several American States systems not thought to lack lawmaking sophistication generally.”<sup>38</sup> The reader inclined to agree may wish to revisit that assessment after considering the following pages.

So, for example, the Texas International Arbitration and Conciliation Act provides that:<sup>39</sup>

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departing from the usual practice in domestic arbitration—empowers the arbitrators to make such an award. *See, e.g.*, Texas International Arbitration and Conciliation Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.145(b)(1)(B) (Vernon 2007). Of course, so do the UNCITRAL Arbitration Rules arts. 38, 40 (1976) (as to all costs *other than attorneys’ fees*, the costs of arbitration “shall in principle be borne by the unsuccessful party”; as to *attorneys’ fees*, responsibility for legal costs will be allocated on a case-by-case basis “taking into account the circumstances of the case”).

<sup>37</sup> *See, e.g.*, Albert S. Golbert & Daniel K. Kolkey, *California’s Adoption of a Code for International Commercial Arbitration and Conciliation*, 10 LOY. L.A. INT’L & COMP. L.J. 583, 589 (1988) (law makes California “a more attractive venue” for international arbitration and should “provide some comfort” to parties choosing the state); Mont P. Hoyt, *Proposed Texas International Arbitration Act*, 52 TEX. BAR. J. 148, 148 (1989) (law “will send a clear message to foreign parties that Texas is interested in promoting international arbitration”); Judith A. Mellman, Comment, *Seeking Its Place in the Sun: Florida’s Emerging Role in International Commercial Arbitration*, 19 U. MIAMI INTER-AM. L. REV. 363, 363 (1988) (“Florida has taken a giant leap towards becoming a major site for international commercial arbitration.”). *See also* Kevin C. Kennedy, *The Model Law on International Commercial Arbitration: It’s Time for Michigan to Adopt It*, 72 MICH. BAR J. 192, 195-96 (1993) (enactment would “send a clear message that Michigan is hospitable to international arbitration” and “could be a very useful first step” in “making Michigan an international commercial arbitration center”).

<sup>38</sup> Jack J. Coe, Jr., *The Case for the UNCITRAL Model—An Introduction*, INT’L ARB. NEWS, Summer 2004, at 2, 3.

<sup>39</sup> Texas International Arbitration & Conciliation Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.174(b) (Vernon 2007) (emphasis added); *see also* CONN. GEN. STAT. § 50a-108 (2007); Illinois International Commercial Arbitration Act, 710 ILL. COMP. STAT. § 30/5-10(a) (2007); Louisiana International Commercial Arbitration Act, LA. REV. STAT. ANN. § 9:4248(A) (2006); Oregon International Commercial Arbitration and Conciliation Act, OR.

*A party may not make a request for a stay [of a pending judicial proceeding] after the time the requesting party submits the party's first statement on the substance of the dispute.*

This is the rule of the Model Law.<sup>40</sup> I am confident that the “draftsmen” in every state legislature were blissfully ignorant of the fact that both state and federal jurisprudence is virtually uniform—and adamant—in opposition: that a presumption against waiver allows a defendant—and even a plaintiff—in the absence of some demonstrable form of “prejudice,” to hesitate and vacillate and engage in preliminary litigation maneuvers before finally deciding to invoke an obligation to arbitrate. And I am equally confident that our “draftsmen” did not spend much time brooding over the question whether such a draconian rule is in fact a good candidate for incorporation into our common law of arbitration—whether, that it is, it is preferable to an “all-things-considered” individual analysis weighing, in the particular circumstances, the damage caused by the moving party against his interest in asserting the contractual right to arbitration.

I have tried elsewhere to demonstrate, at some length, that it is not.<sup>41</sup>

##### 5. *Aping Our Betters (II)*

Another section of a state’s “international arbitration statute” will provide:<sup>42</sup>

*An arbitration agreement must be in writing. The agreement is in writing if it is contained in:*

- (1) *a document signed by each party;*
- (2) *an exchange of letters, telexes, telegrams, or other means of telecommunication that provide a record of the agreement; or*
- (3) *an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.*

I wonder how many of my readers are sufficiently advanced in age to have ever sent a telex—or for that matter, a telegram? Such references in a statute

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REV. STAT. § 36.468 (2005). Some state versions of the Model Law do not contain such a provision; California, Florida and Ohio, for example, merely tell us that a court shall stay litigation of a dispute subject to arbitration if a party’s request to that effect is “timely,” California International Commercial Arbitration and Conciliation Act, CAL. CODE CIV. PROC. § 1297.82 (West 2007); FLA. STAT. § 684.22(2) (2007); OHIO REV. CODE ANN. § 2712.13(B) (West 2007).

<sup>40</sup> UNCITRAL Model Law on International Commercial Arbitration art. 8(1) (amended 2006). See Seventh Secretariat Note, Analytical Commentary on Draft Text (March 25, 1985), ¶ 4, in HOLTZMANN & NEUHAUS, *supra* note 32, at 323-24 (“[I]t seems clear that article 8(1) prevents [a party who has not made a timely request] from invoking the agreement during the subsequent phases of the court proceedings.”).

<sup>41</sup> See Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of “Waiver,”* 6 AM. REV. INT’L ARB. 223, 274-75 (1995) [hereinafter Rau, *Waiver*] (“Article 8 of the Model Law makes it simply impossible to balance in individual cases the conflicting interests presented in ‘waiver’ cases,” and a finding of “waiver” as mandated by the Law “would thus deploy formalism to effect a forfeiture of a federal right.”).

<sup>42</sup> *E.g.*, Texas International Arbitration and Conciliation Act, TEX. CIV. REM. & PRAC. § 172.032(a) (Vernon 2007) (emphasis added). *Cf.* Florida International Arbitration Act, FLA. STAT. § 684.04(4) (2007) (“A written undertaking to arbitrate may be part of a contract, or may be a separate writing, and may be contained in correspondence, telegrams, telexes, or any other form of written communication.”).

first enacted just a few years ago might be thought rather endearing.<sup>43</sup> But the real problem is not there;<sup>44</sup> it lies rather in the Model Law's rigid insistence that the writing, however defined, be "signed" or "contained in" an "exchange" of some sort—an ill-advised requirement carried forward thoughtlessly, verbatim, into a completely alien legal environment.

Now we all know, I suppose, that perfectly acceptable written contracts are entered into every day despite the fact that they are neither signed nor contained in any "exchange"—indeed, despite the fact that one party may not have given any written assent to arbitration *in any form*. This is the most ordinary hornbook law familiar to the most inattentive law student.<sup>45</sup> So take this case: A written proposal to arbitrate is sent by one party—and is then accepted orally, or tacitly, by conduct or the beginning of performance. In such circumstances, under ordinary principles of American contract law—as well as under the domestic law of many other jurisdictions—it would not be difficult for a court to find that an enforceable arbitration agreement has been created.<sup>46</sup>

This language in our state "international arbitration" statutes was copied essentially verbatim from Article 7 of the UNCITRAL Model Law—which in

<sup>43</sup> The Texas statute was enacted in 1989; the Illinois version only in 1998; Louisiana's "international commercial arbitration" legislation was enacted in 2006.

<sup>44</sup> Of course such a creaky text could use some adjustment to take account of more modern forms of communication: The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000), affords "legal effect, validity, [and] enforceability" to signatures "in electronic form" in all transactions affecting interstate commerce. In November 2005, the United Nations General Assembly adopted a "Convention on the Use of Electronic Communications in International Contracts": Under the new Convention, a requirement that a contract be "signed by a party" is satisfied by an electronic communication, as long as some method is used "to identify the party and to indicate that party's intention," and the method is as "reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances." These provisions are specifically made applicable to communications looking to the formation of an arbitration agreement under the New York Convention. See United Nations Convention on the Use of Electronic Communications in International Contracts, arts. 9, 20 (Dec. 9, 2005), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html).

<sup>45</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *id.* cmt. a. ("Words are not the only medium of expression."); *id.* § 69 ("Acceptance by Silence or Exercise of Dominion").

<sup>46</sup> The FAA of course requires that there be at least "a written provision" in a contract, 9 U.S.C. § 2 (2000). See *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960) ("[A] long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law."); see also *Al-Salamah Arabian Agencies Co. v. Reece*, 673 F. Supp. 748, 750 (M.D.N.C. 1987) ("since both parties performed pursuant to the terms of the contract" even though it was unsigned, the claim was "based on a written contract subject to the Arbitration Act"); *Int'l Tin Council v. Amalgamet Inc.*, 524 N.Y.S.2d 971, 978 (Sup. Ct. 1988) (retention of confirmation of sales form containing arbitration clause, without any objection to clause, constituted "tacit acceptance" of arbitration clause given "past contractual history" in which confirmation letters containing arbitration clauses were signed).

A well-known, if not universally beloved, case is *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (terms in a box; "[b]y keeping the computer beyond 30 days, the [purchasers] accepted Gateway's offer, including the arbitration clause").

turn was “modeled on” the similar text of the New York Convention.<sup>47</sup> In the hypothetical case just posited, do these texts allow us to find the requisite “agreement in writing”? The drafters of the Convention apparently intended for the answer in such a case to be “no.”<sup>48</sup>

Given this stark lack of congruence with domestic law, American courts in Convention cases have naturally been tempted to resort to desperate and disingenuous measures of evasion.<sup>49</sup> It is best to assume, though, that our fact pattern cannot fairly be brought within the syntax of Art. II: It will then usually be thought to follow that since the Convention’s requirements for a “written” agreement are “more stringent” than those of the FAA, an international agreement failing to comply with Art. II(2) of the Convention loses all the protection of the Convention—even though it would satisfy American domestic law.<sup>50</sup>

<sup>47</sup> See HOLTZMANN & NEUHAUS, *supra* note 32, at 260; see also PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 73 (2d ed. 2005) (“the underlying policy of attempting to deviate as little as possible from the text of the all important New York Convention”).

<sup>48</sup> See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 196 (1981) (“The text of Article II(2) does not leave any doubt on this point”; the legislative history also “confirms that the drafters of the Convention wished to exclude the oral or tacit acceptance of a written proposal to arbitrate.”).

<sup>49</sup> An overingenious way out of the dilemma is suggested by *Sphere Drake Insurance PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994). Article II of the Convention is drafted so that an “agreement in writing” “shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” So the Fifth Circuit treated itself to a syntactical tour de force according to which an “agreement in writing” can include “either

- (1) an arbitral clause in a contract, *or*
- (2) an arbitration agreement that is
  - (a) signed by the parties *or*
  - (b) contained in an exchange of letters or telegrams.”

And so, “[b]ecause what is at issue here is an arbitral clause in a contract, the qualifications applicable to arbitration agreements do not apply,” and a signature is “therefore not required.”

The Second Circuit quite correctly refused to go down that seductive path in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210 (2d Cir. 1999). In any event, it will be noted that the Model Law is drafted in a somewhat more straightforward manner so that the deviant pathway taken in *Sphere Drake* is barred.

<sup>50</sup> See *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879 (S.D.N.Y. 1991). Here an arbitration clause was contained in a telex sent by one party only, and the court refused to compel arbitration—because the arbitration clause was “not found in a signed writing nor is it found in an exchange of letters” as required by the Convention. Cases under the FAA in which courts had enforced arbitration clauses “contained in [an] unsigned writing” were deemed simply irrelevant—because the court was authorized to “enforce the arbitration clause only if it satisfies *the Convention’s more stringent requirement*,” as “the Convention controls in case of any conflict” with the FAA. *Id.* at 882 (emphasis added). Note that the holding in *Sen Mar* could readily, and more satisfactorily, be explained on other grounds: Since the recipient of the telex in that case immediately objected to its contents, there was simply no acceptance in any form—even oral or tacit—of any proposal to arbitrate.

See generally GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 136-37 (2d ed. 2001) (Most national courts, including those in the United States, treat Art. II(2)’s writing requirement “as a mandatory minimum and maximum requirement.”); Max Bonnell, *How Not To Arbitrate*, 72 ARB. 391, 394 (2006) (if there is no “written acceptance of the offer,” the consequence is that although the parties may have “entered into a valid agreement



That is, the Convention should be viewed as laying down—not *the minimum that states must do* to enforce arbitral agreements—but rather the *maximum that they are allowed* to do, preventing them from going further despite other appropriate evidence of “agreement.” One curious result is that the Convention will have enacted a sort of Statute of Frauds for international arbitration agreements—giving them far less currency than they would have under domestic contract law. Another curiosity—thanks to the notion of “separability”—is that our party, adopting a written proposal by beginning performance, is able “to wash his hands of the arbitration clause but at the same time” sue for breach or “maintain an action for the price of the goods delivered.”<sup>51</sup>

That contracts failing to meet the Convention’s peculiar “writing” requirement should be excluded entirely from Convention coverage, is by no means an inevitable, or even satisfactory, conclusion<sup>52</sup>—but it appears at least for the moment to be the “prevailing view.” Now it is true that given the obligation of mutual recognition lying at the heart of the Convention scheme, one state may have a natural interest in protecting itself against the singularities and idiosyncrasies of another—requiring assurance that a minimum of familiar formal features be present before it assumes the obligation to enforce an award rendered elsewhere. So, for example, assume an arbitration agreement signed by one party only; the other party is alleged to have “tacitly assented to it,” and an

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to arbitrate, that [is] not an agreement that falls within the scope of the New York Convention”; this is “well established”); Toby Landau, *The Requirement of a Written Form for an Arbitration Agreement: When “Written” Means “Oral,”* in ICCA CONGRESS SERIES NO. 11, at 19, 34 (2003) (“[M]any examples of arbitration agreements and awards that have been defeated by reason of a failure to satisfy a written form requirement.”).

<sup>51</sup> See Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARB. INT’L 27, 29 (1996).

<sup>52</sup> It would seem plausible enough to interpret the Convention as *obligating states to take certain minimum steps* to enforce arbitral agreements—but not imposing a *ceiling* on what they may do—so that if an arbitration agreement would be deemed enforceable under the jurisdiction’s general arbitration statute, or under ordinary domestic contract law standards, the Convention could still be satisfied. To the effect that art. II(2) merely “lays down *the minimum [that states must do]*, not the *maximum [that they may do]* to enforce arbitral agreements,” see Adam Samuel, *The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate*, 8 ARB. INT’L 257, 269 (1992) (emphasis added). Professor Bernini agrees that art II(2) should be read as “setting only the maximum requirements of form beyond which no further (or heavier) requirement can be imposed by national law”—but that to read it as also establishing “a minimum ceiling of formality would limit the scope of the Convention as a whole.” Giorgio Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries*, in THE ART OF ARBITRATION 51, 52-53 (Jan Schultz & Albert Jan van den Berg eds., 1982) (Language being as treacherous as it is, the unfortunate fact is that the terms “maximum” and “minimum” are susceptible here to being used in precisely opposing senses—although I trust that the attentive reader will be flexible enough to follow the drift of the argument.).

*See also* Zambia Steel & Bldg. Supplies Ltd. v. James Clark & Eaton Ltd., [1986] 2 Lloyds Rep. 225, 234-35 (C.A.) (oral assent to sales note containing arbitration clause is sufficient under English legislation intended to implement the Convention; “any evidence which proves that the party has agreed to be bound by an agreement to submit contained in a document or documents is sufficient to make the document or documents an agreement in writing,” and such a holding cannot “constit[ute] departure by this country from any obligation assumed under the Convention”).

award is rendered and confirmed in New York. This might present “great difficulties” to an English respondent:

[A]n English party who has not signed anything would be exposed to foreign arbitration proceedings and to the enforcement here [in England] of a foreign award. This is a major legislative decision which the New York Convention did not require and which is open to much abuse.<sup>53</sup>

But none of this can possibly justify a reading of the Convention that would tie a state’s hands, preventing it from going further should it wish to do so; nor do the virtues of “uniformity”—whatever that may mean—justify freezing the development of the contract law of any signatory.<sup>54</sup> Under any reading, of course, New York would be able to enforce the award locally under the safety valve of Article VII;<sup>55</sup> England should, if it chooses, be entitled to withhold recognition under Articles IV and V.<sup>56</sup>

More fundamentally, none of these considerations of priority among nations *have any purchase whatever* under the Model Law—which is after all

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<sup>53</sup> F.A. Mann, *An ‘Agreement in Writing’ to Arbitrate*, 3 *ARB. INT’L* 171, 172 (1987) (criticizing *Zambia Steel*, 2 *Lloyds Rep.* 225, as going “far beyond anything contemplated by the Convention”).

<sup>54</sup> *Cf.* Paul D. Friedland, *U.S. Courts’ Misapplication of the ‘Agreement in Writing’ Requirement for Enforcement of an Arbitration Agreement under the New York Convention*, *MEALEY’S INT’L ARB. REP.*, May 1998, at 21, 23, 25 (“The Convention in this respect is more restrictive and more rigid than many national laws, but that was the choice of the drafters”; in art. II “the drafters and signatory nations manifested their intent that courts adopt a uniform approach to enforcing arbitration agreements.”).

<sup>55</sup> The consequences for the claimant of not being able to bring himself within the Convention are serious, but need hardly be fatal to an award’s currency. When an arbitration is to be held within the United States, perhaps the greatest significance of the Convention is with respect to the jurisdiction of federal courts. *See generally* Alan Scott Rau, *The New York Convention in American Courts*, 7 *AM. REV. INT’L ARB.* 213, 214-18 (1996) (“Why the Convention Matters”).

Note also that the present discussion assumes the applicability of art. VII(1) of the New York Convention to arbitration *agreements* as well as to awards, despite the fact that the text of the article does not expressly mention them. *See id.* at 232-34 (“A product of last-minute drafting and discussion at the conference that produced the text of the Convention, the enforceability of arbitration agreements was only taken up over the continuing objection of many delegates that the subject did not belong in the Convention at all”; still “it seems sensible that the obligations of the Convention should be read as congruent for both agreements and awards.”).

<sup>56</sup> *Cf.* *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003). An award was rendered in China. The Third Circuit held that—even though the panel had already rendered an award—and even though, supposedly, “[t]he absence of a written agreement is not articulated specifically as a ground for refusal to enforce an award” under Art. V—the district court had “an obligation to determine independently the existence of an agreement to arbitrate.” *Id.* at 283-84. Judge Alito (as he then was) wrote separately in concurrence “to elaborate on the importance of Article IV” of the Convention: “[A] party seeking enforcement of an award under Article IV must supply the court with an ‘agreement in writing’ within the meaning of Art. II”; “it is apparent that this means” he must provide “either a duly signed written contract containing an arbitration clause or an agreement to arbitrate that is evidenced by an exchange of letters or telegrams.” *Id.* at 292-93. *See also* *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292-93 (11th Cir. 2004) (London award; “the party seeking confirmation of an award falling under the Convention must meet article IV’s prerequisites to establish the district court’s subject matter jurisdiction to confirm the award”; action dismissed for failure to satisfy the “agreement-in-writing prerequisite”).

nothing more than a state's own internal legislation.<sup>57</sup> Here the question takes on quite different proportions: If agreements falling outside the ambit of the Model Law have—in both domestic and international cases—routinely been enforced for generations, it is to say the least odd that state legislation would aim at taking away from its judiciary the power to enforce these contracts at all.<sup>58</sup> In this, the state voluntarily holds itself hostage to the practice of the least developed foreign legal systems.<sup>59</sup> The troubling implications for the increasingly thorny problem raised by the presence of third parties—that is, the true “non signatory” who seeks to assert rights under an arbitration agreement or whom a party tries to bring into an arbitration proceeding—must be reserved for an article to follow.<sup>60</sup> Still the continuing attempt to align the Model Law and the Convention means that the extensive Convention jurisprudence is liable

<sup>57</sup> For some sensible Model Law decisions to this effect, see *Schiff Food Products Inc. v. Naber Seed & Grain Co.*, [1996] 1 W.W.R. 124, 125 (Sask. Q.B.) (in response to buyer's written offer, seller submitted a sample of goods; under UNCITRAL Model Law, “[a]cceptance need not be in writing but may be inferred by conduct”); *Ferguson Bros. of St. Thomas v. Manyan Inc.*, 38 C.P.C. (4th) 91 (Ont. Sup. Ct. 1999) (buyer did not sign or return a copy of the seller's confirmation form, which made reference to standard terms and conditions including arbitration clause; nevertheless the buyer had dealt with the seller in the past on the basis of similar terms, “had the opportunity . . . to ascertain the terms being incorporated,” accepted the goods “thereby appropriating the goods to the contract,” and paid for the goods following receipt of the seller's invoices; “[t]here was clearly a binding contract”).

<sup>58</sup> See the observations of Lord Wilberforce, then acting as the Observer for the Chartered Institute, during the deliberations over the text: “In present-day trade there were many contracts, even in writing, that were not signed by both parties. To draft the model law so narrowly as to exclude them from arbitration . . . would be far too backward looking.” HOLTZMANN & NEUHAUS, *supra* note 32, at 297.

The paradox did not seem, however, to trouble the drafters of the Model Law—who acknowledged precisely that the Law's “writing” requirement did operate in an even “stricter” fashion than the New York Convention—since “it disallows reliance on a ‘more favourable provision’ in the subsidiary national law (on domestic arbitration) as would be possible under that Convention by virtue of its article VII(1).” See Seventh Secretariat Note, A/CN.9/264, in HOLTZMANN & NEUHAUS, *supra* note 32, at 290.

<sup>59</sup> The Commission's final report rejected suggestions that the text of the Law be expanded to permit the enforcement of arbitration clauses in bills of lading or certain commodity and reinsurance contracts which had not been signed by both parties: “It appeared unlikely that many States would be prepared to accept the concept of an arbitration agreement which, although contained in a document, was not signed or at least consented to in writing by both of the parties.” Commission Report, A/40/17, August 21, 1985, in HOLTZMANN & NEUHAUS, *supra* note 32, at 300-01.

<sup>60</sup> *Lo v. Aetna Int'l, Inc.*, No. 3:99CV195 JBA, 2000 WL 565465, at \*4 (D. Conn. March 29, 2000), illustrates the sort of problem that will inevitably arise. Here a company's manager had signed its “retirement plan” as a trustee and later asserted a claim as a beneficiary. Although the company argued that she should be bound “according to ordinary contracts and agency law and specifically the principle of estoppel,” the court held that it had “shown no written agreement to arbitrate these claims” signed by her “in her capacity as beneficiary”; it thus concluded that it lacked any subject matter jurisdiction under the Convention. See also *Javor v. Francoeur*, 13 B.C.L.R. (4th) 195 (2003) (arbitration award rendered against an individual found to be the “alter ego” of one of the signatories; held, enforcement denied; “[i]t is a contractual obligation and the parties are those to the ‘agreement in writing,’ not persons procedurally added involuntarily as parties during arbitration”; “[t]he concept that the parties are signatories is made in Article II(2),” and the Convention's requirement that a copy of the arbitration agreement must accompany the enforcement application “appears directed to the ability of the court to verify the signatory parties”).

to dominate. It naturally did not occur to anyone proposing arbitration legislation in Texas, or California, or Illinois, that the “model legislation” proposed by UNCITRAL could possibly be varied to reflect local needs.<sup>61</sup>

Recent activity at UNCITRAL aimed at “modernizing” Article 7 of the Model Law has in fact rendered state legislation even more manifestly obsolete. The Commission has decided to present states with a new choice of two similar, but “alternative texts,” and it seems that the pendulum could not have swung much further in the opposite direction:<sup>62</sup> One alternative would simply eliminate any “writing” requirement altogether, making valid even oral agreements to arbitrate. The other is somewhat harder to grasp: Although in principle it would still insist that an arbitration clause be in “writing,” the requirement would be satisfied “if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.”<sup>63</sup>

Where this can possibly leave our state legislatures—who have over the years earnestly and poignantly strived to mimic “international standards”—is anybody’s guess. What is most striking is that none of these problems at all—absolutely nothing that has been touched on throughout this note—is posed in any way by our “skeletal” and “obsolete” federal statute.

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<sup>61</sup> The German version, by contrast, deems the formal requirements of the Model Law to be satisfied “if the arbitration agreement is contained in a document transmitted from one party to the other . . . and—if no objection was raised in good time—the contents of such document are considered to be part of the contract in accordance with common usage.” German Arbitration Act, Jan. 1, 1998, § 1031(2). *See generally* BINDER, *supra* note 47, at 68, 70 (The Model Law “can be adopted as is or with any other useful variations.”).

<sup>62</sup> *See* Note by the Secretariat, Settlement of Commercial Disputes: Form of Arbitration Agreement, U.N. Doc. A/CN.9/606 (April 13, 2006); Report of the Commission, U.N. Doc. A/61/17, June 19-July 7, 2006, ¶¶ 153-155 (the revised text of art. 7 is intended to “[achieve] a significant change of perspective” and the written form is no longer “prescribed to achieve certainty about the parties’ will to arbitrate”).

<sup>63</sup> The second of these two alternatives would still, apparently, *exclude* “a mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure.” By contrast, it would apparently *include*:

- “contracts concluded by performance or by conduct . . . with reference to a standard form containing an arbitration clause,” and
- a case “where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd’s Open Form.” Note by the Secretariat, *supra* note 62, ¶ 9.

These are fine distinctions indeed; I gather we are meant to distinguish between:

- cases where parties orally agree to arbitrate, while at the same time choosing to adopt or adhere to the ICC Rules of Arbitration [not OK], and
- cases where parties orally agree to a deal, at the same time adopting or adhering to some existing document—a standard form, say, which happens to include an arbitration clause [OK].

Can this possibly be defended? Under the proposal the “standard form” in question, like the LOF, need never at any time even have originated with, or been issued by, either of the parties. Still, I’m sure that something perfectly coherent must have been intended—and that I’ll manage to grasp it in due course. In any event, the Secretariat’s hypothesized cases seem to go somewhat further even than the FAA would at the moment permit.

### 6. *Aping Our Betters (III)*

And here is my personal favorite—the most odd and outlandish result of the vogue for verbatim adoption of the UNCITRAL Model Law: A state’s “international arbitration” statute may also provide that:<sup>64</sup>

(d) *The arbitration tribunal shall decide ex aequo et bono or as amiable compositeur if each party has expressly authorized it to do so.*

Now one of the cornerstones of any modern arbitration regime is of course the understanding that arbitral awards are not to be judicially reviewed “on the merits”—and in particular are not to be reviewed for any “error of law.”<sup>65</sup> The usual corollary is that arbitrators are to be allowed a wide margin of creativity in resolving a dispute, or in devising a remedy, as long as they take care to deploy the right language. Nevertheless it is commonplace in the Continental literature to distinguish between arbitrators who make “even particularly blatant errors” of law—something that is tolerated—from those who “presume” to decide *ex aequo et bono* when they were expected instead “to decide according to law”—in which case vacatur may follow on the ground that they have “exceeded their powers.”<sup>66</sup> This is precisely the distinction codified in the Model Law—which accordingly requires an “express authorization” for a decision in equity in order to avoid any “risk of misleading an unwary party.”<sup>67</sup>

<sup>64</sup> E.g., Texas International Arbitration and Conciliation Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.102(d) (Vernon 2007) (emphasis added). This text is taken verbatim from art. 28(3) of the UNCITRAL Model Law. A slightly deviant version is in the Florida International Arbitration Act, FLA. STAT. § 684.17 (2007), which manages to cover all the bases without saying much of anything (arbitrators shall decide the merits “according to the law or other decisional principles provided for in the written undertaking to arbitrate, including acting *ex aequo et bono* or as *amiables compositeurs*”; “[i]n the absence of such stipulation, the tribunal shall decide the merits of the dispute according to the law, including equitable principles, which it determines should control”).

<sup>65</sup> See, e.g., Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 466-67 (1999) (“most nations are alike,” and will bar review “of all but the most egregious procedural or ethical violations”); cf. PHILIPPE FOUCHARD ET AL., *TRAITÉ DE L’ARBITRAGE COMMERCIAL INTERNATIONAL* 937 (1996) (An “error in the interpretation of the applicable law, or with respect to the appropriate legal classification,” is not in itself a ground for vacatur.) (my translation).

<sup>66</sup> See FOUCHARD ET AL., *supra* note 65, at 958-60 (my translation); Otto Sandrock, *How Much Freedom Should an International Arbitrator Enjoy?—The Desire for Freedom From Law v. The Promotion of International Arbitration*, 3 AM. REV. INT’L ARB. 30, 54 (1992) (there is a “clear boundary” between “normal” arbitrators charged with “applying strict legal rules,” and “special” arbitrators authorized to decide *ex aequo et bono*; “[w]ithout proper authorization by the parties, this boundary must never be transgressed” by a “normal” arbitrator, whose “power does not reach beyond the limits of strict law”).

<sup>67</sup> HOLTSMANN & NEUHAUS, *supra* note 32, at 770. See also W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 110, 348-49 (3d ed. 2000), which treats amiable composition, although “a creation of French legal thinking,” as essentially synonymous with decisions “*ex aequo et bono*”; an “arbitrator must apply the law, and not his own concepts of fairness, unless the parties give him the power to disregard strict rules of law.”

Marino Rubino-Sammartano argues that in theory amiable composition is nothing but a “joint mandate to settle”: The parties have “jointly appointed” an “agent” to “settle their differences”—but “[t]o settle is not to decide” and “is not a quasi-judicial activity.” Marino Rubino-Sammartano, *Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo*

My rough impression—gleaned entirely from anecdote—is that this feature of the Model Law, happily, remains entirely unnoticed and obscure. I imagine, for example, that we would bewilder many members of the Texas Bar if we were to warn them that they were expected to master the subtleties of French legal terminology before they could confidently dispose of an “international” dispute through arbitration.<sup>68</sup> (For that matter even the most sophisticated of commentators seem to have some difficulty in grasping just what is entailed by being an “*amiable compositeur*.”<sup>69</sup>)

I say “happily” because it is usually taken for granted in this country that the arbitration process in no way presupposes a decisionmaker who acts by formulating, applying, and communicating general principles of decision, or “rules.” We do not in any event expect that an arbitrator will decide a case the way a judge does.<sup>70</sup> We do not expect that he will necessarily “follow the

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(*Discretionary Authority to Mitigate Strict Law*): *Apparent Synonyms Revisited*, 9 J. INT'L ARB. 5, 14-15 (1992). Such an argument epitomizes brilliantly (if unintentionally) the fault line that seems to run through our every discussion of arbitration: Who on this side of the Atlantic could have doubted that arbitrators were “agents,” and who could have thought that a contractually-mandated “decision” differs in any fundamental respect from an imposed “settlement”? Cf. Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 473-77 (2005) [hereinafter Rau, *Culture*] (“interest arbitration”; “creating entirely new contract terms through adjudication”). Rubino-Sammartano concedes that where the parties “have clearly asked *the amiable compositeur* to decide,” then the process should be construed as “the granting of the discretionary authority to mitigate the law.” Rubino-Sammartano, *supra*, at 16. And at this point any supposed distinction dissipates into abstract clouds of smoke.

<sup>68</sup> For the broad coverage of state international arbitration statutes, see, e.g., TEX. CIV. REM. & PRAC. CODE ANN. § 172.003 (Vernon 2007) (arbitration is “international” within the meaning of the statute if the parties have their places of business in different nations; or if “a substantial part” of the contract is to be performed in another nation, or if the arbitration “arises out of a legal relationship that has another reasonable relation with more than one” nation).

<sup>69</sup> Cf. Paul D. Carrington, *Self-Regulation, the “National Policy” of the Supreme Court*, 3 NEV. L.J. 259, 284 (2003), which suggests that an arbitrator in international practice may act as an *amiable compositeur* only if “the parties ask for such cheerful conciliation service.”

Although the whole “arbitrator/mediator” dichotomy may be something of an alien construct in traditional Chinese legal thinking, it is striking that the Chinese-language version of art. 28(3) of the Model Law uses the word *tiaojie ren*—a term most commonly used to refer to mediators.

And then there is the North Carolina version of the UNCITRAL Model Law, which provides that

[t]he arbitral tribunal shall decide *ex aequo et bono* (on the basis of fundamental fairness), or as *amiable compositeur* (as an “amicable compounder”), only if the parties have expressly authorized it to do so.

North Carolina International Commercial Arbitration and Conciliation Act, N.C. GEN. STAT. § 1-567.58(c) (2007). Adorable, no?

<sup>70</sup> The Uniform Arbitration Act warns that “the fact that the relief [granted by arbitrators] was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.” UNIF. ARBITRATION ACT (amended 2000) § 12(a). There are a number of possible implications: For example, the text assures us that contracting parties may, as in “interest arbitration,” submit to arbitration disputes that would not strictly be considered “justiciable.” In addition it confirms the broad leeway granted to arbitrators in fashioning remedies that extend beyond what a court would undertake. See, e.g., *Staklinski v. Pyramid Elec. Co.*, 160 N.E.2d 78, 80 (N.Y. 1959) (employment contract; “[w]hether a court of equity could issue a specific performance decree in a case like this is

law”—or indeed apply or develop any body of general rules as a guide to his decision. Granted, from time to time we will come across an arbitration clause that grants to the arbitrator the power to act *ex aequo et bono* with just the level of explicitness contemplated by the Model Law.<sup>71</sup> But even in the absence of such express authorization it has become something of a chestnut to say that arbitrators need not decide a case “according to law”: “For they are a law unto themselves, and may decide according to their notions of justice.”<sup>72</sup>

In legal systems where an arbitrator normally sees himself as some sort of an alternative judge, expected to track official jurisprudence, the notion of *amiable compositeur* serves as a useful safety valve. By contrast, the absence of the term from our own vocabulary is hardly a function of our unfamiliarity with the role of equity in arbitration<sup>73</sup>—it rather reflects the total lack of any need to devise a separate category for what is after all everyday arbitral practice: Just as Molière’s M. Jourdain was astonished to find that he had been speaking prose all his life, so American arbitrators, without dreaming of using the word, have been playing all along at being *amicales compositeurs*.<sup>74</sup> If, however, the

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beside the point”); *Coopertex Inc. v. Rue de Reves Inc.*, No. 89-5748, 1990 WL 6548, at \*3 (S.D.N.Y. Jan. 22, 1990) (sale of goods that are not “unique”; “[w]hether or not a court would have awarded specific performance in this case is not the issue”). But the statute has also been invoked to buttress our understanding that arbitral awards need not in substance track the course of official jurisprudence. *See, e.g., Coors Brewing Co. v. Cabo*, 114 P.3d 60, 64 (Colo. Ct. App. 2004) (“To say that an arbitrator who manifestly disregards the law exceeds his authority is not consistent with this provision.”).

<sup>71</sup> *See, e.g., Am. Life Ins. Co. v. Parra*, 25 F. Supp. 2d 467, 474 (D. Del. 1998) (arbitrators “shall decide in accordance with prevailing practices in the Company and with what they think is the fair and right thing to be done between the parties from a business point of view”); *In re Ruefer*, No. 07-99-0114, 1999 WL 371568, at \*1 (Tex. Ct. App. June 8, 1999) (“[A]rbitrator shall settle the dispute in whatever manner he or she feels will do substantial justice, recognizing the rights of all parties and commercial realities in the marketplace.”).

<sup>72</sup> *Leach v. Harris*, 1873 WL 2316, at \*4 (N.C. 1873).

Older cases like this are of course eminently quotable. *See also Leslie v. Leslie*, 24 A. 319, 320 (N.J. Ch. 1892). But then, curiously, they invariably go on to remark that if the arbitrators had instead “intend[ed] to be guided by, and decide the case according to law” — but turned out to be mistaken — then the award could indeed be overturned; in such a case, after all, it could be “assumed that they would have gone in the other direction,” “if they had known the law to be otherwise.” *Leach*, 1873 WL 2316, at \*4; *Leslie*, 24 A. at 320-21. This second part of the equation—an apparent relic of the common law of arbitration—no longer has the slightest resonance for us. It must have created some odd incentives indeed: For if the modern arbitrator, in order to safeguard the currency of his award, will often purport to have followed legal principles—even when he hasn’t—the common-law arbitrator must have often felt the need—even while scrupulously straining to apply the law—to appear to disregard it completely!

*See also S.A. Wenger & Co. v. Propper Silk Hosiery Mills, Inc.*, 146 N.E. 203, 204 (N.Y. 1924) (“It may be that under the rules of the Raw Silk Association matters of strict law are subordinated to a course of dealing or to the equities of the case,” and “[t]raders may prefer the decision of the arbitral tribunal to that of the courts” on questions of law as well as of fact.).

<sup>73</sup> *See Lawrence Newman, Drafting Effective Dispute Resolution Clauses: Part II*, 6 WORLD ARB. & MEDIATION REP. 174, 179 (1995) (“As far as the use of *amicales compositeurs* is concerned, my sense is that the reason we have not come up with an English equivalent is because this power is lacking in the United States as compared to Europe.”).

<sup>74</sup> I’m rather fond of this trope. For a while I even fancied, self-indulgently, that I had discovered it myself. *Rau, Culture, supra* note 67. *See generally id.* at 509-534 (“the red

Model Law had any purchase whatever in the states that have enacted it—if the phrase did not remain safely cabined within its Gallic ghetto—they would require special permission to do so.

7. “Take But Degree Away . . . .”

It is cheap and easy, I suppose, to draw examples as I have done from state legislation—legislation which in most cases of course should readily be swept aside in any event on grounds of federal preemption. And it may be thought that I have been unfairly “running up the score” by choosing to dwell on statutory provisions whose drafting is particularly inept. “Yes, but *we* can do better than *that*.”

Nevertheless the problem is if anything exacerbated—my concerns only made more acute—as the draftsmen become more knowledgeable. Here the glittering temptation is towards sweeping reform aimed at a neat rationalization of our rickety ad hoc system. This is almost always misguided; the problem is not ignorance but the temptation of systemization born of overconfidence. (“O reform it altogether . . . .”)

What I take to be a cautionary example is provided by a recent important work on the FAA, a collaboration among a number of leading arbitration scholars and contributors to this symposium. Whatever the differences that separate the authors of *Arbitration Law in America: A Critical Assessment*, they are at least united in their desire to sweep away almost a century of accumulated jurisprudential detritus—to accomplish a “complete reformulation” of federal arbitration law by replacing a “completely outmoded” statute.<sup>75</sup> Much of the resulting product is eminently sensible. Much of what remains reflects ideological choices with respect to fraught matters of High Policy into which I do not presume to venture.<sup>76</sup> I am talking here only about method. But precisely in regard to method, one still readily finds abundant cause for misgivings, uneasiness, disquiet: The pitfalls of systems-building through codification seem nicely exemplified by attempts at drafting such as this:<sup>77</sup>

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herring of ‘manifest disregard’”). But even a cursory Westlaw search reveals 75 prior similar uses; I am embarrassed to say that LexisNexis yields (and on a search going back only to 1981) as many as 319.

I remember, when as an adolescent I first went to Europe, my friends and I found ourselves one evening in a conversation with some French counterparts; in the usual snarky fashion of teenage males, one of my companions inquired whether the French referred to “French kissing” in the same terms—that is, with the same national identifier—as we did in English. Our French interlocutors were completely bemused and befuddled—but hardly because they were unacquainted with the *phenomenon*. That’s just, for them, what “kissing” was.

<sup>75</sup> BRUNET ET AL., *supra* note 35, at 1.

<sup>76</sup> Consider, for example, the now-common use of arbitration clauses in contracts of adhesion; Professor Sternlight finds “mandatory consumer arbitration” to be “non-consensual” “under most reasonable definitions,” and urges that the practice “be prohibited.” *Id.* at 144, 182. Cf. Rau, *Separability*, *supra* note 19, at 8-9 (“agreement” here should have “no meaning that is in any way different from the use of the term every day in the realm of contract”; the notion that an adherent’s acquiescence in arbitration “must somehow be legitimized by transcendent insight or internal transformation” “seems quaint”).

<sup>77</sup> BRUNET ET AL., *supra* note 35, app. A (Professor Ware) (emphasis added).



*Sections 1 and 2 of this Act apply in courts of the United States and in courts of any State or Territory of the United States . . . . All other sections of this Act apply only in courts of the United States.*

The theoretical explanation appears to be that §§ 1 and 2 of the FAA raise “substantive questions” (“what contracts should be enforced?”). By contrast, the remainder of the Act deals only with “essentially procedural subjects,” respecting “how courts should conduct themselves”—and here, “respect [for] state sovereignty” counsels that states should be able “to make their own rules.”<sup>78</sup>

It is highly unlikely in fact that one will be able to get very far into the arbitration literature before one is faced with doctrinaire assertions that purport to mark off the respective realms of the “substantive” and the “procedural.”<sup>79</sup> But my own legal education—alas so many decades in the past—effectively began with the insight that these terms are perfectly meaningless unless put in some context (“For just what purpose are you asking the question?”). So I very much doubt that such a conceptual framework is a particularly profitable way of dividing up the federal statute.

What is required, by contrast, when we are talking about the respective roles of state and federal law, is an enterprise involving a considerably greater degree of nuance. (What we are given instead, in Henry James’ wonderful phrase, is “an anxious excess of simplicity.”<sup>80</sup>) A “reverse-*Erie*” inquiry would lead us to examine, in each case, what the federal interest in particular outcomes may be, and what obstacles may be thrown up in the way of the federal scheme by the organization of a state’s judiciary. For example, § 4 of

<sup>78</sup> *Id.* at 122-23 (Professor Ware).

<sup>79</sup> *See id.* at 77. Professor Brunet there remarks that the Supreme Court’s action in *Volt* in “upholding [the] parties’ selection of state arbitration procedure is all the more significant” given that the Court could instead “have easily ignored California arbitration procedure on the simple *Southland* theory that substantive federal law trumped state arbitration procedure.”

I’m not quite sure I follow the logic of the argument here: As a matter of fact, the result in *Volt*—the Court’s acquiescence in the refusal to order arbitration—rested wholly on the Court’s highly tendentious characterization of California’s arbitration legislation as constituting nothing more than “rules of arbitration,” “a certain set of procedural rules,” and it was precisely for that reason that they were thought not to implicate federal policy. *Volt* Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989). In any event it seems clear enough that Professor Brunet is wholeheartedly buying into this classificatory scheme. He is hardly alone, see, e.g., *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 627 (Md. 2001) (“FAA § 2 preemption was held not to apply to a California procedural statute in *Volt*.”). But in fact—and this is what makes *Volt* such dubious authority—applying the “California rules” led directly to a refusal to enforce a contract for arbitration, under the precise circumstances where federal law would otherwise require that the agreement be honored. What else, I wonder, can “substantive” mean? *See Rau, Waiver, supra* note 41, at 250-51.

*See also* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 542-46 (2004) (“rules governing the dispute resolution process . . . are fundamentally procedural”; the FAA is “pure procedural regulation” and is “properly seen as procedural when viewed from any angle”; since “Congress lacks the power to regulate procedures in state courts,” it must follow inexorably that “FAA preemption is unconstitutional”).

<sup>80</sup> LEON EDEL, HENRY JAMES: A LIFE 404 (1985).

the statute draws the attention of courts to a federal preference for jury determinations; § 6, to the perceived importance of summary dispositions; §§ 10 and 12, to the limited grounds for vacatur and to the need to make any challenges promptly. Section 16 may draw the attention of courts to the federal commitment to getting the parties into arbitration as expeditiously as possible. And so on. If the federal interest is paramount, the appropriate standard then becomes whether a state rule of civil procedure “digs into”<sup>81</sup>—“imposes unnecessary burdens upon”<sup>82</sup>—prevents us from giving full effect to—any of these federal rights. Such a functional inquiry defies neat encapsulation, requiring instead a process of which the authors are bluffly intolerant—the “water-torture of case-by-case reformation.”<sup>83</sup>

Consider this possible demonstration under § 4 of the FAA. The federal statute, as we know, provides for a jury determination of contested issues concerning the “making of the arbitration agreement”; a state, on the other hand, may prefer to confide these issues to a jury. Now,

[t]o have a court rather than a jury pass on the existence of an arbitration agreement hardly appears to undermine or frustrate the arbitration process; moreover, a bench trial of the issue should not be expected to “frequently and predictably” lead to different outcomes. [It is not particularly clear in any event what role the choice of a jury in § 4 was intended to play in the overall statutory scheme. For . . . it is only “the party alleged to be in default”—presumably the party who has “failed, neglected, or refused” to proceed with arbitration—who under § 4 is entitled to ask for a jury trial; the party “aggrieved” by such “failure, neglect, or refusal” has no equivalent right.] State rules denying a jury trial are certainly consistent both with the summary nature of the proceeding, and with the traditional treatment of these specific performance actions as equitable, and they can only result in making arbitration a speedier and more efficient process.<sup>84</sup>

<sup>81</sup> “To what extent rules of practice and procedure may themselves dig into ‘substantive rights’ is a troublesome question at best.” *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 295-96 (1949). In *Brown* the Court held that when deciding a FELA case, a state may not apply its usual rule that pleadings are to be construed “most strongly against the pleader”: The plaintiff’s federal “right of trial . . . cannot be defeated by the forms of local practice.” Dissenting, Justice Frankfurter noted that the case presented the “reverse situation” from that confronted by federal courts when they are bound to respect “the substance of State-created rights” under *Erie*. *Id.* at 301.

<sup>82</sup> See *Felder v. Casey*, 487 U.S. 131, 134, 138 (1988) (in § 1983 action, state “notice-of-claim” statute is “pre-empted as inconsistent with federal law”; despite the “general and unassailable proposition” that “[s]tates may establish the rules of procedure governing litigation in their own courts,” the state statute stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and its enforcement “will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court”) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

*Cf.* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 36-39 (2006) (“reverse-*Erie*” is in fact “more intrusive than *Erie*”; in the “middle area between state and federal substantive law, state courts must apply federal procedural law to federally created claims more extensively than federal courts must apply state procedural law to state-created claims”).

<sup>83</sup> BRUNET ET AL., *supra* note 35, at 2.

<sup>84</sup> Alan Scott Rau, *Does State Arbitration Law Matter at All?*, in 26 ADR & THE LAW 199, 211 (Fordham Univ. Sch. of Law et al. eds., 1999).

That was intended to be a sample of the appropriate analysis—a functional argument leading nicely to the conclusion that the right to a jury trial ought to be left to state law.<sup>85</sup> By contrast, in other circumstances, a similar sort of reasoning may well come to rest somewhere else. (But at least we have the comfort of knowing that we have been asking the right questions.) It may be, for example, that in some cases states should be required to model their procedures after the commands of the federal act.<sup>86</sup> For example, § 12 of the FAA

<sup>85</sup> At this point Professor Ware will hasten to remind me that his argument is after all qualified in one critical respect: He readily concedes that if states were to ignore § 4 to the point of refusing to grant specific performance of arbitration agreements—or were to ignore § 10 to the point of radically extending the grounds for vacatur, making them “so extensive that they apply to nearly all arbitration awards”—then the mandate of § 2 itself would clearly be implicated, and federal law would again control. See BRUNET ET AL., *supra* note 35, at 123-24. But:

- Does this suggest that we will regularly be called upon—in any case—to engage in precisely the same sort of “reverse-*Erie*” analysis as at present? If so, I am hard put to see how we will have advanced the ball very far at all. (In addition, the concession is a subtle one that courts—even those predisposed to exercise a modicum of good faith—may readily miss: After all, what is a court likely to make of the injunction that § 4, or § 10, is to “apply only in courts of the United States”?)
- Or is the intention, by contrast, somehow to free the states of some of the restrictions under which they labor at present—by raising the bar of preemption much higher? A new and more generous standard of preemption will of course require the same sort of case-law development—but to aim at desired results in covert and disingenuous fashion is usually a rum way to go about legislating.

<sup>86</sup> Consider FAA § 16: Our leading arbitration treatise takes the position that § 16 “constitutes an important substantive addition to the FAA, one integral to its function as a regulatory statute promoting arbitration,” and so in consequence “FAA § 16 governs in all courts.” IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT*, §§ 10.7.1, 43.1.3.2 (1994); *cf.* *Dakota Wesleyan Univ. v. HPG Int’l, Inc.*, 560 N.W.2d 921, 922, 924 (S.D. 1997) (“we turn to the FAA for guidance in determining whether the circuit court’s order to compel arbitration is appealable”; held, “[w]e are without jurisdiction to review the order compelling arbitration in South Dakota”).

When a trial court denied a motion to stay litigation pending arbitration, an Oregon appellate court conducted a careful functional analysis before concluding that the FAA gave it appellate jurisdiction to review the order—even though the denial would *not* have been appealable under state law: For the state procedural rule would “raze[ ] the framework with which the FAA secures its basic objective,” permitting an appellant “to skirt an otherwise valid arbitration clause and to force the moving party into potentially lengthy and costly litigation.” *Berger Farms v. First Interstate Bank of Ore., N.A.*, 939 P.2d 64, 69 (Ore. Ct. App. 1997). *Berger* was later overruled: The court in *Bush v. Paragon Property, Inc.*, 997 P.2d 882 (Ore. Ct. App. 2000) (en banc), thought that a contrary result was dictated by the Supreme Court’s intervening decision in *Johnson v. Fankell*, 520 U.S. 911 (1997) (in a § 1983 action, a state trial court had denied the defendants’ motion for summary judgment on the ground of qualified immunity; held, although an interlocutory appeal would be available had the case been filed in federal court, state law denying the right to such an appeal was not preempted). Now the differences between *Berger* and *Johnson* are obvious enough, and hardly escaped notice—there are several, but note in particular that:

- In *Johnson* the question whether a meritorious defense existed would eventually be determined following trial, and the defendants’ claims could readily be reviewed at that point; by contrast, in *Berger*, the whole point of an arbitration clause, if one is entitled to assert it, is to avoid the threatened trial;
- In *Johnson* the qualified immunity defense had been extended by § 1983 in order “to protect the State and its officials from overenforcement of federal rights,” *id.* at 919-20 (emphasis

tells us that “[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” When one considers the evident purpose of this statutory provision, the argument that is called for doesn’t look particularly fancy: It seems plausible to conclude (by which I mean, of course, that I myself would conclude) that state law may harmlessly contract the time within which a losing party can move to vacate an award.<sup>87</sup> But by contrast, to allow states to extend the statutory time limit would weaken the currency of awards which federal law intends to be definitive.<sup>88</sup> A similar line of reasoning might

added); it seemed to follow that any “interference with *federal* interests” was therefore considerably attenuated; in *Berger*, by contrast, an *independent federal interest* in expeditious dispute resolution in interstate commerce can be taken as read.

Nevertheless the *Bush* position seems for the moment to have emerged as dominant; it now apparently suffices to conjure up notions of “sovereignty” or “procedure” to make the spell effective. See *Am. Gen. Fin. Servs. v. Vereen*, 639 S.E.2d 598, 601 (Ga. Ct. App. 2006) (an order denying a motion to compel arbitration is not directly appealable; while denying an interlocutory appeal “may delay arbitration, such delay is not tantamount to the failure to enforce valid arbitration agreements contrary to congressional objectives”); compare *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 532 S.E.2d 436, 440 (Ga. Ct. App. 2000) (“The timing of the right to appeal from an order compelling arbitration is a procedural matter which may delay but does not prevent enforcement of a valid arbitration agreement,” and so “assuming § 16 of the FAA would prohibit the appeal, it does not preempt Georgia’s procedural rule allowing this appeal.”).

I hope it is evident that I have—as we are supposed to say in Texas—no dog in this fight. Again, the only point is method.

<sup>87</sup> See, e.g., *Joseph v. Advest, Inc.*, 906 A.2d 1205, 1209-10 (Pa. Super. Ct. 2006) (state law imposed a 30-day time limit within which to challenge an award; held, § 12 of the FAA, giving a party three months to challenge an arbitration award, is “a procedural rather than substantive provision” and this provision “will not extend so far as to preempt the procedural rules of state proceedings”). For the same sensible result—strikingly, under a diametrically opposed rationale—see *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1395 (D.C. Cir. 1995) (“the Connecticut statute of limitations for petitions to vacate arbitration awards is jurisdictional, not subject to waiver, and, accordingly, substantive”; if a motion to vacate is not filed within the thirty day time limit imposed by state law, “the trial court does not have subject matter jurisdiction over the motion”).

<sup>88</sup> Cf. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984). Here a losing party “remained silent for four months after the panel of arbitrators found against him,” and only moved to vacate in response to a later motion to confirm. Apparently state law permitted such an untimely defensive motion. But this was held to be “too late”: “The role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award,” and when three months have passed without a motion to vacate, “the successful party has a right to assume the award is valid and untainted.” *Id.* at 176-77. The court acknowledged that its holding might “create one rule for Athens and another rule for Rome,” *id.* at 172, but this dictum can only be understood as unnecessary caution: The degree to which FAA awards are binding should not vary by forum, either between the federal and the state courthouses, or horizontally from state to state.

*MBNA America Bank, N.A. v. Teofil Boata*, 926 A.2d 1035 (Conn. 2007), is not necessarily to the contrary—although it ignores the FAA completely. Here the Connecticut Supreme Court held that an award could be challenged even after the 30 days provided by state statute; “a challenge to the existence of an arbitration agreement is appropriate at any stage before the court renders judgment confirming the award if the issue was not waived during the arbitration proceedings.” *Id.* at 1045. A similar result under federal law is *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, 430 (1st Cir. 1998) (The “enforcement provisions of the FAA, do not come into play unless there is a written agreement to arbitrate,” so that “if there is no such agreement, the actions of the arbitrator have no

suggest that § 10 of the FAA in no way prevents states from narrowing even further the grounds for challenging awards—for might not limited grounds for vacatur in fact minimize judicial interference with the efficacy of the arbitration process?<sup>89</sup> By contrast, state law that expands the grounds for vacatur will at the very least appear considerably more problematical.<sup>90</sup>

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legal validity.”). Still, the Connecticut case is troubling in that the resisting party had not merely stayed out—but had actually taken part in the arbitration; the First Circuit in *MCI* noted sensibly that in such circumstances it would be “reasonable to conclude that participation in the litigation of the merits of a controversy before an arbitration panel, at the very least binds the party to the procedural requirements that emanate from that process.” *Id.* at 430-31.

<sup>89</sup> See, e.g., *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr. 2d 726, 735 (Ct. App. 1999) (California law, “by somewhat more strictly limiting judicial review of the merits of an award,” in fact “furthers the use of arbitration.”).

*Siegel* itself—which rejected a motion for vacatur based on the red herring of “manifest disregard of the law”—is not a case with great probative value. A better illustration of my point would posit a state law requiring confirmation of awards rendered even by “evidently partial” tribunals—at least where the parties themselves had not expressly stipulated that their arbitrators should be “neutral.” Such a case in fact is *Westinghouse Electric Corp. v. N.Y.C. Transit Authority*, 623 N.E.2d 531, 535 (N.Y. 1993) (where parties had “freely and knowingly accepted” a biased arbitrator, the resulting award did not violate state public policy); *MACNEIL ET AL.*, *supra* note 86, § 26.2.5 n.106 (such a permissive view, whether or not it accurately represents state law, “has no proper role to play in the interpretation of the FAA”).

<sup>90</sup> *But cf.* *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117, 118 (Ct. App. 2005). Here the court vacated an award because the arbitrator had failed to make the disclosures required by California’s “Ethics Standards for Neutral Arbitrators in Contractual Arbitration.” The court acknowledged that the FAA “employs a different standard” from that found in California law, in that it “permits the vacating of an arbitration award only on a showing of ‘evident partiality’”—but nevertheless rejected the argument that the federal statute had preemptive effect: The California statute “does not undermine the enforceability of arbitration agreements. It neither limits the rights of contracting parties to submit disputes to arbitration, nor discourages persons from using arbitration,” and in fact “seeks to enhance both the appearance and reality of fairness in arbitration proceedings, thereby instilling public confidence.” *Id.* at 134. *Cf.* *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1135, 1136 & n.26 (9th Cir. 2005) (California “Ethics Standards” are preempted by the federal Securities Exchange Act; the added disclosure requirements would “increase the complexity, cost, and uncertainty of the arbitration process,” deter “well-qualified individuals” from being willing to serve on NASD panels, and in general “create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”; however, there is “no need to consider” whether the Standards are preempted also by the FAA.).

The significance for our purposes of cases like *Ovitz* is also quite limited: It is hard to imagine in any event what preemptive effect could possibly be attributed to a broad statutory standard like “evident partiality”—an accordion phrase, one which different courts can expand or contract in different circumstances at different times. The court seemed to assume that federal cases requiring the presence of a “reasonable impression of partiality”—whatever that means—are “correct” in their reading of § 10. *Ovitz*, 35 Cal. Rptr. 3d at 118-19. But even so: Couldn’t the California legislature—just like California courts—still conclusively deem “evident partiality” to be present whenever its more precise standards of disclosure have been ignored? See *id.* at 134-35 (The “declared legislative purpose” of the California “Ethics Standards” is to “give statutory voice to existing case law”; when a court vacates an award under the Standards, “the undisclosed matter is one that the Judicial Council (with authority from the legislature) has deemed sufficient to undermine an objective perception of fairness.”).

Here is another example of what I believe to be an analogous error:<sup>91</sup>

*“[A]rbitration” means an agreement in a record between two or more parties to submit an existing or a future dispute or controversy to an arbitral tribunal for a decision intended by them to be final.*

I call this an analogous error because it seems to reflect the same impatience with nuance, the same busy intense desire to rationalize, and the same Enlightenment desire to sweep away the past and to “clear things up once and for all.”

Let’s look closely at the suggested text: I leave aside a whole raft of uninteresting questions arising out of the irreducible ambiguity inherent in the term “final.”<sup>92</sup> I also refrain from dwelling on what might strike us as a classical error of logic—that of taking an historically contingent form, the modal form, the form to which we happen over time to have become accustomed, and treating it as a “necessity”—as part of the very “essence” of the process. It is almost “as if a three legged cow belonged to a different species.” This is to “fashion the dimensions of this Procrustean bed with great care and precision indeed.”<sup>93</sup> Agreements calling for “non-binding” arbitration have in fact regularly been held to come within the FAA, at least for the purposes of stays of litigation or orders to compel under §§ 3 and 4. (Given the undoubted power of a court to enforce such agreements anyway as a matter of ordinary contract law,

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The only point I wish to stress here is that when state courts are given a mandate to vacate awards in circumstances not contemplated by the federal statute, this must cause some murmur of concern—must at least raise the question of possible interference with federal policy. It cannot be enough to end all discussion by peremptorily asserting that even where the FAA applies, “California courts are not required to apply” § 10. *But see* Gueyffier v. Ann Summers, Ltd., 50 Cal. Rptr. 3d 294, 300 (Ct. App. 2006), *review granted*, 150 P.3d 693 (Cal. 2007).

<sup>91</sup> BRUNET ET AL., *supra* note 35, app. B (Professor Speidel) (emphasis added).

<sup>92</sup> *See, e.g.,* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002). In Professor Schmitz’s view, where the parties have provided in their contract for expanded review as to matters of law, it follows that we are not even talking about “arbitration” at all—since the award will in some respects lack “finality.” *Id.* at 126-28, 177 (“[W]ould-be arbitration subject to substantive judicial review for factual or legal review is not arbitration . . . because it also depends on a court’s substantive determinations to end a controversy.”).

I have developed elsewhere, and at some length, my belief that this line of argument is ill-considered and misguided. To sweep aside party preference in favor of what is deemed logically “necessary” to the “intrinsic” “essence” of the arbitration process, does not constitute “functional analysis” as I understand the term—it is Platonism not policy, and “[b]y the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts.” *See* Rau, *Culture*, *supra* note 67, at 483-86 (quoting, here, from Baron Pollock in *White v. Bluett*, 23 L.J. 36, 37 (Ex. 1853)); *see also* JOHN DEWEY, *THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* 17 (1929) (Greek thinkers “glorified the invariant at the expense of change, it being evident that all practical activity falls within the realm of change”; they “bequeathed [us] the notion . . . that the office of knowledge is to uncover the antecedently real, rather than, as in the case with our practical judgments, to gain the kind of understanding which is necessary to deal with problems as they arise.”). But at least Professor Schmitz’s article serves to remind us that “finality”—like just about everything else in life—remains a question of degree.

<sup>93</sup> Rau, *Culture*, *supra* note 67, at 485.

applicability of the statute will in most cases amount to little more than a theoretical quibble.<sup>94</sup>)

But here is what I find most unfortunate about this sort of approach to the statute: It simply ignores the possibility that courts, over time, might choose to bring certain variant dispute resolution processes within the purview of the statute *for some purposes, but not for others*. The principled and “accretional”<sup>95</sup> way in which courts regularly go about their business means that they can be expected to ask—in each particular case—*whether and to what extent* the goals of the statutory mechanism are being advanced. It means that every question posed is concrete, and posed as a matter of “more or less.” It means that categories are never closed, but are dynamic—like cases may indeed be “alike” in certain respects, but not in others.

Take for example, precisely the sort of case at which the proposed revision seems directed—the case of an arbitration intended by the parties to be “non-binding.” Here courts should be able to harness our arbitration legislation in aid of the contractually-agreed process, by granting a stay of litigation pending compliance with the contractual undertaking, or by naming a neutral when the parties’ own mechanism has failed. This is in fact the core of modern arbitration legislation. Now I suppose that without the nominal coverage of the FAA, judicial enforcement of the agreement might have to proceed without any of the statutory provisions aimed at ensuring expedited judicial action—such as those calling for summary proceedings and applications by motion.<sup>96</sup> But to deny such streamlined procedures seems both ungenerous and unnecessary: I cannot for the life of me imagine any principled reason whatever why—with the statute readily available—an attempt to enforce private commitments to pursue out-of-court settlement should have to go forward encumbered with all the trappings of “full-scale litigation.”<sup>97</sup>

<sup>94</sup> Our leading arbitration treatise—of which Professor Spiedel is a co-author—criticizes such cases on the ground that “the FAA was not designed to deal with nonbinding arbitration.” MACNEIL ET AL., *supra* note 86, § 9.8.1. One can agree with such an historical judgment without feeling that one has conceded anything of significance to the argument.

<sup>95</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 111-12 (1982) (“If one defines legitimacy in purely functional terms . . . then the fact that courts do the job better than others would be enough despite [the] dangers [that they may “go beyond those situations in which their power is legitimated by analogy to the judicial power to evolve the common law.”]”).

<sup>96</sup> 9 U.S.C. §§ 4, 6 (2000).

<sup>97</sup> See *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 745 (11th Cir. 1988) (filing of a complaint, which could “develop into full scale litigation, with the attendant discovery, motions, and perhaps trial,” is not appropriate); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (motions for stays and for orders to compel under §§ 3 and 4; the Act envisages that judicial decisions will be made after “an expeditious and summary hearing, with only restricted inquiry into factual issues”). In other contexts, compare *Productos Mercantiles e Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46 (2d Cir. 1994) (motion to modify award under Panama Convention; court “was not required to comply with the pleading requirements of Fed. R. Civ. P. 12(b),” and it “properly decided the merits based solely on the papers submitted by the parties in support of their motions”); *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1258 (7th Cir. 1992) (motion to vacate award under § 10; a court is not “obligated to give all the due process owed to parties filing actions of a civil nature and deserving of Federal Rule 16 treatment, e.g., a scheduling conference, hearing, etc.”).

In the FAA, as it is now understood, we have a broad Congressional expression of social policy and, in a barebones statute, a delegation of decision-making responsibility to the judiciary. To allow freedom to the judiciary to draw on the statute in these limited circumstances is to recognize that its very lack of definition gives us the gift of a rich fruitful messiness—a muddle capable of generating, in particular cases, the most sensible results.<sup>98</sup>

8. “Well, of course we never meant that.”

Now I will not, I hope, be taken to claim that legislation has in any sense cornered the market on error. But I would suggest that judicial foolishness—failures of imagination, failures of execution, failures of understanding—are usually likely to be somewhat different in character. Here is an illustration carefully chosen for maximum tendentiousness:

A trial court, finding that the respondent was never a party to an arbitration agreement, vacates an award. The court of appeals affirms, and in doing so notes pointedly that when the existence of an arbitration agreement is challenged, “the issue must be settled by a court *before the arbitration may proceed.*” For the arbitrator was not “*simply free to go forward with the arbitration* as though [the respondent] had not challenged the existence of an agreement.”<sup>99</sup>

Can we conceivably be expected to take any of this at face value? Is it possible even to imagine that an arbitration must grind to a halt whenever such an objection is made? Can it be seriously argued that—even where the court ultimately finds that the parties *had indeed agreed* to arbitrate—an award rendered prior to such a finding would still have to be vacated? Of course not: But surely it is easy enough, in later litigation, to casually brush such argu-

<sup>98</sup> The point, once again, is that there is absolutely no need for our regime of arbitration to be an “all or nothing” affair. So, for example, the arbitration statute might be harnessed to enforce participation in even some contractually-agreed to process like mediation. But it need hardly follow—and it should not follow—that mediators therefore have statutory authority to summon witnesses before them or to subpoena documents: For courts are perfectly capable of recognizing that “[w]ith no particular responsibility for the ultimate outcome, the mediator will not share the arbitrator’s need to ensure access to testimony that he deems necessary to allow him to make a proper determination.” Rau, *Culture*, *supra* note 67, at 503-04. Similarly, a process made mandatory by statute may still constitute “arbitration,” despite the absence of legitimacy conferred by consent. But it need hardly follow—and it should not follow—that the usual statutory deference should be extended to the ensuing award: For courts are perfectly capable of recognizing that other considerations—perhaps “due process” concerns arising out of the solicitude due to non-consenting parties, or perhaps possible externalities created by mandatory public-sector awards—might justify a more demanding standard of judicial review. *See id.* at 504 & nn.215-16.

Professor Speidel will also be quick to point out that his analysis is sufficiently hedged about so as to respond to these points. *See* BRUNET ET AL., *supra* note 35, at 217 & n.123 (courts can “apply appropriate parts [of the statute] by analogy”). Now we can, of course, always legislate standards—so that decision backing is “collapse[d] . . . back into the direct application of the background principle or policy to a fact situation.” Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). But as I said earlier: If statutory revision merely preserves the same roles for courts as they already have under the present “fragmented,” “outdated,” and “creaking” 80-year old statute, then I am hard put to see the point of the exercise.

<sup>99</sup> MBNA Am. Bank, N.A. v. Credit, 132 P.3d 898, 900-01 (Kan. 2006) (emphasis added).



ments aside—to say, airily or brusquely, “well, of course we never meant *that*.”<sup>100</sup> As indeed they didn’t.<sup>101</sup>

“Of course we never meant *that*” is the universal solvent of the common law.<sup>102</sup> By contrast, when legislatures try to engrave their own understanding

<sup>100</sup> See Christopher R. Drahozal, *Jurisdiction of Arbitrators to Decide Their Own Jurisdiction: Compétence-Compétence in Kansas and MBNA America Bank v. Credit*, 17 WORLD ARB. & MEDIATION REP. 296, 300 (2006) (court’s dictum “departs from the usual approach in the American cases and should not be followed”); cf. Alan Scott Rau, “*The Arbitrability Question Itself*,” 10 AM. REV. OF INT’L ARB. 287, 352-53 (1999) [hereinafter Rau, *Arbitrability*] (“To hold that an arbitration is a nullity because it proceeded without a prior court determination of arbitrability” is “a grotesque misreading” of Supreme Court precedent.).

<sup>101</sup> Strictly speaking, the “controlling question” in *Credit* was just whether the respondent’s efforts to vacate the award “c[a]me too late,” *Credit*, 132 P.3d at 900, since her motion was made after the statutory 3-month deadline. Here it should be enough merely to point out that statutory time limits ought not to prevent a respondent—at least a respondent, like Ms. Credit, who had not participated in the proceeding on the merits—from challenging the validity of the award on the ground that there was no agreement to arbitrate. See generally *supra* note 88. More fundamentally, the *Credit* case rests on the rather banal truism that the ultimate power to determine the existence of an arbitration agreement remains in the courts—that the arbitrators cannot acquire any meaningful power merely by going forward—an act which in itself is therefore without legal significance.

<sup>102</sup> An award is rendered in Alabama in a dispute arising out of a construction project. A unanimous Supreme Court holds that the respondent may move to vacate the award in federal court in Mississippi—where the project was located. In other words, the venue provisions of § 10 of the FAA—allowing an award to be vacated by a federal court “in and for the district wherein the award was made”—are now to be understood as “permissive” and not mandatory. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000). Is it possible to deduce from this simple holding that under the FAA, awards rendered in London may now be vacated in Boston? See William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT’L ARB. 75, 114, 125-26 (2002) (given such possibilities, “reform [of the FAA] is warranted” in this area to “significantly improve the climate for international arbitration in the United States”); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT’L L. 1241, 1276, 1286-87 (2003).

But “well, naturally we couldn’t have meant *that*” seems once more to be a perfectly adequate response in the circumstances. Under the FAA “an action or proceeding” “falling under the Convention” may be brought in any federal district court “in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought.” 9 U.S.C. §§ 203, 204 (2000). But in what sense can an action to vacate a foreign award be said to “fall under the Convention,” given the Convention’s overall enforcement scheme—its underlying premise that only the “competent authority of the country in which, or under the law of which, [the] award was made” has the authority to set aside the award? N.Y. Convention, art. V(1)(e), June 10, 1958, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html). This is not a matter of “venue” at all, but of subject-matter jurisdiction. When post-*Cortez* cases reiterate that under the Convention, the courts of only one state can have jurisdiction to annul an award—presumptively, the courts of the seat—it has never occurred to anyone that such a conclusion could in the slightest degree be affected by the *Cortez* case itself. See, e.g., *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 308-09 (5th Cir. 2004); cf. Catherine A. Giambastiani, *Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts*, 20 AM. U. INT’L L. REV. 1101 (2005) (missing the point; “it is unclear whether the U.S. Supreme Court would agree with [the *Karaha Bodas*] line of reasoning”).

The Court in *Cortez* buttressed its conclusion by pointing to one “anomaly” that would result from treating the venue provisions of FAA § 9 (dealing with confirmation) and § 10 (dealing with vacatur) as mandatory rather than permissive: While the New York Convention “provide[s] a liberal choice of venue for actions to confirm” Convention awards, a

of the common law into the statute books—and get it shockingly, howlingly wrong—we have a blockage in the system, a dangerous embolism in the arteries of the law.<sup>103</sup>

I could not but notice, throughout our symposium, a certain impatience—even a certain querulousness—with respect to the many questions for which supposedly we “still have no answers.” But conceptually there can be no “gap” in a common-law system: A rich federal common law—what the Supreme Court prefers to call the “federal substantive law of arbitrability”—is being generated every day, by federal and state courts alike, as a means of spinning out all the implications of the 1925 federal statute. And what my discussion of each of these cases has in common is a wistful belief that our courts will eventually get it right. Incremental and adaptive, the common law, in Lord Mans-

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mandatory reading of § 9 and of § 10 “would preclude any action under the FAA in courts of the United States, to confirm, modify *or vacate* awards rendered in foreign arbitrations not covered by” the Convention. *Cortez*, 529 U.S. at 202-203 (emphasis added). Consider the italicized language: Is this the familiar phenomenon of the fatally superfluous word heedlessly thrown out in the full flow of rhetoric? One federal court has managed to trivialize this phrase by neatly confining it to that once-in-a-blue-moon situation where the parties chose arbitration in a foreign non-signatory state, but at the same time nevertheless “chose to have such arbitration governed by U.S. law.” *Int’l Bechtel Co. v. Dept. of Civil Aviation of Dubai*, 360 F. Supp. 2d 136, 138 (D.D.C. 2005). *But see* MACNEIL ET AL., *supra* note 86, § 44.9.1.8 (vacatur “under the domestic FAA of an award made in a nonsignatory power”). In any event the Court’s discussion in *Cortez*—whatever it means—ostentatiously avoids any implications whatever with respect to the vacatur of foreign Convention awards.

<sup>103</sup> Florida’s International Arbitration Act provides that a court shall issue an order compelling arbitration once it is satisfied that there was “a written undertaking to arbitrate,” unless it finds “that there was fraud in the inducement of the written undertaking to arbitrate” (or unless submission to arbitration would be contrary to state or federal public policy, or if an arbitral tribunal has already determined that “the dispute is not arbitrable”). “All other questions,” including “whether the written undertaking to arbitrate is subject to defenses or is otherwise invalid or unenforceable, shall be for the arbitral tribunal to decide.” FLA. STAT. § 684.22 (2003).

This must be a formulation that someone in Florida had proudly arrived at after pondering for years the teachings of *Prima Paint*. (A task force engaged in statutory revision had “worked and then re-worked its ideas” for over three years, *see* Mellman, *supra* note 37, at 372.) But whoever is responsible, this is far—indefensibly far—off the mark. Compare Rau, *Separability*, *supra* note 19, at 30 (*whenever* the party resisting arbitration “calls into question his assent to arbitrate, it will always be for a court to verify whether there has in fact been such assent”), *id.* at 67-70 (there may be any number of different sorts of “challenges to the arbitration clause itself” where “the putative defect is ‘wrapped up,’ or ‘enmeshed,’ in the very process of arbitration”). *Cf.* *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 177 (3d Cir. 1999) (clause provided for arbitration of disputes concerning “the validity of this arbitration clause or the entire contract,” but the court nevertheless proceeded to evaluate, and uphold, the arbitration clause against attacks based on a lack of “mutuality” and alleged “unconscionability”).

It was inevitable that the legislature’s codification of a travesty of *Prima Paint* would lead courts astray, as it did the Eleventh Circuit in *Rintin Corp., S.A. v. Domar, Ltd.*, 476 F.3d 1254, 1258 (11th Cir. 2007) (relying on the task force’s “commentary” to conclude that “when the parties have raised in the arbitration the issue of whether a written undertaking to arbitrate is valid and enforceable and the arbitrators have resolved the question, ‘the tribunal’s decision is final’”). Can we accept that the Florida “task force” was thus able to prospectively overrule *First Options*?

field's celebrated phrase, strives ultimately over time to "work its way pure."<sup>104</sup> (Perhaps this faith in "reasoned elaboration"—in constrained and rational judicial decisionmaking, with its reliance on the norms of judicial craftsmanship—is enough to consign me, as infallibly as carbon dating, to a remote and far more innocent generation.<sup>105</sup>)

Many answers are in fact immanent, and revealed (much like Michelangelo's angel already present in a block of marble), over time, to those who are patient. And then new questions routinely and predictably generate new answers;<sup>106</sup> such answers are subject to continual scrutiny to see whether they remain workable. Further dialogue with the profession—responsiveness to the goading and prodding, the suasion and censure, of the academy and the bar—should help the process along nicely.<sup>107</sup> (One has only to note how once-troublesome decisions like *Volt* and *First Option* have, within a decade, found their proper levels—in each case all the misunderstandings pruned away, the problematical "dicta" safely marginalized, the main thrust widely understood.<sup>108</sup>)

<sup>104</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 377 (1978) (in the field of commercial transactions courts "are drawing out the necessary, or at least the reasonable, implications of a regime of private property and exchange," gradually "tracing out the full implications of a system already established"). See also Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 952 (2006) (the common-law process is "a process of trial and error with both parallel and hierarchical mechanisms for improving legal rules"); MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 107 (1988) (referring to "change[s] in the implicit experiential, moral, and policy propositions underlying" "socially incongruent" doctrines, which justify their being set aside).

<sup>105</sup> For a nice, reductionist—and ad hominem—expression of this point, see Paul F. Campos, *The Color of Money*, 67 U. COLO. L. REV. 921, 923-25 (1996) (for the "typical liberal legal academic," "the rule of law is in all likelihood really the rule of Harvard law, which is to say of the legal process jurisprudence that has been handed down to a generation of legal academics during their student days in Cambridge, Massachusetts, or some very similar sort of place;" his "agonized struggle" over the "proper deployment of . . . interpretive methods" results in "making that meaning accessible to everyone who has undergone a socialization process resembling that to which students at elite American law schools were subjected, circa 1958").

<sup>106</sup> This is what I meant, above, in saying that "conceptually there can be no 'gap' in a common-law system." See also EISENBERG, *supra* note 104, at 154, 159 ("there may be a common law rule on a matter even in the absence of a doctrinal proposition adopted in a binding precedent"; "there is a legal answer to every question that takes the form, 'What is the law concerning this matter?'" (emphasis added)).

<sup>107</sup> See *id.* at 12-13 (courts are "obliged to be responsive to what the profession has to say," which entails that they "attend to the professional discourse and stand ready either to modify their views when that discourse is convincing to or to give good reason showing why it is not convincing"); Rachlinski, *supra* note 104, at 953 ("Even if many courts adopt a misguided approach to an issue, so long as lawyers, professors, and subsequent courts have the means of identifying the sensible decisions of their predecessors, the misguided rulings will lose influence.").

<sup>108</sup> *Volt Information Sciences, Inc. v. Board of Trustees. of Leland Stanford Junior University*, 489 U.S. 468 (1989), now stands for little more than the proposition that parties may choose to subject themselves to state rather than federal rules of arbitration—as long as their intention to do so is particularly explicit. See RAU ET AL., *supra* note 16, at 904-05. In some places it is even said that the case must be "limited to its own facts"—which is of course the jurisprudential equivalent of a "do not resuscitate" order. (Can there even exist, in any common law system, a case thought to be properly decided—but which at the same time is

By contrast courts seem understandably more reluctant to disturb even patent legislative idiocy.<sup>109</sup>

## II. FEDERAL COMMON LAW AND THE DIMENSIONS OF PARTY “CONSENT”

The respective roles of courts and arbitrators in deciding whether to refer a dispute to arbitration is a recurring problem in any legal system. The treatment of the problem in American courts has not been without its twists and turns—but it exemplifies, I think, the common law at its best—able over time to get the job done well enough, if roughly, and to forge sensible, commonly-held understandings. That is the theme of this essay, and here is an attempt at a synthesis:

I begin with a point so banal, so commonplace, so formulaic, that readers justifiably wince when they see it repeated. “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>110</sup> (The antiquity of this formulation is well demonstrated by its blithe use of the (now proscribed) male pronoun.<sup>111</sup>) A second rule, “follow[ing] inexorably from the first,” is that this “question of arbitrability”—whether there is “a duty for the parties to arbitrate” the dispute—whether the parties have consented to a final arbitral judgment on the

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thought to have no resonance, no applicability in principle, beyond “its own facts”?) See also Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 234-35 n.40 (1997).

For the marginalization of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), see Rau, *Separability*, *supra* note 19, at 108 (“The *First Options* presumption that ‘courts, not arbitrators [are] to decide a particular arbitration-related matter (in the absence of ‘clear and unmistakable’ evidence to the contrary)’ has now become little more than a ‘limited’ and ‘narrow exception’ to a more general imperative of arbitral competence.”).

<sup>109</sup> Could one find a better example of “woodenness masquerading as deference” than *United States v. Locke*, 471 U.S. 84 (1985)? A federal statute imposed a recording system to govern mining claims on public lands, and required claimants to file with the BLM a notice of intention to hold the claim “prior to December 31” of each year; failure to comply was to be “deemed conclusively to constitute an abandonment” of the claim. A claimant filed such a notice of intention on December 31 itself—and this was held to be “one day too late”; his mineral deposits escheated to the Government. Courts, said Justice Marshall, do not have “*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do,” and to “attempt to decide whether some date other than the one set out in the statute is the date actually ‘intended’ by Congress is to set sail on an aimless journey.” *Id.* at 93, 95. Justice Stevens protested vigorously in dissent that the holding “creates a trap for unwary property owners,” since Congress’ choice of language was “at best the consequence of a legislative *accident*.” *Id.* at 117-18. The “absurdity doctrine” must be narrow indeed to leave no room for such a case. *But cf.* *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring) (“we need not apply” language literally where it would “lead to ‘patently absurd consequences’” that “Congress could not *possibly* have intended”; however, the Court must act “with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone”).

<sup>110</sup> *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); see also Rau, *Separability*, *supra* note 19, at 4-8 (“A person is only bound to arbitrate a dispute if he has agreed to do so.”).

<sup>111</sup> Today it would presumably be mandatory to use what the TLS calls “the egregious ‘she.’” NB, *TIMES LITERARY SUPPLEMENT*, Nov. 24, 2006, at 14.

issues—whether, in short, the arbitrators have “jurisdiction” to decide—is “undeniably an issue for judicial determination.”<sup>112</sup>

But all of that merely provides the starting point: For would it not be possible to characterize *every* objection to arbitration as implicating the jurisdiction of the arbitrators—in the sense that it potentially calls into question the presence of consent to submit to the process?

- A party may well have “consented” to the arbitration of disputes relating to a contractual shipment of pork bellies—but he has not necessarily “consented” thereby to arbitrate disputes arising out of an arguably distinct contract for the shipment of pig iron: Why, then, should any “arbitrator’s” assumption of jurisdiction over the latter be entitled to the slightest deference?
- A party may undoubtedly have “consented” to arbitrate the merits of a contractual dispute—but it need not follow that he has “consented” to arbitrate such a claim where, say, the validity of the underlying contract has been vitiated by fraud. Nor does it follow that he has necessarily “consented” to arbitrate any claim at all where the underlying contract is no longer in force—where it may have expired, or terminated, or been superseded or relinquished or repudiated or abandoned. To avoid bootstrapping, must these questions of “consent” too be resolved by a court without reference to “arbitral” findings?<sup>113</sup>
- Again, a party may undoubtedly have “agreed” to arbitrate timely claims: But it does not at all follow that there is necessarily any “agreement” to arbitrate claims not brought within contractual time limits: If a contract provides that disputes are no longer “eligible” for arbitration after six years have elapsed, is it even possible to “speak of an ‘arbitrator’ at all in the seventh year”?<sup>114</sup> (Perhaps we could say, parroting the language of the Revised Uniform Arbitration Act, that in such cases the agreement to arbitrate no longer “exists.”<sup>115</sup>) Nor does it follow that a

<sup>112</sup> AT&T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 649 (1986). *See also* Rau, *Separability*, *supra* note 19, at 5 (“For one must enter into the system *somewhere*, and the notion of an arbitration clause that can be entirely self-validating—the product, apparently, of some curious process of autogenesis—is completely alien to our jurisprudence.”).

<sup>113</sup> When courts begin to refer to questions like these as raising issues of “duration arbitrability,” we know that we are in deep waters indeed. *See, e.g.*, *Consol. Rail Corp. v. Metro. Transp. Auth.*, No. 95-2142, 1996 WL 137587, at \*8 (S.D.N.Y. Mar. 22, 1996) (respondent argued that the agreement containing the arbitration clause had later been extinguished; held, deference should be extended to arbitral findings on this issue, for “when the issue is one of duration the policy considerations and practical reasons to reverse the presumption of arbitrability are absent”).

<sup>114</sup> Park, *supra* note 102, at 117.

<sup>115</sup> UNIF. ARBITRATION ACT § 6(b) (amended 2000).

Unlike truly living things, though, a “contract” can “exist” for some functional purposes, and in some contexts, and not in others. But once provided with the wrong metaphor, courts are likely to find it irresistible. *See, e.g.*, earlier cases like *City of Cottonwood v. James L. Fann Contracting, Inc.*, 877 P.2d 284, 289 (Ariz. 1994) (“Because repudiation calls into question the existence of the arbitration agreement, repudiation is an issue for the court.”); *Stauffer Const. Co. v. Bd. of Educ.*, 460 A.2d 609, 614 (Md. Ct. Spec. App. 1983) (a finding of waiver means “that the contractual right to compel arbitration [should be] . . . treated as though it had never existed”; “[b]ecause an inappropriate delay in demanding arbitration acts as a relinquishment of the contractual right to compel such a proceeding,

party has “agreed” to arbitrate anything where the contract imposes certain procedural prerequisites to the assertion of a claim that have not yet been met. But if there is no consent to arbitration in these circumstances, how in the world can the arbitrator come by his authority to determine whether the claim is properly brought?

Examples could probably be multiplied indefinitely:

- Could someone possibly have agreed to arbitrate a dispute that had already been the subject of a prior and binding judgment?<sup>116</sup> Or a prior and binding arbitration?<sup>117</sup>

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where that matter is in dispute, its resolution constitutes, in effect, a determination of whether the agreement to arbitrate still exists; and, under the statute, that *is* a proper issue for the court”).

<sup>116</sup> See Rau, *Arbitrability*, *supra* note 100, at 341-42:

Such a challenge might be characterized as a “defense to the arbitrability” of the underlying claim. But given a sufficiently broad mandate to the arbitrator, a court is [equally] likely to find this also constitutes a separate, arbitrable issue: . . . The court would then send the challenge to the arbitrators for a ruling on the *res judicata* or collateral estoppel effect of the prior adjudication; an arbitrator who declines to find preclusion has then presumably found that the underlying claim can itself be arbitrated.

See generally *U.S. Fire Ins. Co. v. Nat’l Gypsum Co.*, 101 F.3d 813, 817 (2d Cir. 1996) (claim of collateral estoppel arising from earlier court decision was itself arbitrable; “[i]f one can agree to waive collateral estoppel without consideration, one can agree to arbitrate the issue as part of a contractual scheme”); *Sherrock Bros., Inc. v. DaimlerChrysler Motors Co. LLC*, 465 F. Supp. 2d 384, 390 (M.D. Pa. 2006) (whether preclusive effect is to be given to an administrative decision of the State Board of Motor Vehicle Manufacturers, affirmed by a state court, “was a matter for the arbitrators to decide”). Compare *In re Y & A Group Securities Litigation*, 38 F.3d 380, 382-83 (8th Cir. 1994), in which the court enjoined an arbitration that had followed upon an earlier consent judgment—noting that it was “the best interpreter of its own judgment” and that it has “the power to defend [its] judgments.” But Arnold, J., concurring, wrote, *id.* at 384-85:

In general, when parties agree to submit a matter to arbitration, they contract for the arbitrator’s decision on legal questions as well as questions of fact. Such legal questions would include defenses, such as *res judicata*, and I do not read this Court’s opinion today to hold generally that courts may, by injunction, control the decision of arbitrators on questions of issue or claim preclusion. In the present case, though, the judgment in question also included an express injunction barring relitigation, and I would be most reluctant to say that a court cannot enforce its own pre-existing injunctive order, notwithstanding subsequent invocation of the arbitration process by one of the parties to the case that resulted in the injunction. Among other things, violation of an injunction is of course contempt of court, and the Federal Arbitration Act should not be construed to divest courts of their traditional powers to punish for contempt.

<sup>117</sup> The claim that a prior arbitration can deprive subsequent arbitrators of their “jurisdiction” must seem particularly frivolous. See, e.g., *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1128, 1132 (9th Cir. 2000) (*res judicata* effect of a prior arbitration award on a subsequent arbitration; held, “[b]ecause *res judicata* is a legal defense that is necessarily intertwined with the merits,” and because the parties’ agreement “requires arbitration of ‘any’ dispute,” “this is a matter for the arbitrator”); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) (“Nothing in the arbitration clause gives any indication that anyone other than the arbitrator should decide the preclusive effect of a prior arbitration.”).

But as every realtor knows, there is presumably at least one buyer somewhere for even the most shabby and ramshackle structure, especially in the Deep South. See, e.g., *Bryan County v. Yates Paving & Grading Co.*, 638 S.E.2d 302, 304 (Ga. 2006) (held, *res judicata* is not a claim “arising out of or relating to” the parties’ contract within the language of a generic arbitration clause, since it is “a principle of law that does not arise out of the contract

- Suppose that a contract prohibits the recovery of “lost profits” or consequential damages, but that an arbitrator nevertheless awards them: Has he exceeded the limits of the authority granted him—has he decided matters the parties did not wish to arbitrate, and therefore strayed beyond the perimeter of contractual consent?<sup>118</sup>
- Someone who has agreed in one contract to arbitrate disputes with X, and in another contract to arbitrate disputes with Y, has not necessarily “consented” to submit to any consolidated proceeding—in which X and Y may each be asserting claims against him. Someone who has agreed to arbitrate the merits of a claim has not necessarily “consented” to arbitration in cases where the presence of some third party is necessary to the resolution of the dispute. But if he hasn’t agreed to arbitration in these circumstances, then whether an arbitration can proceed in the absence of this third party is equally an “issue of arbitrability,” is it not, to be resolved by a court?<sup>119</sup>

In short, even an otherwise unexceptional arbitration agreement can be cabined about with limitations and conditions that may well be thought to go “to the power of the arbitrator to act.”

Now I suppose it would be possible to set about the task of searching for some verbal formulation, some reliable test, to enable us to distinguish between

- true issues of arbitral jurisdiction—which by definition are entrusted to courts for a final determination—and
- other objections to dispute resolution by arbitration—including other “threshold issues” which may preclude consideration of the merits.

The Supreme Court has tried on, with a conspicuous lack of success, the concept of “arbitrability” as a way of giving some content to the first category.<sup>120</sup> Some commentators have acquiesced and in consequence posit a “critical distinction” “between questions of arbitrability and ‘gateway’ issues.”<sup>121</sup> These “are indeed as different as night and day.”<sup>122</sup>

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documents”; while it “eliminate[s] substantive claims . . . it does not do so by reaching the merits of those claims”; as a consequence, if a claim is barred by *res judicata* “no arbitrable claims remain to be submitted to an arbitrator”).

<sup>118</sup> See *Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 481 (6th Cir. 2006) (no; this is “not a question of arbitrability per se [sic], but rather a question of what remedies were appropriate”); *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 401, 404 (5th Cir. 2007) (same; contract did not create “a plain limitation on the authority of [the] arbitrator” but the parties instead “intended to have the issue of the enforceability of the Exculpatory Clause handled by arbitration”).

<sup>119</sup> See *Telectronics Pacing Sys., Inc. v. Guidant Corp.*, 143 F.3d 428, 431 (8th Cir. 1998) (however, here the agreement of the parties expressly “reserved for the arbitrator” this “issue of arbitrability”).

<sup>120</sup> See, e.g., *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003) (“If the contractual ambiguity could itself be characterized as raising a ‘gateway’ question of arbitrability, then it would be appropriate for a court to answer it in the first instance.”); cf. Rau, *Arbitrability*, *supra* note 100, at 308 (lower courts have hardly “advanced the ball very far when their efforts have focused, not on functional analysis, but on the search for proper terminology—that is, on the futile quest for the correct definition of ‘*First Options* arbitrability’”).

<sup>121</sup> See *Highlights*, 17 *WORLD ARB. & MEDIATION REP.*, Nov. 2006, at 349.

But all of this is to dichotomize a continuum: None of the relevant terms are self-defining, and so I wonder whether it may not be preferable instead to look at the critical question of “consent” as one of degree. It is of course true, as Jan Paulsson remarks, that “only a fool would argue that the existence of a twilight zone is proof that day and night do not exist.”<sup>123</sup> But the phenomenon of twilight should at least give us pause—may suggest that these terms may not be the best choices to serve as organizing principles—that they may not be particularly helpful in deciding close cases. At best they can channel judgment—that is, they may draw relevant variables to the attention of private actors as well as state officials.

So a statute may impose different speed limits for daytime and for “night” driving—to remind us that the dangers of travel vary with visibility.<sup>124</sup> (Of course in a criminal statute it would be advisable to legislate against vagueness—the Constitution may in fact actually require us to abolish twilight by legislative decree.<sup>125</sup>) But there is a broad ground of “more or less” that resists facile categorization. (One of my colleagues, a philosopher, performs a similar riff on the concept of “being bald,” but for various reasons I’d prefer to spare the reader any such demonstration.)

Suppose, then, that one were to test the presence of “consent” in terms of a series of concentric circles, radiating outward: In the core, inner circle, one would ask the critical question, “*Did the parties agree to arbitrate anything at all, at any time?*” After that, the only relevant inquiry becomes the precise scope of the submission—how far the parties were willing to go in entrusting their affairs to “their” arbitrators. And as we move from the core to the periphery, absolutism with respect to “consent” may be tempered, and insistence on a strict requirement of “consent” becomes progressively less appropriate—or more properly perhaps, *deference to arbitral determinations* respecting “consent” becomes progressively *more appropriate*.

So “the line,” in any particular case, is but a function of where on the continuum we are—and then, as the presumption in favor of a judicial determination becomes weaker, a function of how strong is the evidence of “consent” or “submission”; how closely connected to the question of “consent” are the ultimate “merits,” and what may be the practical consequences of drawing the line in any particular way—for example, how strong are the functional advantages here of a “one-stop” adjudication, how real the prospect of inconsistent adjudications?

A reasonable synthesis of what our solar system in fact is beginning to look like appears at the end of this article. A true development of the point,

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<sup>122</sup> Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 603 (Gerald Aksen et al. eds., 2001).

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., TEX. TRANSP. CODE ANN. § 545.352(b)(2) (Vernon 2007) (driving in excess of “70 miles per hour in daytime and 65 miles per hour in nighttime” on highways outside urban districts is “prima facie evidence” that the speed is unlawful).

<sup>125</sup> See, e.g., § 541.401(1) (“‘Daytime’ means the period beginning one-half hour before sunrise and ending one-half hour after sunset.”); § 541.401(5) (“‘Nighttime’ means the period beginning one-half hour after sunset and ending one-half hour before sunrise.”).



given our space constraints, is something that will have to be left to another day. But perhaps this will suffice for the moment:

(1) An arbitrator who purports to “adjudicate” a dispute despite the total absence of any consent whatever, is not always—is not necessarily—a con man and a charlatan. (Although on occasion the conclusion is compelling that this is, in fact, precisely what he is.<sup>126</sup>) But even if a more benign account of his behavior is possible, he is no less an impostor (or more charitably, an “officious intermeddler”). The claim that “*nothing* is subject to arbitration because there is *no* agreement to arbitrate must be the mother of arbitrability questions.”<sup>127</sup>

(2) But once the parties have agreed to arbitrate—and have chosen “their” arbitrator to do *something*—it seems rather extreme to treat him *entirely* as an intermeddling, officious stranger—or a “random commuter passing through the Paris Métro or

<sup>126</sup> In 2002, Citibank began receiving letters, purportedly from its credit card holders, stating that “notwithstanding any other agreements which may be in conflict with these terms,” Citibank, “for valuable consideration given,” must now arbitrate disputes under the rules of the “National Arbitration Council.” The NAC is an “arbitration service” of which a certain Charles Morgan is the “sole proprietor and arbitrator.” Although Citibank sent notice to the NAC that it did not agree to arbitrate under NAC rules, the NAC nevertheless conducted 300 arbitrations: Citibank never participated in any of these “proceedings”—at which no witnesses were called—but in every case NAC issued an “award” against Citibank in the exact amount of the cardholder’s outstanding credit card debt, plus NAC’s fee. *See* Citibank (S.D.), N.A. v. Nat’l Arbitration Council, Inc., No. 3:04-1076, 2004 U.S. Dist. LEXIS 28539, at \*2-3 (M.D. Fla. Dec. 13, 2004) (having demonstrated a substantial likelihood of success on its claims for tortious interference with contractual relations and for unfair and deceptive practices, Citibank was granted a preliminary injunction against NAC). An identical case is *Chase Manhattan Bank USA, N.A. v. National Arbitration Council*, No. 3:04-1205, 2005 WL 1270504, at \*2 n.5 (M.D. Fla. May 27, 2005); at the preliminary injunction hearing, the following colloquy took place between the court and defendant’s counsel:

THE COURT: So I’m a cardholder, I owe Chase Manhattan Bank \$20,000, I go to Mr. Morgan, I pay him \$170, and I get a piece of paper that says, I don’t owe them any money anymore and they owe me \$20,000 plus \$170? Right?

MS. TROUTWINE: Yes.

The Alabama Supreme Court did allow a consumer to unilaterally change the terms of a pest control agreement so as to avoid any future obligation to arbitrate. *See* *Cook’s Pest Control, Inc. v. Rebar*, 852 So. 2d 730, 736-37 (Ala. 2003) (since consumer’s “addendum” was in response to the company’s notice of renewal, it constituted “a counteroffer or a conditional acceptance,” and was accepted when the company cashed the check and continued performance). I imagine that the Alabama court derived a measure of satisfaction—or even wry amusement—from what could be viewed as the poetic justice of such a result. Nevertheless it hardly corresponds to any sensible application of Contracts doctrine. What was above all at issue in *Cook’s* was not whether the consumer’s response was in fact a “counteroffer” or—since the company had originally extended a continuing guarantee of treatment, subject only to the consumer’s right to “cancel”—whether it was instead a “request for a modification.” The crux of the matter was rather the lack of any possible reasonable understanding on the part of the consumer to the effect that the company—merely by processing payment and continuing its work—was in fact assenting to the elimination of the arbitration clause. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 20 (“Effect of Misunderstanding”), 201 (“Whose Meaning Prevails”). *Cf.* Terry Carter, *Arbitration Pendulum: Mandatory Arbitration Agreements, Once an Easy Pass, Come Under More Scrutiny*, A.B.A. J., May 2003, at 14, 15 (“the trick” used in *Cook’s Pest Control*, a “man-bites-dog” result, was “ghostwritten” by a Birmingham plaintiffs’ lawyer).

But at least we were spared here the prospect of judicial enforcement of a completely bogus award.

<sup>127</sup> *MCI Telecomms. Corp. v. Exalon Indus., Inc.*, 138 F.3d 426, 429 (1st Cir. 1998).

New York's Grand Central Station"—should he happen to exceed his mandate.<sup>128</sup> Once they have agreed to arbitrate, the parties have an obvious incentive to monitor the behavior of arbitrators, minimizing the likelihood of a runaway tribunal, "outlier" awards, and unjustified assumptions of jurisdiction. And parties who have agreed to arbitrate cannot after all rationally claim to be wholly astonished when they find "their" arbitrators have been tempted to expand their own jurisdiction through self-interest—nor is it unfair to charge them with the risk that this might sometimes occur.<sup>129</sup>

(3) Very remote from all of this—beyond, in fact, the gravitational pull of any principle whatever—is the case where an agreement purports to deny the arbitrator the power to award a successful claimant punitive damages, or attorneys' fees, or other relief guaranteed by statute.

Such agreements may be challenged as being outside the permissible ambit of arbitration for reasons of "public policy": Is it plausible that such challenges implicate the jurisdiction of the arbitrator—the "arbitrability" of the dispute—and thus the enforceability of the arbitration clause itself? Almost all of the American commentators and cases seem to assume that the answer is "yes"—but I can't think why. It is here that recent authority has been particularly incoherent. There are judicial decisions that take it as axiomatic that it is for a *court* to determine whether an arbitration clause contains provisions "defeat[ing] the remedial purpose" of a federal statute; in such a case, arbitration cannot be compelled.<sup>130</sup> And there is abundant commentary in which the same tired a priori assertion is trotted out in the guise of argument.<sup>131</sup>

<sup>128</sup> Cf. William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 155 (2007).

<sup>129</sup> As one member of the Court suggested at the time of oral argument in *First Options of Chicago, Inc. v. Kaplan*:

Whenever you submit issues to arbitration, in effect you're consenting to a kind of rough-and-ready disposition of whatever your claims or disputes may be, and therefore there's no reason to sort of draw fine lines as to what you were rough and ready about.

Transcript of Oral Argument, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) (No. 94-560), 1995 WL 242250, at \*43-44.

<sup>130</sup> E.g., *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1056, 1062 (11th Cir. 1998) (Title VII; "the arbitrability of such claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies"; a clause that limits remedies to "damages for breach of contract only" is therefore unenforceable); *Gambardella v. Pentec, Inc.*, 218 F. Supp. 2d 237, 247 (D. Conn. 2002) (attorneys' fees; "[b]y denying [the plaintiff] access to a remedy Congress made available to ensure that violations of the Title VII are effectively remedied and deterred, the arbitration agreement . . . impermissibly erodes the ability of arbitration to serve those purposes as effectively as litigation"); cf. *Kristian v. Comcast Corp.*, 446 F.3d 25, 46-47 & n.15 (1st Cir. 2006) (since "the remedies provided by the antitrust statute cannot be contractually waived," the remedies limitation in the parties' agreement "raises a question of arbitrability"; "the enforceability of the arbitration agreement turns on the question of waiver—can a contracting party waive its rights to the treble damages" mandated by statute?).

<sup>131</sup> See, e.g., Margaret M. Harding, *The Redefinition of Arbitration By Those With Superior Bargaining Power*, 1999 UTAH L. REV. 857, 922 & n.375:

[*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)] does not mandate that the arbitrator determine if the arbitration clause restricting or limiting statutory rights violates public policy or is otherwise unenforceable. The claim that an arbitration clause is invalid because it improperly restricts statutory remedies should be distinguished from the situation where the parties in the container contract exclude certain types of damages.

Indeed there seems to be something of a competition going on to find the most tendentious way possible of posing the question: To posit, for example, that a limitation on statutory remedies amounts to a limitation on arbitral power—as opposed to a simple instruction to the arbitrators as to how they ought to go about deciding the case—is naturally intended to suggest that this must be a matter for judicial determination.<sup>132</sup> Since there can be no “prospective waiver” of an employee’s “substantive rights and remedies,” a “remedy-stripping clause” “folded into an arbitration agreement” may be “facially unenforceable”—“making the entire arbitration clause unconscionable and therefore unenforceable *in toto*.”<sup>133</sup>

The problem, of course, is that this is precisely what the notion of “separability” is all about: The whole point of the line of cases running from *Prima Paint* to the Court’s recent decision in *Cardegna*<sup>134</sup> is that by sending a dispute to arbitration, a court is not adjudicating the merits at all—and as a corollary, that defects in the parties’ agreement—any impermissible restriction of statutory rights—need not impair the validity of the submission to private adjudicators. If the process is not itself tainted, such defects say absolutely nothing about “the unsuitability of the particular arbitral scheme crafted for determining the claim.”<sup>135</sup> It is baffling to me that the current analysis does not even glance in the direction of this established jurisprudence, familiar for almost half a century.<sup>136</sup> This is indeed a most curious technique for dealing with inconvenient

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The reader will note how neatly this “argument” assumes its own conclusions: It is only “the container contract” that excludes other types of damages, but the restriction of “statutory remedies” somehow necessarily implicates the “arbitration clause” itself.

<sup>132</sup> See *Coddington Enters., Inc. v. Werries*, 54 F. Supp. 2d 935, 939, 941-42 (W.D. Mo. 1999), *rev’d sub nom*, *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001) (RICO; contract provided that “[t]he arbitrators will not award punitive, consequential or indirect damages”; held, this “is a limitation on the authority of arbitrators, something the parties can doubtless agree to—even if their agreement means that arbitration provides inadequate remedies and cannot be enforced”); *Terrell v. Amsouth Inv. Servs., Inc.*, 217 F. Supp. 2d 1233, 1238 (M.D. Fla. 2002) (contractual provisions “limit or preclude the statutory remedies in this whistle-blower case,” and so the arbitrators do not “possess the powers necessary to implement the vast remedies available” under the statute; accordingly, “this Court cannot compel arbitration”).

<sup>133</sup> David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 55, 68, 81 (2003) (federal policy “assumes an enforceable contractual intention and so necessarily begs the question of whether an enforceable agreement exists”).

<sup>134</sup> See Alan Scott Rau, “*Separability*” in *the United States Supreme Court*, 2006 STOCKHOLM INT’L ARB. REV. 1.

<sup>135</sup> Harding, *supra* note 131, at 923.

<sup>136</sup> In his discussion of “remedy-stripping clauses” Professor Schwartz cites *Prima Paint* just once—in passing—and for an unrelated point. Schwartz, *supra* note 133, at 85 n.170. See also Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 426-27 (2006), who also argues that arbitration agreements which “explicitly bar rights or remedies that external law allows”—for example, which bar “punitive damages where they would be available in court”—impermissibly “take away” “nonwaivable employee rights.” She betrays no awareness of *Prima Paint* at all.

It is obviously not a coincidence that Professor Schwartz appears to be one of a number of arbitration scholars for whom the doctrine of “separability” is of “dubious logic”—a group surprisingly large, and still hardy and resolute. He has, in consequence, drafted for

legal authority—raising a telescope, as Nelson famously did at Copenhagen, to one’s blind eye.

In reality, as my map of our solar system is intended to suggest, limits on statutory remedies raise questions of arbitral “jurisdiction”—implicate the possible validity of the agreement to arbitrate—to precisely the same degree that Pluto has a claim to being considered a “planet.”

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this symposium certain suggested amendments to the FAA, one of which provides that “the validity or enforceability of an agreement to arbitrate” shall be determined

by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

David S. Schwartz, *If You Love Arbitration Set It Free: How “Mandatory” Undermines “Arbitration,”* 8 NEV. L.J. 400, 426, app. B (2007).

Now when I first read this, I thought it a not entirely inaccurate summary of current law (not entirely inaccurate—although not particularly felicitous either, given that “specifically” and “in conjunction with” are not exactly terms of great explanatory power or precision. *See* Rau, *supra* note 134, at 14 (“a careless turn of phrase”). So I was taken aback to read in his commentary that he had intended by this language to *overrule Prima Paint*—a case that “creates a needlessly confusing exception to the rule that courts determine whether an arbitration agreement is valid.”

But really, absolutely everyone agrees that an arbitrator has no power at all unless a court first determines that a “valid” arbitration agreement “exists”; such a banal truism is not in the slightest degree inconsistent with *Prima Paint*, and does not advance the ball in any direction. I am troubled by the nagging suspicion that commentators who dislike *Prima Paint* still have not entirely internalized one critical point—which I have made in the past, and which I promise never to make again—I wish the present law review format would allow me to say this in bold face, in large font, or even in flashing neon: “*A potential contract defense is not—at least not necessarily, not unfailingly, not logically, not inexorably—incompatible with the parties’ desire to submit the merits of the defense to arbitral determination.*”

Now naturally one can assert that the necessary “consent” to arbitration must disappear whenever there is any defense to the main contract: That hardly makes it true, but yes, one can assert it. Thomas Reed Powell, I am told, used to say that of course he believed in prayer—after all, he had actually seen it done. If I wanted, though, to enact my a priori assertion into law, here’s what I would write instead:

Should any court find upon motion by any party that grounds exist for the rescission [or, perhaps, “for the refusal of enforcement”] of any contract, then any supposed undertaking to submit to arbitration any dispute arising out of or related to that contract shall itself, ipso jure, without further ado, with no nuance whatever, and any intention of the parties to the contrary notwithstanding, be deemed invalid.

A remarkably foolish statute, but at least one that is perfectly coherent.

I should note, finally, that The Arbitration Fairness Act of 2007, introduced as S.1782 in July 2007 by Senator Feingold, contains a § 4 which is identical—word for word—to Professor Schwartz’s proposed amendment. So now we come full circle, my misgivings about the legislative process as a vehicle for law reform abundantly vindicated.

